

**Restoring Women: Community and Legal Responses to Violence Against Women  
in Opposite Sex Intimate Relationships**

by

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B.A., Mount Allison University, 1995  
LL.B., Dalhousie University, 1998  
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A Dissertation Submitted in Partial Fulfillment  
of the Requirements for the Degree of

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**Supervisory Committee**

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Dr. Susan C. Boyd, Studies in Policy and Practice

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## Abstract

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Violence against women by their male intimate partners remains a serious problem in all parts of Canadian society. Both the Canadian state and Canadian feminist anti-violence activists have explored legal responses to ending intimate violence, including criminalisation, and restorative justice. To date these legal responses have not effectively reduced the rates of intimate violence in Canada. This dissertation explores state and community-based legal responses to intimate violence in the Lower Mainland of British Columbia, Canada between 1999 and 2010, where both criminalisation and restorative justice were legislated responses to intimate violence.

While restorative justice, in the form of Alternative Measures, was an available option in these cases, it was rarely applied. Criminalisation in the form of prosecution was also an option, but was applied in less than fifty percent of cases. Instead a peace bond, a form of criminally legislated restraining order, was often used. Research participants saw peace bonds as a flawed justice response to intimate violence, and described ways in which they felt peace bonds contributed to the revictimisation of survivors of intimate violence. Significantly, many research participants mislabeled peace bonds, attributing these negative characteristics to ‘restorative justice’.

This dissertation draws on interviews with research participants, and existing empirical research on intimate violence, to outline some characteristics of a better justice response to intimate violence. That is; a hybrid justice response which includes models that are

typically associated with both the restorative justice movement, and with the criminalisation of intimate violence. Regardless of what we call them, justice responses must take as their political and practical starting point the restoration of survivors of intimate violence, their families and their communities to full social, economic and political participation in Canadian society. To reinsert 'justice' into state and community responses to intimate violence, these practices need to be taken up, consciously, as a political tool.

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**Dedication**

To Hannah, Sophie, and Iris with my sincere thanks and unbounded love.

I shall bake you a pie.

## **Introduction: Restoring Women: Justice Responses to Violence Against Women in Opposite Sex Intimate Relationships**

### **Restorative Justice**

The term “restorative justice” is attributed to the American criminologist Albert Eglash in a 1977 article discussing restitution.<sup>1</sup> This phrase has been adopted by a wide range of actors in many criminal justice systems around the world, and carries with it multiple meanings. The Law Commission of Canada asserts broadly that “...the label restorative justice is attached to any practice that takes place outside a courtroom without two lawyers and a judge.”<sup>2</sup> In this introduction I want to sketch out two further basic distinctions between restorative justice and the conventional criminal justice system in Western democracies. In subsequent chapters I will engage more fully with the debates, ambiguities, and tensions within restorative justice theory and practice. Specifically, in Chapter One I will describe the core principals, approaches, and debates within this global movement. In Chapter Two I will review the existing literature on the use of restorative justice in cases of intimate violence. In Chapter Three I will examine the provenance of restorative justice in Canada, and British Columbia, including specific models and practices. The subsequent chapters, building on this foundation, then examine in more detail the operation of various legal responses to intimate violence in the British

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<sup>1</sup> Daniel Van Ness & Karen Heetderks Strong attribute this term to Eglash in their book *Restoring Justice* (Cincinnati, Oh: Anderson Publishing, 1997) at 24. See also: Albert Eglash, “Beyond Restitution: Creative Restitution” in Joe Hudson & Burt Galaway eds., *Restitution in Criminal Justice* (Lexington, MA: D.C. Heath and Company, 1977) at 91. Restitution is a movement that was “rediscovered” in the 1960s in the Western world, proponents claim its roots lay in the justice practices of several ancient civilizations. Its basic tenet is “paying back the victim” in one of several ways, including monetary compensation or compensation in kind. The movement’s target is the needs of the victim, which they claim will then serve the larger interests of society by promoting healing and forgiveness amongst community members. Contemporary restorative justice theorists sometimes see restitution as an important aspect of restorative justice. See Llewellyn and Howse, *Infra* note 2 at 7.

<sup>2</sup> Jennifer Llewellyn & Robert Howse, “Restorative Justice: A Conceptual Framework” (Ottawa: Law Commission of Canada, 1999) at 9.

Columbia's Lower Mainland, including Alternative Measures, a form of restorative justice.

First, restorative justice aims to include victims of crime, and the communities they (and offenders) come from in adjudicating and/or finding appropriate solutions to criminal behavior. The conventional criminal justice system, on the other hand, allows victims and community members in only strictly controlled and circumscribed roles. According to Western criminal justice theory these limitations are necessary to ensure impartial and fair fact finding, and to protect the civil liberties of the accused.<sup>3</sup> Placing control in the hands of the impartial state avoids unfair or disproportionate sanctions against the accused by victims or community members motivated by personal revenge.

Daniel Van Ness and Karen Heetderks Strong, well-known restorative justice advocates, trace an historical evolution from community-based conflict resolution (which they liken to contemporary restorative justice) to the domination of the state over all conflict in Western democracies. As the king became the primary, and only, victim of crime, the focus of the justice system shifted from the community to the state and the courts.<sup>4</sup>

According to Van Ness and Strong by “stealing” conflict from the community and the victim, the state has institutionalized conflict, making it impossible for the victim, offender and community to rebuild and strengthen after a crime, as they were able to do

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<sup>3</sup> Christine Boyle, Marilyn McCrimmon & Dianne Martin, *The Law of Evidence: Fact Finding, Fairness and Advocacy* (Toronto: Edmond Montgomery, 1999) at 55.

<sup>4</sup> Van Ness & Strong, *supra* note 1 at 9. According to Daniel Van Ness et al this paradigm shift can be traced to the Norman invasion of Britain in 1066. William the Conqueror and his descendants used the criminal justice process to centralize personal power. William's son Henry I issued the *Legis Henrici* taking royal jurisdiction over the king's peace. To violate this peace was as offence against the king. Daniel Van Ness, David Carleson Jr., & Karen Strang, *Restorative Justice: Theory* (Washington DC: Justice Fellowship, 1989) at 50. In the Canadian context Judge Barry Stuart also sees this ‘theft’ of conflict as an impetus for the implementation of sentencing circles in Northern Communities. See Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares” in Burt Galaway & Joe Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey, NY: Criminal Justice Press, 1990) at 193.

when “community justice” was the norm.<sup>5</sup> Unlike the conventional criminal justice system, restorative justice theory sees the involvement of victims, families, and communities as a help rather than a hindrance. In restorative justice theory, state impartiality is replaced by a forgiving community with a deep knowledge of the victim and offender, and an innate ability to heal the root causes of criminal behavior. Van Ness and Strong describe restorative justice as being “...aimed less at punishing criminal offenders than at resolving the consequences to their victims...to restore a community that has been sundered by crime.”<sup>6</sup>

A second defining characteristic of restorative justice is a foundational opposition to incarceration as a response to most criminal activity. For instance, the late Ruth Morris, Canadian restorative justice advocate and prison abolitionist, calls the Canadian criminal justice system “...expensive, unjust, immoral and a failure”.<sup>7</sup> The restorative justice movement consistently works to reduce or eliminate the use of incarceration as a response to crime.

The conventional criminal justice system, on the other hand, relies on codified sentencing purposes and principals,<sup>8</sup> and common law to determine what is the most fit, proportionate punishment, including incarceration, for each act defined as criminal. Notwithstanding changes to the Canadian sentencing regime in 1996, which were intended to reduce the use of incarceration,<sup>9</sup> putting offenders in prison in order to meet

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<sup>5</sup> Lewellyn & Howse, *supra* note 2 at 4-6.

<sup>6</sup> Van Ness & Strong, *supra* note 1 at 9.

<sup>7</sup> Ruth Morris, *Stories of Transformative Justice* (Toronto: Canadian Scholar’s Press, 2000) at 4.

<sup>8</sup> *Criminal Code*, R.S.C. 1985, c. C- 46, s. 718.

<sup>9</sup> See Chapter 3.

the codified purposes and principles of sentencing is a common practice in the conventional criminal justice system.<sup>10</sup>

At its most basic, restorative justice supports community involvement in healing the damage caused by crimes, and keeping the offender in the community. Restorative justice looks to people who know the offender personally to work together to heal the harm inflicted on the victim, and the community, and to prevent the offender from committing further crimes. On the other hand the conventional criminal justice system underlines the importance of impartial state adjudication of criminal behavior, followed by a sanction that may include a period of incarceration.

This research project began as an attempt to empirically investigate the use of Alternative Measures, a legislated form of restorative justice, in cases of intimate violence<sup>11</sup> in British Columbia's Lower Mainland.<sup>12</sup> What soon became obvious in my research, however, is that while intimate violence cases were often not prosecuted the decision to avoid prosecution was not rooted in the values and practices of restorative justice, despite

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<sup>10</sup> Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) Chapter 5.

<sup>11</sup> Anne McGillivray & Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at xiv.

I follow McGillivray and Comasky, Canadian feminist legal scholars, in using this term in lieu of wife battering, battered woman syndrome, wife abuse, spousal assault, family violence, domestic abuse, domestic assault and domestic violence. Intimate violence is used instead because it speaks to the close, personal relationship between abuser and survivor, and "...the deep trust presumed to exist among family members, between intimate partners..."

<sup>12</sup> The Lower Mainland refers to the region surrounding and including Vancouver, British Columbia, Canada. It is the unceded territory of the Musqueam and Tsleil'waututh Indigenous nations. As of 2007, 2,524,113 people (60% of British Columbia's total population) live in the region; sixteen of the province's thirty most populous municipalities are located there. While there are at least a dozen major population centres, the communities included in my research were Surrey, Whalley, Vancouver and White Rock. The Lower Mainland is very ethnically and racially diverse. For instance, in 1996, British Columbia, with 13 per cent of Canada's population, received almost 23 per cent of the national immigration intake, and this trend has continued. The Lower Mainland has a well settled population of Asian and South Asian citizens, for instance there were more citizens of Chinese origin than German origin living in the Lower Mainland in 2007. (Statistics BC, *Regional Population Trends in BC* (Victoria: Ministry of Finance and Corporate Relations, 2008) )

a move by the Canadian government in 1996 to increase the use of restorative justice across the country.<sup>13</sup> Rather, policy and practice militated towards a non-restorative form of diversion, a peace bond under section 810 of the *Criminal Code*.<sup>14</sup>

A peace bond is an agreement between a defendant in a criminal proceeding and the state that allows the defendant to avoid prosecution and incarceration under certain conditions. In this case, a defendant is brought before a judge<sup>15</sup> to facilitate the peace bond based on information brought to that judge by a third party. In cases of intimate violence the party bringing the information is often the survivor of violence, or a Crown Attorney. In British Columbia, Crown Attorneys have the responsibility of deciding whether or not to lay and proceed with criminal charges based on a report they receive from police. When police report to a Crown Attorney that an incident of intimate violence has taken place the Crown will sometimes decide to proceed with a peace bond rather than lay charges and proceed with a full prosecution. The reasons for this, and the implications for survivors of violence, are discussed fully in Chapters Four and Five.

The party bringing the information must show the judge that they have a reasonable fear that the defendant will cause someone physical harm; in cases of intimate violence this most often means the Crown must show that the defendant causes the survivor fear for her physical safety. Once the judge is convinced there is a reasonable apprehension of harm, they can order the defendant to abide by certain conditions for up to twelve months. Possible conditions suggested in section 810 of the *Criminal Code* include a prohibition on firearms, a prohibition on the defendant being within a certain distance of

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<sup>13</sup> See Chapter 3.

<sup>14</sup> *Criminal Code*, R.S.C. 1985, c. C- 46, s. 810.

<sup>15</sup> Or justice of the peace.

the survivor or her residence, and communicating with the survivor, or her children. The exact conditions are selected by the presiding judge. The conditions are supervised by a probation officer, with whom the defendant must communicate or meet periodically.

Should the defendant breach the conditions, and be reported to the police or their probation officer, section 810 of the *Criminal Code* allows for the defendant to be criminally charged with violating the peace bond, with the maximum penalty for breach being twelve months in prison. If the defendant abides by the conditions set out in the peace bond there are no criminal charges laid for the incident(s) that caused the survivor reasonable fear in the first instance.

Some would assert that this is not necessarily a negative trend; advocates of restorative justice, and even some feminist anti-violence advocates, have long argued that prosecution and/or incarceration does not necessarily lower rates of violence against women, and may be more harmful than helpful to hypercriminalised, marginalized communities.<sup>16</sup> This study asks what lessons can be learned from examining a jurisdiction that has avoided prosecution of cases of intimate violence in this way? What are the key differences in praxis between a failure to prosecute, and restorative justice *per se*? Results from this study show that there are key differences between merely failing to prosecute, and the actual practice of restorative justice, and that these differences may have concrete consequences for survivors of intimate violence.

But the larger question beyond the failure of these particular forms of non-restorative diversion is: what would an effective response actually look like, restorative or not? This dissertation draws on interviews with Crown Attorneys, and anti-violence service

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<sup>16</sup> See for instance Chapter One, note 5.

providers, existing empirical research, and key policy texts to sketch the outlines of a more effective criminal justice response to intimate violence than is being deployed in the Lower Mainland. Some of these aspects align clearly with the values and practices of restorative justice, and some do not, at least at first glance.

As discussed above, restorative justice has been touted as a criminal justice model that can heal the victim, the offender, and the community.<sup>17</sup> Despite the vast amount of literature that has been devoted to restorative justice, crimes of intimate violence against women have not been seriously addressed until relatively recently within that literature. I review the existing research and literature on restorative justice and intimate violence in Chapter Three.

The issues raised by restorative justice interventions in cases of intimate violence are of increasing importance and urgency as their numbers increase,<sup>18</sup> despite a paucity of empirical evidence regarding their safety or success. Unlike many crimes, inadequate or incomplete criminal justice interventions in cases involving intimate violence may result not only in unjust outcomes, but may immediately jeopardize the life or physical safety of the survivor. The movement to embrace restorative justice models has resulted in varied initiatives in every province in Canada.<sup>19</sup> These models are consistently used to address very serious cases of intimate violence against women.<sup>20</sup>

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<sup>17</sup> See for instance: Van Ness & Strong, *supra* note 1 and Llewellyn & Howse, *supra* note 2.

<sup>18</sup> See: Chapter Three.

<sup>19</sup> See: Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice" (2006) 10 *Theoretical Criminology* 49.

<sup>20</sup> See: Cameron *ibid.* and: *R v. Naappaluk*, [1994] 2 C.N.L.R. 143 (Q.C. (Crim Div.)); *R. v. Johnson*, [1994] 91 C.C.C. (3d) 21 (Y. Terr. Ct. App.); *R. v. Bennett*, [1992] Y.J. No. 192 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. Charleyboy*, [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) online: Q1 (B.C.J.); *R. v. Green*, [1992] Y.J. No. 217 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. D.N.* [1993] Y.J. No. 193 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. S.E.H.*, [1993] B.C.J. No. 2967 (B.C. Prov. Ct. (Crim. Div.)) online: QL

The arguments for and against the use of restorative justice in cases of intimate violence are frequently presented with emotion and a genuine desire for positive social change. However, the fact remains that there is little empirical evidence to support either position. Both government and academic sources have noted this lack of systematic evaluation.<sup>21</sup> There have been very few Canadian evaluations that address such basic factors as recidivism rates and cost. There are presently six major evaluations of Canadian restorative justice practices generally.<sup>22</sup>

In the final analysis I argue that unless non prosecutorial justice responses such as peace bonds and restorative justice are being wielded mindfully as political, theoretical, and practical tools to support survivors and the communities they belong to, they are merely a decriminalisation of violence against women by men. This decriminalization, while other

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(B.C.J.); *R. v. Seymour*, [1989] M.J. No. 273 (Man. Prov. Ct. (Crim. Div.) online: QL (M.J.); *R. v. Clement*, [1994] B.C.J. No. 1247 (B.C. ProvCrt. (Crim.Div) online: QL (B.C.J.); *R. v. Taylor*, [1995] 104 C.C.C. (3d) 346 (Sask. C.A.). See also: David L. Gustafson, "Facilitating Communication between Victims and Offenders in Cases of Serious and Violent Crime" (1997) 4 *I.C.C.A. Journal on Community Corrections*, Best Practices Edition 44.

<sup>21</sup> See for instance: Joan Nuffield, "Diversion Programs for Adults" (Ottawa: Public Works and Government Services Canada, 1997); Joan Ryan & Brian Calliou, "Aboriginal Restorative Justice Alternatives: Two Case Studies" (Ottawa: Law Commission of Canada, 2002); Don Clairemont & Rick Linden, "Developing and Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature" (Ottawa: Solicitor General, 1998); Kathleen Daly, "Restorative Justice: The Real Story" (2002) 4 *Punishment and Society* 55.

<sup>22</sup> They are: Avery Calhoun, "Evaluation Report: Calgary Community Conferencing- An Innovative Pilot Project of the Youth Justice Renewal Initiative" (Ottawa: Justice Canada, 2001); Jeff Latimer, Craig Dowden & Danielle Muis, "The Effectiveness of Restorative Justice Practices: a Meta-Analysis" (Ottawa: Department of Justice, 2000); James Bonta, Jennifer Rooney, & Suzanne Wallace-Capretta, "Restorative Justice: An Evaluation of the Restorative Resolutions Project" (Ottawa: Solicitor General Canada, 1998); Don Clairemont & Rick Linden, "Developing and Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature" (Ottawa: Solicitor General 1998); Tara Lajeunesse, "Community Holistic Circle Healing: Hollow Water First Nation" (Ottawa: Solicitor General, 1993); Joan Pennell & Gale Burford "Feminist Praxis: Making Family Group Conferencing Work" in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 108. A major evaluation of the Ottawa restorative justice project is pending. However, preliminary results do not aggregate intimate violence data, nor do they deal specifically with gendered aspects of crime. See: Tanya Ruge & Robert Cormier, "Restorative Justice in Cases of Serious Crime: an Evaluation" in Elizabeth Elliot & Robert Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluations* (Portland, Oregon: Willan Publishing, 2005) at 266.

ungendered crimes are vigorously prosecuted,<sup>23</sup> makes a clear statement that the Canadian state views violence against women, and its attendant forms of gendered subordination, as less worthy of state intervention and resources. This is exactly the position that women found themselves in prior to feminist led legislative and policy reform in the late 1970s and 80s.<sup>24</sup> Decriminalisation of intimate violence without adequate attention to gendered harms turns back the clock on the feminist struggle against gendered violence.

### **The Role of Punishment, Incarceration and the State**

One key finding of my research, which I will discuss in more detail in Chapters Four and Five, is that the research participants did not experience or understand the use of peace bonds as a just response to intimate violence, and expressed concern for the impacts of these justice practices on survivors of intimate violence and their children. In exploring what worried them about peace bonds, and the current criminal justice response to intimate violence, participants also spoke to what they *would* view as a more just response to violence against women. Overall their visions of justice were highly complex, and in places self-contradictory. The primary area of self-contradiction was in relation to the role of revenge and punishment as represented by prosecution and incarceration. On one hand, participants expressed a desire to see abusers punished, and for the most part this punishment was in the form of prosecution and incarceration. Simultaneously, participants expressed a desire for abusers (particularly those from marginalised communities) and women to be economically, physically, and emotionally restored and

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<sup>23</sup> For instance according to Statistics Canada, while the overall crime rate is dropping, drug related offences were among the few crimes to show increases in charges and prosecutions. Canada, *Canada Yearbook* (Ottawa, Statistics Canada: 2009).

<sup>24</sup> See Chapter One for an historical account of feminist-led legislative reform.

healed, although in different ways. In Chapters Five and Six, I examine the role that punishment and incarceration might play in an effective justice response to intimate violence, based on data from my research, and on existing empirical work from other scholars. I conclude that there may be a role, albeit limited, for punishment and incarceration even within a justice response that is rooted in restorative values and practices.

### **Method and Methodology**

In this project I draw on a variety of scholarly methods and traditions including institutional ethnography. In the planning stages of the project, my focus was on institutional ethnography; a feminist methodology developed by sociologist Dorothy Smith.<sup>25</sup> Institutional ethnography, in the end, proved a very useful research and analysis tool, but not always in the ways outlined or prescribed by self-described institutional ethnographers, including Smith. Institutional ethnography, at its heart, reflects a highly prescribed research process, and its practitioners predict research results within particular parameters. This was not entirely my experience. While the theories, practices, and theoretical insights of institutional ethnography proved useful in many instances, there were key points where both my methods and findings diverged from orthodox institutional ethnographic parameters. In order to make full sense of my data I have also brought in other critical methodologies, feminist activism, and legal and political theory.

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<sup>25</sup>*The Everyday World as Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987); *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London: Routledge, 1990); *Institutional Ethnography: A Sociology for People* (New York: Altamira Press, 2005); *Writing the Social: Critique, Theory and Investigations* (Toronto: University of Toronto Press, 1999); *The Conceptual Practice of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990); *Institutional Ethnography as Practice* (Maryland; Rowman and Littlefield, 2006).

The following section lays out the foundations of institutional ethnography as practiced by Dorothy Smith and other institutional ethnographers, and follows with a description of my own particular research project. I include the ways institutional ethnography was useful in shaping the final product, and areas where I turned to other methodological tools.

### **Institutional Ethnography**

The primary methodology I employed in planning this research project was institutional ethnography (IE), which is meant to generate an ethnography of an institution, not individuals or groups. In my case the institution in question was a discrete portion of the criminal justice system in the Lower Mainland of British Columbia, Canada between 1999 and 2010.

Beginning from the embodied, everyday experiences described by interviewees<sup>26</sup> in various locations relative to the institution in question, the researcher attempts to learn the ways that the local, particular experiences of the interviewees are governed by institutional concerns, which Smith calls ruling relations.<sup>27</sup> It is through the mapping of these variable positions that ruling relations become clearer to the researcher.<sup>28</sup>

As a legal scholar mainly unfamiliar with sociological methods, I first had to unravel the differences between method and methodology.<sup>29</sup> At its most basic level, methodology is a

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<sup>26</sup> Smith takes the ethical position that interviewees are experts in their own everyday/everynight lives. The implications of this ontological starting point are discussed further below in the segments on subjectivities.  
<sup>27</sup> “[R]uling relations are forms of consciousness and organisation that are objectified in the sense that they are constituted externally to particular people and places.” Dorothy Smith, *Institutional Ethnography: A Sociology for People*, *supra* note 25 at 13.

<sup>28</sup> This clarity falls well short of classic positivist objectivity.

<sup>29</sup> I was fortunate to be able to take a graduate-level course in institutional ethnography from Dorothy Smith at the University of Victoria in 2005, as well as audit a course on methodology taught by Professor Susan C. Boyd in the same year.

research ontology. By this I mean a way of thinking about research that explores the explicit and implicit presuppositions embedded in research about the existence and hierarchy of particular forms of knowledge and subjectivities.<sup>30</sup> Research methods speak more to ‘how to do empirical research’. For instance, are interviews or questionnaires preferable, in person, or by telephone? Smith calls IE a ‘method of inquiry’<sup>31</sup> or a ‘method of thinking’<sup>32</sup> rather than either a methodology or method. IE draws on both being comprised of several research processes, each of which are connected by an underlying theory.

In terms of method, IE interviewing techniques are similar to open-ended ethnographic research interviews. The starting point for Smith is the verbatim description of the everyday experience of the participants as absorbed during the interview, and later as captured in the transcripts. This requires open questioning about, and listening to, concrete details of everyday life as important data.

According to Marie Campbell, professor and institutional ethnographer, “The research process follows the shape of the problematic in the everyday world that the researcher explicated, not the shape of a plan developed prior to undertaking the inquiry.”<sup>33</sup> This means that the retrospective description of how the research unfolded will almost always differ somewhat from the original research proposal, and will have explicated aspects of

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<sup>30</sup> See: Marjorie DeVault, *Liberating Method: Feminism and Social Research* (Philadelphia: Temple University Press, 1999) at 38-42.

<sup>31</sup> Dorothy Smith, *Institutional Ethnography: A Sociology for People* (New York: Altamira Press, 2005) at 24-25 and 50 [*Sociology for People*].

<sup>32</sup> Dorothy Smith, *The Everyday World as Problematic: A Feminist Methodology* (Toronto: University of Toronto Press, 1987) at 105 [*Problematic*].

<sup>33</sup> Marie Campbell & Frances Gregor, *Mapping Social Relations: A Primer in Doing Institutional Ethnography* (Aurora, Ontario: Garamond Press, 2002) at 56.

the institution in question that the researcher did not know were important before the research began. This was certainly true of my own project; I began my research with a view to examining restorative justice practices in cases of intimate violence, and ended by looking closely at peace bonds. This change in direction was dictated by the information given to me in my earliest interviews, showing that peace bonds, rather than restorative justice, were being frequently applied in such cases, and that research participants felt uncomfortable and worried about this practice. Rather than being considered a failure, as this kind of deviation may be seen in other research techniques, it is an indication that the researcher has successfully followed IE.<sup>34</sup> Relying on field notes and interview data the researcher explains how and why some event or information directed her attention to a certain matter, a certain informant, or a certain problem. My retrospective analysis tracing this trajectory is included later in this introductory chapter.

IE also describes a particular method for processing the interview data, which deviates from some social science approaches. There is no coding, no counting, and no paraphrasing. With an emphasis on ‘raw’ (verbatim) data the researcher attempts to “...understand how the everyday lives of research participants are being co-ordinated, to make those connections and co-ordination explicit so that others can see and understand them.”<sup>35</sup>

‘Mapping’ is then employed as a tool to understand interview data. Mapping, according to Smith, is an attempt by a researcher to put their understandings of both the other and their own worldviews into a coherent whole, allowing the researcher to move beyond the

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<sup>34</sup>*Ibid* at 57.

<sup>35</sup>*Ibid* at 83.

intersubjective experiences of individuals to understanding how systemic factors affect these experiences. Smith has likened this to quilt making, each starting from their own place, but making parts that are attached to one another in a pattern. In Chapters Four, Five, and Six I use a form of mapping to understand how the experiences and knowledge of Crown Attorneys and service providers, and the policy texts that shape their everyday work fit together, revealing in part how the criminal justice system deals with cases of intimate violence. Mapping also allows me to draw on the knowledge and experience of the research participants to better understand ways that the interests of survivors of intimate violence may be compromised or supported by the functioning of the criminal justice system in these cases.

### **The Ontology of Texts: Power, Language and Institutions**

According to Smith, texts play a vital role in mapping social relations; they efficiently “...mediate, regulate and authorize peoples’ activities”.<sup>36</sup> Texts are able to co-ordinate the actions of individuals within the same institution who have never met each other, and who may be unaware of each other’s existence. According to Smith, texts not only co-ordinate actions in an extra-local way, they also convey and reinforce meaning. Textually mediated or mandated procedures “...subordinate people’s experience to the institutional...making institutional realities”.<sup>37</sup> Smith takes the ethical stance that people should be regarded as being experts in their own lives and links it to the inevitable selectivity of institutional realities that are constituted, in large part, through text. The

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<sup>36</sup>Dorothy Smith, “Texts and the Ontology of Organisations and Institutions” (2001) 7 *Studies in Organisations and Societies* 159-198 at 169.[*Ontology*]. See also: Dorothy Smith *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London: Routledge, 1990).

<sup>37</sup>*Ontology, ibid* at 187.

textually constituted institutional reality will often exclude important experiences from the realm of institutional concern.<sup>38</sup>

In my research texts play a crucial role, in particular, two policy manuals designed to aid Crown Attorneys in their decision-making processes in cases of intimate violence. They are: The British Columbia Crown Counsel Policy Manual, with particular attention to “Alternative Measures for Adult Offenders” and Crown Counsel Policy SPO 1 “Spouse Assault”. They are examined in depth in Chapters Four and Five. Rather than coordinating the actions of Crown Attorneys and service providers across time and space, as Smith might argue they ought to do, these governing texts were selectively used, and sometimes ignored in order to animate justice practices in the Lower Mainland. The institutional concerns that dominated these justice practices came not from the texts themselves, but from an eclectic set of extra-textual considerations, including research participants’ concerns with the safety of survivors of intimate violence, and providing prolonged counseling and services for men accused of violence against their intimate female partners. Research participants, particularly Crown Attorneys, ‘read between the lines’ of these governing texts and crafted a hybrid justice practice that I argue offered neither the full benefits of the conventional criminal justice system, nor restorative justice practice. This argument is fully fleshed out in chapters Five, Six, and Seven.

### **Subjectivity and Standpoint**

Institutional ethnography employs a version of feminist standpoint theory as a tool to ensure that the voices of research participants are respected and heard.<sup>39</sup> Generally, Smith

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<sup>38</sup>*Ibid* at 188.

<sup>39</sup> Respect for the voices of research participants is not unique to IE. Aboriginal and feminist methodologies also pay particular attention to being respectful of participants’ voices and viewpoints. See for instance:

employs standpoint theory in order to keep the experiences of participants present and relevant to the research, and to avoid objectifying experiences related during the interviews. In Smith's formulation the research participant has an expert knowledge of *her* everyday life, and the researcher learns about this from the participant. With the participant as the expert, the researcher learns about an issue or experience from that specific embodied person in a specific embodied place. According to Smith, this is an inquiry where the researcher and the participant learn from each other through an open exchange. "...[R]esearch might be thought of as a dialogue, in which, in classic hermeneutic terms, the researcher is changed."<sup>40</sup> While the researcher learns from and is changed by their interaction with the interview participant, they must not accept the participants' experience as the *only* truth, but one of many standpoints or truths expressed by various participants.

This position on subjectivity has particular resonance with my research project, as I was unable<sup>41</sup> to interview survivors of intimate violence themselves. Thus, the experiences of survivors should not be attributed to Crown Attorneys, service providers, or government officials, even in places (for instance the concerns of feminist anti-violence service providers) where they might be presumed to overlap.<sup>42</sup> Therefore, in terms of the analysis of my interview data, and especially in my conclusions, it is key to point out that my research reflects only the everyday experiences, interests, and concerns of these workers within the justice system, and does not necessarily reflect the everyday experiences,

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Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Dunedin: University of Otago Press, 1999); Sandra Kirby & Kate McKenna, *Experience, Research, Social Change: Methods from the Margins* (Toronto: Garamond Press, 1989).

<sup>40</sup> *Ontology* at 50-51.

<sup>41</sup> See the retrospective description of the research project below.

<sup>42</sup> Thanks to Professor Susan C. Boyd for this important insight.

interests, and concerns of survivors of intimate violence. In some instances, for example in discussing the role of punishment and incarceration in responding to intimate violence, I draw upon the empirical research of other scholars to draw attention to possible points of convergence or disagreement between my interviewees and survivors themselves.

### **Reflection**

Both my PhD proposal and human subject research ethics application outlined in detail how I hoped to pursue my empirical research. Briefly, these documents outlined a plan to interview up to ten service providers who support survivors of intimate violence, and women survivors of male intimate violence whose partners had both been charged with assaulting them, and had then been diverted into a restorative justice program (“women participants”). I had hoped to contact women participants through women-serving organisations, many of whom I had done paid and unpaid work for, or through Crown Attorney’s offices. This focus on women participants was motivated by a dearth of existing empirical research that included their voices and experiences.

I included an ethical and ontological focus on interviewing Aboriginal women participants, including theoretical and practical tools I might use to minimize possible risks of participant exploitation, revictimisation, or ethnocentrism on my part. This focus arose out of a presumed connection between Aboriginal peoples in Canada, and restorative justice practices.

In retrospect, my research agenda unfolded in a very different way. From a methodological perspective, many of these differences are not signs of failure, but are rather the inevitable result of IE’s approach to method, which not only allows for but mandates an organic unfolding of both the research participants interviewed, and the

questions that researchers ask. As with all research projects, there is an element of unpredictability built into the use of IE.

Though a focus on women had been at the centre of my research plan, I was not able to interview any women participants. In spite of advertising for women participants through women-serving organisations<sup>43</sup> several times, no one contacted me to participate in the research. I had anticipated that this might be the case, primarily because of women's legitimate desire for privacy around their trauma and its aftermath.

Conducting research using IE means that while you begin with a set of people you wish to interview, that list may shrink or expand, depending on what you learn from the work and everyday/night experiences of those that you interview. As you find out more about the ways that ruling relations co-ordinate the work and lives of individuals, this information leads to new questions, and new people who may be able to help you check your understanding of how these ruling relations operate. This was the case with my research trajectory.

I thus began by interviewing seven service providers, five who provide services to women survivors of intimate violence in various capacities, and two who provide services to men who batter. All seven service providers were women.

All service providers were contacted through the executive directors (ED) of their respective organizations. I emailed or telephoned the EDs, and asked if they would notify

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<sup>43</sup> After interviewing several service providers to survivors of intimate violence I decided against advertising for participants through the Crown research participants. All of the service providers expressed fears that survivors would presume that participation in the research was mandatory if a Crown Attorney brought it to their attention.

their staff and volunteers about my research. The service providers who I interviewed then contacted me to indicate they were interested in participating in an interview.

Each service provider was interviewed during the workday, at their workplace. I travelled to meet them at a time of their choosing, and participated in face-to-face interviews that lasted from twenty minutes to two hours. In two cases, with the permission of the participants and with prior ethics approval, I interviewed two service providers together. In this case, they were co-workers who had very busy schedules, and who preferred to be interviewed together to cut down on the time spent away from their employment duties. The service providers to women worked in several locations in Surrey, and White Rock and in several locations in and around downtown Vancouver. The service providers to men who batter were located in and around downtown Vancouver and in Surrey.

All of the service providers who worked in Surrey self-identified as South Asian. One service provider in downtown Vancouver self-identified as Aboriginal, two as South Asian, and the remaining women did not self-identify by race or ethnicity. This is important to note, as many of the cases discussed by these service providers, and by the Crown Attorneys (see below) dealt with intimate violence in South Asian families.

Surrey, British Columbia, is a suburb of Vancouver, and has a high concentration of citizens of South Asian origins,<sup>44</sup> thus contributing to the focus on this particular

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<sup>44</sup>In 2006, the total South Asian population in Surrey City, British Columbia, was 107,810, comprised of 53,730 male and 54,080 female residents. The total population of Surrey was 394,976. Thus, South Asians comprised 27.3% of the population of Surrey. The entire population of citizens that identified as South Asian in British Columbia as a whole is 132,225, thus placing the vast majority of those British Columbians who identify as South Asian in Surrey. (Statistics Canada, "2006 Census, Community Profiles" (Ottawa: Statistics Canada, 2006).

population. South Asian service providers in downtown Vancouver and Surrey also offered specialised services to South Asian clients from around the Lower Mainland; again skewing the discussion in relation to violence within South Asian families. The emphasis in my data on violence by South Asian men against South Asian women must not be read to imply that South Asian men are more violent than non South Asian men. It is merely an effect of the geographical location of the study (within South Asian communities) that places the emphasis here. In Chapter One I frame my theoretical lens, intersectional theory, for understanding the implications of race, ethnicity and gender in my data. In Chapters Four and Five I apply this lens, pointing out ways in which racialised survivors of intimate violence may experience justice interventions differently than non-racialised survivors, necessitating specialized justice responses. It is also worth noting, however, that many of the concerns expressed by research participants about justice practices in cases of intimate violence were not confined to a particular racialised population, and seemed transsystemic.

While the questions asked were emergent from the interviews themselves, I started with the following list of basic questions when interviewing service providers to survivors:

- In your own words, how would you describe restorative justice?
- Have you ever had a client's case get moved into a restorative justice program?
- What happens when a client's case gets moved into a restorative justice program?
- What are the main differences between restorative justice and the regular court system?
- Did you think this/these case(s) were handled fairly?
- What did you like about it?
- What would you change?

The first group of service providers, those serving survivors, were included in my original research plan; I had hoped that they would be willing to pass along my contact information to client survivors who might want to participate in the research. All of the women's service providers accepted my recruitment materials, and indicated that they would pass them along to possible participants. I then chose to interview the service providers to men who batter because of questions that arose in my mind during the first round of interviews. Many of the women's service providers spoke with disdain about the programs for men who batter, and identified these programs as a restorative justice program. I wanted to check their understanding of this against the knowledge of service providers who provided programs for men who batter.

There was a massive discursive and institutional disconnect between these two groups of service providers. They were each confident in their knowledge of how programs for men who batter came to be imposed upon men accused of violence, yet those accounts conflicted with one another.

Again, with service providers to men, questions emerged within the interviews, but I started with the following basic questions:

- In your own words how would you describe restorative justice?
- Do you consider your program to be a form of restorative justice?
- Have you ever had a client's case get moved into a restorative justice program?
- What happens when a client's case gets moved into a restorative justice program?
- What are the main differences between restorative justice and the regular court system?
- Did you think this/these case(s) were handled fairly?
- What did you like about it?
- What would you change?

I then turned to interview two provincial government officials in charge of legal policy and practice around intimate violence, in hopes that they could check my own evolving understanding of how restorative justice worked in the Lower Mainland of British Columbia, and answer some of my questions regarding conflicting accounts of programs for men who batter. I also wanted to check some of my emerging ideas about how and why those conflicting accounts existed. I interviewed these two government officials in their workplace, during the workday. I travelled to a location of their choosing, and conducted face-to-face interviews, which lasted between one and two hours. Neither official self-identified as belonging to a racialised group, and both were women. Their workplaces were both located in downtown Vancouver.

The emergent questions started from this basic list:

- In your own words how would you describe restorative justice?
- Do we have restorative justice programs in British Columbia?
- Do they deal with cases of intimate violence?
- What are the main differences between restorative justice and the regular court system?

Following the transcription of these interviews, and a preliminary review of the data, several key questions and concerns remained for me. I decided to interview Crown Attorneys who prosecute cases of intimate violence, hoping that they might be able to answer questions about process, policy, and functioning definitions of restorative justice. I also hoped to gain access to anonymised, individual files documenting cases of intimate violence. I contacted the Ministry of the Attorney General for British Columbia, the provincial government body that employs Crown Attorneys. They referred me to the regional Crown Attorneys for each geographical region of the city, who are the direct supervisors of the Crown Attorneys. Some regional Crown Attorneys refused to allow their staff to participate, while others chose participants for me. Regional Crown Attorneys put me directly in touch with Crown Attorneys under their supervision that they thought would be willing to speak to me. While I was granted interviews with four Crown Attorneys, I was denied access to any documentation, either systemic or individual files, despite a separate, formal, written application to the provincial Attorney General regarding the paper files.

All four Crown Attorneys were men, and one self-identified as South Asian. The remaining three did not self-identify as belonging to a particular racialised group. Two of the Crown Attorneys worked in Surrey, and two in downtown Vancouver (one at the provincial court at Main and Hastings, and the other at the community court at Main and Hastings). I interviewed each participant in his workplace, travelling to meet them at a time and place convenient to them. I interviewed each Crown Attorney face-to-face, in sessions that lasted from twenty minutes to an hour.

Vancouver's community court was set up in 2008, based on recommendations by the British Columbia Justice Review Task Force and the Street Crime Working Unit.<sup>45</sup>

According to the Ministry of the Attorney General : “(t)he DCC takes a problem-solving approach to deal with offending behaviours of individuals and the health and social circumstances that often lead to crime.”<sup>46</sup> This means that as well as criminal justice services, key support services including housing, health care, social assistance etc. are made available to both accused and victims of crime during the criminal justice intervention. These services are coordinated and provided in a timely manner in the same building, and by the same staff, as the criminal justice process.<sup>47</sup>

Follow up questions emerged during the interviews themselves, but I began with the following list of questions:

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<sup>45</sup>British Columbia Ministry of the Attorney General, “Downtown Community Court in Vancouver: Interim Evaluation Report” (Vancouver: Justice Services Branch, 2010) at 3.

<sup>46</sup>*Ibid* at 3.

<sup>47</sup>*Ibid* at vii.

- In your own words how would you describe restorative justice?
- What are the main differences between restorative justice and the regular court system?
- What are the main differences between restorative justice and a peace bond?
- Have you ever used restorative justice in cases of intimate violence?
- What happens when an accused is placed on a peace bond for intimate violence?
- Did you think this/these case(s) were handled fairly?
- What did you like about it?
- What would you change?

In practice, these expansions to my interview list were negotiated through constant updates to my ethics status.<sup>48</sup> This involved writing or re-writing lists of topics, research questions and consent forms.

The only model of restorative justice that is empirically examined in this study is Alternative Measures, and (as outlined in Chapter Three) many research participants confused this model of restorative justice with an 810 peace bond. Although Chapters Four and Five do treat Alternative Measures to some extent, the primary analysis is not of restorative justice *per se*; rather it is of the implications of this confusion, the actual justice practices deployed *instead* of restorative justice, and the impact of these practices on survivors of intimate violence.

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<sup>48</sup>A special thank you to the staff at the University of Victoria human research ethics office. They were amazingly co-operative, competent, and fast.

## **Chapter One: Literature Review and Conceptual Frameworks**

Chapter One concerns two influential movements that combine scholarship, activism and interventions in policy debates, and whose efforts have converged in the field of criminal law scholarship, namely the feminist anti-violence movement and the restorative justice movement. My discussion of these two movements in Part One draws upon criminological theories of punishment and retribution. Part One reviews the relevant literature while demonstrating links or overlaps. Part Two of this chapter outlines two conceptual lenses that, alongside institutional ethnography, shape my understandings of the research data. These are feminist intersectional theory and feminist critiques of neo-liberalism.

### **Part 1 - Feminism: Scholarship and Activism**

#### ***Violence Against Women in Canada: A Snapshot***

Violence against women by their male intimate partners around the world is a widespread, systemic problem,<sup>1</sup> and Canada is no exception. Through Statistics Canada, the Canadian government has been tracking rates of violence against women in Canada since 1993.<sup>2</sup> It has remained a consistent and pressing problem throughout this

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<sup>1</sup> United Nations Secretary General, *In-Depth Study on All Forms of Violence against Women: Report of the Secretary General* (New York, United Nations General Assembly, 2006).

<sup>2</sup> In 1993 Statistics Canada conducted the first survey dedicated to violence against women. (Johnson, *Infra* at 16). Also, 2011 marks the twelfth edition of Statistics Canada's more general violence measuring tool, which tracks ungendered data collected from the national census in five year cycles. (Canada, Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Statistics Canada, 2011).

period.<sup>3</sup> Despite an overall drop in the crime rate,<sup>4</sup> women in 2009 reported rates of physical assault and sexual assault similar to those reported in 1999.<sup>5</sup> In 2009, of the eight crimes reported in the General Social Survey, women were most likely to report being a victim of physical assault, followed by sexual assault, and robbery.<sup>6</sup> According to 2009 police-reported data, spouses (current or former), and other intimate partners, committed more than 41% of violent incidents involving female crime victims. Other family members and acquaintances account for another 42% of violent incidents. In other words, 83% of violent crimes committed against women are perpetrated by people they know.<sup>7</sup> In 2006, spousal violence made up the single largest category of convictions involving violent offences in non-specialized adult courts in Canada over the five-year period 1997/98 to 2001/02. Over 90% of offenders were male.<sup>8</sup> Women are also more likely to be killed by a spouse or other intimate partner than anyone else. In 2009, females accounted for 71% of victims of homicides perpetrated by a current spouse, 88% by a former spouse, and 78% involving other intimate partners.<sup>9</sup>

These rates, which include data from police, may under represent the actual rates of violence against women, due to underreporting of violence. In 2009, only one-quarter of women victims of spousal violence reported the incident to police. Reasons for not

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<sup>3</sup> Holly Johnson, *Measuring Violence against Women: Statistical Trends, 2006* (Ottawa: Minister of Industry, 2006). It is worth noting that updated, ungendered statistics from 2009 do not show any significant changes from the 2006 data, except to note that ‘rates of self-reported spousal violence remained stable, as did the severity of the violence, although overall survivors were less likely to report violence to the police.’ (Statistics Canada, *supra* note 2 at 2).

<sup>4</sup> Johnson, *supra* note 3.

<sup>5</sup> Mahoney, *infra* at 6.

<sup>6</sup> Statistics Canada, *Women and the Criminal Justice System* by Tina Hottan Mahoney (Canada: Minister of Industry 2011) at 5 [Mahoney].

<sup>7</sup> *Ibid.* at 7.

<sup>8</sup> Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006).

<sup>9</sup> Mahoney, *supra* note 6 at 13.

reporting to police are varied and include fear of reprisals by the offender, shame and embarrassment, and a reluctance to become involved with the police and courts.<sup>10</sup> This is down from 2004 reporting rates, which showed 36% of female victims of spousal violence reported these crimes to the police.<sup>11</sup>

As these statistics demonstrate violence against women in heterosexual intimate relationships is a serious problem, and the current legal response has not effectively reduced rates of violence. In the following section I trace the history of the criminalization of intimate violence in Canada, which has been the primary legal response to date. In Chapters Six and Seven I sketch some of the contours of a legal response to intimate violence that may better reduce rates of violence.

### **Other Anti-Violence Strategies**

Although criminalization has been the primary focus of state-sanctioned action against intimate violence, both the feminist movement and the state have provided other resources and services to women. Both my data<sup>12</sup> and other empirical and anecdotal evidence suggests, however, that these resources are currently insufficient to meet the needs of survivors.

Outside of the purview of the criminal justice system, shelters are one example of an important resource for survivors. Shelters for abused women in Canada were initiated by feminist volunteers and community organizations to provide a short-term escape from violence.<sup>13</sup> While the majority of shelters now receive government funding, many rely

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<sup>10</sup>*Ibid.* at 6.

<sup>11</sup> Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006).

<sup>12</sup> See Chapter 4 at 204.

<sup>13</sup> Statistics Canada, *Canada's Shelters for Abused Women* by Andrea Taylor-Butts (Ottawa: Juristat, Canadian Centre for Justice Statistics, 2005) [Taylor-Butts].

on additional funding through private donations.<sup>14</sup> Official records have been kept on women's shelters since 1975, when only 18 shelters existed in Canada. Between 1975 and 2004, there was a relatively steady increase in the number of new agencies being established, particularly between 1979 and 1992 when over 200 new shelters were opened. By 2004, 543 shelters were in operation throughout Canada.<sup>15</sup> In 2004, there were 52,127 women and 36,840 children admitted to shelters for abused women across Canada.<sup>16</sup>

The number of shelters for abused women is not necessarily an indicator of the severity or prevalence of violence against women, since the existence of shelters depends largely on factors such as the availability of government or non-government funds and qualified staff, particularly in smaller and remote communities. A specific example illustrates this point. In 2010, the women running the sole local women's shelter in Fort McMurray, Alberta went on a hunger strike to bring attention to the rates of intimate violence in their community, and the lack of services available to support survivors. According to the executive director of Unity House, the shelter's 35 beds are constantly full; during the year leading up to the hunger strike, workers had to turn 400 women and children away

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<sup>14</sup>Melanie A. Beres, Barbara Crow, & Lise Gotell, "The Perils of Institutionalisation in Neoliberal Times: Results of a National Survey of Canadian Sexual Assault and Rape Crisis Centres" (2009) 34 *Canadian Journal of Women and the Law* 135 at 156.

<sup>15</sup> Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006) (Figure 32).

<sup>16</sup>*Ibid.*

for lack of accommodations.<sup>17</sup> In British Columbia, lack of space for women or their families resulted in over 6,000 women being turned away from shelters in 2008/09.<sup>18</sup>

Within the criminal justice system individual provinces and territories also provide services to victims of crime, including survivors. In 2003, Statistics Canada conducted *The Victim Services Survey* as part of the General Social Survey, which indicated that (on October 22, 2003) 373 victim service agencies provided services to 4,358 victims of crime. Three-quarters (3,379) were female and one-quarter (979) were male. A total of two-thirds were female victims of sexual assault, or spousal assault (including stalking).<sup>19</sup> In other words, survivors of gendered violence<sup>20</sup> are the most prevalent users of state sponsored victims' services. Both my own data<sup>21</sup> and other studies have shown that the current level of victims' services in British Columbia is insufficient to meet the needs of survivors.<sup>22</sup> In short, intimate violence against women, by men, is a reality for large numbers of Canadian women, many of whom do not report the violence to police. Both survivors who access the criminal justice system, and those who do not, face a serious shortage of support services both inside and outside of the criminal justice system.

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<sup>17</sup>Josh Wingrove, "Hunger Strikers Seek Money for Women's Shelter in Fort McMurray" *Globe and Mail* (15 August 2010).

<sup>18</sup>British Columbia Housing and British Columbia Society of Transition Houses, *Review of Women's Transition Housing and Supports Program Consolidated Report: Key Findings and Recommendations* (Vancouver: BC Housing and BC Society of Transition Houses, 2010) at 7.

<sup>19</sup>Statistics Canada, *supra* note 13 at figure 45. This underestimates the number of female victims seeking help as only 58% of sexual assault centres in Canada responded to the survey.

<sup>20</sup>Christine Boyle describes gendered crimes (or "gendered assault") as "...offences against women as women rather than against people who simply happen to be women." Christine Boyle, Marie-Andree Bertrand & Celine Lacerte-Lamontagne, *A Feminist Review of Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1985) at 49.

<sup>21</sup> See Chapters Five and Six.

<sup>22</sup> BC Housing and BC Society of Transition Houses, *supra* note 62, BC Association of Specialized Victim Assistance & Counselling Programs, B.C./Yukon Society of Transition Houses and BC Institute Against Family Violence, *Critical Elements of an Effective Response to Violence Against Women: Briefing Document* (Vancouver, Ending Violence Association of BC, 2007).

## The Canadian Women's Anti-Violence Movement

The Canadian women's anti-violence movement has been at the forefront of the battle against intimate violence for decades.<sup>23</sup> Feminist organisations were among the first groups in Canada to label such violence as a problem worthy of the state's attention, and took the lead in pushing the state to begin to take criminal action against abusers.<sup>24</sup> Early in the feminist anti-violence movement in Canada, violence was recognized as a serious impediment to women's equality in all aspects of life.<sup>25</sup> While feminist transformation of society has been, and still is, the overall goal of the feminist movement in Canada, there has been a parallel movement to provide pragmatic assistance to women survivors of intimate violence. Keeping women safe from male violence was (and is) seen not merely as a public service, but as part of the feminist political movement.<sup>26</sup> Feminist activists have gained a foothold in policy and government corridors, and are a well-defined and organized presence in lobbying, litigation and protest.<sup>27</sup> In Chapters Six and Seven, I examine the ways in which this political foothold may be loosening, how in some cases feminist legal reform has been co-opted by a neoliberal state, and what the implications may be for survivors of intimate violence.

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<sup>23</sup>Lee Lakeman, *Obsession with Intent: Violence Against Women* (Montreal: Black Rose Books, 2005) at 24; Lorene Clark, "Feminist Perspectives on Violence against Women and Children: Psychological, Social Service and Criminal Justice Concerns" (1989) 3 C.J.W.L. 420.

<sup>24</sup>Lise Gotell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 129-131.

<sup>25</sup>Ann Duffy & Julianne Momirov, *Family Violence: A Canadian Introduction* (Toronto: Lorimer, 1997) at 176; Lakeman, *supra* note 23; Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005).

<sup>26</sup>See: Pauline Funston, "Feminism in the Transition House" (2000) 20 *Canadian Woman Studies* 41.

<sup>27</sup>I do not mean to suggest that there has been no diversity of views as well as disagreement over strategic and theoretical questions pertaining to intimate violence and women. However, women's organizations, grass roots activism and institution building strategies have been influential at community, legal, and policy levels.

Since the late 1960s, front-line feminist efforts to address violence against women have included the provision of shelters to abused or sexually assaulted women, consciousness raising groups, feminist counseling for survivors,<sup>28</sup> the formation of feminist anti-violence collectives, sexual assault counseling centers, ‘safety audits’, and public marches to bring attention to the issue of violence against women.<sup>29</sup> Alongside this collective organizing and the founding of transition houses, feminist advocates and lawyers have continually engaged with the state and the criminal justice system to address the needs of survivors of male violence. This engagement has meant accompanying women through the court process, lobbying for changes to criminal justice policy, and litigating for changes to the law itself.<sup>30</sup>

The theoretical and political foundation of Canadian anti-violence feminist activism is that crimes of intimate violence are not just private power imbalances between individual survivors and offenders; they are perpetuated and supported by normative, gendered power imbalances embedded in most aspects of society that ensure women’s economic, political, and social subordination to men.<sup>31</sup> Elizabeth Sheehy, a feminist legal academic and anti-violence advocate, sums up the position this way: “Woman’s vulnerability to

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<sup>28</sup> Duffy & Momirov, *supra* note 25 at 176 and 164.

<sup>29</sup> Holly Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson Canada, 1996) at 99. For more detail on women’s marches see: The Canadian Women’s March Committee, ‘It’s Time for Change: The World March of Women 2000’ (2000) 20 Canadian Women Studies 21; Lee Lakeman, “Why ‘Law and Order’ Cannot End Violence Against Women; and Why the Development of Women’s (Social, Economic and Political and Civil) Rights Might” (2000) 20 Canadian Woman Studies 24 at 24.

<sup>30</sup> See for instance: Elizabeth Sheehy, “Legal Responses to Violence Against Women in Canada” (1999) 19 Canadian Woman Studies 62; Christine Boyle, “A Duty to Retreat” (1991) 25 U.B.C.L. Rev. 60; Laura Burt “The Battered Woman Syndrome and the Plea of Self-Defence: Can the Survivor and the Accused be Strangers?” (1993) 27 U.B.C.L. Rev. 93; Boyle, Bertrand & Lacerte-Lamontagne, *supra* note 20.

<sup>31</sup> Kathleen Mahoney, “The Legal Treatment of Spousal Abuse: A Case of Sex Discrimination” (1992) 41 U. N.B.L.J. 21; “The Political Economy of Non-Violence” in Jane Kelly ed, *Violence Against Women* (Calgary: Calgary Institute for Humanities, 1995) at 7; Bertha Wilson, “Family Violence” (1992) 5 C.J.W.L. 137.

male violence and our ability to harness law are inextricably linked to women's social, economic and political position in Canada."<sup>32</sup>

### **Feminist Reforms to Criminal Justice: Pro-Arrest Policies and the Prosecution of Intimate Violence**

While there has been some variety in state responses to intimate violence over the last twenty years in Canada, the most prevalent have been mandatory arrest policies, and the criminalization of intimate violence through mandatory prosecution.<sup>33</sup> Pro-arrest policies implicate police officers who attend calls for help from survivors. These policies dictate that police must conduct a proper investigation, and arrest people who are accused of violence against a spouse or intimate partner, where the evidence exists. These policies emerged in the 1980's, and persist in many jurisdictions, with the urging of some women's anti-violence organisations.<sup>34</sup> Pro-arrest policies were promulgated in part due to feminist concerns that police were not taking these calls for help seriously, and that they frequently failed to arrest or remove men accused of violence against their intimate partners.<sup>35</sup>

Mandatory prosecution policies dictate that where adequate evidence exists, Crown Attorneys (or other criminal justice personnel who make charging decisions) must proceed with criminal charges against men accused of intimate violence, even if

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<sup>32</sup>Sheehy, *supra* note 30 at 62.

<sup>33</sup>Trevor Brown, "Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses" (Ottawa: Department of Justice, 2000); Sheehy, *supra* note 31 at 62-69. Non-criminal legal responses have included domestic violence statutes, and common law actions against abusers and police.

<sup>34</sup>Paula C. Barata & Frank Schneider, "Battered Women Add Their Voices to the Debate about the Merits of Mandatory Arrest" (2004) 32 *Women's Studies Quarterly* at 148.

<sup>35</sup>Richard Faubert & Richard Hinch, "The Dialectics of Mandatory Arrest Policies" in Thomas O'Reilly-Fleming, ed, *Post-Critical Criminology* (Scarborough, Ontario: Prentice-Hall, 1995) at 230.

survivors do not want to proceed.<sup>36</sup> Such a mandatory prosecution policy exists in British Columbia.<sup>37</sup>

In most cases these state actions have been supported by or initiated from the feminist anti-violence movement.<sup>38</sup> Feminists pushed for the criminalisation of intimate violence as a way to counter the pervasive notion that it was merely a private conflict between two equally situated adults, or a private family matter, rather than a systemic, gendered crime.<sup>39</sup>

Feminists began in the early 1970's to push for reform, as a reaction to the first *Royal Commission on the Status of Women*, which was virtually silent on violence against women.<sup>40</sup> While feminists theorized about male violence, organised transition houses and help lines for survivors of male violence, the criminal justice system was "...patronising at best, at worst inclined to blame the survivor."<sup>41</sup> The National Association of Women and the Law (NAWL) was formed in 1974, and part of their mandate was to advocate for changes to the criminal law in this area.<sup>42</sup> The earliest challenges included gaining legal recognition that spousal abuse was a crime, and having criminal justice personnel such as police take complaints seriously.

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<sup>36</sup> Lauren Bennett, Lisa Goodman, & Mary Anne Dutton, "Systemic Obstacles to the Criminal Prosecution of a Battering Partner" (1999) 14 *Journal of Interpersonal Violence* at 761; Tara Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against the Prosecution" (2000) 7 *International Review of Victimology* 141.

<sup>37</sup> See Chapter 4 at 127.

<sup>38</sup> Jennifer O'Connor, "Rape Crisis: The Debate over Professionalised Services" (2005) 28-29 *Herizons* 47; Sheila McIntyre, with contributions from Christine Boyle, Lee Lakeman & Elizabeth Sheehy, "Tracking and Resisting Backlash against Equality Gains in Sexual Offence Law" (2000) 20 *Canadian Woman Studies* 72.

<sup>39</sup> *Ibid*; and Rebick, *supra*, note 25.

<sup>40</sup> Rebick, *supra* note 25 at 69.

<sup>41</sup> Rebick, *ibid*.

<sup>42</sup> Brettell Dawson, ed., *Women, Law and Social Change: Core Readings and Current Issues* (Concord, Ontario: Captus Press, 2002) at 119.

The *Criminal Code* (even up to reforms in 1982) allowed for men to be charged for assaulting their female partners under the generic assault provisions, but there was a lack of understanding of the systemic nature of violence against women, and survivors were often forced to prosecute their own cases.<sup>43</sup> The early 1980's, and the arrival of the equality provisions of the *Charter*, saw a change in policy, encouraging the charging and prosecution of abusive men.<sup>44</sup> Later into the 1980's and early 1990's, federal government policy and jurisprudence interpreted the criminal law in ways that more clearly recognised women's vulnerability to violence as it was understood by feminists.<sup>45</sup> Reforms to the *Criminal Code* throughout this time brought us anti-stalking provisions,<sup>46</sup> rape shield laws,<sup>47</sup> and the elimination of the marital rape exemption.<sup>48</sup> The most recent changes to the sentencing provisions in the *Criminal Code*, made in 1996, contain specific provisions both recognising the impact of intimate violence, and introducing less harsh penalties for it.<sup>49</sup>

One area where feminist debates about criminal justice intervention crystallized early, and continue to cause disagreement, is the support of criminalisation through mandatory arrest and charging policies. While pro-arrest and prosecution have been a key policy stance on the part of some feminist anti-violence groups, their relationship to these policies is often complex and difficult. One way to better understand feminist support of

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<sup>43</sup>Sheehy, *supra* note 30.

<sup>44</sup>Mark Drumb, "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform" (1994) 12Canadian Journal of Family Law 11.

<sup>45</sup> Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984).

<sup>46</sup> Orit Kamir, *Every Breath You Take: Stalking Narratives and the Law* (Michigan: University of Michigan Press, 2001).

<sup>47</sup> Kwong-Leung Tang, "Rape Law Reform in Canada: the Success and Limits of Legislation" (1998) 42 International Journal of Offender Therapy and Comparative Criminology 258.

<sup>48</sup>Sheehy, *supra* note 30.

<sup>49</sup> See Chapter Three.

pro-arrest and prosecution policies is to place them against the larger backdrop of feminist anti-violence activism. As Lee Lakeman, a representative of the Canadian Association of Sexual Assault Centres, notes “...it has never been the position of CASAC that violence against women should be considered by government...primarily as a matter of criminal justice.”<sup>50</sup> In fact throughout their engagement with the federal government in shaping criminal justice reforms, feminist anti violence advocates have consistently emphasized the need for parallel provision of non-criminal responses to intimate violence including “...social policy, public education and the provision of a stable funding base for independent, women-controlled front-line work and activism.”<sup>51</sup> This stance is evidenced by CASAC’s publication of *Ninety-Nine Federal Steps* in 1993, a document that lays out a plan for eliminating intimate violence emphasizing these social reforms alongside appropriate criminal justice response to violence.<sup>52</sup> In Chapters Five and Six I will analyse the ways in which a neoliberal state agenda has led to the cooption of feminist-inspired criminal legal reforms, and the key role contemporary women’s anti-violence groups play in reclaiming responses to intimate violence.

Over the last decade the role of these policies has become even more complex and contested. Feminist support for criminalisation has been critiqued, both from within the feminist anti-violence movement,<sup>53</sup> and by those who advocate for restorative

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<sup>50</sup> Gotell, *supra* note 24 at 130.

<sup>51</sup> *Ibid.*

<sup>52</sup> Canadian Association of Sexual Assault Centres, “Ninety-Nine Federal Steps to End Violence Against Women” (Vancouver: CASAC, 1993), See also Judy Rebick, *Ten Thousand Roses* Chapter 6, for first person accounts of anti-violence workers from 1970 to present day, documenting the broad array of anti-violence strategies they deployed alongside criminalization.

<sup>53</sup> See for example: Kristen Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham and London: Duke University Press, 2008); Donna Coker, “Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Colour” (2000) 9 *University of California Davis Law Review* 1009-1055; Eve Bazawa & Carl Bazawa, eds., *Do Arrests and Restraining Orders Work?* (California: Thousand Oaks, 1996); Patricia Hughes & Mary Jane Mossman,

justice<sup>54</sup> rather than arrest and prosecution in cases of intimate violence.<sup>55</sup> Ironically, there is also evidence that despite pro-arrest and prosecution policies, police are still not attending, and taking these crimes seriously,<sup>56</sup> and Crown attorneys are still not prosecuting intimate violence<sup>57</sup> resulting in calls from some within the feminist movement for better enforcement of these policies. Simultaneously, however, intersectional analysis<sup>58</sup> has led many feminists to see how pro-arrest and prosecution policies may exacerbate the hyper-criminalisation of racialised and other marginalised groups, and therefore to a critique of incarceration as a just means of reducing violence against women in marginalised communities.<sup>59</sup> Finally, feminists themselves have been

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“Rethinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses” (2002) 13 Windsor Rev. Legal and Soc. Issues 1 at 70.

<sup>54</sup> Allison Morris, Gabrielle Maxwell & Jeremy Robertson, “Giving Victims a Voice: A New Zealand Experiment” (1993) 4 The Howard Journal of Criminal Justice 76; John Braithwaite and Philip Petit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990).

<sup>55</sup> Loretta Frederick & Kristine C. Lizdas, “The Role of Restorative Justice in the Battered Women’s Movement” (Minneapolis: The Battered Women’s Justice Project, 2003); Alan Edwards & Jennifer Haslett, “Domestic Violence and Restorative Justice: Advancing the Dialogue” (Paper presented at the Sixth International Conference on Restorative Justice at the Centre for Restorative Justice, Vancouver BC, 1-4 June 2003); Peggy Grauwiler & Linda Mills, “Moving Beyond the Criminal Justice Paradigm: A Radical Restorative justice Approach to Intimate Abuse” (2004) 31 J. Soc. and Soc. Welfare 49.

<sup>56</sup> George Rigakos, “The Politics of Protection: Battered Women, Protection Orders, and Police Subculture” in Kevin Bonnycastle & George Rigakos eds., *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 82-93 at 91.

<sup>57</sup> Colleen Varcoe, Fatima Jaffer & Pat Kellan, *Protecting Women? Women’s Experiences of Seeking Protection From Abuse by Intimate Partners* (Vancouver, BC: Health Research Foundation, 2000).

<sup>58</sup> See below.

<sup>59</sup> See for instance: Bumiller, *supra* note 53; Ms. Foundation for Women, “Safety and Justice for all: Examining the Relationship between the Women’s Anti-Violence Movement and the Criminal Legal System” (Brooklyn, NY: Ms. Foundation for Women, 2003) at 7-11; Andrea Smith, “Beyond Restorative Justice: Radical Organising against Violence” in Ptacek, *infra* note at 255; Himani Bannerji, “A Question of Silence: Reflections on Violence Against Women in Communities of Colour” in Enakashi Dua and Angela Robertson, *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women’s Press, 1999) 261; Mary Ellen Turpel-Lafond, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” in Caroline Andrew and Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen’s University Press, 1997) 64.

highly critical of the criminal justice system's revictimisation of survivors through arrest and prosecution processes.<sup>60</sup>

Empirical research in the area has been inconclusive. There are some studies that indicate that mandatory arrest and prosecution policies are an abject failure in reducing incidents of violence.<sup>61</sup> Other studies indicate that, at least for some women, mandatory arrest and prosecution policies decrease the most serious forms of violence, and murders,<sup>62</sup> or even that these policies reduce re-offending by large margins.<sup>63</sup>

This is where restorative justice comes in; pro-arrest and prosecution policies are often held up by government,<sup>64</sup> restorative justice practitioners,<sup>65</sup> and some feminists<sup>66</sup> as a failure of feminist intervention in criminal law, and a reason to use restorative justice instead. Essentially, they argue that if it is unclear that criminalization prevents violence,

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<sup>60</sup> Quince Hopkins, Mary Koss and Karen Bachanr, "Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities" (2004) 23 St. Louis U Pub L Rev 289 at 290; Laureen Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990) 10 Canadian Journal of Law and Society 75; and Christine Boyle, "The Battered Wife Syndrome and Self-Defence: *Lavallee v R.*" (1990) 9 Can. J.Fam.L. 171.

<sup>61</sup> Leeann Iovani, Susan Miller & Kathleen Kelley, "Criminal Justice System Responses to Domestic Violence; Law Enforcement and Courts" in Claire M. Renzetti, Jeffery L. Edelson & Raquel K. Bargen, eds., *Sourcebook on Violence Against Women* (California, Thousand Oaks, 2001) 313. This literature review of the existing data concludes that "...[t]he system has a limited ability to keep women safe due to the fact that the problem has its roots in the structured, gendered inequality in society." (at 309)

<sup>62</sup> Ms. Foundation for Women, *supra* note 59 at 9.

<sup>63</sup> Christopher D. Maxwell, Joel H. Garner & Jeffrey A. Fagan, "The Preventative Effects of Arrest on Intimate Partner Violence" (2002) *Criminology and Public Policy* 51-80 at 51; London Family Court Clinic Inc., *Wife Assault as A Crime The Perspectives of Victims and Police Officers on Charging Policy in London Ontario from 1980-1990* (Department of Justice Canada WD1991-13a, April 1991) at 3-4.

<sup>64</sup> The Honourable Geoff Plant, Q.C., "Reforms to Spousal Assault Policy" (2003) 61 *The Advocate* 589 at 599.

<sup>65</sup> Daniel Van Ness & Karen Heetderks Strong, *Restoring Justice* (Cincinnati, Oh: Anderson Publishing, 1997).

<sup>66</sup> Kathleen Daly and John Braithwaite, "Masculinities, Violence and Communitarian Control" in Tim Newburn and Elizabeth Stanko, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994) 189 and Joan Pennell and Stephanie Francis, "Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children" (2005) 11 *Violence against Women* 666.

then the disproportionate effects of criminalization on marginalised communities should tip the balance away from criminalization, and towards restorative justice. In Chapters Five and Six I argue that restorative justice can be seen as a viable alternative to criminalization *only* where it is part of a larger agenda to politicize violence against women and provide support for survivors.

### **Restorative Justice: A Brief Introduction**

In recent decades restorative justice has captured the imagination of many who are dissatisfied or disillusioned with conventional models of criminal justice in Western countries such as Canada, the United States, New Zealand and Australia. This popularity is marked by a proliferation of conferences, websites,<sup>67</sup> community groups,<sup>68</sup> a restorative justice training ‘boot camp,’<sup>69</sup> and “how to” manuals provided for mass distribution.<sup>70</sup> The Correctional Service of Canada marks national ‘Restorative Justice Week’ in November,<sup>71</sup> and restorative justice is the “...stated new justice wave” for several provinces including Saskatchewan, British Columbia, Alberta, Nova Scotia, New

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<sup>67</sup> Restorative justice online ([www.restorativejustice.org](http://www.restorativejustice.org)), and the Victim Offender Mediation Association ([www.voma.org](http://www.voma.org)). See also: Robert Cormier, “Restorative Justice: Directions and Principles-Developments in Canada” (Ottawa: Public Works and Government Services Canada, 2002) at 9 and United Nations Resolution: ECOSOC/2000/14.

<sup>68</sup> See for example: Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) at 11. This publication discusses the role of both the Restorative Justice Coalition and Victim’s Voice, the former is a prison-centred advocacy group for the promotion of restorative justice and the latter a national victims rights organization involved in promoting restorative justice. They are both based in Victoria, British Columbia and work out of the William Head Institution. See also: John Howard Society of Canada “Briefing Paper on Restorative Justice” in Timothy F. Hartnagel ed., *Canadian Crime Control Policy: Selected Readings* (Toronto: Harcourt and Brace, 1998) at 91, which discusses the role of the John Howard Society of Canada in promoting restorative justice at the level of policy and legislation. These are but a few examples.

<sup>69</sup> Emma Poole, “Seminar Takes Fresh Look at Justice” *Calgary Herald* (30 March 2001), B5.

<sup>70</sup> See for example: Rick Linden & Don Clairmont, “Making it Work: Planning and Evaluating Community Corrections and Healing Projects in Aboriginal Communities” (Ottawa: Solicitor General Canada, 1998). See also: Part B of the same work: “Evaluations, Manuals and Programs” for an extensive list of manuals available in Canada.

Online: <<http://www.sgc.gc.ca/epub/Abcore/e199805b/e199805b.htm>>.

<sup>71</sup> “Reintegrating Offenders into Society” *St. John’s Telegram* (20 November 2001) A5; Robert Cormier, “Restorative Justice: Directions and Principles-Developments in Canada (Ottawa: Public Works and Government Services Canada, 2002) at 5.

Brunswick, Newfoundland, Prince Edward Island, and Manitoba.<sup>72</sup> It is also evident in policy and legislation recently adopted in these jurisdictions, incorporating the principles and practices of restorative justice into the criminal justice system itself,<sup>73</sup> and in the extensive array of scholarly writing on the topic.<sup>74</sup>

It is abundantly clear that restorative justice is a global social movement; however, even a quick perusal of the extensive print, electronic, and visual materials available on the topic reveals that there is no clear, fixed centre. It is a polyvalent set of overlapping social movements that have collected under a single title. Those who theorize and practice restorative justice often disagree about how it should be defined, practiced and how the movement should move forward. In fact, whether to apply restorative justice in cases of intimate violence is one of the key debates within the movement.<sup>75</sup>

The main purpose of this section is to clarify the elusive concept of restorative justice.

Rather than attempting a full and final definition, I will outline some of the diverse

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<sup>72</sup> See: Carol LaPrairie, "Understanding Restorative Justice" (2001) [unpublished], Manitoba Looks at Expanding Alternative Justice in Criminal Cases, *St. John's Telegram* (Sept. 2, 2001 ) A5, Summerside Supports Inquiry Dealing with Family Violence, *The Charlottetown Guardian* (Sept. 1, 2001) A3, and "Reintegrating Offenders into Society", *St. John's Telegram* (November 20, 2001) A5.

<sup>73</sup> See Chapter 3.

<sup>74</sup> See for example: Elizabeth Beck, Sarah Britto & Arlene Andrews, *In the Shadow of Death: Restorative Justice and Death Row Families* (New York: Oxford University Press, 2007); Howard Zehr & Barb Toews, *Critical Issues in Restorative Justice* (Monsey: Criminal Justice Press, 2004); Charles K. Barton, *Restorative Justice: The Empowerment Model* (Annandale: Federation Press, 2003); Adam Crawford & Tim Newburn, *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (Portland: Willan Publishing, 2003); John W. De Gruchy, *Reconciliation: Restoring Justice* (London: SCM Press, 2003); Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003); Ruth Ann Strickland, *Restorative Justice* (New York: Peter Lang Publishing, 2003); Andrew von Hirsch et al., eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland: Hart Publishing, 2003); Lode Walgrave, *Restorative Justice and the Law* (Portland: Willan Publishing, 2003); Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Portland: Willan Publishing, 2002); Gordon S. Bazemore & Mara Schiff, eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing Company, 2001); John Braithwaite & Heather Strang, eds., *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001); Michael Braswell, John Fuller & Bo Lozoff, *Corrections, Peacemaking, and Restorative Justice: Transforming Individuals and Institutions* (Cincinnati: Anderson Publishing Company, 2001).

<sup>75</sup> See below.

theoretical, political, cultural, and historical ideas that inform the current uses of restorative justice in Canada. In order to underline the complex nature of restorative justice theory and practice I will also consider several of the main debates within the restorative justice movement that most interest me, and inform my research project.

### **Theoretical, Political, Cultural and Historical Underpinnings**

As I noted in the introduction, the term “restorative justice” is attributed to the American criminologist Albert Eglash in a 1977 article discussing restitution.<sup>76</sup> In the same year Nils Christie, a Norwegian academic and prison abolitionist, wrote a paper that has contributed significantly to contemporary understandings of restorative justice, and is often cited by restorative justice practitioners and advocates. Christie’s paper “Conflicts as Property”<sup>77</sup> argues that by ‘stealing’ conflict from the community, the state effectively disabled our innate ability to resolve our own conflicts at an everyday level. Christie counseled more involvement by the community and victims in court processes as a way to begin reclaiming conflict, and to relearn how to solve justice problems amongst ourselves as citizens.

This first, modest vision has grown over the past forty years into a complex set of globalised movements and practices. In the late 1980s and early 1990s, two separate scholars, in two geographical locations, penned books that, for the first time, fleshed out a

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<sup>76</sup> Daniel Van Ness and Karen Heetderks Strong attribute this term to Eglash in their book *Restoring Justice* (Cincinnati, Oh: Anderson Publishing, 1997) at 24. See also: Albert Eglash, “Beyond Restitution: Creative Restitution” in Joe Hudson and Burt Galaway eds., *Restitution in Criminal Justice* (Lexington, MA: D.C. Heath and Company, 1977) at 91. Restitution is a movement that was “rediscovered” in the 1960s in the Western world, proponents claim its roots lay in the justice practices of several ancient civilizations. Its basic tenet is “paying back the victim” in one of several ways, including monetary compensation or compensation in kind. The movement’s target is the needs of the victim, which they claim will then serve the larger interests of society by promoting healing and forgiveness amongst community members. See Jennifer Llewellyn & Robert Howse, “Restorative Justice: A Conceptual Framework” (Ottawa: Law Commission of Canada, 1999) at 7.

<sup>77</sup>(1977) 33 *British Journal of Criminology* 1.

more full vision of what restorative justice might look like in both theory and practice. In 1989, Australian John Braithwaite, considered by some to be the founder of the restorative justice movement, wrote *Crime, Shame and Reintegration*.<sup>78</sup> A year later, American Howard Zehr, often called the ‘grandfather of restorative justice’, published *Changing Lenses: A New Focus for Crime and Justice*,<sup>79</sup> and three years later *The Little Book of Restorative Justice*.<sup>80</sup> Both have gone on to publish numerous works;<sup>81</sup> however, these three early books are most often quoted by contemporary scholars in outlining foundational principals.<sup>82</sup>

Interestingly, Braithwaite’s influential book did not make reference to the term restorative justice; instead, he introduced the concept of ‘reintegrative shaming’, which has become an important part of the theoretical and practical foundations of contemporary restorative justice.<sup>83</sup>

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<sup>78</sup>John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

<sup>79</sup>Howard Zehr, *Changing Lenses: A new Focus for Crime and Justice* (Scottsdale: Herald Press, 1990).

<sup>80</sup> Howard Zehr, *The Little Book of Restorative Justice* (Pennsylvania: Good Books, 2002) [*Little Book*].

<sup>81</sup> See for instance: John Braithwaite, “Shame and Modernity” (1993) 33 *British Journal of Criminology* 1; “Decomposing a Holistic Vision of Restorative Justice” (2000a) 3 *Contemporary Justice Review* 433; “Shame and Criminal Justice” (2000b) 42 *Canadian Journal of Criminology* 281; “Restorative Justice and a New Criminal Law of Substance Abuse” (2001) 33 *Youth and Society* 227; “Families and the Republic” (2004) 31 *Journal of Sociology and Social Welfare* 199; “Encourage Restorative Justice” (2007) 6 *Criminology* 689.

See for instance: Howard Zehr & Lorraine Stutzman Amstutz, *What Will Happen to Me* (Intercourse: Good Books, 2010), Howard Zehr & Barb Toews, eds, *Critical Issues in Restorative Justice* (Monsey: Willan Publishing, 2004); Howard Zehr, “Intersection of Restorative Justice with Trauma Healing, Conflict Transformation and Peacebuilding” (2009) 18 *Journal for Peace and Justice Studies* 20, “Justice Paradigm Shift? Values and Visions in the Reform Process” (1995) 12:3 *Mediation Quarterly* 207, “Restorative Justice and the Death Penalty” in John PJ Dussich & Jill Schellenberg, eds, *The Promise of Restorative Justice: New Approaches for Criminal Justice and Beyond* (Boulder: Lynne Rienner Publishers, 2010) 133, Evaluation and Restorative Justice Principles” in Elizabeth Elliott & Robert M. Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton: Willan Publishing, 2005) 296.

<sup>82</sup> See for instance Elizabeth M. Elliott, *Security with Care: Restorative Justice and Healthy Societies* (Black Point: Fernwood Press, 2011).

<sup>83</sup> His second influential book in 1990 with Philip Pettit develops his own ideas regarding reintegrative shaming further, but also does not refer to restorative justice as a distinct movement, idea or theory. (John Braithwaite and Philip Pettit, *Not Just Deserts; A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990)).

Braithwaite's earliest work as a criminologist focused on white-collar crime.<sup>84</sup> In examining the reaction of white-collar criminals to prosecution, Braithwaite found that further criminal behavior was prevented by 'shame and humiliation' on the part of the offender.<sup>85</sup> Braithwaite went on to compare this reaction to a group of "poor, young black offenders" who had committed crimes such as robbery, drug dealing or assault.<sup>86</sup> He found that prosecution, in fact, enhanced their status in their families and communities, rather than causing them shame and humiliation.<sup>87</sup> In other words, offenders would work to align their behavior to obtain a positive reaction from those they cared about and respected. According to Braithwaite, the criminal justice system ought to harness the power of shame; not by heaping scorn and humiliation on the offender, but by developing a 'reintegrative shaming' approach. In essence, the best response to criminal behavior is to make the offender feel shame for their delinquent behavior, thus motivating a change in behavior, but simultaneously feel supported by their community, thus further enforcing the positive turn.

Braithwaite's basic thesis in regards to the purposeful application of shaming is this:

The crucial distinction is between shaming that is reintegrative and shaming that is disintegrative (stigmatization). Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law abiding citizens. These gestures

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<sup>84</sup>John Braithwaite and Gilbert Geis, "On theory and action for corporate crime control" (1982) 28 *Crime & Delinquency* 292. White collar crime is "...nonviolent crime usually involving cheating or dishonesty in commercial matters. Examples include fraud, embezzlement, bribery and insider trading." *Black's Law Dictionary*, 9<sup>th</sup>ed, *sub verbo*. See also: Kelly Strader, *Understanding White Collar Crime* (Newark, NJ: LexisNexis Group, 2002).

<sup>85</sup>*Crime, Shame and Reintegration*, *supra* note 78 at 300.

<sup>86</sup>*Ibid* at 300.

<sup>87</sup>*Ibid* at 300.

of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as deviant.<sup>88</sup>

Combined with Christie's insights,<sup>89</sup> some basic parameters of restorative justice begin to appear; the involvement of victims, families, and communities is a help rather than a hindrance; their role is both to generate behavior-changing shame, and to provide support. This not only changes an offender's criminal behavior, it empowers the victim and the community to learn how to address and prevent crime themselves, rather than relying on the state.

For the most part, the approaches envisioned by both Braithwaite<sup>90</sup> and Christie are designed to function within the conventional criminal justice system. Zehr's work adds another key dimension: the important role of the community as justice agents outside of the courtroom, and potentially outside of the criminal justice system altogether. Zehr, a Mennonite, learned about restorative justice in Canada. It is a much-noted fact that the first victim-offender mediation project (a form of restorative justice)<sup>91</sup> in North America took place in Kitchener-Waterloo in Ontario, and was conceived of and run by the Mennonite Central Committee.<sup>92</sup>

In his book *Changing Lenses*, Zehr calls for a 'paradigm shift' away from retributive justice, and towards restorative justice. He lays out these visions of justice as

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<sup>88</sup> *Ibid* at 55.

<sup>89</sup> Braithwaite cites Nils Christie extensively in this and other works.

<sup>90</sup> *Crime, Shame and Reintegration*, *supra* note 78 at 97.

<sup>91</sup> A form of restorative justice involving a mediated face to face meeting between a victim and offender whereby the victim is able to tell the offender about the harms done to them, and the offender is able to take responsibility for their actions, apologise and sometimes offer some kind of restitution. See: Robert Coates, Boris Kalanj & Umbreit, Mark *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (New York: Criminal Justice Press, 1994).

<sup>92</sup> Don E. Peachey, "The Kitchener Experiment" in Mark Wright and Burt Galaway, eds., *Mediation and Criminal Justice; Victims, Offenders and Community* (Newbury Park: California: Sage, 1989) at 14-26.

fundamentally opposed,<sup>93</sup> characterizing retributive justice as outright ignoring the victim and failing to hold offenders accountable. Zehr urges Western polities to turn away from punitive measures (including incarceration), claiming they are inhumane and ineffective. According to Zehr restorative outcomes are best achieved through a process that *may* involve the state, and professionals, but *must* involve “...those who have a direct stake in the event or offence- that is, those who are involved, impacted by, or who otherwise have a legitimate interest in the offence.”<sup>94</sup> Rather than a court process Zehr points to “... (a) directed, facilitated, face to face encounter...”<sup>95</sup> such as a meeting between victim and offender, a family group conference or a circle process.<sup>96</sup>

There are two other main points to be emphasized in this brief summary of restorative justice. First, of particular interest to my own research inquiry, is the role of victims of crime within restorative justice. One of the major critiques of the processes and institutions of the conventional criminal justice systems is the ways in which they ignore, diminish, and even revictimize the victims of crime.<sup>97</sup> Almost all models of restorative justice emphasize the role of the victim, and claim that while the retributive justice system is offender-driven,<sup>98</sup> restorative justice is victim-centered.<sup>99</sup> Starting with Christie,<sup>100</sup> throughout restorative justice literature the plight of the (ungendered) victim

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<sup>93</sup> In his later work, in response to critics of his work in the 1990s, he notes “Despite my earlier writing I no longer see restorative justice as the polar opposite of retribution.” (Zehr [*Little Book*], *supra* note 80 at at 13). I draw on this point, and the work of Kathleen Daly, in Chapter Five to describe the role incarceration might play in a restorative approach to intimate violence.

<sup>94</sup> Zehr [*Little Book*], *supra* note 80 at 26.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* See Chapter Three for more detail on these forms of restorative justice.

<sup>97</sup> See for instance: Heather Strang, *Repair or Revenge* at Chapters Five and Six.

<sup>98</sup> Mark Umbreit, “Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment” (1998) 1 *Western Criminology Review* 1 at 2..

<sup>99</sup> Thomas Quinn, “The Future and Restorative Community Justice” (International Crime Prevention Practitioners Conference, Vancouver, British Columbia, April 1, 1996)

<sup>100</sup> *Supra* note 77 at 10.

is a common and consistent thread.<sup>101</sup> Restorative justice advocates rely on extensive research which shows that victims in the retributive justice system not only suffer from monetary loss, physical injury, and psychological stress due to the crime, but that their losses are compounded by loss of time, delays, humiliating testimony and cross examination, and lack of input.<sup>102</sup> Marty Price, director and founder of the Victim-Offender Reconciliation Program Information and Resource Centre in Washington, characterizes the peripheral role played by victims in the criminal justice system: “Victims may be viewed, at worst, as impediments to the prosecutorial process; at best, as valuable witnesses for the prosecution of the state’s case. Only the most progressive prosecutors offices view crime victims as their clients and prioritize the needs of victims.”<sup>103</sup>

Restorative justice practitioners have, over the past twenty years, developed clear theories and ideals around the participation of victims of crime in restorative processes, calling for more involvement than is offered within the conventional criminal justice system, and specialized supports for victims.<sup>104</sup>

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<sup>101</sup> See for example: Daniel Van Ness & Karen Heetderks Strong, *Restoring Justice* (Cincinnati, OH: Anderson Publishing, 1997) at 19-21; John Howard Society, *supra* note 68 at 91; Ruth Morris, *Stories of Transformative Justice* (Toronto: Canadian Scholar’s Press, 2000) at 9-13 and Llewellyn and Howse, *supra* note 76 at 21.

<sup>102</sup> John Howard Society, *supra* note 68 at 95; Strang *infra* note 104.

<sup>103</sup> Michelle Price, “Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders” (2000) 9 *Dispute Resolution Magazine* 8at 8.

<sup>104</sup> See for instance: Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002); Simon Green, “The Victims’ Movement and Restorative Justice” in Gerry Johnstone and Daniel Van Ness eds., *Handbook of Restorative Justice* (Devon: Wilan Publishing, 2007)171; Kay Pranis, Barry Stuart & Mark Wedge, *Peacemaking Circles; From Crime to Community* (Minnesota: Living Justice Press, 2003) at 151-152, 26-27 and 218-219.

Second, restorative justice is not simply about form and function. It is underpinned by a set of values, which have been the subject of much restorative justice scholarship.<sup>105</sup> As these values are often defined quite differently depending on the worldview of the writer (Christian, Indigenous, feminist etc), I will instead turn to what Andrew Woolford, a Canadian restorative justice scholar and practitioner, calls an ‘ethos’.<sup>106</sup> Woolford’s account provides a basic understanding of the *raison d’etre* of restorative justice, without engaging in the more epistemic debates around values that characterize the literature in this area. According to Woolford, one can make the following assumptions about any restorative justice model:

Conflicts are knowable...we can get to know conflicts through the act of communication...conditions can be established in which communication is unproblematic...human behavior can be changed...humans possess the capacity for communication and therefore creative problem solving...a society built upon effective communication will be more peaceable and progressive.<sup>107</sup>

Note the reoccurring emphasis on communication as a tool for addressing anti-social behavior, and as a tool of social change. Unlike the conventional criminal justice system, which relies on incarceration, or other forms of state surveillance and punishment to control behavior, restorative justice relies instead on the power of communication between people to control the anti-social behavior of individuals.

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<sup>105</sup> See for instance: Kay Pranis, Barry Stuart & Mark Wedge, *ibid* 50; Kay Pranis “Restorative Values” in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice*. (Cullompton, Devon: Willan Publishing, 2007) 59-74; Valerie Braithwaite, *Values and Restorative Justice in Schools* in Heather Strang and John Braithwaite, eds., *Restorative Justice: Philosophy to practice* (Burlington, Vermont: Ashgate Publishing Company, 2000) 121-144; Howard Zehr, “Justice Paradigm Shift? Values and Visions in the Reform Process” (1995) 12 *Mediation Quarterly* 207.

<sup>106</sup> Andrew Woolford, *The Politics of Restorative Justice* (Halifax: Fernwood, 2009) at 41. Woolford defines an ethos as “...the dispositions or guiding beliefs of the (restorative justice) movement.”

<sup>107</sup> *Ibid* at 54.

Restorative justice, as a social movement and set of actual practices, saw a huge popularization in Western democracies in the 1990s and early 2000s.<sup>108</sup> Simultaneously during this time there has been a rise in debates within the movement itself, as well as criticisms from without.<sup>109</sup> These debates, at their core, represent a challenge to the early, central vision of restorative justice as strictly defined in contradistinction to conventional criminal justice. This black and white distinction between restoration and retribution has been successfully challenged by scholars around the world including Canadians George Pavlich,<sup>110</sup> Andrew Woolford,<sup>111</sup> Analise Acorn,<sup>112</sup> Carol Laprairie and Jane Dickson-Gilmore.<sup>113</sup> What has emerged is a much more nuanced vision that is able to capture both restoration and retribution as important elements of justice.<sup>114</sup> I will draw on these visions of restorative justice in Chapter Five as I discuss improved legal and community responses to intimate violence. It is also noteworthy that throughout this same time period

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<sup>108</sup> See for instance: Elizabeth Beck, Sarah Britto & Arlene Andrews, *In the Shadow of Death: Restorative Justice and Death Row Families* (New York: Oxford University Press, 2007); Howard Zehr & Barb Toews, *Critical Issues in Restorative Justice* (Monsey: Criminal Justice Press, 2004); Charles K. Barton, *Restorative Justice: The Empowerment Model* (Annandale: Federation Press, 2003); Adam Crawford & Tim Newburn, *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (Portland: Willan Publishing, 2003); John W. De Gruchy, *Reconciliation: Restoring Justice* (London: SCM Press, 2003); Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003); Ruth Ann Strickland, *Restorative Justice* (New York: Peter Lang Publishing, 2003); Andrew von Hirsch et al, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland: Hart Publishing, 2003); Lode Walgrave, *Restorative Justice and the Law* (Portland: Willan Publishing, 2003); Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Portland: Willan Publishing, 2002); John Perry, ed., *Repairing Communities through Restorative Justice* (Lanham: American Correctional Association, 2002); Gordon S. Bazemore & Mara Schiff, eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing Company, 2001); John Braithwaite & Heather Strang, eds., *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001); Michael Braswell, John Fuller & Bo Lozoff, *Corrections, Peacemaking, and Restorative Justice: Transforming Individuals and Institutions* (Cincinnati: Anderson Publishing Company, 2001).

<sup>109</sup> See below for an in depth look at some of these debates and critiques.

<sup>110</sup> George Pavlich, *Governing Paradoxes of Restorative Justice* (London: Glasshouse Press, 2005).

<sup>111</sup> Andrew Woolford, *The Politics of Restorative Justice: A Critical Introduction* (Halifax: Fernwood, 2009).

<sup>112</sup> *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004.)

<sup>113</sup> Carol LaPrairie & Jane Dickson-Gilmore, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of conflict and Change* (Toronto: University of Toronto Press, 2005).

<sup>114</sup> See below on the role of retribution in restorative justice.

scholars have produced an avalanche of empirical studies gauged to determine the success of this 'new' justice model;<sup>115</sup> only a handful deal with intimate violence.<sup>116</sup>

### **Restorative Justice: Main Debates within the Literature**

In many instances the major debates within restorative justice have been generated by critiques of the movement from both inside and outside. One major critique has come from scholars concerned with the role of race, gender, sexual orientation, and other marginalized social locations within the restorative justice movement, and its practice.

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<sup>115</sup>See below for a review of the existing empirical evidence on restorative justice and intimate violence. For empirical evidence regarding other crimes see: Lawrence W Sherman & Heather Strang, "Crime and Reconciliation: Experimental Criminology and the Future of Restorative Justice"(2009) 22:1 *Acta Criminologica* 1; Tom R Tyler et al., "Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment" (2007) 41:3 *Law and Soc'y Rev* 553; Heather Strang et al., "Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis" (2006) 62:2 *Journal of Social Issues* 281; Lawrence W Sherman et al., "Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials" (2005) 1 *Journal of Experimental Criminology* 367; Lawrence W Sherman & Heather Strang, "Repairing the Harm: Victims and Restorative Justice" (2003) 1 *Utah Law Review* 15; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Oxford University Press, 2002); Jacki D Sieppert, Joe Hudson & Yvonne Unrau, "Family Group Conferencing in Child Welfare: Lessons from a Demonstration Project" (2000) 81:4 *Families in Society: The Journal of Contemporary Human Services*, Joe Hudson & Burt Galaway, "Restitution Program Models with Adult Offenders" in B Galaway & J Hudson, eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey: Criminal Justice Press, 1990) 165; Joe Hudson & Burt Galaway, "Community Service: Toward Program Definition" (1990) 54:2 *Federal Probation* 3; Joe Hudson & Burt Galloway "Financial Restitution: Toward an Evaluable Program Model" (1989)31:1 *Canadian Journal of Criminology* 1; Joe Hudson, Burt Galaway & S Novak, *National Assessment of Adult Restitution Programs Final Report* (Duluth: University of Minnesota, 1980); Mark Umbreit & R. Ritter, "Arab Offenders Meet Jewish Victim: Restorative Family Dialogue in Israel" (Fall 2006) 24:1 *Conflict Resolution Quarterly* 99; W. Nugent, M. Williams & Mark Umbreit, "Participation in Victim Offender Mediation and the Severity of Re-offense: A Meta-Analysis" (2004) *Research in Social Work Practice*, Mark Umbreit, T. Lewis & H. Burns, "Community Response to a 9/11 Hate Crime: Restorative Justice through Dialogue" (2003) 6:4 *Contemporary Justice Review* 383; W. Nugent, M. Williams & Mark Umbreit, "Participation in Victim-Offender Mediation and the Prevalence of Subsequent Delinquent Behavior: A Meta-Analysis" (2003) *Utah Law Review*, L; Abrams & Mark Umbreit, *Youthful Offenders Response to Victim Offender Conferencing in Washington County, MN* (St. Paul: Center for Restorative Justice and Peacemaking, 2002); Roberts Coates, Mark Umbreit & Betty Vos, *Systemic Change Toward Restorative Justice: Dakota & Washington Counties in Minnesota* (St. Paul: Centre for Restorative Justice and Peacemaking: 2002), Mark Umbreit et al., *Executive Summary: Victim Offender Dialogue In Crimes Of Severe Violence: A Multi Site Study Of Programs In Texas And Ohio* (St. Paul: Center for Restorative Justice & Peacemaking, 2002).

<sup>116</sup> See section below.

Scholars such as Julie Stubbs,<sup>117</sup> Ruth Busch,<sup>118</sup> myself,<sup>119</sup> and the Aboriginal Women's Action Network,<sup>120</sup> have criticized restorative justice as being theorized in a vacuum, where power imbalances between participants are sometimes sidelined to facilitate speedy resolution of 'conflicts'. There are two key components to this debate, each of which is discussed in some detail below. First is the role of Aboriginal laws and legal orders in the restorative justice movement. Within this debate the role of race, ethnicity, gender, and the state are all queried, and brought to the fore. Secondly, I explore literature on whether restorative justice should be deployed at all in cases of intimate violence. Both of these debates frame the ways that I interpret my own research data.

### **Aboriginal Justice**

One of the main debates within restorative justice has been regarding the role of race and culture in theory and practice. While the contemporary restorative justice movement, as described above, originated with white, Christian, male academics,<sup>121</sup> the use of

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<sup>117</sup>Julie Stubbs, "'Communitarian' Conferencing and Violence Against Women: A Cautionary Note" in Mariana Valverde, Linda MacLeod and Kirsten Johnson eds., *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) 260.

<sup>118</sup>Ruth Busch, "Who Pays if We Get it Wrong?" in Heather Strang & John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 223.

<sup>119</sup>Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice" (2006) 10 *Theoretical Criminology* 49.

<sup>120</sup>Aboriginal Women's Action Network, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley and Fay Blaney (Vancouver: AWAN, 2001)

<sup>121</sup>Both John Braithwaite and Howard Zehr are practicing Christians, and root their commitment to restorative justice in their faith. In many senses the Christian faith was inextricably linked to rise of the popular restorative justice movement. The solutions and alternatives promised by restorative justice have been hailed as "miraculous" and "magic" (Morris, *supra* note 101 at 146 and 254, and Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) at 10. Although other faith communities such as Aboriginal spirituality have made distinct contributions, Christian values have been a primary motivator in the development of restorative justice theory and practice. There is a long history of Christian involvement in movements for better prison conditions and, later in prison abolition and alternatives to imprisonment. (See: Michael Jackson, *Prisoners of Isolation* (Toronto: University of Toronto Press, 1983) at 13 to 19) Today the involvement of the Christian faith community has not diminished. Among the varied and diverse restorative justice models and projects that currently exist in Canada, many have been conceived and are run by faith communities. (Harold Pepinsky, "Peacemaking in Criminology and Criminal Justice" in Harold Pepinsky and Richard Quinney eds., *Criminology as*

“restorative justice” methods in historical Indigenous cultures is often cited as one of several cultural sources of historical legitimacy and authenticity for contemporary restorative justice theory and practice.<sup>122</sup> In the Canadian context this has given rise to debates focused on the impact of criminalization on Aboriginal peoples, and on the role of Indigenous laws and legal orders within the restorative justice movement. Although my own research data focuses on Canadians of South Asian descent, these debates regarding Indigenous peoples helped me to frame important questions, and answers about incorporating race, ethnicity, and gender in evaluating justice responses within marginalized communities.

One key discussion in the literature has been regarding the relationship between restorative justice and Aboriginal laws and legal orders. Restorative justice, as envisioned by advocates such as Braithwaite, Zehr, and Canadian advocate Judge Barry Stuart,<sup>123</sup> is held out as one important way to alleviate the oppression of all Aboriginal peoples by the Canadian criminal justice system. Other commentators, however, draw a clear line between restorative justice as envisioned by these advocates, and Aboriginal laws and legal orders.<sup>124</sup> It is relatively common for commentators, government policy makers, and

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*Peacemaking* (Indiana: Indiana University Press, 1991) 299-300. In fact this work offers a full chapter on *Religious and Humanist Peacemaking Traditions*.) The enduring role of Christianity in the restorative justice movement has been the subject of debate. See: Michael L Hadley, “The Spiritual Roots of Restorative Justice” (Albany: The State University of New York Press, 2001), Katherine Beaty Chiste, ‘Faith-Based Organizations and the Pursuit of Restorative Justice’ (2006-2008) 32 *Man L J* 28; Jordan J. Ballor, ‘To Reform or to Abolish?: Christian Perspectives on Punishment, Prison and Restorative Justice’ (2008) 6 *Ave Maria L Rev* 481.

<sup>122</sup> See for example: Van Ness and Strong, *supra* note 101 at 9; Umbreit, *supra* note 98 at 4, John Howard Society, *supra* note 68 at 103, Rafferty, *supra* note 121 at 5, Lewellyn and Howse, *supra* note 76 at 6, and John Winterdyk, “It’s Time, it’s Time...is it Time for Restorative Justice?” (1998) *Law Now* at 21.

<sup>123</sup> Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares” in Joe Hudson and Burt Galaway eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996) and “Sentencing Circles...Making Real Differences” (Ottawa: Department of Justice, 1996).

<sup>124</sup> John Borrows, “Indigenous Legal Traditions in Canada” (Ottawa: Law Commission of Canada, 2005); John Borrows, “Creating an Indigenous Legal Community” (2005) 50 *McGill L. J.* 153; Craig Proulx,

scholars to conflate ‘Western’ restorative justice with Aboriginal laws and legal orders, either seeing Aboriginal justice as the historical basis of Western restorative justice, or as a “type” of restorative justice informed by Western restorative justice.<sup>125</sup> Some commentators view this conflation as a form of colonialism, or cultural appropriation, and insist on the separate validity of Aboriginal laws and legal orders as constitutionally protected legal systems within the Canadian polity.<sup>126</sup> According to these scholars the desire of Aboriginal peoples to apply their own laws and legal orders is part and parcel of self-government and self-determination, rather than a part of the Western restorative justice movement.<sup>127</sup>

A second debate has been about the role of restorative justice in addressing violence against women in Aboriginal communities. Many Canadian Commissions of Inquiry, the Canadian Bar Association, and the Supreme Court of Canada, have demonstrated that the

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Reclaiming Aboriginal Justice, Identity and Community (Saskatoon: Purich, 2002); Kathleen Daly, “Restorative Justice: The Real Story” (2002) 4 *Punishment and Society* 55; and Chris Cunneen, “Thinking Critically about Restorative Justice,” in E. McLughlin, ed., *Restorative Justice: Critical Issues* (California: Sage Publications, 2002). Jonathan Rudin, “Aboriginal Justice and Restorative Justice,” in E. Elliott & R. Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluations* (Portland OR: Willan Publications, 2005), 89 at 99.

<sup>125</sup> See for example: Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) at 12 and 13, and British Columbia, Ministry of the Attorney General, News Release 9911 “Healing the Harm: Restorative Justice Helps to Heal the Effects of Crime” (March 3, 2000). Online <[www.ag.gov.bc.ca/media/9911nov/healing\\_the\\_harm.htm](http://www.ag.gov.bc.ca/media/9911nov/healing_the_harm.htm)>, Doulis, *supra* note 42 at 1. The British Columbia government’s press release discusses restorative justice as being rooted both in “aboriginal cultures” and “...the teachings of faith communities”.

<sup>126</sup> James Tully, “The Struggles of Indigenous Peoples for and of Freedom” in Ardith Walkem & Hailie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus Books, 2003), 272 at 273.

See also: Dale Turner, “Perceiving the World Differently” in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2005) at 57–69; and Taiaiake Alfred, *Peace, Power, and Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999).

<sup>127</sup> For more on self-government see: Richard Gosse, James Youngblood Henderson & Roger Carter eds., *Continuing Poundmaker and Riel’s Quest: Presentation made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich, 1994) Part III; Kent McNeil ed., *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) Part II.

Canadian criminal justice system has failed Aboriginal peoples.<sup>128</sup> In particular, Aboriginal peoples face staggering rates of hyper-criminalisation and over-representation in Canadian prisons.<sup>129</sup> Aboriginal commentators also note that the current criminal justice system enforces goals and processes that are foreign to many Aboriginal people.<sup>130</sup>

Rates of violence against women in Aboriginal communities are also high. “Overall, the rate of self-reported violent victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women. This was true regardless if the violence occurred between strangers or acquaintances, or within a spousal relationship.”<sup>131</sup> There is a need to address the devastating effect of criminalization for Aboriginal people, yet the vital question remains: how to achieve real justice for offenders in a way that provides true healing, safety and protection from violence for both survivors and the community? Thus, both race and gender frame the debates about the use of restorative justice in Aboriginal communities, as they do in my own research.

Proponents of restorative justice movement suggest that its use in cases of intimate violence in Aboriginal communities is a way to avoid the negative impact of

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<sup>128</sup>See for instance: Canada, *Report of the Royal Commission on Aboriginal Peoples*, “Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996) and Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Vol. I (Winnipeg: Queen’s Printer, 1991).

<sup>129</sup>For debate on this assertion see below.

<sup>130</sup> See for instance: Mary Ellen Turpel, “Reflections on Thinking Concretely About Criminal Justice Reform” in Gosse and Youngblood Henderson eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich: 1994) 206 at 210; Canada, *Report of the Royal Commission on Aboriginal Peoples*, “A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996) at 12-33.

<sup>131</sup>Statistics Canada, ‘Family Violence in Canada: A Statistical Profile’ (Ottawa: Minister of Industry, 2011) at 4. See also: Shannon Brennan, ‘Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009’ (Ottawa: Minister of Industry, 2011).

criminalization on Aboriginal offenders, while simultaneously supporting survivors and communities. They claim further that models of restorative such as sentencing circles are more culturally appropriate for Aboriginal peoples than the conventional criminal justice system.<sup>132</sup> This debate is examined in depth in the section below, which considers the current literature on whether restorative justice should be used in cases of intimate violence in any community.

### *Positions For and Against Restorative Justice in Cases of Intimate Violence*

Feminist scholars and activists have been at the forefront of the debate about the efficacy and safety of applying restorative justice in cases of intimate violence- on both sides. The following section shows the links and disruptions between feminist scholarship and activism, and the restorative justice movement.

Since 2003 there have been two major edited collections, and two special edition journals dedicated to the use of restorative justice in cases of intimate violence.<sup>133</sup> These collections reflect the fact that, at an international level, scholars from many disciplines are deeply divided in a serious debate about the efficacy of restorative justice in such circumstances. It is also an indicator, I would argue, of the growing sense that existing Western criminal justice systems generally are failing survivors of intimate violence, and

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<sup>132</sup>Rupert Ross, "Dueling Paradigms?: Western Criminal Justice Versus Aboriginal Community Healing" in Richard Gosse & James Youngblood Henderson eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Press, 1994); Judge Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in Burt Galaway & Joe Hudson Eds. *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996) 193.

<sup>133</sup> Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002), "Feminism, Restorative Justice, and Violence Against Women," a Special Issue of *Violence Against Women* (2005) 11, "Gender, Race and Restorative Justice", A Special Issue of *Theoretical Criminology* (2006) 10 (I was an invited contributor), in James Ptacek, ed., *Restorative Justice and Violence Against Women* (Oxford, Oxford University Press, 2010). See also; James Ptacek and Loretta Frederick, "Restorative Justice and Intimate Partner Violence: A Review of the Literature" (2008) *Applied Research Forum*.

that feminists must look to alternatives to these systems. These collections, and the other prolific literature produced during the same time period, also represent the deep divisions between feminists themselves on what those ‘alternatives’ should look like.

*a) Promise*

The international scholars and restorative justice advocates included in this section recognize that intimate violence is a serious, gendered crime that warrants state and community attention and resources. They are actively engaged with the feminist anti-violence community, and do not minimize the gendered impacts of intimate violence on women survivors. Many of them self-identify as feminist. For these writers, restorative justice is a *better* response to intimate violence, and one that deals specifically with the needs of survivors and marginalized communities. These writers are also actively engaged with feminist critiques of their position, and have taken those critiques seriously.<sup>134</sup> The commentators discussed below, however, are not representative of all, or perhaps even most restorative justice advocates or practitioners. Their self-reflexivity and willingness to engage with the women’s anti-violence movement puts them at the forefront of those who are writing on the issue.<sup>135</sup>

There are two general theoretical and political reasons put forth in the literature for supporting restorative justice in cases of intimate violence. First, commentators assert that the conventional justice system, despite feminist reform, continues to fail survivors

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<sup>134</sup> Many other restorative justice advocates and practitioners, however, are either unaware of, or dismissive of feminist critiques of its use in cases of intimate violence. This position is not at all well represented in the literature, except as it is reflected in the critical feminist literature as the target of on-going criticism.

<sup>135</sup> One notable exception is Dr. Linda Mills who, in her work on restorative justice and intimate violence, engages with but dismisses and attacks feminist critiques as baseless. See for instance: Linda Mills, *Violent Partners: A Breakthrough Plan for Ending the Cycle of Abuse* (New York: Basic Books, 2008).

of intimate violence, and that restorative justice will *better* meet these needs.<sup>136</sup> Second, restorative justice will not only meet the needs of survivors during the specific justice intervention, it will empower survivors in ways that go far beyond dealing with a single incident of abuse.<sup>137</sup>

First, according to restorative justice advocates, the criminal justice system has failed survivors of intimate violence in myriad ways: by forcing prosecutions despite survivors' wishes to drop charges,<sup>138</sup> with low conviction rates for crimes of intimate violence,<sup>139</sup> by failing to reduce overall rates of intimate violence,<sup>140</sup> by revictimizing survivors in the courtroom through cross examination, and through a general lack of information and support.<sup>141</sup> These critiques of the criminal justice system are echoed in critical feminist literature,<sup>142</sup> and adopted by these commentators as proof that the criminal justice system is 'broken' and in need of replacement (rather than more reform). Restorative justice

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<sup>136</sup> See: Loretta Frederick and Kristine Lizdad, "The Role of Restorative Justice in the Battered Women's Movement" (The Battered Women's Justice Project: Minneapolis, 2003); Ms. Foundation for Women "Safety and Justice for All: Examining the Relationship between the Women's Anti-violence Movement and the Criminal Legal System" (New York: Ms Foundation for Women, 2003) 12-17; Juliet Behrens, "Meeting the Needs of Survivors of Domestic Violence with Family Law Issues: the Dangers and Possibilities in Restorative Justice." (2005) 3 *International Journal of Law in Context* 215 at 217.

<sup>137</sup> Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in Joe Hudson and Burt Galaway eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996a); Don Avison, "Clearing Space: Diversion Projects, Sentencing Circles and Restorative justice" in Richard Gosse, in James Henderson eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 235.

<sup>138</sup> Jean Ferguson, "Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation" (2009) 4 *Criminal Law* 3; Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42 *British Journal of Criminology* 616; Lois Presser and Emily Gaarder, "Can Restorative justice Reduce Battering? Some Preliminary Considerations" (2000) 27 *Social Justice* 175; Kathleen Daly & John Braithwaite, "Masculinities, Violence and Communitarian Control" in Tim Newburn & Elizabeth Stanko, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Rutledge, 1994) at 189.

<sup>139</sup> Lawrence W. Sherman, "Domestic Violence and Restorative Justice: Answering Key Questions" (2000) 8 *Virginia Journal of Social Policy and Law* 263.

<sup>140</sup> Allison Morris & Lorraine Gelsthorpe, "Re-Visioning Men's Violence against Female Partners" (2000) 39 *Howard Journal of Law* 412; Margaret Martin, "From Criminal Justice to Transformative Justice: The Challenges of Social Control for Battered Women" (1999) 4 *Contemporary Justice Review* 415.

<sup>141</sup> Hudson, *infra*, note 161; Presser and Gaarder, *supra*, note 138, Daly & Braithwaite, *supra* note 138.

<sup>142</sup> See below.

advocates also look to the needs of survivors of intimate violence, and the ways in which restorative justice might better address these needs. For instance supporters claim that, properly executed, restorative justice can better hold offenders to account, and in more meaningful ways than prosecution or jail time. Ideally, offenders would face the censure and supervision of those they care most about: family and community.<sup>143</sup> This censure may constitute a more difficult and appropriate punishment<sup>144</sup> than the short jail term likely to result from a prosecution.<sup>145</sup>

Closely related to this is the assertion by some Aboriginal peoples and their allies that the criminal justice system fails to address the particular needs of Aboriginal survivors and abusers stemming from colonialism.<sup>146</sup> Supporters of restorative justice in this context point to the over incarceration of Aboriginal peoples, and to the systemic racism of the criminal justice system.<sup>147</sup> This critique is also echoed by feminists and other progressive

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<sup>143</sup> Robert Yazzie & James Zion, “Navajo Restorative Justice: The Law of Equality and Justice” in Burt Galaway & Joe Hudson eds., *Restorative justice: International Perspectives* 75; Donna Coker, “Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence” in Braithwaite and Strange eds., *supra* note 108 at 128, Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998); Alphonse Janvier, “Sentencing Circles” in Gosse & Youngblood Henderson, eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich Press: 1994) 301, Maureen Linker, “Sentencing Circles and the Dilemma of Difference” (1999) 42 *Crim. L.Q.* 116, and *R v. Moses*, (1992) 71 C.C.C (3d) 347 (Y.Terr.Ct.). For critical commentary on the role of apologies in this process see: Anisette Acorn, *Compulsory Compassion: A Critique of Restorative justice* (Vancouver: UBC Press, 2004) at 74.

<sup>144</sup> Linker, *ibid*; *R v. Moses ibid*; Janvier, *ibid*.

<sup>145</sup> Hudson, *infra* note 161; Presser and Gaarder, *supra* note 138; Daly and Braithwaite, *supra* note 138.

<sup>146</sup> Dr. Joe Couture et al., “A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process” (Ottawa: Solicitor General, 2001); Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998), Rupert Ross, “Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing” in Gosse & Youngblood Henderson eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich Press: 1994); Patricia Monture-Angus, “Thinking about Aboriginal Justice: Myths and Revolution” in Gosse & Henderson eds., *ibid* at 210, Patricia Monture-Okanee & Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) *U.B.C. L.Rev. Special Edition* 248.

<sup>147</sup> Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998)

at 886, Joan Pennell & Gale Burford “Feminist Praxis: Making Family Group Conferencing Work” in Braithwaite and Strang, eds., *supra* note 108 at 2, Provincial Association of Transitions Houses ( PATHS)

scholars.<sup>148</sup> Several Aboriginal women scholars have supported restorative justice in cases of intimate violence as a path to Aboriginal sovereignty, and a tool to be used against current manifestations of colonialism.<sup>149</sup>

Second, advocates assert that restorative justice empowers survivors by creating spaces for them to be heard in ways that they are denied in the conventional justice system.<sup>150</sup> Specifically, the process "...afford(s) greater concern for victims..."<sup>151</sup> This empowerment stems from being able to speak for themselves, in their own words,<sup>152</sup> rather than being limited to testimony or victim impact statements.<sup>153</sup> Some practitioners also assert that some forms of restorative justice (healing circles for instance) are more culturally appropriate for Aboriginal survivors and abusers, and therefore empower them at the level of Indigenous sovereignty.<sup>154</sup> Daly and Braithwaite, Australian scholars,

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"Restorative Justice: Is it Justice for Battered Women? Report on PATH's April 2000 Conference" at 10-12.

<sup>148</sup> I have written elsewhere about reconciling feminist views with prison abolitionist views in the context of intimate violence in Aboriginal communities. See: Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2007) 18 *Canadian Journal of Women and the Law* 1019.

<sup>149</sup> Patricia Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) U.B.C. L. Rev. *Special Edition* 248; Terese Lajeunesse, "Community Holistic Circle Healing: Hollow Water First Nation" (Ottawa: Solicitor General, 1993), Green, *supra* note 147 at 86, PATHS, *ibid* at 10-12, Jocelyn Proulx & Sharon Perrault, "The MaMawi Wi Chi Itata Stony Mountain Project: Blending Contemporary and Traditional Approaches for Male Family Violence Offenders" in Jocelyn Proulx and Sharon Perrault eds., *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood, 2000).

<sup>150</sup> Hudson, *supra* note 138, Presser and Gaarder, *supra* note 138; Morris & Gelsthorpe, *supra* note 140; and Sherman, *supra* note 139.

<sup>151</sup> *R v. Moses*, *supra* note 143 & Stuart, 1996 a), *supra* note 123.

<sup>152</sup> Linker, *supra* note 143; Janvier, *supra* note 143.

<sup>153</sup> Green, *supra* note 147, Stuart, 1996 a), *supra* note 143; Janvier, *supra* note 143.

<sup>154</sup> Stuart, 1996 a), *ibid.*, Green, *ibid*; Linker, *supra* note 143; Heather Nancarrow, "Restorative Justice for Domestic and Family Violence: Hopes and Fears of Indigenous and Non-Indigenous Australian Women" in James Ptacek ed, *supra* note 9, Harry Blagg, "Restoring Justice and Aboriginal Family Violence: Opening a Space for Healing" in Braithwaite & Strang *supra* note 2 at 198, Loretta Kelly, "Using restorative justice in Aboriginal Communities" in Braithwaite & Strang, eds, *ibid* 212 at 219, Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Self-Government* (Toronto: University of Toronto Press, 1998), Barry Stuart, "Building Community Justice Partnerships: Community Peacemaking Circles" (Ottawa: Department of Justice, 1997), Barry Stuart, "Sentencing Circles...Making Real Differences" (Ottawa: Department of Justice, 1996 b), Canada, Report of the Royal Commission on Aboriginal Peoples, "Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" (Ottawa:

propose that this kind empowerment, coupled with the minimal use of incarceration to ensure the safety of survivors, provides a legitimate alternative to mandatory arrest and prosecution policies.<sup>155</sup>

The gendered power imbalances that characterise abusive relationships are cited as a major concern in allowing cases of intimate violence to be dealt with by restorative justice (see below). Restorative justice advocates respond to this primarily in an instrumental fashion, suggesting practice-oriented solutions to bolster empowerment including: implementing basic rules of procedural fairness during interventions,<sup>156</sup> having family and community members openly challenge abusers,<sup>157</sup> shuttle mediation,<sup>158</sup> online dispute resolution,<sup>159</sup> and ensuring that the survivor has access to support from family and friends.<sup>160</sup>

The bulk of commentary on restorative justice, intimate violence and racialised communities has been about Aboriginal peoples. Fewer commentaries have been focused on non-Aboriginal racialised communities. Barbara Hudson posits that restorative justice, with its ability to be reflexive, discursive, and relational is the best way to get beyond

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Canada Communication Group, 1996) by Michael Jackson & Jonathon Rudin, *R. v. Moses*, *supra* note 143.

<sup>155</sup>Kathleen Daly & John Braithwaite, "Masculinities, Violence and Communitarian Control" in Tim Newburn & Elizabeth Stanko, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994) 189 at 197.

<sup>156</sup> Morris & Gelsthorpe, *supra* note 140; Sherman, *supra* note 139.

<sup>157</sup> Morris and Gelsthorpe, *ibid*; Daly and Braithwaite, *supra* note 155.

<sup>158</sup> Helene Carbonatto, "Dilemmas in the Criminalisation of Spousal Abuse" (1994) 2 *Social Policy Journal of New Zealand* 21. Shuttle mediation describes a process whereby a mediator speaks to each party in a separate room, relaying key messages from one to another, but rephrasing those messages to be more emotionally neutral. For instance if one party expresses anger, the shuttle mediator conveys only the underlying substantive message, not the anger, to the other party.

<sup>159</sup> Sarah Rogers, "Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence" (2008-2009) 24 *Ohio State Journal on Dispute Resolution* 349. Rogers argues that online mediation, while well suited to stranger sexual assaults, is less useful in cases of intimate violence.

<sup>160</sup> Morris and Gelsthorpe, *supra* note 140.

what she calls ‘white man’s justice’.<sup>161</sup> On the other hand, Rashmi Goel, a South Asian Canadian commentator, warns that ‘particular cultural factors’<sup>162</sup> exacerbate gendered power imbalances between heterosexual South Asian partners, rendering restorative justice even more likely to re-victimize South Asian women. The American organization Incite! Women of Color against Violence has been critical of restorative justice for failing to provide abuser accountability, and for failing to ensure that survivors are safe.<sup>163</sup> Overall there is a paucity of literature on the simultaneous roles of gender and race in restorative justice practice. One of the aims of my research is to go some small distance to filling this gap.

#### *b) Critique*

In Canada, critique of the use of restorative justice in cases of intimate violence has been primarily from the feminist anti-violence movement, and feminist scholars.<sup>164</sup> It is important to note that within this body of critical literature Aboriginal women have been extremely pro-active in speaking to concerns that particularly affect their communities and nations. Many Canadian grassroots feminist anti-violence groups have been extremely critical of the use of restorative justice in cases of intimate violence, both in lobbying, and in scholarly literature. These include The BC/Yukon Society of Transition Houses,<sup>165</sup> The Newfoundland and Labrador Provincial Association against Family

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<sup>161</sup>Barbara Hudson, “Race, Gender and Justice in Late Modernity” (2006) 10 *Theoretical Criminology* 29.

<sup>162</sup>Rashmi Goel, “Sita’s Trousseau: Restorative Justice, Domestic Violence and South Asian Culture” (2005) 11 *Violence Against Women* 639 at 639.

<sup>163</sup>Andrea Smith, “Beyond Restorative Justice: Radical Organising Against Violence” in Ptacek ed, *supra* note 7 at 258, “Incite! Women of Color against Violence”, ed. *The Color of Violence: the Incite! Anthology* (Boston: South End Press, 2010).

<sup>164</sup>Except see: Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) for critiques rooted in an anti-racism, intersectional position.

<sup>165</sup>Valerie Oglov, “Restorative Justice Reforms to the Criminal Justice System” (Vancouver: BC/Yukon Society of Transition Houses, 1997).

Violence,<sup>166</sup> the British Columbia Association of Specialized Victim Assistance and Counselling Programs<sup>167</sup>, Pauktuutit,<sup>168</sup> the Aboriginal Women's Action Network<sup>169</sup>, the Avalon Sexual Assault Centre in Nova Scotia<sup>170</sup>, and PATHS.<sup>171</sup> Their ultimate positions vary from calling for a full moratorium, to supporting restorative justice in very, very rare cases only under the most rigorous scrutiny, and after meeting extensive criteria.

The overarching worry shared by all of these organisations, and many international feminist commentators, is the inherent power imbalance<sup>172</sup> between survivors and abusers, and restorative justice programs' inability to recognize and/or mitigate them.<sup>173</sup> Feminists assert that this innate power imbalance may allow for abusers to

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<sup>166</sup> Newfoundland and Labrador Provincial Association Against Family Violence (NLPAAFV), "Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative justice and Alternative Dispute Resolution" (St. John's: Provincial Association Against Family Violence, 1999) and Newfoundland and Labrador Provincial Association Against Family Violence, "Making it Safe: Women, Restorative justice and Alternative Dispute Resolution" (St John's: Provincial Association Against Family Violence 2000).

<sup>167</sup> Sandra Goundry, "Restorative Justice and Criminal Justice in British Columbia: Identifying Some Preliminary Questions and Concerns" (Vancouver: BC Association of Specialized Survivor Assistance and Counseling Programs, 1998).

<sup>168</sup> Pauktuutit Inuit Women's Association, "Setting Standards First: Community-based Justice and Corrections in Inuit Canada" (Ottawa: Pauktuutit, 1995).

<sup>169</sup> Aboriginal Women's Action Network, "The Implications of Restorative justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia" by Wendy Stewart, Audrey Huntley & Fay Blaney (Vancouver: AWAN, 2001).

<sup>170</sup> Avalon Sexual Assault Centre, "Formal Response to the Nova Scotia Department of Justice re: The Restorative justice Program" (Halifax: Avalon Sexual Assault Centre, 1999).

<sup>171</sup> Provincial Association of Transition Houses in Saskatchewan (PATHS), "Restorative Justice: Is it Justice for Battered Women? A Report on PATHS' April 2000 Conference" (Saskatoon: PATHS, 2000).

<sup>172</sup> Rashmi Goel, "No Women at the Centre: The Use of the Canadian Sentencing Circles in Domestic Violence Cases" (2000) 15 *Wisconsin Women's Law Journal* 293, Anne McGillivray & Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999), Green, *supra* note 147, Ellie Teshler, "The Case for 'Sentencing Circles'" *The Toronto Star* (September 19, 1996) A2, and Robert C. Depew, "Popular Justice and Aboriginal Communities: Some Preliminary Considerations" (1996) 36 *Journal of Legal Pluralism* 52.

<sup>173</sup> Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative justice" in Braithwaite & Strang, eds, *supra* note 108 at 42, Ruth Busch, "Who Pays if We Get it Wrong?" in Braithwaite & Strang, eds, *ibid* at 223, Ruth Busch, Neville Robertson & Hilary Lapsley, "The Gap: Battered Women's Experience of Justice System in New Zealand" (1995) 8 C.J.W.L.190, Stephanie Coward, "Restorative justice in Domestic and Sexual Violence: Healing Justice?" (December 2000) Directed Interdisciplinary Studies, Carleton University, Lee Lakeman, "Why 'Law and Order' cannot end Violence against Women; and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" (2000) 20 *Canadian Woman Studies* 24; Ruth Busch & Stephen Hooper, "Domestic

continue the abuse during and after the restorative justice intervention with no consequences, not even the less than effective consequences afforded during a criminal justice intervention.<sup>174</sup> Feminists argue that separation violence,<sup>175</sup> poorly trained facilitators,<sup>176</sup> and poor community based supervision<sup>177</sup> create circumstances that *foster* continuing abuse, while eliminating any form of accountability for the abuser.<sup>178</sup>

Survivor intimidation is also a major concern, particularly in small communities.

Other perhaps more pragmatic concerns have been voiced in reaction to particular programs or models, where feminist critiques have been ignored or minimised. These include an overall lack of consultation with women and women's groups in planning and implementing initiatives,<sup>179</sup> a general lack of gender and diversity analysis in planning

Violence and the Restorative justice Initiatives: the Risks of a New Panacea." (1996) 4 Waikato Law Review 188, Hilary Astor, "Swimming against the Tide: Keeping Violent Men out of Mediation" in Julie Stubbs, ed., *Women, Male Violence and the Law* (Sydney: Federation Press, 1994), and Emma Cunliffe & Angela Cameron, "Feminist Textuality: Towards a New Feminist Reading of Law's Written Texts" (2007) 19 Canadian Journal of Women and the Law 1.

<sup>174</sup> Coward, *ibid*; Carol LaPrairie, "The 'New' Justice': Some Implications for Aboriginal Communities" (1998) 1 *Can. J. Crim.* 1, Jennifer Koshan, "Aboriginal Justice and the Charter: Bridging the Divide?" (1998) 1 U.B.C.L.Rev. 23; Emma LaRoque, "Re-Examining Culturally Appropriate Models of Criminal justice Applications" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997) 73; Diane Stallone, "Decriminalisation of Violence in the Home: Mediation in Wife Battering" (1984) 2 *Law and Inequality* 45; There have been several recorded incidents of survivor revictimisation see: Joan Ryan and Brian Calliou, "Aboriginal Restorative justice Alternatives: Two Case Studies" (Ottawa: Law Commission of Canada, 2002), Mary Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* 159, Busch 2002, 1995, 1996, *supra* note 173.

<sup>175</sup> Busch, 2002, *ibid*.

<sup>176</sup> Busch, 2002; *ibid*, Robert Cormier, "Restorative Justice: Directions and Principles-Developments in Canada" (Ottawa: Public Works and Government Services Canada, 2002), Coward, *supra* note 173; Pamela Rubin, "Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation" (Halifax: Management Committee of Restorative justice in Nova Scotia, March 2003).

<sup>177</sup> Busch, 2002; *supra* note 173, Julie Stubbs, "Domestic Violence and Community Safety" in John Braithwaite & Heather Strang *Restorative Justice and Family Violence* (Cambridge, Cambridge University Press, 2002) 42.

<sup>178</sup> Stubbs 2002, *ibid* at 56.

<sup>179</sup> Aboriginal Women's Action Network, *The Implications of Restorative justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley & Fay Blaney (Vancouver: AWAN, 2001), Coward, *supra* note 44; Goundry, *supra* note 167; Oglov, *supra* note 165.

and evaluating initiatives,<sup>180</sup> a perception that in many cases restorative justice is culturally inappropriate for Aboriginal participants,<sup>181</sup> that overall there is a serious lack of transparency and accountability in the planning and execution of restorative justice programs,<sup>182</sup> and that there is a serious lack of research, resources, proper training for facilitators and funding.<sup>183</sup>

A related political critique of the use of restorative justice in cases of intimate violence is that restorative justice decriminalizes intimate violence.<sup>184</sup> That is, after decades of fighting to have intimate violence recognized as a criminal act and not merely a ‘private dispute,’ feminists fear that restorative justice will once again move intimate violence out of the public sphere. This means that the systemic nature of intimate violence is erased, and it becomes transformed into an individual ‘couples’ problem. Secondly, intimate violence gets removed from the conventional criminal justice system where (as least some) assistance and resources for women are already established through decades of feminist lobbying and activism. Another political concern in consensus-based models is: whose values represent ‘the community’ where sexism or victim-blaming is part of the community discourse?<sup>185</sup> Many communities exist where blaming survivors of intimate

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<sup>180</sup> Stubbs, 2002; *supra* note 177, NLPAAVF, 2000, *supra* note 166; Goundry, *ibid*.

<sup>181</sup> Oglov, *supra*, note 165; Green, *supra* note 141; Crnkovich, *supra* note 174. In the Australian context see: Larissa Behrendt, “Lessons from the Mediation Obsession; Ensuring that Sentencing ‘Alternatives’ Focus on indigenous Self-Determination.” In John Braithwaite & Heather Strang eds., *Restorative justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 178.

<sup>182</sup> Coward, *supra* note 173; Goundry, *supra* note 167; Oglov, *supra* note 165.

<sup>183</sup> Stubbs, 2002, *supra* note 177; Coward, *supra* note 173, Goundry, *ibid*; Maria Volpe, “Mediation in the Criminal Justice System: Process, Promises, Problems” in Pepinsky and Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) and Cumming, J.A. & McEachern, C.J.Y.T., in *R v. Johnson* [1994] 91 C.C.C (3d) 21 (Y. Terr. Ct. App.).

<sup>184</sup> Coward, *supra* note 173; Goundry, *supra* note 167; Oglov, *supra* note 165; Crnkovich, 1995, *supra* note 174.

<sup>185</sup> Julian Roberts & Carol LaPrairie, “Sentencing Circles: Some Questions Unanswered” (1996) 39 *Criminal Law Quarterly* 69, Crnkovich, 1995, *supra* note 174.

violence, minimizing its seriousness, or normalizing violence is acceptable.<sup>186</sup> In particular, commentators note that in small, isolated communities, offenders may exert political or familial pressures, allowing them to manipulate the process.<sup>187</sup> Other critics argue that gendered stereotypes will be called upon to persuade survivors to ‘forgive and forget’, urging them to protect their male partners from criminal justice sanctions.<sup>188</sup>

Within the critical literature discussing Aboriginal communities and programs particularly, there are three discernable themes. First, feminists have been critical of ‘Western’ restorative justice (as opposed to Aboriginal justice based in Aboriginal laws and legal orders) constructions of ‘traditional’ culture, pointing out that these understandings often ignore the role of gender, sexual orientation or class in analyzing contemporary manifestations of tradition.<sup>189</sup> Second, some Aboriginal women argue that current restorative justice models are both male-centered, and culturally inappropriate.<sup>190</sup>

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<sup>186</sup> Pauktuutit Inuit Women’s Association, “Setting Standards First: Community-based Justice and Corrections in Inuit Canada” (Ottawa: Pauktuutit, 1995).

<sup>187</sup> McGillivray & Comasky, *supra* note 172, Julie Stubbs, “Domestic Violence and Community Safety” in John Braithwaite and Heather Strang *Restorative Justice and Family Violence* (Cambridge, Cambridge University Press, 2002) 42 at 53. This fear seems to have been borne out in a Canadian restorative justice project, the South Island project located on Vancouver Island, British Columbia, in a Coast Salish Community. The program was cancelled when it was revealed that community Elders were refusing to punish family members for sexual assault and intimate violence. Bruce Miller, *The Problem of Justice* (Nebraska: University of Nebraska Press, 2001) at 175-199.

<sup>188</sup> Julie Stubbs, “Domestic Violence and Community Safety” in John Braithwaite & Heather Strang eds., *Restorative Justice and Family Violence* (Cambridge, Cambridge University Press, 2002) at 58.

<sup>189</sup> Margo Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases.” (1991) 23 *Ottawa Law Review* 71, Carol LaPrairie, “Altering Course: New Directions in Criminal Justice” (1995) 28 *Australia and New Zealand Journal of Criminology*, Teressa Anne Nahanee, “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’” In Julian Roberts & Renate Mohr eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192, Depew, *supra* note 172, McGillivray and Comasky, *supra* note 172, Kelly MacDonald, “Literature Review: Implications of Restorative Justice in Cases of Violence Against Aboriginal Women and Children” (Vancouver: AWAN, 2001), Cameron 2006, *supra* note 119.

<sup>190</sup> Patricia Monture-Okanee & Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) *U.B.C. L.Rev. Special Edition* 248, Crnkovich, 1996, *supra* note 174, Nightingale, *ibid.*, LaRoque, 1992, *supra* and Emma LaRoque, “Re-Examining Culturally Appropriate Models of Criminal justice Applications” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997) 73.

These critiques flow in part from concerns about the conflation of restorative justice and Aboriginal justice. Third, a major theme is the debate amongst Aboriginal women regarding how tradition *should* be understood and applied in Aboriginal justice models. Some Aboriginal feminists question the authenticity of Aboriginal justice models, even when conceived of and run by Aboriginal communities themselves.<sup>191</sup> Their concerns often originate where particular models, practices or theories do not afford Aboriginal women their traditional respect, stature and leadership role, or when Aboriginal justice practices fail to physically protect survivors from abusers.

### **Criminal Justice, Restorative Justice and Feminism: Connections for Ending Violence**

The inherent conflict in feminist theory and practice around the use of arrest and prosecution in cases of intimate violence is reflective of a larger debate within feminism, and restorative justice on the appropriate role (if any) of punishment in justice responses to intimate violence. Arrest, prosecution and incarceration are clearly forms of punishment, as well as possibly serving other justice purposes such as rehabilitation, or physical separation of survivor and abuser. As I have established above, some feminists are both leery of allowing the state to use incarceration as a tool of punishment against marginalized populations, but simultaneously want intimate violence to be taken seriously. Many feminists worry that restorative justice is reprivatising violence, leaving women unprotected by the state, no matter how inadequate state protection may be. This tension within the feminist movement regarding the deployment of incarceration and criminalization to address intimate violence animates a similar tension in my research

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<sup>191</sup>LaRoque, 1997, *ibid*, Stewart, 2001, *supra* note 189, MacDonald, *supra*, note 189, Ryan and Caillou, *supra* note 174.

data. This is what Kathleen Daly, a prominent feminist restorative justice scholar, calls the ultimate quandary: "...how do we treat gendered harms as serious, without engaging in harsh forms of punishment or hypercriminalisation?"<sup>192</sup> Elizabeth Elliott, a prominent restorative justice theorist and practitioner, poses the question in another way: how do we provide security to those who have been victimised by crime, while simultaneously providing care for those who have committed the crime; or how do we provide 'security with care'?<sup>193</sup> I think these questions, although the source of tension and possible difficulties, represent the best way forward in any inquiry about justice in cases of intimate violence. A just and effective response to intimate violence must engage with, and attempt to address this fundamental quandary.

## **Part 2: Conceptual Lenses**

### ***Feminism***

I have performed paid and unpaid work within the women's anti-violence community for the past decade. I believe that the systematic nature of intimate violence is an expression of normative gender inequality, and that this is borne out in both the statistics presented earlier in this chapter, and in my own personal experience from within the anti-violence community. I also, however, struggle with the ways in which the criminal justice system disproportionately impacts marginalized communities, particularly racialised communities.

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<sup>192</sup>Kathleen Daly, "Restorative Justice: The Real Story" (2002) 4 *Punishment and Society* 55 at 62.

<sup>193</sup> Elizabeth M. Elliott, *Security with Care: Restorative Justice and Healthy Societies* (Black Point: Fernwood Press, 2011)

I argue that responses to intimate violence must include legal and non-legal strategies<sup>194</sup> that incorporate the gendered, systemic realities of survivors of intimate violence before, during and after the criminal justice intervention. Within the criminal justice context this means that legal strategies must not only address the particular incident, they must take into account the economic, political, and social factors that increase women's vulnerability to intimate violence. Justice response to violence against women must also "...be mindful of the larger structures of violence that shape the world we live in,"<sup>195</sup> including racism, homophobia and colonization.

Drawing on my personal experience and political engagement as a feminist, I turned to feminist intersectional theory to ensure a more nuanced approach to my analysis.

### **Feminist Intersectional Theory**

This section provides a conceptual framework within which to understand and unravel the complexities of recognizing intimate violence as a form of gender subordination, while simultaneously acknowledging the racialising effects of criminalisation on marginalized communities. Intersectionality provides a theoretical tool to grapple with both forms of marginalization concurrently while seeing how they are connected to and sustain one another. According to Andrea Smith, Indigenous feminist and anti-violence advocate:

...(T)he issues of colonialism, race, class and gender cannot be separated... (s)trategies designed to combat sexual and domestic violence within (racialised) communities must be linked to strategies that combat violence directed against (racialised) communities, including state

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<sup>194</sup> Such as transition houses, education and the economic empowerment of women.

<sup>195</sup> Andrea Smith, "Beyond Restorative Justice: Radical Organising against Violence" in James Ptacek, Ed. *Restorative Justice and Violence against Women* (Oxford: Oxford University Press, 2010) 255 at 255

violence (e.g. police brutality, prisons, militarism, colonialism and economic exploitation)<sup>196</sup>

Theories of intersectionality have been used extensively by feminists to negotiate the complex interactions of multiple oppressions, in an effort to ensure that the experiences of diverse women are accurately reflected in legal analysis and engagement.<sup>197</sup> While intersectionality has been defined and applied by numerous scholars, I will rely here on a definition by Renzetti that I find particularly satisfying as it relates to intimate violence.

The goal is not to fit “others” into the dominant mould, but rather to come to a better understanding of the diversity of domestic violence experiences, the significance and meaning this violence has in the lives of different groups of people, and how this intersectionality affects outcomes, particularly institutional responses to domestic violence.<sup>198</sup>

Through coincidences of geography and timing my research participants spoke extensively about violence against women in South Asian communities, although initially my research focus was on Aboriginal communities. One of the aims of this dissertation has become to examine how institutional responses to violence against women in the Lower Mainland of British Columbia impacts the lives of South Asian survivors, and their communities. I argue that their experiences of intimate violence, and institutional responses to this violence are mediated by their social location within South Asian

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<sup>196</sup>Smith, *ibid.*

<sup>197</sup> See for instance: Tina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Masters House” (1995) 10 *Berkeley Women’s Law Journal* 16, Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour” (1991) 43 *Stanford Law Review* 1241, Kathleen Daly & Lisa Maher, “Crossroads and Intersections : Building from Feminist Critique” in Kathleen Daly & Lisa Maher, eds., *Criminology at the Crossroads: Feminist Readings in Crime and Justice* ( New York: Oxford University Press, 1998) and Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999).

<sup>198</sup> Claire Renzetti, “Violence and Abuse in Lesbian Relationships: Theoretical and Empirical Issues” in Raquel Bergen ed, *Issues in Intimate Violence* (Thousand Oaks Ca: Sage, 1998) at 291 as cited in Janice Ristock, *No More Secrets: Violence in Lesbian Relationships* (New York: Routledge, 2002) at 17.

communities. I will elaborate in Chapter six on what this intersectional approach brings to the discussion of justice responses.

Intersectional analysis calls for an examination of the experiences of marginalised women that also shines a spotlight on those whose relative privilege perpetuates and interacts with this oppression. As Rebecca Johnson, feminist theorist, has noted:

(An intersectional) approach emphasizes the importance of paying as much attention to the ways in which women are privileged as to the ways that they are disadvantaged. That is, one needs to examine not simply black women, but also black men, white men, and white women in order to understand how various patterns of oppression, resistance and benefits combine to hold these systems of disadvantage in place.<sup>199</sup>

Intersectional analysis applies *within* marginalised communities where markers of relative oppression such as gender, class, disability, and sexual orientation highlight power relations within these communities which are often viewed as homogeneously defined by race or culture. In the context of justice responses to intimate violence intersectionality demands that we examine not only the relationships of power between the Canadian state and marginalised offenders, but also the power dynamics between marginalised men and marginalised women. For instance, while the experiences of racism may be shared by many racialised people, regardless of their gender, racialised women's experiences may be different in important ways from their male

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<sup>199</sup>Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002) at 7.

counterparts.<sup>200</sup> These experiences may be underpinned and maintained by unequal gender relations within racialised communities.<sup>201</sup>

*Beyond Intersectionality: Contextual and Institutional Factors*

While intersectionality offers a way to theorize difference between women in a productive and non-essentialising way, it has been criticized for its narrow focus on identity. Some feminist theorists assert this limited ontological framework does not go far enough in illuminating the ways in which social, economic and political macrocontexts (often within institutions) shape outcomes for women, as much as, or sometimes more than identity.

In response to this Sylvia Walby posits instead a theoretical focus on ‘regimes of inequality’, citing unease with the individualist/identity focus of the first iterations of intersectionality theory described above.<sup>202</sup> Walby proposes eliminating the language of intersectionality altogether, and puts forward instead a more three-dimensional model of intersecting and overlapping systems. According to Walby intersectionality has proven to be problematic:

It (intersectionality) has tended to become a strategy of seeking out ever finer units for analysis, in pursuit of a pure intersecting category. But there are no pure

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<sup>200</sup> See for instance: Sharon McIvor & Teresa A. Nahanee, “Aboriginal Women: Invisible Survivors of Violence” in Kevin D. Bonnycastle & George Rigakos eds., *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 63.

<sup>201</sup> See for instance: Patricia Monture-Angus, “Thinking About Aboriginal Justice: Myths and Revolution” in Richard Gosse & James Youngblood Henderson eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich Press: 1994) at 222, and Mary Ellen Turpel-Lafond, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” in Caroline Andrews & Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen’s University Press, 1997) at 68.

<sup>202</sup> Sylvia Walby, *Globalisation and Inequalities: Complexity and Contested Modernities* (London: Sage Publications, 2009) at 29. See also Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (Princeton: Princeton University Press, 1998) at 3 and 6 and Rosemary Hunter, ed, *Rethinking Equality Projects in Law: Feminist Challenges* (9 Oxford: Hart Publishing, 2008) at 2.

groups, there are always more forms of difference...There is also a tendency to cultural reductionism and the use of rather static identity categories...Further, with such a micro approach it is hard to address larger questions, such as those involving global horizons.”<sup>203</sup>

She posits a theory of ‘multiple complex inequalities’, a contextual methodology with a systemic focus. She proposes separating relations of inequality (which speak to the specific experiences and differences between women) and institutional domains (which allows for a more global horizon).<sup>204</sup> According to Walby:

‘Complex inequalities’ include: gender, class, ethnicity, race, religion, nation, linguistic community, able-bodiedness, sexual orientation and age. In each case there is a complex combination of inequality and differences, the balance of which varies according to both the set of social relations under analysis, and the interpretation of them.<sup>205</sup>

She denotes each of these social locations as a ‘regime of complex inequality’. To this Walby adds a series of matrices, including time and space, in which regimes may intersect.<sup>206</sup> “Regimes of complex inequality have different temporal and spatial reach.”<sup>207</sup> At these intersecting points, however, Walby posits that regimes are never co-equal, rather they take on temporary, asymmetrical relations, as “...each regime takes all others as its environment’.<sup>208</sup> Walby takes this systems approach further, suggesting specific evaluation for each regime of inequality in a given time and place. This evaluation will allow social scientists to “...adjudicate rival claims about progress on the basis of evidence and theory...”<sup>209</sup> Walby proposes that we measure the state of complex

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<sup>203</sup>Walby, *supra* note 202 at 61.

<sup>204</sup>*Ibid* at 64.

<sup>205</sup>Walby, *supra* note 202 at 272.

<sup>206</sup>*Ibid* at 272.

<sup>207</sup>*Ibid* at 273.

<sup>208</sup>*Ibid* at 273.

<sup>209</sup>*Ibid* at 17.

inequalities in each of the following institutional domains: economy, polity, violence and civil society, each defined broadly.<sup>210</sup>

Rosemary Hunter proposes the elimination of ‘equality’ and attending<sup>211</sup> language altogether in the quest for women’s “...economic independence, social freedom, bodily autonomy, political power (and) legal visibility.”<sup>212</sup> Instead she proposes the use of the term “policy neglect’, as it avoids parsing differences ( and thus formulations of equality) between men and women, and between women themselves, while simultaneously indicating “...some form of systemic, group disadvantage...” as well as forcing policy reform.<sup>213</sup> This formulation of policy neglect also has resonance with my research.

Hunter proposes that the ‘...failure of legal aid agencies to respond adequately to the cluster of family law, domestic violence, and interconnected civil and criminal law issues that some women experience...’<sup>214</sup> amounts to policy neglect, a term which I think sheds light on the barriers to justice in cases of intimate violence described by research participants.

In their work on women and access to legal aid in Australia Rosemary Hunter and Tracey de Simone question whether subordination is best illuminated via intersectionality or whether it should be understood as a variable product of particular institutional structures.<sup>215</sup>

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<sup>210</sup>*Ibid* at 19.

<sup>211</sup>Including intersectionality.

<sup>212</sup>Hunter, *supra* note 202 at 82.

<sup>213</sup>*Ibid* at 99 and 200.

<sup>214</sup>*Ibid* at 99.

<sup>215</sup>Rosemary Hunter & Tracey De Simone, “Identifying Disadvantage: Beyond Intersectionality” in Emily Grabham, Davina Cooper, Jane Krisnadas & Didi Herman eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009) 159 at 160.

They conclude that, within the space and time that they studied inequality in legal aid access, context rather than identity was a more useful theoretical tool. The disadvantage created by legal aid access was not based on identity ( i.e. no particular group of women suffered more than others) rather it was based in institutionally created barrier. Negative outcomes were dictated by institutional concerns, forms, questionnaires, and an inability to work outside of those parameters, and effected women across categories. All women found their access to legal aid uniformly arbitrary- sometimes getting legal aid and sometimes not- based on categories of exclusion that did not map onto identities, but onto categories unrelated to identity created by the institution itself.

Rather than parsing this debate, I propose to employ both formulations. The added dimension of contextual theory enriches my analysis, given that much of my research is aimed at the policy level and not at individual claims of inequality under discrimination law which often demands a focus on the identity of the claimant and any comparator group. Deploying intersectional theory alongside these mesocontextual analyses sheds light on how disadvantage is mapped *both* within and across identity categories, as well as how each expression of disadvantage is created and sustained at an institutional level.

Both Walby and Hunter note that subordination needs to be explored in a range of institutional contexts, and that this type of analysis is highly contextual, meaning that at a given time, place, space analyses of disadvantage, oppression or inequality may differ.<sup>216</sup>

I argue that throughout my research both identity as discussed by intersectional theorists,

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<sup>216</sup> Hunter & De Simone: Rather than working from predetermined identity categories it is necessary to examine the ways in which domination, subordination and subjects themselves; are constructed in particular locations and contexts. *Ibid* at 160.

(in this case South Asian identity) and contextual factors within justice responses to intimate violence shape the ways that women experienced disadvantage, oppression and inequality. Importantly, however, South Asian identity is not a homogenous factor in theorizing disadvantage in this institutional context. Research participants spoke to both empowering and disempowering aspects of South Asian identity as deployed within the criminal justice system.

### *Neo Liberalism and its Feminist Critiques*

“Neoliberalism” is a global political turn rooted in a normative vision about the role of the state and the relation of the state to markets and to human freedom. It describes an approach to economic and social policy that proposes to transfer control of the economy and various other services (including healthcare, education and some aspects of criminal law) from the public to the private sector, under the belief that human welfare is enhanced by a system based on private property, free markets, and free trade.<sup>217</sup> The ‘liberal’ in neoliberal reflects a post welfare state return to the classical liberal notion that markets, not the state are the best mechanism for allocating resources and facilitating prosperity and freedom. The ‘neo’ refers to its global reach beyond and across the borders of Western democracies where liberalism first flourished, and to a transformed rather than diminished role for the state.

While neoliberalism at first glance seems to be exclusively about a macrostructural shift occurring on a global scale, my research shows that it translates on the ground in direct and harsh way for vulnerable groups. Feminist work has been crucial in highlighting

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<sup>217</sup> David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 2.

neoliberalism's gendered impacts. Part of my research project is to trace, and critique, the impacts of the neoliberal project on criminal law in cases of intimate violence.

Wendy Larner, a feminist political theorist, cautions against monolithic accounts of neoliberalism that fail to take account of variants and contradictions across different jurisdictions.<sup>218</sup> Instead she advocates looking at policies or projects in specific geographic, temporal and political spaces, taking account of the “messy actualities” and inherent contradictions inherent in such analyses.<sup>219</sup> My analysis of the impact of neoliberalism on justice response to intimate violence in the Lower Mainland aims to do this. This context-specific micro and macro analysis also replicate important aspects of feminist intersectional and contextual theory, described above.

This section sets the stage for the analysis of my research in Chapter Six. Here I sketch a brief history of the global and domestic events that mark the development of neoliberalism.. This section then goes on to describe two main analytical tools drawn from feminist critiques of neoliberalism. The first is the reconstruction of the state and of freedom under neoliberalism, the second is constitution of the gendered neoliberal citizen.

### *Historical Context*

David Harvey outlines the history of neoliberalism in his seminal book, *A Brief History of Neoliberalism*, where he begins his analysis by examining the underlying values of

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<sup>218</sup>Wendy Larner, “Neoliberalism?” (2003) 21 *Environment and Planning D: Society and Space* 509 at 509.[ Neoliberalism?] See also Wendy Larner, “Post-Welfare State Governance: Towards a Code of Social and Family Responsibility” (2000) *Social Politics* 244 at 274. [Post-Welfare]

<sup>219</sup>Larner, *supra* note 217, Post-Welfare, at 247. See also: Dominique Masson, “Constituting ‘Post-Welfare’ Welfare Arrangements: The Role of Women’s Movement Service Groups in Quebec” Paper presented at the Canadian Sociology and Anthropology Association, 10 June, 1997.

freedom and individual choice that informed the post World War II era, and that have been conspicuous in American political philosophy until present day.<sup>220</sup> He recalls:

Concepts of dignity and individual freedom are powerful and appealing in their own right. Such ideals empowered the dissident movements in Eastern Europe and the Soviet Union before the end of the Cold War as well as the students in Tiananmen Square. The student movements that swept the world in 1968—from Paris and Chicago to Bangkok and Mexico City—were in part animated by the quest for greater freedoms of speech and of personal choice.<sup>221</sup>

Harvey goes on to explain the era of embedded liberalism, which he describes as the period from the Second World War to the 1970s, when “market processes and entrepreneurial and corporate activities were surrounded by a web of social and political constraints and a regulatory environment that sometimes restrained but in other instances led the way in economic and industrial strategy.”<sup>222</sup> Harvey recounts that embedded liberalism employed Keynesian policies to develop an economic plan that would avoid a repeat of the Great Depression. He states,

...[A] class compromise between capital and labour was generally advocated as the key guarantor of domestic peace and tranquillity. States actively intervened in industrial policy and moved to set standards for the social wage by constructing a variety of welfare systems [health care, education, and the like].<sup>223</sup>

By the end of the 1960s, however, embedded liberalism began to break down, with high unemployment and inflation ushering in the global phase known as ‘stagflation’, and economists began looking for alternatives to the Keynesian model.<sup>224</sup> The goal of

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<sup>220</sup> Harvey, *supra* note 202 at 5.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid* at 11.

<sup>223</sup> *Ibid* at 10-11.

<sup>224</sup> *Ibid* at 12. Harvey describes this period in more depth at 12: “Even before the Arab-Israeli War and the OPEC oil embargo of 1973, the Bretton Woods system of fixed exchange rates backed by gold reserves had fallen into disarray. The porosity of state boundaries with respect to capital flows put stress on the system of fixed exchange rates. US dollars had flooded the world and escaped US controls by being deposited in European banks. Fixed exchange rates were therefore abandoned in 1971. Gold could no longer function as

neoliberalism, which was only one of the models put forward to counter these economic shocks, was to disaggregate capital from the web of social and political constraints applied by the previous era. Harvey theorizes that among the competing ideologies that could have been used to counter the failing embedded liberal project, neoliberalism was the only one that did not point to a more socialist interpretation of the “social compromise between capital and labour,”<sup>225</sup> thus the economic elite, who had seen their profits diminish in the previous era, were motivated to protect their interests at all costs.<sup>226</sup>

In 1976, Milton Friedman at the University of Chicago won the Nobel Prize for economics for his theory of neoliberalism, marking the beginning of the dominance of neoliberal theory in mainstream economic policy.<sup>227</sup> The real solidification of this, however, came in 1979 with Margaret Thatcher elected as Prime Minister of England, and Volcker, chairman of the US Federal Reserve Bank under President Carter, orchestrating a shift away from the principles of the New Deal (which was a Keynesian policy with full employment as the goal) toward a neoliberal model designed to “quell inflation no matter what the consequences might be for employment”.<sup>228</sup>

The 1980s saw Reaganomics and Thatcherism as the two main global proponents of neoliberalism. In the United States, Reagan’s neoliberal agenda inspired destructive

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the metallic base of international money; exchange rates were allowed to float, and attempts to control the float were soon abandoned. The embedded liberalism that had delivered high rates of growth to at least the advanced capitalist countries after 1945 was clearly exhausted and was no longer working.”

<sup>225</sup>*Ibid.* at 15.

<sup>226</sup>*Ibid.*

<sup>227</sup>*Ibid.* at 22.

<sup>228</sup>*Ibid.* at 23.

international policies such as the structural adjustment programs of the IMF.<sup>229</sup> In the 1970s, countries in the Global South were encouraged to borrow from American investment banks at rates that were advantageous to the lenders. This meant, however, that a rise in interest rates could push said countries into default. Harvey explains the strategy in the following manner:

The Reagan administration, which had seriously thought of withdrawing support for the IMF in its first year in office, found a way to put together the powers of the US Treasury and the IMF to resolve the difficulty by rolling over the debt, but did so in return for neoliberal reforms. This treatment became standard after what Stiglitz refers to as a ‘purge’ of all Keynesian influences from the IMF in 1982. The IMF and the World Bank thereafter became centres for the propagation and enforcement of ‘free market fundamentalism’ and neoliberal orthodoxy. In return for debt rescheduling, indebted countries were required to implement institutional reforms, such as cuts in welfare expenditures, more flexible labour market laws, and privatization. Thus was ‘structural adjustment’ invented.<sup>230</sup>

By the end of the 1980s in Canada, under the Mulroney Conservative government, neoliberalism also flourished. According to Cossman and Fudge “...a new neoliberal rhetoric about the need to reduce state spending, cut back on state regulation, and maximize exports- all in the pursuit of private capital investment- had caught hold of Canada’s macroeconomic policies.”<sup>231</sup> William Carrol and William Little note that trade<sup>232</sup> agreements with the United States during the 1980’s and early 1990s helped to usher American style neoliberalism into Canadian politics and the economy over a relatively short time span.<sup>233</sup>

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<sup>229</sup>*Ibid.* at 27.

<sup>230</sup>*Ibid* at 29.

<sup>231</sup> Cossman and Fudge, *infra* note 252 at 14.

<sup>232</sup>The 1989 FTA and the 1994 NAFTA.

<sup>233</sup>William Carrol & William Little ‘Neoliberal transformation and Antiglobalisation Politics in Canada: Transition, Consolidation and Resistance’ (2001) 31 *International Journal of Political Economy* 33 at 38 and 9.

Globally, neoliberalism in the 1990s saw a return to a slightly moderated regime that, while embracing major portions of neoliberalism, still sought to incorporate a socially progressive agenda. Prime Minister Tony Blair and President Bill Clinton mark this middle-way approach, with initiatives designed to combine capitalism with greater corporate responsibility and modest social welfare provisions.<sup>234</sup> For example, both President Clinton and Prime Minister Blair introduced more lenient healthcare legislation that allowed for such provisions as maintaining health coverage between jobs, but more restrictive welfare provisions such as welfare requiring “work” in exchange for assistance.<sup>235</sup>

The 1990s in Canada, however, were marked by an entrenchment of neoliberal economic and political policies.<sup>236</sup> Of particular note under the Chrétien Liberal government, were the elimination of the Canada Health and Social transfer, the Canada Assistance Plan, and the Established Program Financing Program; all intergovernmental mechanisms originally created to support and sustain social welfare and health programs across the country.<sup>237</sup> Simultaneously, Paul Martin, the Liberal Minister of Finance, began a long term campaign to cut government spending, which entailed massive cuts to federal funding for income assistance, and social and health services.<sup>238</sup> At the level of federal-provincial politics the entrenchment of neoliberal politics saw the federal government cut

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<sup>234</sup> Manfred B. Steger & Ravi Roy, *Neoliberalism: A Very Short Introduction* (Oxford: Oxford University Press, 2010) at 50.

<sup>235</sup> *Ibid* at 65-66.

<sup>236</sup> Janine Brodie, “Reforming Social Justice in Neoliberal Times” (2007) 2 *Studies in Social Justice* 93.

<sup>237</sup> Gwen Brodsky & Shelagh Day (1998) *Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women Canada, 1998).

<sup>238</sup> Ken Battle & Sherri Torjman, “Desperately Seeking Substance: Commentary on the Social Security Review” in Jane Pulkinghan & Gordon Ternowetsky eds., *Remaking Canadian Social Policy: Social Security in the Late 1990s* (Halifax: Fernwood, 1996) 54 at 57.

transfer payment to the provinces, forcing provincial governments to cut welfare, health care and other key social services.<sup>239</sup>

Neoliberalism, even in Canada in the 1990s, has not operated in a monolithic way. First it has been moderated by other political rationalities including conservative strategies of harsh criminalization, which are often directed at racialized populations.<sup>240</sup> This speaks to my attempts to seek justice responses that counter this move to hypercriminalize marginalised communities. Second, as Katherine Teghtsoonian, a British Columbia feminist economist, points out that traces of both neoliberalism, and resistance to this political turn have been visible both before and since in British Columbia and elsewhere.<sup>241</sup> My analysis takes place primarily during the period of time. This more complex understanding of neoliberalism helps to shed light on the simultaneous practices of hyper criminalizing racialised men for violence against intimate partners, and failing to provide state funded assistance during justice interventions to the women they abuse. Both neoconservative state coercion, and neoliberal marketisation are at play in the criminal justice response to intimate violence examined in my research.

Third, several key historical events have also fragmented the neoliberal project. Both the events of 9/11<sup>242</sup> and the 2008/2009 economic crisis<sup>243</sup> have noticeably pushed back against neoliberal common sense without by any means displacing it. Echoing more

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<sup>239</sup> Carroll & Little, *supra* note 233 at 39.

<sup>240</sup> Wendy Lerner, "Post-Welfare State Governance: Towards a Code of Social and Family Responsibility" (2000) *Social Politics* 244 at 259 and Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1 *Studies in Social Justice* 93.

<sup>241</sup> "W(h)ither Women's Equality? Neoliberalism, Institutional Change and Public Policy in British Columbia" (2003) 22 *Policy, Organisation and Society* 26 at 39.

<sup>242</sup> See for instance: Carol Greenhouse ed., *Ethnographies of Neoliberalism* (Philadelphia: University of Pennsylvania Press, 2010).

<sup>243</sup> David Kotz, "The Financial and Economic Crisis of 2008: A Systemic Crisis of Neoliberal Capitalism" (2009) 41 *Review of Radical Political Economics* 305.

conservative domestic criminalization strategies is now a valid position, across the political spectrum, that violent state intervention (torture for example)<sup>244</sup> that violates core civil and political rights is acceptable in the name of national security. As well seemingly entrenched neoliberal norms regarding the market and its regulation have been shaken by the 2008-09 financial collapse.<sup>245</sup> Although the terms of the debate are still rooted in neoliberal discourses valorizing the free market, there is now at least a debate over the term “free”, sometimes reflecting the moderation of neoliberal political hegemony with both neoconservative and social democratic conceptions of the role of the state in the economy.<sup>246</sup>

In the early 2000s, in Canada, the neoliberal regime of the Liberal government ended at the federal level. Prime Minister Stephen Harper of the Conservatives won a minority government. Neoliberalism was displaced, at least in part, by neo-conservatism.<sup>247</sup>

Because of their minority status in Parliament the Conservatives were unable to enact full neoconservative reforms, although Janine Brodie notes:

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<sup>244</sup> See for instance *Suresh v Canada* [2002] 1 S.C.R. 3 in which the Supreme Court of Canada ruled that refugee claimants may be deported to countries where they may face torture, if they pose a security risk in Canada.

<sup>245</sup> Kotz *supra* note 238 and Ray Barrel & Philip Davis, “The Evolution of the Financial Crisis 2007-2008” (2008) 5 *National Institute Economic Review* 206.

<sup>246</sup> See for instance: Ben Bernake, Chairman of the United States Federal Reserve “The Crisis and Policy Response” (Jan. 13<sup>th</sup>, 2009, Stamp Lecture, London School of Economics).

<sup>247</sup> Neoconservatism as political ideology can be understood as a blend of both liberal political economics and conservative values. In domestic politics, ‘Neo-Cons’ are typically not ‘conservative’ in the traditional sense but rather may be said to adhere to a more “muscular” form of liberalism. Generally, they tend to agree with liberals/neoliberals regarding “the importance of free markets, free trade, corporate power and elite governance.” However, they “are much more inclined to combine their hands-off attitude toward big business with intrusive government action for the regulation of the ordinary citizenry in the name of public security and traditional morality.” They tend to base policy on appeals to “law and order” occasionally to the detriment of individual rights. Internationally, “neo-conservatives advocate an assertive and expansive use of both economic and military power, ostensibly for the purpose of promoting freedom, free markets and democracy around the world.” Internationally, neoconservatives are typically quite hawkish. Most “advocate [the need for] an assertive and expansive use of both economic and military power, ostensibly [to promote] freedom, free markets and democracy around the world.” Manfred B Stager & Ravi K Roy, *Neoliberalism: A Very Short Introduction* (Oxford: Oxford University Press, 2010) at 22-23.

Since the election of the Harper government, however, this exercise in rethinking Canada's social architecture has simply grounded to a halt. Key federal policy units, which were immersed in research on social inclusion and social capital such as the Policy Research Initiative (PRI), have been redeployed to other projects, while social policy making has been either further fiscalized or devolved to the provinces. All of this is very much in keeping with Prime Minister Harper's long held conviction that the federal government should get out of the social policy field altogether – this despite the fact that the National Council of Welfare, the federal government's own reporting body, has recently described social welfare policy in Canada as “an utter disaster”. This inaction is especially puzzling given the mounting weight of evidence demonstrating that the life conditions and chances of Canadians are increasingly polarized into haves and have-nots. Statistics Canada data, for example, indicate that, in 2004, the average earnings of the richest 10% of families with children was 82 times that of the poorest 10% of families with children: in 1976, the ratio was 31:1.<sup>248</sup>

While the Conservatives held minority in Parliament, they pursued a ‘law and order’ agenda even during their tenure as a minority government. This included the elimination of ‘2-for-1’ credits for time served in jail prior to conviction,<sup>249</sup> abolishing the prior system of ‘Accelerated Parole Review’ for non-violent offenders that could allow them to receive day parole after serving only one sixth of their sentence,<sup>250</sup> they repealed s. 745.6 of the *Criminal Code*, known as the ‘faint hope clause’ which allowed serious offenders the possibility of parole eligibility after serving 15 years of a sentence of life imprisonment.<sup>251</sup> Bill C-31 was passed in 2010 to stop the payment of Old Age Security benefits to incarcerated individuals.

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<sup>248</sup> Janine Brodie, “Reforming Social Justice in Neoliberal Times” (2007) 1 *Studies in Social Justice* 93 at 94.

<sup>249</sup> Under the old system, individuals convicted of crimes could receive credit against their sentence for double the amount of time that they had already served in remand. After the passing of Bill C-25 in 2010, known as the ‘Truth in Sentencing Act,’ convicted criminals may only receive ‘one-for-one’ credits. Gloria Galloway, “Truth in Sentencing Bill becomes Law” *The Globe and Mail* (23 February 2010).

<sup>250</sup> In Spring 2011, Bill C-59 (the *Ending Early Parole Act*) was passed, bringing in amendments to the *Corrections and Conditional Release Act*.

<sup>251</sup> Bill S-6 (the *Serious Time for Serious Crime Act*) was passed in 2010 and given royal assent in the spring of 2011.

In May of 2011 the Conservative government won a majority in the federal parliament, with the New Democratic Party, a democratic socialist party, taking the position of official opposition. During the first full sitting of Parliament in September 2011 the Conservatives have pursued a legislative agenda conforming to their neoconservative values. This includes introducing a bill that creates more mandatory minimum sentences for those convicted of drug related offences.<sup>252</sup> This legislation reflect a ‘law and order’ agenda in the realm of criminal law; the theoretical antithesis of restorative justice.

The period of time, however, during which my research took place, tracks the ascendance of neoliberalism to a great extent. It is therefore the impacts of neoliberalism, rather than neoconservatism, which will be examined in this dissertation.<sup>253</sup>

### **The Reconstruction of the Citizen and Freedom Under Neoliberalism**

#### *The State, Freedom and Modes of (Non Regulatory) Governance*

Both Wendy Larner and Nikolas Rose, political theorists, have argued that while neoliberal states may be moving to smaller governments, and less direct legal regulation, they have simultaneously begun to deploy expanded means of non-legal governance through the discursive framework of individual freedom. Larner, drawing on Michel Foucault’s theories, explains the evolution of these modes of governance this way:

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<sup>252</sup>Bill S-10, “An Act to Amend the Controlled Drugs and Substances Act and to make related and consequential changes to other acts”. See: David Gibb, “Harper Government Omnibus Crime Bill: Canadian Justice Gets a Major Makeover” *The Huffington Post Canada* (3 June 2011).

<sup>253</sup>However, the impact of the rise of a neoconservative government in Canada in the coming years will no doubt have significant impacts on the functioning of the criminal justice system, and perhaps the very existence of restorative justice programs. For the most part restorative justice programs in Canada are either created under the Criminal Code, which is federal legislation, or funded by the federal government within Aboriginal communities; placing many of these programs within the grasp of the Conservative majority.

New political technologies, found in diverse realms including workplaces, educational institutions, and health and welfare agencies, encourage individuals to see themselves as active subjects responsible for their own well-being....the object of these techniques is to encourage us to exercise our own agency and transform our own status and manage our own risk.<sup>254</sup>

In other words, in the name of individual freedom and choice, we govern and constitute ourselves as ideal, rational neoliberal citizens in order to attain the economic and social benefits of this form of citizenship. There is no need for the State to legislate our participation in the neoliberal project. State<sup>255</sup> governance through the citizen and the notion of freedom rather than in opposition to freedom provides a useful frame for understanding the economic cutbacks in British Columbia that have created such problems for survivors of intimate violence who come in contact with the criminal justice system. These economic measures are, in part, ideologically fueled by the transformation of the role of state from one which provides to one which facilitates the rational actions of the responsible, neoliberal citizen.

Nikolas Rose outlines one particular technology of governance that has resonance for my research; the marketisation of the state.<sup>256</sup> According to Rose states and citizens have internalized the language, disciplines and practices of the market, and that these have supplanted the former emphasis on social democracy and citizenship that characterized the welfare state. He argues, for instance, that welfare agencies are now governed through indirect market technologies such as budgets, audits and accountability

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<sup>254</sup>Larner, *supra* note 217, [Post-Welfare] at 246.

<sup>255</sup> Larner draws a distinction between the government and governance, or between the state and government, in order to distinguish traditional state-centred modes of regulatory control such as status, regulations and policies from more indirect modes which mobilize individual agency or control performance at a distance through mechanisms such as budgets or benchmarking. *Ibid* at 244. While others see the state as simply a specific mode of power within the broader field of political power. "Nikolas Rose & Peter Miller "Political Power beyond the State: Problematics of Government" (1992) 43:2 *British Journal of Sociology* 173 at 176.

<sup>256</sup>"Government, Authority and Expertise in Advanced Liberalism" (1993) 22 *Economy and Society* 283.

mechanisms, and competition and customer services have replaced notions of public service.

This notion of the marketisation of the state, is key to my analysis in Chapter Six of how Crown Counsel implementation of supposedly feminist inspired policies has become dominated by concerns with efficiency, in other words how justice work by state actors is informed and shaped by market values.

### *Constituting the Gendered Neoliberal Citizen*

Feminist theory has contributed to understanding how these macro changes in governance manifest themselves on the ground, in the lives of women and their families. In their volume entitled *Privatization, Law and the Challenge to Feminism*, Judy Fudge and Brenda Cossman explain their concern with the Canadian neoliberal project in the following manner: “In Canada, feminists have begun to demonstrate not only that privatization<sup>257</sup> has had different impacts on men and women (Luxton & Reiter 1997) but that it undermines the gender order that prevailed under Keynesianism (Bakker 1996a).”<sup>258</sup> According to Fudge and Cossman, a new gender order is being constituted under neoliberalism, one whose outlines can be traced partly in citizens’ relationships with law.<sup>259</sup> Part of my research project is to trace, and critique, the impacts of the neoliberal project on criminal law in cases of intimate violence.

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<sup>257</sup>Privatization, narrowly conceived is simply a mechanism, of the neoliberal project. Thanks to Hester Lessard for this, and many other insights, into neoliberalism and political theory generally.

<sup>258</sup> Brenda Cossman & Judy Fudge, eds, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 4.

<sup>259</sup>*Ibid.* at 24.

Janine Brodie, a Canadian feminist scholar, argues that emerging forms of governance, such as neoliberalism, encourage citizens to conform to new models of citizenship; shaping their economic, political and social interactions with one another and the state.<sup>260</sup>

Fudge and Cossman argue that this forging of the ideal neoliberal citizen within the Canadian polity has negative gendered implications; erasing the political relevance of gendered inequality, while simultaneously cutting social welfare programs which previously went some distance in addressing the substantive inequality faced by many Canadian women.<sup>261</sup> This analysis dovetails with Dorothy Smith's understandings of ruling relations, or the ways in which institutional interests and priorities shape the daily work and interactions of individuals in profound ways. In other words, the institutional interests and priorities of the neoliberal political project have particular, gendered impacts on Canadian women both as individuals, and as a marginalized group.

Lise Gotell, a Canadian feminist scholar, has deepened this analysis, tracing the impacts of the neo liberal project on criminal law in cases of sexual violence against women.<sup>262</sup>

According to Gotell law is a key site at which changes in the social and political sphere, such as the ascendancy of neoliberalism, can be examined. "Developments in law cannot be disarticulated from the broader political, economic and social context."<sup>263</sup> In Chapter Six I will draw on Gotell's work to analyse my data, illustrating areas of convergence and

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<sup>260</sup>Janine Brodie, "Meso-Discourses, State Forms and the Gendering of Liberal Democratic Citizenship" (1997) 2 *Citizen Studies* 223 at 235.

<sup>261</sup>*Supra* note 253 at 24-28.

<sup>262</sup> Lise Gotell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver, UBC Press, 2007) 127. Brenda Cossman traces the impact of the neoliberal project on women in relation to family law. See: Brenda Cossman, 'Family feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatisation Project' in Brenda Cossman & Judy Fudge, *Privatisation, Law and the Challenge to Feminism* (University of Toronto Press, 2002) 169 at 169.

<sup>263</sup>*Ibid.* at 127.

divergence between her findings on sexual violence, and my own in the area of intimate violence. I articulate ways in which the institutional interests and priorities of the neoliberal political project have particular, gendered impacts on survivors of intimate violence in the Lower Mainland of British Columbia from 1998 to 2010.

Those citizens who refuse to or are unable self-govern, as theorized by Larner and Rose, or to constitute themselves appropriately as gendered, neoliberal subjects, as theorised by Gotell, run the risk of being exposed to the conjunction<sup>264</sup> between neoliberal forms of governance, and neoconservative approaches to governance, which encompasses not only the economic consequence of poverty, but often harsh criminalization. “...(T)hese different regimes of power (neoliberalism and neo conservatism) have specific implications for redefinition of gendered and racialised social relations”.<sup>265</sup> Larner notes that those who are unable or unwilling to be governed or govern themselves in this way are disproportionately marginalized people including women, and racialised citizens.<sup>266</sup> This is echoed in my own research, both for racialised men who have abused their intimate partners, and for survivors of intimate violence themselves.

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<sup>264</sup> See note 242.

<sup>265</sup> Larner, *supra* note 217, Post-Welfare at 245.

<sup>266</sup> “...the divide between those who are constructed as active citizens and those who are disciplined is inflected by both gender and race/ethnicity...feminist commentators have been quick to point out that the rational economic actor who chooses work over welfare is a male subject. Nor is it hard, in a national context where poverty and unemployment are very strongly racialised, to understand that many of those who will be directly monitored are Maori and Pacific Islanders” *ibid.* at 245.

## **Chapter Two: (More) Successful Justice Interventions**

This chapter describes two justice responses to intimate violence that have been employed by the state, in conjunction with feminist community groups, and also explicates feminist responses to these models. These justice responses are Family Group Conferences (FGCs), a form of restorative justice, and the Duluth model, which employs pro-arrest/prosecution policies plus batterer intervention programs. A discussion of these justice responses provides a comparative context in which to examine and critique justice practices in the Lower Mainland of British Columbia in the following chapters. FGCs provide a comparator to better understand the ways in which restorative justice has been mislabeled in the Lower Mainland, and its implications, while the Duluth model illustrates a successful prosecutorial model very different from the one studied in this research project.<sup>1</sup> Both restorative justice and the Duluth model endeavor to simultaneously support women, marginalised men, and communities; in other words they attempt to live up to Elizabeth Elliott's vision of 'security with care'.<sup>2</sup> Both models also incorporate an active element of the feminist anti-violence community, alongside state criminal interventions. While the empirical data is somewhat inconclusive, it is clear that FGCs and the Duluth model can claim some major successes in addressing cases of intimate violence, and represent starting points from which to evaluate justice practices in the Lower Mainland.

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<sup>1</sup>Ironically the earliest versions of the VAWIR policy (see Chapter 4 at 110) were based on the Duluth Model, as advocated by British Columbia feminist anti-violence groups. Patricia Kachuk, "Violence against Women in Relationships: An Analysis of Policies and Actions" (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 1998) at 14.

<sup>2</sup>See Chapter One note 193.

### Family Group Conferences (FGCs)

While FGCs are not unequivocal triumphs, they can claim specific successes in addressing intimate violence. In particular this model has shown a reduction in recidivism by abusers,<sup>3</sup> and relatively high survivor satisfaction<sup>3</sup> rates. FGCs are being used extensively, and with increasing frequency, across jurisdictions in dealing with cases of intimate violence. FGCs are

“...a decision-making process involving families, public agencies and community participants.... There are five basic stages to FGC: community involvement, referral, preparation, the conference itself and implementing the family plan.”<sup>4</sup>

The central piece to an FGC is a conference that allows family members to meet in a safe place to discuss and put in place a plan to stop violence in their own family. This plan is then supported by state and community based resources (organisational, social, economic, and psychological) for *each* member of the family until the plan is successfully completed.

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<sup>3</sup> The Hollow Water Healing Circle program in Northern Manitoba also boasts very low recidivism rates (2% over ten years), as measured by further charges. Teresa Lajeunesse, “Community Holistic Circle Healing: Hollow Water First Nation” (Ottawa: Solicitor General, 1993). However, this program has not been included here as these rates have been extensively questioned by other researchers. Jennifer Koshan, “Aboriginal Justice and the Charter: Bridging the Divide?” (1998) 1 U.B.C.L. Rev. 23; Emma LaRoque, “Re-Examining Culturally Appropriate Models of Criminal Justice Applications” in Michel Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997) 73. The program has been recently evaluated to show poor records keeping, particularly in relation to survivors, problems with funding and accountability, and overall a minimal involvement of survivors. A review of data from an evaluation of the program showed that only 28% of victims (versus 72% of offenders) found the circles to be a positive experience. Mandy Young, “Aboriginal Healing Circle Models Addressing Child Sexual Assault” (Australia: Churchill Fellowship, 2006). There is some evidence that charges were not laid where abusers breached their conditions and abused again. (Canada, Report of the Royal Commission on Aboriginal Peoples, “Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996) by Michael Jackson & Jonathon Rudin).

<sup>4</sup>“Family Group conferencing in Child Welfare Practice Guidance” North Carolina State University Social Work Program (faculty.chass.ncsu.edu/Pennell) at 1.

Originating with youth offenders in New Zealand, FGCs were piloted in Canada in the 1990s in Newfoundland in both an Aboriginal and a non-Aboriginal community.<sup>5</sup> The primary researchers in the Newfoundland project, Joan Pennell and Gale Burford, recommend FGCs for dealing with cases of “family violence” (including intimate abuse). Pennell has gone on to establish a “safety conferencing” program in North Carolina, which uses FGC specifically to address male violence against women, and their children.<sup>6</sup>

Based on the Newfoundland pilot project, John Braithwaite and Kathleen Daly, Australian restorative justice advocates, strongly support the use of this model for cases of intimate violence, and provide a detailed description of how a model program might be administered.<sup>7</sup> Several long-time feminist critics of restorative justice in cases of intimate violence also see the Newfoundland model as an appropriate response.<sup>8</sup> This is in part because Pennell and Burford, in their Newfoundland project (and subsequently Pennell in her North Carolina project) take an explicitly feminist approach to FGCs, and have drawn

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<sup>5</sup>Joan Pennell & Gale Burford “Feminist Praxis: Making Family Group Conferencing Work” in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 108. Pennell and Burford note that their model is “influenced’ by New Zealand FGC models.

<sup>6</sup>Joan Pennell & Stephanie Francis, “Safety Conferencing; toward a Coordinated and Inclusive Response to Safeguard Women and Children” (2005) 11 *Violence against Women* 666.

<sup>7</sup>Kathleen Daly & John Braithwaite, “Masculinities, Violence and Communitarian Control” in Newburn and Stanko, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994).

<sup>8</sup>Judith Lewis Herman, “Justice from the Victims’ Perspective” (2005) 11 *Violence Against Women* 571 at 599; Julie Stubbs, “‘Communitarian’ Conferencing and Violence Against Women: A Cautionary Note” in Mariana Valverde, Linda MacLeod & Kirsten Johnson eds., *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) 260; Carol LaPrairie, “Altering Course: New Directions in Criminal Justice” (1995) 28 *Australia and New Zealand Journal of Criminology*; Ruth Busch, “Who Pays if We Get it Wrong?” in Heather Strang and John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 223.

extensively on the work of feminist anti-violence workers in designing, implementing, and deploying the program.<sup>9</sup>

Other jurisdictions have adopted similar FGCs in cases of intimate violence. First, the State of Hawaii is piloting a program called *Pono Kaulike*, which conducts conferences, although the survivor and abuser never meet face to face unless the survivor requests it. Facilitators can hold separate conferences and co-ordinate plans and services for all parties.<sup>10</sup> An evaluation of the project running from 2002 and 2007, involving 38 men who assaulted their partners, shows positive results. Compared to a control group, the *Pono Kaulike* participants showed a markedly lower recidivism rate,<sup>11</sup> and 59 of 60 survivor participants reported a positive experience.<sup>12</sup>

Second, Hampshire County in Britain, United Kingdom has also adopted FGCs to deal with cases of intimate violence.<sup>13</sup> This program, called Dove, uses FGCs only where a woman wants to stay in her relationship following abuse. Facilitators are trained in “...domestic violence issues of power and control,”<sup>14</sup> and the program has the support of local women’s and victims’ advocates. Like other successful FGC programs, it has many state and community based services at its disposal to assist in executing a safety plan.<sup>15</sup> Dove has not yet been subject to a systemic evaluation.

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<sup>9</sup> Joan Pennell, “Stopping Domestic Violence or Protecting Children? Contributions from Restorative Justice” in Dennis Sullivan & Larry Tift, eds., *Handbook of Restorative Justice: A Global Perspective* (London: Routledge, 2006) at 296-298.

<sup>10</sup> Lorene Walker & Leslie Hayashi, “*Pono Kaulike*: Reducing Violence with Restorative justice and Solution-Focused Approaches” (2009) 73 *Federal Probation* 23 at 24.

<sup>11</sup> *Ibid* at 25. 2.17 percent in the control group versus .05 in the *Pono Kaulike* group.

<sup>12</sup> Walker and Hayashi, *supra* note 10 at 24.

<sup>13</sup> Laura Mirsky, “Hampshire County, UK: A Place of Innovation for Family Group Conferencing” (2003) 4 *Restorative Practices* 1.

<sup>14</sup> *Ibid* at 5.

<sup>15</sup> *Ibid* at 6.

*a) Newfoundland Evaluation*

Pennell and Burford have written systematic evaluations of both the Newfoundland project<sup>16</sup> and a work based on the success stories of individual cases of intimate violence.<sup>17</sup> Because of the success rates reported in the systemic evaluation they claim that FGC can end intimate violence in a variety of cultural and geographical settings. The project took place over one year, and involved 32 families, which accounted for 472 participants (88 of whom were service providers). Families were followed for a one to two year period after the conference and compared to independently selected comparator families.

The major findings were:

- A reduction in indicators of child maltreatment and domestic violence;
- An advancement in children's development; and
- An extension of social supports<sup>18</sup>

Overall, there were no violent outbursts during the conferences despite the fact that the families were left alone for most of the conference. In some cases, however, the abuse that already existed did not stop immediately after the conference.<sup>19</sup>

Unlike many justice responses, the Pennell and Burford project had substantial economic and human resources at its disposal.<sup>20</sup> Preparation for conferences took up to four weeks,

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<sup>16</sup> Joan Pennell & Gale Burford, *supra* note 5 at 108; Joan Pennell & Gale Burford, "Family Group Decision Making: Protecting Children and Women" (2000 b)) 79 Child Welfare 131; Joan Pennell & Gale Burford, "Family Group Decision Making Project: Implementation Report Summary" (St. Johns Newfoundland: Memorial University, 1996) [Family Group Decision Making Project].

<sup>17</sup> Joan Pennell & Gale Burford, "Family Group Decision-Making and Family Violence" in Gale Burford and Joe Hudson eds., *Family Group Conferencing: New Directions in Community-Centred Child and Family Practice* (New York: Walter de Gruyter, 2000).

<sup>18</sup> Pennell & Burford, *supra* note 5 at 110.

<sup>19</sup> Pennell & Burford, Family Group Decision Making Project, *supra* note 16 at 14.

and included testing and counselling for all family members. Conferences lasted from four hours to three days, and several families had more than one. The families were provided with access to extensive social, health, and educational services to complete the plan they had drawn up during the conference.<sup>21</sup>

Pennell and Burford also note limitations of the project. For instance, they would exclude "...families of estranged partners who have no wish to reconcile and no children in common..." from participating in any similar program.<sup>22</sup> They also dealt with "extreme" cases by excluding men who assaulted their family members. In these cases he was not contacted, and did not participate in the conference.<sup>23</sup> Some participants noted that men who had committed violence were not challenged enough, out of fear of how they might react.<sup>24</sup>

#### ***b) North Carolina***

The North Carolina FGC program, directed by Pennell, is relatively new but applies much of the same theory and practice as the Newfoundland project. One critical difference is that rather than having the family enter the program because of child welfare issues (and have intimate partner violence added as it is disclosed) the family enters the program because of intimate violence.<sup>25</sup> Like the Newfoundland project these FGCs apply a consciously feminist praxis, and are mindful of race, culture, and ethnicity as an

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<sup>20</sup> The program was ultimately cancelled in 1997 due to its high financial cost.

<sup>21</sup> Stubbs, 1995, *supra* note 8.

<sup>22</sup> Pennell & Burford, Family Group Decision Making Project, *supra* note 6 at 13 and 20.

<sup>23</sup> *Ibid* at 14.

<sup>24</sup> *Ibid*.

<sup>25</sup> Joan Pennell & Mimi Kim, "Opening Conversations across Cultural, Gender and Generational Divides" in James Ptacek, ed., *Restorative Justice and Violence against Women* (Oxford: Oxford University Press, 2010) at 177.

important factor for the families they involve, including Indigenous peoples.<sup>26</sup> There has, to date, been no systemic evaluation conducted of the project.<sup>27</sup>

### **The Role of the State, Sanctions and Incarceration**

Although there is a role for the women's anti-violence community, and other non-state actors, the role of the state in FGCs is extensive. Not only are criminal justice professionals involved in ensuring the successful completion of a family plan; child welfare, youth protection, women's antiviolence, victim support services, police, and other social services are also part of the support, monitoring, and enforcement of family plans, including anti-violence provisions.<sup>28</sup> In most cases protective services have already been involved with the family and actively participate in providing information and ideas to help shape the plan. This results in both heightened support for the survivor, but also heightened surveillance for the family as a whole. According to Pennell and Burford, this heightened scrutiny ensures the safety of survivors, while simultaneously allowing "...the state authorities, community organisations and family group members [to] work together to resolve situations of family violence."<sup>29</sup> The involvement of the police, as a coordinated state actor, allows for charging and prosecution if abuse continues following a coordinated effort to end violence.

### **The Duluth Model**

The Duluth model is an anti-violence program developed by the Domestic Abuse Intervention Project (DIAP) and Praxis International; sister community organisations

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<sup>26</sup>Mimi Kim, "Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges" in James Ptacek, ed., *Restorative Justice and Violence against Women* (Oxford: Oxford University Press, 2010) at 193.

<sup>27</sup> There are a number of case studies discussed as exemplars in Pennell & Kim, and Kim, *ibid*.

<sup>28</sup> Pennell & Burford, *supra* note 5 at 125.

<sup>29</sup>*Ibid* at 125.

based in Duluth, Minnesota, USA. The Duluth model is characterised as “...perhaps the most widely known feminist antiviolence approach in the United States and many parts of the world.”<sup>30</sup> This program, pioneered by Ellen Pence, a long-time feminist anti-violence activist, attempts to make pro-active changes to the existing criminal justice system, including mandatory arrest and prosecution policies, from within.<sup>31</sup> The basic premise behind the model is that the state is already entrenched in dealing with intimate violence, and therefore feminists must work to make the extant system responsive not only to gendered violence, but also to the realities of marginalisation for racialised communities, including men who batter.<sup>32</sup> A key component to the Duluth approach is to be systemically watchful for state co-option of feminist legal and policy reforms, a theme that has deep resonance in my project. Pence notes “...many of the (domestic violence) laws and regulations were either ignored or cynically turned against battered women or against men in marginal positions in society.”<sup>33</sup> The Duluth model is comprised of both a prescribed justice approach to dealing with individual cases of intimate violence (described below) and a safety and accountability audit,<sup>34</sup> designed to evaluate criminal justice interventions inspired by feminist reform, to monitor the treatment of survivors in the system, and to facilitate positive change.<sup>35</sup> The audit is also deployed to investigate

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<sup>30</sup> Pennell & Kim, *supra* note 25 at 12.

<sup>31</sup> Melanie Shepard & Ellen Pence, eds., *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (London: Sage, 1999) at 135.

<sup>32</sup> *Ibid.*

<sup>33</sup> Ellen Pence, “Safety for Battered Women in a Textually Mediated Legal System” (Doctoral Thesis, University of Toronto, Sociology of Education, 1996) [unpublished] at 27-28.

<sup>34</sup> Developed using institutional ethnography.

<sup>35</sup> Pennell & Kim, *supra* note 25 at 13.

the disproportionate impact of criminal justice interventions on racialised and other marginalised populations, and to suggest systemic changes to address these issues.<sup>36</sup>

The DIAP see restorative justice as “potentially dangerous”,<sup>37</sup> stating that “...the risks of placing the victim of abuse in a setting where she may be re-abused by the restorative justice processes are very high....group or couple meetings where victims confront their offenders (often a centerpiece of restorative justice) require huge resources to create a change of community and family culture that repudiates domestic violence and provides an effective means to monitor offenders and individual restorative interventions.”<sup>38</sup>

The Duluth Model has been developed, and continually revamped, over twenty years. Pence describes it as “...the evolving process of trying to use existing institutions and agencies of social control to act on behalf of victims of battering.”<sup>39</sup>

It began in 1980 as an agreement between Duluth women’s anti-violence advocates, and every key legal agency in Duluth to “[c]oordinate their interventions through a series of written policies and protocols that limited individual discretion in the handling of cases and subjected practitioners to a minimum standard of response.”<sup>40</sup> This included the development and deployment of a mandatory arrest policy, and the creation of a

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<sup>36</sup> See for instance: Lila George & Alex Wilson, *Community-Based Analysis of the U.S. Legal Systems Interventions in Domestic Abuse Cases Involving Indigenous Women* (Washington, D.C., National Institute of Justice, 2002).

<sup>37</sup> Ellen Pence & Kristine Lizdas, *The Duluth Safety and Accountability Audit* (Duluth, Minnesota Program Development, 1998) at 151.

<sup>38</sup> Michael Paymar & Graham Barnes, “Countering Confusion about the Duluth Model” (Minneapolis, The Battered Women’s Justice Project, 2004) at 11.

<sup>39</sup> Melanie Shepard & Ellen Pence, eds., “Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond” (California: Sage Publications, 1999) at 273.

<sup>40</sup> Ellen Pence, “The Duluth domestic Abuse Intervention Project: Toward a Coordinated Community Response to Domestic Abuse” (1983) 6 *Hamline Law Review* 274-280.

mandatory batterer education program.<sup>41</sup> The model developed to include several key components including: court-mandated men's curriculum,<sup>42</sup> advocacy and support services for survivors,<sup>43</sup> mandatory arrest policies, a tracking system to monitor interagency coordination in the criminal justice system,<sup>44</sup> and a central role for survivors and their community advocates.<sup>45</sup> The DIAP also expanded to include a child visitation centre, and training for service providers from racialised and marginalised communities.<sup>46</sup> Another key element to the Duluth Model is that it is designed to take account of the realities of meagre material resources available to survivors throughout a typical criminal justice system, and aims to "...implement an effective, low-cost program that wouldn't compete with the limited funds being used to support battered women's programs."<sup>47</sup>

### **The Role of State, Sanctions, and Incarceration**

The Duluth model relies extensively on the existing state apparatus, including the criminal justice system, in order to function. The Duluth model views state funded (but community run) batterer education programs as playing a key role in providing men who batter with supported opportunities to change their abusive behaviour. However, there is still a role, albeit secondary, for sanctions and incarceration. Men who participate in the Duluth program are arrested, tried, and given the option of incarceration or being placed

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<sup>41</sup> Shepard & Pence, eds., *supra* note 39 at 4.

<sup>42</sup> In fact Duluth's batterer education program has been cited as the national standard for such programs by leading experts in the field. Edward Gondolf, "Regional and Cultural Utility of Conventional Batterer Counseling" (2004) 10 *Violence Against Women* 880 at 886; and Evan Stark, "Insults, Injury and Injustice: Rethinking State Intervention in Domestic Violence Cases" (2004) 10 *Violence Against Women* 1302 at 1321.

<sup>43</sup> Shepard & Pence, eds., *supra* note 39 at 15.

<sup>44</sup> *Ibid* at 4.

<sup>45</sup> Paymar & Barnes, *supra* note 38 at 14.

<sup>46</sup> Shepard & Pence, eds., *supra* note 39 at 15.

<sup>47</sup> Paymar & Barnes, *supra* note 38 at 14.

in the Duluth male batterer program while on probation. Failure to attend the court-mandated education programs results in a charge for breach of probation.<sup>48</sup>

### **Batterer Intervention Programs (BIPs)**

Coupled with criminal sanctions for non-attendance, BIPs play a key political and practical role in the Duluth model. They have also been the primary site of evaluation of the Duluth program. Extensive social science research has been completed on whether pro-arrest/prosecution policies coupled with mandatory BIPs reduce recidivism. While there has been some conflicting research on BIPs alone,<sup>49</sup> overall the Duluth model, comprising *all* aspects of the coordinated community response, has been successful in reducing rates of violence,<sup>50</sup> and survivors have reported reduced psychological and physical violence.<sup>51</sup> It is vital to note that within the Duluth model BIPS are only *one* part of a community wide network of services; in particular, women and children also receive support and counseling.<sup>52</sup> Those who have developed and deploy the Duluth BIP view it as part of a larger web of culturally appropriate services.<sup>53</sup> Part of the mandate of BIP

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<sup>48</sup> Shepard & Pence, eds., *supra* note 39 at 130.

<sup>49</sup> The results of social science research on BIPs alone has been inconclusive with some studies indicating BIPS do not reduce recidivism (Christopher Eckhardt, Christopher Murray, Danielle Black and Laura Shur, "Intervention Programs for Perpetrators of Intimate Partner Violence: Conclusions from Clinical Research Perspective, (2006) 121 Public Health Rep.369-381 and Rebecca Dobash, Russell Dobash, Kate Cavanagh and Ruth Lewis, *Changing Violent Men* (London: Sage Publications, 2000) and that they may, in fact, increase the risk of violence against women in racialised and marginalised communities(Gondolf, *supra*, note 122 at 884). Other research has been more positive (Edward Gondolf, *Batterer Intervention Systems* (London: Sage Publications, 2002) showing an overall reduction in recidivism using BIPs alone under specific conditions. It is fair to assert, then, that there is no conclusive evidence either for or against BIP programs in the absence of a coordinated community response. Linda Mills, "Enhancing Safety and Rehabilitation in Intimate Violence Treatments: New Perspectives" (New York: Centre on Violence and Recovery, 2006) at 364

<sup>50</sup>Melanie Shepard, Dennis Falk & Barbara Elliot, "Enhancing Coordinated Community Responses to Reduce Recidivism in cases of Domestic Violence" (2002) 17 J Interpersonal Violence 551 at 566.

<sup>51</sup>*Ibid* at 567.

<sup>52</sup> Shepard & Pence, eds., *supra* note 39 at 130.

<sup>53</sup> DIAP works with racialised and marginalised communities to provide services to men, women, and children, and to conduct safety audits and community coordination that meet the specific needs of their communities. (see: Lila George & Alex Wilson, *Community-Based Analysis of the U.S. Legal Systems*

counselors is to communicate with survivors to ensure their continued safety, and as a tool to track the progress of their male clients.<sup>54</sup>

### **Characteristics of an Effective Justice Response**

The Duluth Model and FGCs represent quite varied responses to intimate violence; however, there are a number of characteristics which are common to both, and worth noting. These characteristics of successful justice interventions animate my discussion in the following chapters of my research in the Lower Mainland, providing key departure and comparison points.

Both programs feature responsive coordination and co-leadership between state, the program, and community-based antiviolence advocates. This extends to both formal agreements, and concerted efforts at effective communication between justice response participants. Both prominently feature feminist praxis including an underlying theory on the causes of gendered violence, and firm principles underpinning action and decision-making. Also significant, I think, is that those involved in both state and community service provision have been actively trained in the dynamics of intimate abuse and gendered power imbalances. FGCs and the Duluth model solicit input from survivors and anti-violence workers in planning and carrying out justice interventions.

It is incredibly important to the success of both programs that survivors (or entire families) are provided access to extensive social, educational and material resources. To do justice ‘right’ may be expensive, as evidenced by the cancellation of the Pennell and Burford project in Newfoundland due to the financial cost of successfully completing

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*Interventions in Domestic Abuse Cases Involving Indigenous Women* (Washington, D.C.: National Institute of Justice, 2002); <http://www.theduluthmodel.org/mendingsacredhoop.php>).

<sup>54</sup> Shepard & Pence, eds., *supra* note 39 at 130.

family plans developed in conference. I argue that the fact that survivors are given individual time and specialised support, regardless of the participation of abuser, is also very important.

As I outlined in Chapter One, recent intersectional feminist analysis of anti-violence work has shown that taking into account the experiences of racialised and other marginalised communities *as a whole* is key to successful justice interventions. In different ways each of these programs has taken intersectional analysis and praxis seriously, and this has contributed to their successes.

The role of sanctions and incarceration is also central, and represents a possible compromise in the inherent conflict in feminist theory and practice regarding the criminalisation of intimate violence. As I outline in Chapter One, many feminist scholars are leery of arrest, prosecutions, and incarceration, and their adverse and disproportionate impact on survivors, and marginalised communities. However feminists also call for intimate violence to be taken seriously by both the state and civil society. They worry that decriminalising such violence (through some forms of restorative justice) is minimising and re-privatising violence against women, leaving them unprotected even by inadequate state responses. This tension is echoed by my research participants. Both Duluth and FGCs offer survivors, abusers, and family members significant support and resources to help end violence, safety supervision for women and children, while simultaneously marking gendered violence as unacceptable (usually via charges). Both programs deploy incarceration as a strategic tool, and only if supported efforts to end the violence are unsuccessful.

### **The Duluth Model and Family Group Conferences: Important Differences**

There are also several key differences between the Duluth and FGC models. These differences will be revisited in Chapter Five and in the Chapter Seven as I discuss what a vision of better justice might entail. First, the Duluth model avoids face-to-face contact between survivor and offender as a way to redress gendered power imbalances. Survivors and abusers are provided with separate, specialised, feminist counseling and support. The negative impact of face-to-face meetings between a survivor of violence and an abuser are one of the major concerns of feminist critics of restorative justice,<sup>55</sup> and have been cited by Duluth practitioners as a reason to avoid models such as FGC.<sup>56</sup> I agree with this assertion, and share feminist concerns that face-to-face meetings with abusers may be revictimising for many survivors.

The Duluth model itself, however, has been subject to criticisms that I think are also valid. Pennell and Burford<sup>57</sup> have noted that in cases where the express wish of the survivor is to reconcile, it may better sustain her safety to hold supported, face-to-face meetings with the abuser in order to set up a monitored family recovery plan. These key differences, I argue in Chapter Five, warrant a specialised, bifurcated approach to justice responses.

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<sup>55</sup> For example see: Sandra Goundry, "Restorative Justice and Criminal Justice in British Columbia: Identifying Some Preliminary Questions and Concerns" (Vancouver: BC Association of Specialized Survivor Assistance and Counseling Programs, 1998); Julie Stubbs, "Domestic Violence and Community Safety" in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, Cambridge University Press, 2002) at 58, Pauktuutit Inuit Women's Association, "Setting Standards First: Community-based Justice and Corrections in Inuit Canada" (Ottawa: Pauktuutit, 1995).

<sup>56</sup> *Supra* note 40.

<sup>57</sup> Joan Pennell & Stephanie Francis, "Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard women and Children" (2005) 11 *Violence against Women* 666 at 675. See Conclusion for more on the differences and debates between the Duluth Model and FGCs.

## **Chapter Three: the Historical, Social, Political and Legal Context for Justice Practices in the Lower Mainland**

### **Introduction**

There are several interweaving strands of socio-political context and history that inform my analysis of justice practices in cases of intimate violence in the Lower Mainland.

These include the role of restorative justice, the role of pro-arrest/prosecution policies, and the role of governments and the women's anti-violence movement. The past twenty years have seen a transformation of Canadian criminal justice and sentencing practices, including the adoption of restorative justice practices. Because the administration of criminal justice is a provincial matter, these changes have manifested themselves differently in each province and territory. The discussion below is intended to situate justice practices in the Lower Mainland in this historical, political, social, and legal environment.

Chapter Three is divided into three main sections. The first describes the place of restorative justice in Canadian (and therefore) British Columbian law. The second section describes the particular historical, social, legal, and political matrix of British Columbia during the introduction and deployment of federal restorative justice laws and policies (1995 to 2010). The third section discusses the history and role of the women's anti-violence movement in British Columbia during the same time period. Read alongside section two, this final section underlines the tensions between the development and use of restorative justice in cases of intimate violence in this jurisdiction, and the equally strong movement by local feminists to ensure accountability for violence against women.

### **History: The Federal Government and the Introduction of Restorative Justice**

As outlined in Chapter One, there has been a global movement in many parts of the Western world (notably the United Kingdom, Australia, New Zealand, and Canada) away from the automatic use of prosecution and/or incarceration in response to certain crimes, and towards restorative justice.<sup>1</sup> This global movement is a strong one, and has found purchase in the policies and laws of many national governments, including our own. The following section speaks to the ways in which discourses of restorative justice are entrenched in our laws and policies at both the national and provincial levels. This influence in cases of intimate violence is tempered, however, by an equally powerful feminist movement to ensure that these crimes are taken seriously, often through the use of prosecution. In provinces other than British Columbia, for instance, due to feminist concerns, cases of intimate violence are specifically excluded from restorative justice practices.<sup>2</sup>

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<sup>1</sup> Other social movements of note which have influenced Canadian restorative justice practices generally include the prison abolition movement. (See: John Braithwaite & Philip Petit, *Not Just Deserts: a Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 5), the Christian church (See: Harold Pepinsky, "Peacemaking in Criminology and Criminal Justice" in Harold Pepinsky & Richard Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) 299-300 (in fact this work offers a full chapter on *Religious and Humanist Peacemaking Traditions*), the victim's movement (see: Mark Umbreit, "Restorative Justice through Victim-Offender Mediation: A Multi-Site Assessment" (1998) 1*Western Criminology Review* 1at 2) and lobbying to address the over incarceration of Aboriginal peoples, as outlined in the *Royal Commission on Aboriginal Peoples*. The role of these movements in relation to the question of intimate violence specifically has been marginal compared to the feminist movement.

<sup>2</sup> Nova Scotia, for example, expressly excludes cases of intimate violence from provincially run restorative justice programs. Pamela Rubin, "Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation" (Halifax: Management Committee of Restorative Justice in Nova Scotia, March 2003).

## Entrenching Restorative Justice in Canadian Law

Canada has a long history of experimenting with non-incarceral responses to criminalized behaviour. The official legal precedent for the contemporary use of restorative justice was set by Parliament in 1996, with major changes to federal criminal legislation via Bill C-41.<sup>3</sup> This law was not, however, the first instance of the use of alternatives to incarceration in Canadian sentencing. Previous legislative regimes employed similar principles (to reduce prosecution and/or incarceration) prior to 1996, without the moniker ‘restorative justice’. Starting in the 1930s options such as restitution<sup>4</sup> were available for young offenders.<sup>5</sup> In the 1970s the federal government began to consider these alternatives for adults, with a series of sentencing reform papers by the Law Reform Commission of Canada suggesting restitution, compensation, and pre-trial diversion.<sup>6</sup> Simultaneously, academics published scholarly works advocating for and evaluating the expanded use of alternatives to incarceration in Canada and other jurisdictions.<sup>7</sup> This work did not refer specifically to intimate violence.

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<sup>3</sup> *An Act to Amend the Criminal Code (Sentencing)*, S.C. 1995 c. 22, passed into law September, 1996. Full description below.

<sup>4</sup> “Restitution” is defined as a sanction imposed by an official of the criminal justice system requiring the offender to make a payment of money or service to the crime survivor or a substitute. Joe Hudson & Burt Galaway, *National Assessment of Adult Restitution Programs. Preliminary Report IV: Monetary Restitution and Community Service. Annotated Bibliography*, (Duluth MN: University of Minnesota, 1980).

<sup>5</sup> Bruno Theoret, “Childhood and Juvenile Detention: The Case of the Winnipeg Youth Tribunal between 1930 and 1959” (1995) 28 *Criminologie* 119.

<sup>6</sup> Michael Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities” (1992) U.B.C.L. Rev. Special Edition 170.

<sup>7</sup> See for instance: Joe Hudson, Burt Galaway & Steve Chesney, “When Criminals Repay their Victims: a Survey of Restitution Programs” (1977) 60 *Judicature* 312; Burt Galaway & Joe Hudson (eds.), *Criminal Justice, Restitution, and Reconciliation* (Monsey, NY: Criminal Justice Press, 1990); Tony Dittenhoffer & Richard Ericson, “The Victim - Offender Reconciliation Program: A Message for Correctional Reformers” (1983) 33 *U.T.L.J.* 315; James Bonta at al., “Restitution in Correctional Half Way Houses: Survivor Satisfaction, Attitudes and Recidivism” (1983) 20 *Canadian Journal of Corrections* 140; Joe Heinz, Burt Galaway, & Joe Hudson, “Restitution or Parole: A Follow-up Study of Adult Offenders” (1976) 50 *Social Service Review* 148.

In the late 1970s and early 1980s restitution, alongside other penalties, became an option for more adult offenders.<sup>8</sup> A national symposium on criminal reparation was held in 1982 by the federal Ministry of the Solicitor General, garnering more popular support for alternatives to incarceration. This symposium discussed and endorsed the use of expanded reparative sanctions such as restitution.<sup>9</sup> Despite other support for restitution at that time from a variety of parliamentary<sup>10</sup> and Sentencing Commissions, and a Supreme Court of Canada decision,<sup>11</sup> the use of this sentencing option remained cautious and reserved in the early 1980s.<sup>12</sup> Two legislative amendments attempting to broaden the use of restitution were introduced in the 1980s, however neither passed.<sup>13</sup> Today, section 738 (1) (a) of the *Criminal Code*<sup>14</sup> still allows a court to order restitution to be paid to some victims of crime.<sup>15</sup>

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<sup>8</sup> Sab Thorvaldson, “Restitution by Offenders in Canada: Some Legislative Issues” (1987) 29 Can. J. Crim. 1 at 2.

<sup>9</sup> Canada, Ministry of the Solicitor General, *Proceedings: Crime and Redress, National Symposium on Reparative Sanctions*, May 31<sup>st</sup>-June 2<sup>nd</sup>, 1982, Vancouver, B.C. (Ottawa: Ministry of the Solicitor General, 1986).

<sup>10</sup> In 1988 the Parliamentary Standing Committee on Justice and the Solicitor General conducted a review, and published a report entitled *Taking Responsibility* (also known as the Daubney Report) (Canada, House of Commons, 1988) that endorsed the use of restorative justice. (Robert Cormier, “Restorative Justice: Directions and Principles-Developments in Canada” (Ottawa: Public Works and Government Services Canada, 2002) at 4.)

<sup>11</sup> *R. v. Zelensky* [1978] 2 S.C.R. 940. The court stated that it was within the jurisdiction of the federal government under the criminal power to order restitution in criminal cases. It was, however, quite cautious and reserved regarding the extent to which restitution ought to be used.

<sup>12</sup> Joe Hudson, “A Review of Research Dealing with Financial Restitution” in Heinz Messmer & Hans-Uwe Otto Eds. *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation: International Perspectives* (The Netherlands: Kluwer, 1992) at 275; Thorvaldsen, *supra* note 8 at 2.

<sup>13</sup> Bill C-19, 1984 died on the order paper, and Bill C-89, 1987 was passed in July of 1988, however the provisions relating to the expanded use of restitution never came into force. *Canada Legislative Index*, 2nd Session, 33<sup>rd</sup> Parliament, Proclamations at 5, SI/88-198.

<sup>14</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].

<sup>15</sup> These provisions came into force in September of 1996. *Order fixing September 3, 1996 as the Date of the Coming into Force of Certain Sections of the Act, Canada Gazette Part II, Vol. 130, No. 17* at 2719. Section 738 (2) They allow for the Lieutenant Governor of each province to pass regulations prohibiting the inclusion of a restitution order in probation or conditional sentence orders. See also *R. v. DeBay* [2001] 49 W.C.B. (2d) 344, and *R. v. Seimens* [1999] 43 W.C.B. (2d) 85 for restitution in sentencing.

Community service orders were also a sentencing option prior to the 1996 *Criminal Code* amendments introducing restorative justice. Offenders deemed a “safe risk”<sup>16</sup> could perform community service as part of a probation order in some provinces during the 1970s.<sup>17</sup> At around the same time in Saskatchewan, and other provinces, a Fine Option Program was initiated which allowed low income offenders who were fined to “work out” outstanding amounts in activities benefiting the community instead of spending time in prison for fine default.<sup>18</sup> Both community service and fine options programs continue to exist today.<sup>19</sup>

In June of 1988 the federal Liberal government introduced the first iteration of the national strategy on community safety and crime prevention; a meta-policy document reflecting the overall position and planning of the federal government in relation to crime in Canadian society. The national strategy discussed the particular problems faced by Aboriginal peoples, and pointed out negative outcomes in relation to incarceration for both Aboriginal and non-Aboriginal peoples.<sup>20</sup> Starting in the early 1990s, as a progression of these meta-policy concerns, the then Liberal federal government began to use the term restorative justice to describe policies aimed at addressing over-incarceration.<sup>21</sup> Later versions of the national strategy, including “Safer Communities:

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<sup>16</sup> “...a first or second offender convicted of a minor offence who has been screened as nondangerous.” (Canada, *Community Participation in Sentencing* (Ottawa: Law Reform Commission 1977)).

<sup>17</sup> Anne Newton, “Sentencing to Community Service and Restitution” (1979) 11 *Criminal Justice Abstracts* 435 at 444-446.

<sup>18</sup> These programs were aimed particularly at Aboriginal peoples, as they were instituted on 44 “Indian reserves” in 1975. *Ibid* at 445-6.

<sup>19</sup> See *Criminal Code* s. 736 (Fine Options Program) and s. 732.1 (fine option as a condition of a probation order). See also: *R. v. Brand* (1996) 105 C.C.C. (3d) 225 (community service as a condition of a probation order). Community service may also be imposed as a condition of a conditional sentence.

<sup>20</sup> Lucie Leonard et al., “Building Safer Communities: Lessons learned from Canada’s National Strategy” (2005) 47 *Can J Crim and Crim J.* 56.

<sup>21</sup> Canada, “Safer Communities: Everybody’s Responsibility: Canada’s National Crime Prevention Strategy” (Ottawa: Minister of Justice, 1996)

Everybody's Responsibility",<sup>22</sup> began to discuss restorative justice in a more and more positive light, leading to major changes to the *Criminal Code* in 1996.

In 1996 the Parliament of Canada undertook a major revamping of portions of the *Criminal Code* to reflect restorative justice values and practices envisioned in the National Strategy. The foundation of these provisions was to move from retribution and deterrence alone to fostering the values of healing and restoration alongside other principles of sentencing. The Supreme Court of Canada notes, "[t]he enactment of the new Part XXIII (Bill C-41) was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."<sup>23</sup> Then Minister of Justice, Allan Rock, speaks to the aims of Parliament in passing this legislation:

A general principle that runs through Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration...

This bill creates an environment which encourages community sanctions and the rehabilitating of offenders together with reparation to the survivors and promoting in criminals a sense of accountability for what they have done.<sup>24</sup>

The changes introduced mechanisms that could be used to drastically reduce the use of incarceration, codifying several alternatives to incarceration for those convicted of committing *Criminal Code* offences. Three main provisions make up the new sentencing regime, and interact to provide several avenues for the application of restorative justice principles. They are described in some detail below.

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<sup>22</sup> *Ibid.*

<sup>23</sup> *R. v. Gladue* [1999] 1 S.C.R. 688 at 702.

<sup>24</sup> Minister of Justice Allan Rock, House of Commons Debates, vol. IV, 1<sup>st</sup> Sess., 35<sup>th</sup> Parl. at 5873.

Following the 1996 reforms, the federal Liberal government continued to focus on and support restorative justice. For example, in its 1999 Speech from the Throne, the federal government launched a further national restorative justice program, with a focus on victims of crime rather than offenders.<sup>25</sup> In 2000 the federal Department of Justice (Policy Centre for Victim Issues) represented Canada at the United Nations, playing a key role at the UN Human Rights Committee in drafting the *United Nations Basic Principles on Restorative Justice*, and the *Restorative Justice Resolution*, which are intended to establish standards for restorative justice programs globally.<sup>26</sup> In 2004 then federal Minister of Justice, Irwin Cotler, declared during federal restorative justice week:

Restorative justice represents a fundamental – and ultimately progressive – shift in how we view a criminal act. No longer should we only view crime as an act against the faceless state, but one done against an individual and a community – in other words, those personally harmed by the wrongful act. As a result, victims are provided with the opportunity to obtain recognition and validation of their experiences, while offenders are encouraged to take responsibility for their actions.<sup>27</sup>

The election of Stephen Harper's Conservatives in 2006 to a minority federal government has seen a rise in 'tough on crime' rhetoric,<sup>28</sup> much of which is antithetical to the values and practices of restorative justice. During their first term, the Conservatives held minority status in the House of Commons, making wholesale criminal law reform impossible. However, the Conservatives have recently won a majority government,

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<sup>25</sup> Jo-Anne Wemmers & Marisa Canuto, "Victims' Experiences with, Expectations of and Perceptions of Restorative Justice: A Critical Review of the Literature" (Ottawa: Policy Centre for Victim Issues, 2000) at 1.

<sup>26</sup> Canada, "Summative Evaluation of the Survivors of Crime Initiative: Technical Report" (Ottawa: Dept of Justice, 2004) at 46.

<sup>27</sup> Statement of the Honourable Minister of Justice Irwin Cotler, Statement on Restorative Justice Week 2004, <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2004/doc\\_31282.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2004/doc_31282.html)>.

<sup>28</sup> For details of this agenda see the current federal government's web page, online: <<http://www.tacklingcrime.gc.ca/index-eng.aspx>>.

which will allow them to pass extensive changes to the *Criminal Code*, possibly erasing the Liberal legacy of restorative justice reform.<sup>29</sup>

Despite its tough-on crime rhetoric, and many funding cuts to progressive and equality-seeking groups across Canada,<sup>30</sup> the current Conservative government continues to fund many restorative justice programs in a variety of ways. This may change in the coming year. For now the Department of Justice has primary responsibility for restorative justice, and delegates this authority to several of its branches. The Aboriginal Justice Directorate (AJD) co-funds (with provinces and territories) community-based Aboriginal justice projects. The AJD administers the Aboriginal Justice Strategy, which is a primary funder for many restorative justice programs run on-reserve in Aboriginal communities. The Policy Centre for Victim Issues co-funds (with provinces and territories) victim advocacy programming and compensation, including for victims of crime participating in restorative justice programs. Other federal programming includes restorative justice programs during and after incarceration run by Corrections Canada. Corrections Canada has a restorative justice branch, which celebrates Restorative Justice Week that was marked in 2008 by 165 cities across Canada.<sup>31</sup>

Due to the constitutional division of powers, the federal government makes criminal legislation (in the form of the *Criminal Code*), while the provincial/territorial governments administer it. This means that restorative justice programs that are created by a federal statute are funded, administered, and monitored differently from one

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<sup>29</sup> For a full list of criminal justice reforms to date please see Chapter one at 69.

<sup>30</sup> See for example: cutting the court challenges program, a federally funded program designed to provide free legal assistance to equality-seeking groups. See: Tracey Taylor, "The Charter's Challenges" *The Toronto Star* (7 April 2007).

<sup>31</sup> Online: <[www.csc-scc.gc.ca/text/rj/rj2009/lett.eng.shtml](http://www.csc-scc.gc.ca/text/rj/rj2009/lett.eng.shtml)>.

province or territory to the next. This variability is accentuated by interprovincial/territorial differences in funding and accessibility to victims' services, crime prevention strategies, and court-related resources. Restorative justice looks incredibly different from one province or territory to the next; even geographical differences within provinces and territories (especially in the North) can shape wildly differing restorative justice programming. In the final section of this chapter I describe British Columbia's particular experience with restorative justice. I focus on the Lower Mainland, including the greater urban area of Vancouver, Surrey, Whalley, White Rock, and North Vancouver.

### **Contemporary Restorative Justice Models and Practices**

The following describes the models of restorative justice in use in Canada today, all of which deal with cases of intimate violence. The chart (Figure 1) outlines the models in an abbreviated format. In most cases the funding and administration of restorative justice programs are shared between the federal and provincial/territorial governments, although in most cases provincial/territorial governments have more day-to-day control than their federal counterparts, who generally provide more funding.

*Figure 1: Restorative Justice Practices in Canada*

<b>Legal Basis</b>	<b>Restorative Justice Model</b>	<b>Parameters</b>
<b>Common law/<i>Criminal Code</i></b>	* Judicially convened sentencing circle	Conducted by sentencing judge following a plea or finding of guilt.

<p><b>Negotiated Protocols</b></p>	<p>*Hollow Water Community Holistic Healing Program</p> <p>Aboriginal Legal Services of Toronto Community Council Program</p> <p>Aboriginal Ganootamaage Justice Services of Winnipeg</p> <p>*Fraser Regional Community Justice Initiatives Association</p>	<p>Pre-charge sentencing and healing circles for offender, victim and community.</p> <p>Pre-charge diversion, community counsel directs healing.</p> <p>Pre-charge diversion, community counsel direct healing.</p> <p>Victim-Offender Reconciliation</p>
<p><b><i>Criminal Code</i></b></p>	<p>*<i>Alternative Measures s.716</i></p> <ul style="list-style-type: none"> <li>• Designed and administered by individual provinces and territories</li> <li>• Can be pre or post charge</li> <li>• Designed to be extra-judicial.</li> </ul>	<p>Usually pre-charge, apology letters, community service.</p>

	<p><i>*Conditional Sentences s.742</i></p> <ul style="list-style-type: none"> <li>• Sentencing option within judicial process.</li> </ul>	<p>May include: sentencing circles</p> <p>House arrest</p> <p>Aboriginal spirituality</p> <p>Community service</p>
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\* denotes cases of intimate violence accepted.

In the context of my own research, the only model of restorative justice that is touched upon is Alternative Measures, and (as outlined in the introduction) many research participants confused this model of restorative justice with a ‘peace bond’ (or a recognisance under s. 810 of the *Criminal Code*). Although Chapters Four and Five do treat Alternative Measures to an extent, the primary analysis is not of restorative justice *per se*; rather it is of the implications of this confusion, the actual justice practices deployed *instead* of restorative justice, and their impact on survivors of intimate violence.

#### **a) Basic Structures**

Restorative justice models can be used to deal with both adults and youth offenders.<sup>32</sup>

Restorative justice principles can be used at various stages of an offender’s involvement in the justice system. According to a meta-analysis of Canadian restorative justice

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<sup>32</sup> For discussion of restorative justice models in the context of youth offenders see: Dawn Wilkinson, “Central Okanagan Restorative Justice” (Vancouver: The Canadian Bar Association of British Columbia, Criminal Law Section, 2001); Timothy Hayes & Richard Wortley, “Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot” (Brisbane, Australia: Queensland Department of Justice, Juvenile Justice Branch, 1998).

practices by Jeff Latimer, a government policy analyst, "...there are five identified entry points into the criminal justice system where offenders may be referred to a restorative justice program:

1. Police (pre-charge)
2. Crown (post charge)
3. Courts (pre-sentence)
5. Corrections (post sentence)
6. Parole (pre-revocation)"<sup>33</sup>

This spectrum means there are numerous possible ways for survivors of intimate violence to participate in restorative justice processes, including those options that require face-to-face meetings with the abuser at various stages, or that allow a complete absence of personal involvement between the survivor and the offender.<sup>34</sup>

Restorative justice processes can take place prior to (or in lieu of) laying criminal charges,<sup>35</sup> or following the laying of charges but before a court hearing.<sup>36</sup> Restorative justice models such as victim-offender mediation may be offered in conjunction with an on-going court process, or at any stage of the offender's involvement in the criminal justice process. Restorative justice also operates after a guilty plea (or finding of guilt in a trial) to inform the sentencing of an offender.<sup>37</sup> Finally it may be used in an attempt to

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<sup>33</sup> Jeff Latimer, Craig Dowden, & Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (Ottawa: Research and Statistics Division, Department of Justice, 2001).

<sup>34</sup> Kathleen Daly, "Restorative Justice and Sexual Assault" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 62 at 67.

<sup>35</sup> As in cases of diversion.

<sup>36</sup> In this case legislation generally provides judicial discretion to drop charges upon the completion of certain conditions.

<sup>37</sup> Sentencing circles and conditional sentencing for example.

rehabilitate offenders in prison,<sup>38</sup> or in anticipation of and following their release from prison.<sup>39</sup>

***b) Federal Legislation: Bill C-41***

With few exceptions, changes wrought to the *Criminal Code* in 1996 remain in place, providing a federal legislative underpinning for restorative justice practices.

*i. Section 718: The Purposes and Principles of Sentencing Generally*

Section 718 encodes the purposes and principles of sentencing including several 1996 additions that clearly reflect a ‘restorative’ approach to sentencing. They are (in the order they are found in the legislation): denouncing unlawful conduct, specific and general deterrence, separation of offenders from society where necessary, the rehabilitation of offenders, reparation of harm to the survivor or community, and the promotion of a sense of responsibility in offenders, and acknowledgement of harm done to survivors and the community.

Separately, s. 718.1 lists proportionality as the “Fundamental Principle” of sentencing. This principle dictates, “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 (b) also emphasizes that similar sentences should be imposed upon similar offenders for similar offences, although this is not included as a ‘fundamental’ principle. As some commentators have observed,

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<sup>38</sup> See for instance: Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 103; Lila Rucker, “Peacemaking in Prisons” in Harold Pepinsky & Richard Quinney, eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 172.

<sup>39</sup> Community-assisted hearings are allowed by the National Parole Board, sometimes resulting in the conditional release of an offender into the community under sections 79 to 84 of the *Correction and Conditional Release Act*, R.S. 1992, and c. 20.

there is a tension between the restorative justice principle of flexible, individualized justice, and the fundamental *Criminal Code* sentencing principle of proportionality.<sup>40</sup>

Section 718.2 discusses “Other Sentencing Principles” and mandates that aggravating or mitigating factors be taken into account in reducing or increasing a sentence. Notably, for my project aggravating factors include evidence of spousal or child abuse, and evidence of an abuse of authority or trust. These are listed alongside crimes committed out of bias or hatred based on sex, race, religion, age, sexual orientation etc. This provision clearly highlights the criminal nature of intimate violence, and is a strong public statement that it is considered morally and socially reprehensible. By including intimate violence alongside grounds that are protected in the *Charter*, and federal and provincial human rights legislation, Parliament has underlined intimate violence as a particularly serious criminal behavior, and that states that such behaviour makes any offence more serious (‘aggravating’).

Sections 718.2 (c) through (e) seek to provide principles which may, on the other hand, mitigate a sentence. Section 718.2 (d) specifies that incarceration should be used only if “less restrictive sanctions” are inappropriate. Section 718.2 (e) goes further to state that:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

These provisions regarding aggravating and mitigating factors espouse internally conflicting goals. On one hand Parliament is condemning intimate violence alongside

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<sup>40</sup> See Bruce Archibald, “Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (With Ruminations on Restorative Justice) [1998] 40 *Crim. L.Q.* 263; Carol LaPrairie & Jane Dickson-Gilmore, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 46.

hate crimes and human rights violations, yet in s. 718.2 (e) certain offenders, regardless of their crime, are to be considered for less punitive sanctions. Of particular importance to this dissertation is that the *Criminal Code* gives us very little guidance on how to reconcile intimate violence as an aggravating factor in sentencing, with special consideration for Aboriginal or other marginalised offenders in circumstances where such offenders have committed crimes involving intimate violence.

*ii. Alternative Measures*<sup>41</sup>

Alternative Measures were introduced as part of the federal government's sentencing reform under Bill C-41. Section 717 of the *Criminal Code* allows for "Alternative Measures" for all offenders who meet the criteria as set out in those provisions.

Alternative Measures are defined in section 716 as "...measures other than judicial proceedings under this *Act* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence." This definition is very broad, and encompasses many models and initiatives that function outside of judicial proceedings; including sentencing circles and diversion programs.

Some restrictions are placed upon the use of Alternative Measures, and these are listed in sections 717 (1), (2) and (3). Specifically these include that:

(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate...

(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the survivor;

...

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<sup>41</sup> Included in this list are Family Group Conferences, described in Chapter Two, although I do not repeat that information here.

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

...

Pursuant to provincial constitutional jurisdiction over the administration of justice, each province or territory designs and administers their own Alternative Measures program. Each province or territory maintains its own policies regarding the use of Alternative Measures in cases of intimate violence, designates funds to support the programs, and chooses the model to be employed. The manner in which a particular province or territory administers, and funds such programs will in part dictate the experience of survivors of intimate violence in that particular program. Below I provide a detailed description of British Columbia's Alternative Measures programs.

### *iii. Conditional Sentences*

Also introduced under Bill C-41, s. 742 of the *Criminal Code* provides for the imposition of a conditional sentence. A conditional sentence differs from Alternative Measures in that it is the result of a judicial process. A conditional sentence of imprisonment must be for a term of less than two years, and it is served in the community under conditions imposed by the sentencing court. The Supreme Court of Canada has asserted that the conditional sentencing regime calls for a rebalancing of the purposes and principals of sentencing, towards a more 'restorative' result. In the case of *R. v. R (RA)*<sup>42</sup> the Supreme Court stated:

The amendments to the *Criminal Code* entitled the Court of Appeal to re-weigh the objectives of denunciation, deterrence and rehabilitation in light of the new emphasis on restorative objectives, and to consider the possibility of imposing a conditional sentence.

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<sup>42</sup>[2000] 140 C.C.C. (3d) 523 (S.C.C.). See also *R. v. S (RN)* [2000] 140 C.C.C. (3d) 553 (S.C.C.).

I include conditional sentencing as a restorative justice model for this, and other reasons.<sup>43</sup> Section 742.3 outlines a number of conditions that are compulsory, however the sentencing judge may add additional conditions that specifically address the offence or the needs of the offender. Such additional conditions may include alcohol and drug counseling, community service or traditional Aboriginal justice or spiritual practices.<sup>44</sup>

#### **a) The Sentencing Circle**

Some of the first instances of the application of restorative justice as an identifiable principle within the Canadian criminal justice system were by white activist judiciary in northern Canada in the early 1990s. As these judges visited Northern communities for circuit court they often encountered recidivist Aboriginal offenders.<sup>45</sup> Several of these judges expressed frustration at the apparent inability of the criminal justice system to address the needs of these offenders. They also expressed alarm at the number of

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<sup>43</sup> First, it was included in Bill C-41 as part of the federal government's restorative approach. Carol LaPrairie & Julian Roberts, "Conditional Sentencing in Canada: An Overview of Research Findings" (Ottawa: Solicitor General Canada, 2000) at 1-2. Second, conditions imposed particularly on Aboriginal offenders are of a restorative nature as described by restorative justice advocates. Third, Canadian case law such as *Gladue, infra* discusses conditional sentencing in the context of restorative justice principles. Finally it is regularly used to deal with extremely serious cases of intimate violence involving women and children survivors. From 1996 to 1999 national statistics show that conditional sentences were used in 1870 cases of sexual assault and 239 cases of 'family violence'. LaPrairie & Roberts, *supra* at 43. For examples of particularly serious cases see: *R. v. Belrose* [2001] B.C.J. No. 1310 (B.C.C.A.) online: QL (B.C.J.); *R. v. Brenton* [2001] N.W.T.J. No. 48 (N.W.T.S.C.) online: QL (N.W.T.J.); *R. v. Lake* [2000] O.J. No. 5082 (Ont. Sup. Ct. (T.D.)) online: QL (O.J.); *R. v. Platonov* [2001] O.J. no. 5156 (Ont. Sup.Ct. Just.) online: QL (O.J.); *R. v. Belez* (2000) O.J. No. 4220 (Ont.Ct. Just.) online: QL (O.J.); *R. v. MIP* (1998) N.B.J. No. 424 (N.B.Ct. Q.B. (T.D.)) online: QL (O.J.). Other commentators have named conditional sentences as a form of restorative justice. See: Patricia Hughes & Mary Jane Mossman, "Rethinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 *Windsor Review of Legal and Social Issues* 91 at 91.

<sup>44</sup> These latter types of provisions are generally imposed only with the support and/or at the suggestion of an Aboriginal offender's community.

<sup>45</sup> Recently non-Aboriginal offenders have been sentenced using sentencing circles, or have requested the use of sentencing circles. Les Perreux, "Survivor Rejects Native Justice for Ex-Offenders" *The National Post* (1 December 2001) National Edition, A8; Heather Sokoloff, "Sentencing Circles Gain Judge's Approval" *The National Post* (15 May 2002) National Edition, A3.

Aboriginal people being sent to prisons in Southern Canada from their courtrooms,<sup>46</sup> prompting judges to employ their common law sentencing powers and invent alternatives to the conventional courtroom procedures, primarily the sentencing circle.<sup>47</sup>

Although judicially convened sentencing circles were in limited use prior to 1992,<sup>48</sup> the case of *R. v. Moses*<sup>49</sup> is widely recognized as the jurisprudential starting point for sentencing circles in Canada. Judge Barry Stuart, as he was then, describes the conduct of a sentencing circle:

Rearranging the court in a circle without desks or tables, with all participants facing each other with equal access and equal exposure to each other dramatically changes the dynamics of the decision-making process . . . The circle breaks down the dominance that traditional courtrooms accord lawyers and judges . . . Community involvement through the circle generates new information about the accused and the community. The circle, by enhancing community participation, generates a richer range of sentencing options and by improving the quality and quantity of information provides the ability to refine and focus the use of sentencing options to meet the particular needs in each case.<sup>50</sup>

This case marked a major departure from conventional sentencing practices by allowing members of the Aboriginal community where a crime took place to discuss sentencing options with the presiding judge in an open forum. As is currently the case in most judicially convened sentencing circles, the community members in *Moses* acted as

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<sup>46</sup> See for instance: Dorothy Harley Eber, *Images of Justice* (Montreal: McGill-Queen's U Press, 1997); Judge Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in Burt Galaway & Joe Hudson, eds., *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996) at 193; Barry Stuart, "Sentencing Circles...Making Real Differences" (Ottawa: Department of Justice, 1996a); Cunliffe Barnett "Circle Sentencing/Alternative Sentencing" [1995] 3 *C.N.L.R.* 1.

<sup>47</sup> Stuart, 1996 and 1996a) *ibid.*

<sup>48</sup> Judge Cunliffe Barnett recounts having used restorative justice methods as early as 1978. Cunliffe Barnett "Circle Sentencing/Alternative Sentencing" [1995] 3 *Canadian Native Law Reporter* 1 at 3.

<sup>49</sup> (1992) 71 C.C.C. (3d) 347 (Y. Ter. Ct.) [*Moses*].

<sup>50</sup> *R. v. Moses* (1992), 71 C.C.C. (3d) 347 (Y. Ter. Ct.) at 347-8.

advisors, while the final decision rested with the sentencing judge. This model has been used in a number of controversial cases involving intimate violence.<sup>51</sup> While judges in cases such as *Moses* relied on their common law powers of sentencing discretion, since 1999 the use of circles by the judiciary is legally supported by the *Gladue*<sup>52</sup> case.

### **b) Negotiated Protocols**

While most restorative justice programs in Canada function under the auspices of federal legislation, several initiatives have been created under negotiated protocols that do not fall within the purview of the *Criminal Code*. Negotiated protocols are agreements between Aboriginal or faith groups and local Crown Attorney's offices that allow those groups to take significant responsibility for offenders from the police and Crown.

The Aboriginal Justice Directorate is a federal government branch that funds and supervises community-based justice programs in Aboriginal communities. The Directorate partners with provinces and territories in supporting many programs run under the auspices of negotiated protocols. For instance the Hollow Water program in Manitoba and the Tsuut'ina program are both funded in part by the Directorate.<sup>53</sup>

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<sup>51</sup> See for instance: *R. v. Naappaluk* [1994] 2 C.N.L.R. 143 (Q.C. (Crim Div.);, *R. v. Johnson* [1994] 91 C.C.C. (3d) 21 (Y. Terr. Ct. App.); *R. v. Bennett* [1992] Y.J. No. 192 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. Charleyboy* [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) online: Q1 (B.C.J.); *R. v. Green* [1992] Y.J. No. 217 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. D.N.* [1993] Y.J. No. 193 (Y. Terr. Ct.) online: QL (B.C.J.); *R. v. S.E.H.* [1993] B.C.J. No. 2967 (B.C. Prov. Ct.(Crim. Div.)) online: QL (B.C.J.); *R. v. Seymour* [1989] M.J. No. 273 (Man. Prov. Ct. (Crim. Div.)) online: QL ( M.J.); *R. v. Clement* [1994] B.C.J. No. 1247 (B.C. ProvCt.(Crim.Div)) online: Q1 (B.C.J.); *R. v. Taylor* [1995] 104 C.C.C. (3d) 346 (Sask. C.A.).

<sup>52</sup>[1999] 1 S.C.R. 688 [*Gladue*]. While technically dealing with conditional sentences, this case has been cited extensively to support the use of other restorative justice models, including alternative measures and sentencing circles.

<sup>53</sup> Canada, "Aboriginal Justice Strategy Annual Activities Report 2002-2005" (Ottawa Department of Justice, 2005) at 26 and 19. The mingling of provincial and federal funding and oversight creates difficulties at the programming level. See for instance: Mandy Young, "Aboriginal Healing Circle Models Addressing Child Sexual Assault" (Sydney: Winston Memorial Churchill Trust of Australia, 2006) at 28.

The Hollow Water sexual offender circle is one such initiative. It exists by virtue of a written protocol between the Manitoba Department of Justice and a group of professionals and volunteers formed to address the issues of intergenerational sexual abuse and intimate violence in that community (hereinafter the Community Holistic Circle Healing Program or 'CHCH'). The protocol was not initiated under any provisions of the *Criminal Code* or other pre-charge diversion initiatives described below. Instead it allows the community to determine a treatment program for offenders. The criminal justice system is involved only to receive a plea of guilty, or if there is a trial (which the CHCH attempts to avoid), and in a secondary supervisory role through probation officers after the community-based sentence has been passed.

Other restorative justice programs that fall under the auspices of negotiated protocols are the Aboriginal Legal Services of Toronto Community Council Program,<sup>54</sup> the Aboriginal Ganootamaage Justice Services of Winnipeg,<sup>55</sup> and the Fraser Region Community Justice Initiatives Association.<sup>56</sup>

### **Restorative Justice and Intimate Violence in British Columbia 1995-2010**

At a general level like their Liberal federal counterparts, the New Democratic (NDP) government of British Columbia embraced the policy and practice of restorative justice in the 1990s. British Columbia is among many provinces including Saskatchewan, Alberta,

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<sup>54</sup> Protocol Between Aboriginal Legal Services of Toronto and the Crown Attorney's Office of Toronto with Regard to the Community Council Program, online, <<http://www.aboriginallegal.ca>> (date accessed July 2011)

<sup>55</sup> Kathy Mallet, Kathy Bent & Dr. Wendy Josephson, "Aboriginal Ganootamaage Justice Services of Winnipeg (AGJSW)" in Jocelyn Proulx & Sharon Perrault, eds., *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood and Resolve) 2000 at 62.

<sup>56</sup> See online: <<http://www.nicr.ca:8080/Org.asp?id=18019>>, National Institute of Conflict Resolution & Dave Gustafson, "Mediation Can Make Communities Safer" (Presentation at conference in *Restorative Justice; Four Community Models* organized by Saskatoon Community Mediation Services and the Mennonite Central Committee Ministry in Saskatoon, Saskatchewan, 17-18 March, 1995.

Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island, and Manitoba, to have made public declarations adopting restorative justice as official policy.<sup>57</sup> A decade ago British Columbia had more than 60 restorative justice programs operating in that province alone.<sup>58</sup> A conservative estimate in 2010 put the number closer to 80.<sup>59</sup>

Unlike many other provinces/territories British Columbia had a restorative justice policy of sorts even before the major federal legislative overhaul in 1996.<sup>60</sup> British Columbia's *Alternative Dispute Resolution Policy Statement* issued in May of 1995 included reference to increasing the use of 'ADR' in both civil and criminal cases. This included adult and youth diversion throughout the province, and supporting the development of victim-offender reconciliation programs.<sup>61</sup> It is worth noting that the policy statement declares that best practices would dictate "...dispute resolution processes be structured to balance power inequities between parties."<sup>62</sup> This ungendered recognition of the potential for power imbalances in non-judicial processes is the pre-cursor to much more explicit language in later incarnations of this document, recognising the dangers of gendered power imbalances in 'ADR' and restorative justice processes.

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<sup>57</sup> See: Carol LaPrairie, "Understanding Restorative Justice" (2001) [unpublished]; "Manitoba Looks at Expanding Alternative Justice in Criminal Cases", *St. John's Telegram* (2 September 2001) A5; "Summerside Supports Inquiry Dealing with Family Violence", *The Charlottetown Guardian* (1 September 2001) A3; Reintegrating Offenders into Society", *St. John's Telegram* (20 November 2001) A5.

<sup>58</sup> Dawn Wilkinson, "Central Okanagan Restorative Justice" (Vancouver: The Canadian Bar Association of British Columbia, Criminal Law Section, 2001) at 1.

<sup>59</sup> British Columbia, "An Informal Directory of Restorative Justice Programs, Agencies and Contacts" (Vancouver: Restorative Justice BC, 2010)

<sup>60</sup> British Columbia, "Alternative Dispute Resolution (ADR) policy Statement" (Victoria: Minister of Attorney General, May 1995)

<sup>61</sup> *Ibid* at 3.

<sup>62</sup> *Ibid* at 2.

In British Columbia it took only two years for the then NDP government to begin administering restorative justice as laid out in the federal *Criminal Code* in 1996.<sup>63</sup> Leading up to the 1998 launch of its full-fledged restorative justice program, the government released a series of discussion documents for public perusal and feedback. These included: “*Safer Communities for British Columbia*”,<sup>64</sup> “*Strategic Reforms of BC’s Justice System*”, and “*A Restorative Justice Framework*”.<sup>65</sup> The first two introduced the basic concepts behind restorative justice as interpreted by the government of the day, and announced that these principals were to be integrated into the justice system in British Columbia. The latter outlines the values, frameworks, and specific policies to be used in implementing restorative justice. In 1998 the NDP government rolled out two kinds of restorative justice programs: community accountability programs (CAPs) and an Alternative Measures programs.<sup>66</sup>

### ***Community Accountability Projects***

CAPs, which are run by volunteer citizens groups, were introduced to increase community involvement in the justice system. The guidelines and programming have remained similar from 1998 to 2010, with the major exception of what kinds of crimes

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<sup>63</sup> The reforms to British Columbia’s criminal justice system were simultaneously introduced with family and civil law reform mandating “collaborative dispute resolution” and mediation techniques. Both criminal and civil reforms were administered by The Dispute Resolution Office of British Columbia. See Online: <<http://www.ag.gov.bc.ca/dro/index.htm>>.

<sup>64</sup> British Columbia “Safer Communities for British Columbia: A Report to British Columbians from Attorney General Ujjal Dosanjh” (Victoria: Ministry of the Attorney General, Sept. 1997).

<sup>65</sup> British Columbia “A Restorative Justice Framework: British Columbia Justice Reform” (Victoria: Ministry of the Attorney General, January 1998) online: <<http://www.ag.gov.bc.ca/public/98001.htm>> (date accessed: January 2001), and British Columbia, Ministry of the Attorney General, News Release, “Family Justice Initiatives and Legal Changes Announced” (February 6, 1997) online <<http://www.ag.gov.bc.ca/media/9702feb/06lssja.htm>> (date accessed: October, 2000).

<sup>66</sup> Technically the CAP program is a subset of the Alternative Measures program, but is dealt with separately because it has been consistently operated under its own programs, guidelines, and protocols, particularly in relation to cases of intimate violence. British Columbia, Ministry of the Attorney General, News Release, “Community Accountability Programs” (11 November, 1999), online: <[http://www.ag.gov.bc.ca/media/9911nov/community\\_accountability.htm](http://www.ag.gov.bc.ca/media/9911nov/community_accountability.htm)> (date accessed: October 2000.) see below for more details.

CAPs can deal with. In 2010 CAPs are no longer permitted to accept referrals for sexual assaults, spousal assaults, or hate motivated crimes.<sup>67</sup> This dissertation does not examine data collected in CAP programs.

### *Alternative Measures*

The second stream of restorative justice in British Columbia is “Alternative Measures” which falls under s. 717 of the *Criminal Code*.

In the 1990s Alternative Measures officially diverted only “low-risk, less serious” offenders who were to be subject to guidelines for admission to the programs available. These guidelines were drafted by the office of the Attorney General in *Restorative Justice: A Framework for the Ministry*. Alternative Measures were to be used only where “...the charge meets the province’s standard for prosecution...”<sup>68</sup> However, pursuant to s. 717, charges were not to be formally laid except at the discretion of a judge in the case of a breach. Both Crown and police were able to refer to Alternative Measures programs. Throughout the 1990s these programs were administered by organizations such as the Elizabeth Fry Society and the John Howard Society, through contract probation officers.<sup>69</sup> For-profit contractors also extensively administered Alternative Measures in British Columbia, using primarily non-restorative approaches such as letters of apology and community service orders.<sup>70</sup>

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<sup>67</sup> Ministry of Public Safety and Solicitor General, “Restorative Justice”, Online: Community Safety and Crime Prevention <<http://www.pssg.gov.bc.ca/crimeprevention/justice/index.htm#cap>>.

<sup>68</sup> Fact Sheet, *supra* note 65 at 2.

<sup>69</sup> *Ibid* at 2.

<sup>70</sup> Patricia Kachuk, “Violence against Women in Relationships: An Analysis of Policies and Actions” (Vancouver: the FREDa Centre for Research on Violence Against Women and Children, 1998) at 14. Companies such as Transformative Justice Australia provide facilitator training and contractors to administer the alternative measure programs in British Columbia.

Policy changes in 2003 (see below) that are still in place, brought about procedural changes within alternative measures programs. Starting in 2003 the provincial government began drawing a line between the practices of ‘diversion’, and ‘Alternative Measures’. Diversion applies to criminal acts where there is no charge pending whatsoever, and is primarily performed by Crown Attorneys. Alternative Measures refers to criminal acts where charges are, or can be, laid. Referrals to Alternative Measures are to be made only by Crown, and only to programs that have been certified by the Attorney General under s. 717 of the *Criminal Code*. The Crown can only refer a person once they are assured that the ‘charge approval standard’ has been met.<sup>71</sup>

Once a person is referred to an Alternative Measures program Corrections assumes all responsibility for administration, evaluation, and implementation of their programming and supervision. This is achieved through the supervision of parole and probation officers, and through reporting by any participating community service organisations.<sup>72</sup>

Corrections monitors the referred person and refers them back to the Crown for non-compliance and charges if necessary.

### **British Columbia’s Anti-Violence Movement**

British Columbia’s active women’s anti-violence movement has publicly critiqued the use of restorative justice in cases of intimate violence from the start of these legal and policy reforms in 1996. That year the provincial government announced major changes to the administration of criminal justice (which would include restorative justice) in November, hot on the heels of the federal reforms. Throughout 1997, before restorative justice practices were fully introduced in British Columbia, the women’s anti-violence

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<sup>71</sup>*Ibid* at 11.

<sup>72</sup>*Ibid* at 7.

community took extensive action to let the provincial government know their concerns regarding the use of restorative justice in cases of intimate violence. The government's response was an incoherent amalgam of public platitudes and directly conflicting policy objectives and programs, reflecting the dissonance between the strong pull of federally mandated restorative justice, and the pro-arrest/prosecution stance of anti-violence feminists. This kind of incoherence, I argue, also characterises the current justice responses to intimate violence outlined in Chapters Four and Five. There are remarkable similarities between the conflicting policies and procedures put in place in 1997, and the current justice practices relating to intimate violence, despite a change in government and an ostensible overhaul of the charging mechanisms used in such cases in 2003.

### **Violence against Women in Relationships Policy (VAWIR)**

During the early implementation of the move to restorative justice the conduct of cases of intimate violence within the criminal justice system were governed by a provincial policy entitled *Violence Against Women in Relationships*. This policy was a comprehensive, feminist inspired document that represented the strong advocacy of the provincial women's anti-violence movement. The *Violence against Women in Relationships* policy was preceded in British Columbia, in 1984 by the (gender specific) "Wife Assault Policy", which introduced Pro-arrest and prosecution policies to British Columbia.<sup>73</sup> From 1984 to 1998 three major revisions were undertaken,<sup>74</sup> and a fourth is underway in 2012. In all three iterations, extensive references are made to the importance of services

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<sup>73</sup> Patricia Kachuk, "Violence Against Women in Relationships: An Analysis of Policies and Actions" (Vancouver: FREDA, 1998) at 1.

<sup>74</sup> *Ibid.* The policy was renamed the *Violence against Women in Relationships* policy in 1993.

to survivors, references that were included due to the advocacy of women's anti-violence organizations.<sup>75</sup>

In 2003, the Justice Branch of the Ministry of the Attorney general, who supervises Crown Attorneys, withdrew from British Columbia's *Violence Against Women in Relationships* policy, changing the way that Alternative Measures were used in cases of intimate violence.<sup>76</sup> As of 2003 the Crown, in considering the use of Alternative Measures in cases of intimate violence, must consult Crown Counsel policy ALT 1 ("Alternative Measures for Adult Offenders") and Crown Counsel Policy SPO 1 ("Spouse Assault"). In contrast to the VAWIR's emphasis on the importance of resources and services to the survivor aside from prosecution, the Crown policy on Spouse assault notes only that "[a]ll victims should be advised of the availability of victims' services."<sup>77</sup>

A great deal of Chapter Four is dedicated to the implications of this policy and procedure shift. However, the upshot has been that Crown have very broad discretion, and that since 2003, they have been directed by the provincial government to make greater use of alternatives to incarceration. Under the Spousal assault policy, Crown are to consider Alternative Measures only after a probation officer's risk assessment and are also prompted to consider an application for a recognisance under s. 810 of the *Criminal Code* instead of referring an abuser to Alternative Measures. My data confirms this, showing that Crown use peace bonds rather than Alternative Measures as their preferred

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<sup>75</sup> Kachuk, *supra* note 73 at 14.

<sup>76</sup> The *Violence Against Women in Relationships* policy (VAWIR) is currently being expanded and updated, with the most recent draft circulated in June of 2010. The Ministry of the Attorney general supports its use, but continues to keep Crown attorneys from being subject to it. Crown are to continue to 'refer to SPO 1 for specific policy guidance.' (at 21) This newest version of VAWIR also specifically refers to s. 810 recognisance orders as a viable option to alternative measures.

<sup>77</sup> Crown Counsel Policy Manual, "SPO 1 Spousal Assault" at 7.

alternative to prosecution. It is worth noting, however, that even before Crown's 2003 policy change, British Columbia studies found that almost 50% of charges were stayed in domestic violence cases, which was inconsistent with Ministry policy, and that twenty percent of these stays were in combination with a peace bond. In other words, even before the direction to reduce the use of prosecution in cases of intimate violence, about half of these cases were not prosecuted.<sup>78</sup> Chapters Four and Five discuss the role of the s. 810 recognisance in relation to Alternative Measures in detail.

### ***Early Implementation***

The early implementation of restorative justice marks the beginning of a decline in feminist influence on provincial policy-making around violence against women, which had reached a high water mark with the *VAWIR*.

In February of 1997, the provincial government held a workshop on the expansion of the use of diversion in British Columbia, as a vehicle for the implementation of the *Criminal Code* amendments. No representative from the women's anti-violence community was invited.<sup>79</sup> According to the workshop materials, "...the current *VAWIR* (Violence against Women in Relationships) policy states that police should not recommend diversion in cases of violence within a relationship."<sup>80</sup> However, a closer reading of the materials reveals that spousal assault and violence against women in relationships (category 2 offences) could be diverted to Alternative Measures in "exceptional circumstances".<sup>81</sup> In April of 1997, following a request from a coalition of women's anti-violence

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<sup>78</sup> Darryl Plecas, Tim Segger & Lauren Marsland, *Reticence and Re-Assault Among Victims of Domestic Violence in Abbotsford, BC*. (Victoria, BC: Ministry of Attorney General, 2000).

<sup>79</sup> British Columbia "Workshop on the Expansion of Diversion in BC, February 11-12, 1997: Discussion Guide" (Victoria: Ministry of the Attorney General, 1997)

<sup>80</sup> *Ibid* at 3.

<sup>81</sup> *Ibid* at 6.

organisations, the provincial government, through the Victims Services Branch, shared the proceedings of the conference with them for the first time.<sup>82</sup> That same month the provincial government officially released “*Strategic Reforms of British Columbia’s Justice System*”<sup>83</sup>, in which the Attorney General claims to have:

Responded to concerns about violence against women by updating the ministry’s Violence against Women in Relationship Policy and supporting its implementation.<sup>84</sup>

In June of 1997 the government held a province-wide video networking conference called “Satisfying Justice”<sup>85</sup> with a view to creating a task force to implement restorative justice practices across British Columbia the following year. One representative from the women’s anti-violence community participated. This same month the British Columbia Association of Specialized Victim Assistance and Counseling Programs (an umbrella organisation for many women’s anti-violence groups) published a highly critical research paper, discussing the use of restorative justice in cases of violence, and citing empirical research from other Western jurisdictions to back their concerns.<sup>86</sup>

In July of 1997 a coalition of 10 women’s anti-violence groups<sup>87</sup> wrote to the Attorney General of the day, The Honourable Ujjal Dosannjh, outlining their concerns in a five-

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<sup>82</sup> Letter April 30, 1997 from Rita Buchiwitz, Victims Services, Ministry of the Attorney General to Gail Edinger/Lorraine Stuart, Battered Women’s Support Services” (FREDA fonds).

<sup>83</sup> British Columbia “Strategic Reforms of British Columbia’s Justice System” (Victoria: Ministry of Attorney General, April 1997).

<sup>84</sup> *Ibid* at 5.

<sup>85</sup> “Achieving Satisfying Justice in Your Community: A Video Conference on Restorative Justice Approached June 19-20, 1997” (FREDA fonds).

<sup>86</sup> Sandra Goundry, “Restorative Justice and Criminal Justice in British Columbia: Identifying Some Preliminary Questions and Concerns” (Vancouver, BC Association of Specialized Survivor Assistance and Counseling Programs, 1997).

<sup>87</sup> These included BC-NAC, the Aboriginal Women’s Action Network, Abbotsford Transition House, Battered Women’s Support Services, Carnegie Centre, FREDA Centre for Research on Violence Against Women and Children, South Asian Women’ Centre, Vancouver Rape Relief and Women’s Shelter, Vancouver Status of Women and WAVAW/Rape Crisis Centre.

page letter.<sup>88</sup> These organisations objected to being excluded from the consultations to date, and outlined substantive concerns with the processes and policies around restorative justice and intimate violence as laid out in the province’s plan. Echoing their federal counterparts, this coalition of provincial women’s groups situated their critiques of restorative justice within larger concerns about women’s social and economic inequality, and demanded the provision of basic supports for survivors, such as funding for transition houses, and social services for women leaving abusive relationships. The Attorney General responded by sending the coalition a copy of *Strategic Reforms*, and asking for support in implementing the changes. He did not respond directly to their letter.

In September of 1997 the government released *A Framework for Restorative Justice*,<sup>89</sup> a document similar to the 1995 *Alternative Dispute Resolution Policy*. Like its predecessor policy, the framework notes the possibility for power imbalances in restorative justice processes. The document further states that:

Nothing in this framework is intended to, nor should be taken to rescind, modify or replace existing Ministry policies on Violence against women in Relationships.....<sup>90</sup>

September 1997 also saw the publication of a position paper<sup>91</sup> by the British Columbia/Yukon Society of Transition Houses, detailing the inconsistencies and problems they found with this framework. In particular, the author Valerie Oglov notes

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<sup>88</sup>Letter to the Honourable Ujjal Doasanjh (sic) from Harjit Kaur, Chair NC-NAC Anti-Violence Subcommittee, June 18, 1997 (FREDA fonds).

<sup>89</sup> British Columbia “A Restorative Justice Framework: British Columbia Justice Reform” (Victoria: Ministry of the Attorney General, January 1998) online: <<http://www.ag.gov.bc.ca/public/98001.htm>> (date accessed: January 2001), and British Columbia, Ministry of the Attorney General, News Release, “Family Justice Initiatives and Legal Changes Announced” (February 6, 1997) online <<http://www.ag.gov.bc.ca/media/9702feb/06lssja.htm>>(date accessed: October, 2000).

<sup>90</sup>Page 2 at note 1.

<sup>91</sup> Valerie Oglov, “Restorative Justice Reforms to the Criminal Justice System” (Vancouver: BC/Yukon Society of Transition Houses, Sept. 1997).

that despite being subject to the VAWIR policy, and despite the statement that the restorative justice framework should not change this policy, the discretion given Crown and police to divert cases of intimate violence to Alternative Measures was clearly given in the framework.<sup>92</sup> Oglov notes that this women's coalition had already brought instances of restorative justice diversion to the attention of the Attorney General and that the exceptional circumstances under which such a diversion might be allowed were not widely understood by police and Crown, and had not been applied in the cases mentioned.<sup>93</sup> Essentially, the province's policy guidelines created a contradiction: in some documents it was implied that police should not divert to Alternative Measures at all in cases of intimate violence. A closer reading showed that 'under exceptional circumstances' had been left undefined; and at the discretion of police and Crown such cases could be diverted. Women's anti-violence organisations claimed that some of these cases had already, in fact, been diverted. The policies were unevenly applied across the province, and even provincial justice officials were unclear not only on whether cases of intimate violence were being diverted, but even on what the policy itself allowed.

This was further complicated by the provisions of the *Criminal Code* dealing with the collection of statistics on Alternative Measures. Such collection was (and is) permissible, but not mandated. It is unclear whether or not the province kept statistics on Alternative Measures, and even more hazy as to whether numbers were kept on diverted cases of intimate violence.

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<sup>92</sup> Oglov, *ibid* at 4

<sup>93</sup> Oglov, *supra* note 91 at 7.

October of 1997 saw the publication of the BCASVAP newsletter, dedicated entirely to the topic of restorative justice and intimate violence in British Columbia.<sup>94</sup> Again the women's anti-violence movement called upon the provincial government to consult with them, and especially with Aboriginal women in the planning and implementation of these practices. The full roster of restorative justice programming in British Columbia (as described above) was up and running in early 1998, including mechanisms by which to divert cases of intimate violence.

In 1998, Bishop Hubert O'Connor escaped a third trial for the sexual abuse of Aboriginal women (then girls) under his care in British Columbia residential schools, by participating in a healing circle.<sup>95</sup> The assistant deputy minister claimed that this was a unique circumstance, and that Alternative Measures would not normally have been considered.<sup>96</sup> The women's anti-violence community, headed by Aboriginal women's groups, were horrified and enraged by the use of Alternative Measures in this case. A spokesperson for the BC/Yukon society of transition houses stated "...the underlying message that is now being conveyed to women of BC is that sexual assault and violence against women are no longer being taken seriously by our government."<sup>97</sup> Thus began a concentrated, grassroots movement of women to intervene in and critically examine the restorative justice practices that had so suddenly become a permanent part of the legal landscape in cases of intimate violence.

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<sup>94</sup> Newsletter of the BCASVACP, Fall 1997.

<sup>95</sup> Suzanne Fournier & Barbara McLintock, "Healing or Vicious Circle? Furor rises over native rite that freed Bishop Hubert O'Connor from a third rape trial" *The Province* (19 June 1998).

<sup>96</sup> *Ibid.* Although by 1998 alternative measures was in full swing, and was diverting cases of violence against women in relationships, and sexual assault.

<sup>97</sup> *Ibid.*

I am personally implicated in this history. I moved to British Columbia in the summer of 1999 to pursue my Masters of Laws degree, wanting to examine whether restorative justice was an appropriate response to violence against women. Through feminist faculty at the UBC Faculty of Law, I began paid and volunteer work for various women's anti-violence groups who were concerned about restorative justice practices.<sup>98</sup> I was incredibly privileged to begin volunteer work as an ally with the Aboriginal Women's Action Network (AWAN), an alliance of feminist Aboriginal women who were deeply concerned about the use of restorative justice in cases of intimate violence in Aboriginal communities. They were determined to conduct empirical research in British Columbia's remote, rural, Aboriginal territories, and wanted to speak with Aboriginal women about restorative justice. I had the great honour to assist them in crafting a grant application to the Law Foundation of British Columbia, from which they received a \$500,000 grant to study the implications of restorative justice from the perspective of Aboriginal women.<sup>99</sup>

During the time that AWAN conducted their research, the provincial government changed. In May of 2001 the British Columbia Liberal party won the provincial election, defeating the NDP. From 2001 to 2003, policy and practice in the area of Alternative Measures in cases of intimate violence and sexual assault was in flux.<sup>100</sup>

In 2002, Attorney General Geoff Plant acknowledged that "[t]he criminal justice branch is indeed looking at policy around the criminal practice of British Columbia..."<sup>101</sup> He

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<sup>98</sup>See for instance: Angela Cameron, "Restorative Justice and Intimate Violence: A Critical Review of the Literature" (Vancouver: British Columbia Institute against Family Violence, 2005).

<sup>99</sup>See: Aboriginal Women's Action Network, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley & Fay Blaney (Vancouver: AWAN, 2001).

<sup>100</sup> See "Spousal Abuse: How Best to Arrest?" *The Province* (6 June 2002) A20.

<sup>101</sup> British Columbia, Legislative Assembly, *House of Commons Debates* (30 May, 2002) at 1425.

maintained that the suggested changes were merely a ‘policy review’. In fact, he “...welcom[ed] the suggestions ...of all British Columbians.”<sup>102</sup> Despite calling for public consultation on diversion in cases of intimate violence, the Attorney General had already ordered Crown prosecutors to increase their use of Alternative Measures, indicating that he “...no longer expects Crown prosecutors to proactively charge in cases of spousal abuse and spousal assault.”<sup>103</sup> This was a huge turn from the *VAWIR*. This not only placed restorative justice as the preferred option for dealing with intimate violence, it undermined British Columbia’s decade old pro-charge policy in such cases. British Columbia women’s anti-violence groups spoke out against the lack of public consultation, and the potential dangers of such a policy shift to survivors of intimate violence.<sup>104</sup> This change in policy took place at the same time as other major policy shifts introduced by the Liberal provincial government; including cuts to welfare rates,<sup>105</sup> social services,<sup>106</sup> and the defunding of women’s advocacy groups.<sup>107</sup>

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<sup>102</sup> *Ibid.*

<sup>103</sup> Interview by CBC Victoria with Diane Turner, Victoria Lawyer (June 6, 2002, 7:14 am) Transcript at 1. See also Press Release: BC Coalition of Women’s Centres, News Release “Gordon Campbell, Geoff Plant in Breach of Public Trust” (May 30, 2002) at 1.

<sup>104</sup> BC Coalition of Women’s Centres, *ibid* at 1.

<sup>105</sup> Andrew McLeod, “Welfare’s New Era: Survival of the Fittest” *The Tyee* (9 July 2004) online: <[http://thetyee.ca/News/2004/07/09/Welfares\\_New\\_Era\\_Survival\\_of\\_the\\_Fittest/](http://thetyee.ca/News/2004/07/09/Welfares_New_Era_Survival_of_the_Fittest/)>; Glen Bohn, “Liberals’ welfare cuts take effect: high rents don’t leave much for other necessities” *The Vancouver Sun* (25 April 2002) B3; Tom Barrett, “Single moms, seniors hit by changes to welfare: Cuts designed to speed parents’ return to the work force” *The Vancouver Sun* (18 January 2002) A4.

<sup>106</sup> Bill Tielman, “Disabled again on BC Liberals’ Hit List” *The Tyee* (9 March 2010) online: <http://thetyee.ca/Opinion/2010/03/09/DisabledBudgetCuts/>; Evan Stewart, *Failed Policies: corporate profits soar, corporate taxes plunge, public services cut*, online: The British Columbia Federation of Labour <<http://bcfed.ca/node/2132>>; Friends of Women and Children in BC, “Cutting Social Supports in the Name of Independence, Self-Sufficiency and Choice: Women and Children with Disabilities in British Columbia” *FWCBC Report Card 2:2* (2003).

<sup>107</sup> Gillian Creese & Veronica Strong-Boag, *Losing Ground: The Effects of Government Cutbacks on Women in British Columbia, 2001-2005*, (Vancouver: BC Coalition of Women’s Centres, The University of British Columbia Centre for Research in Women’s Studies and Gender Relations The B.C. Federation of Labour, 2005), Gina Whitfield, “Campbell’s cruel cuts end era for BC women” *rabble.ca* (30 march 2004) online: <<http://rabble.ca/news/campbells-cruel-cuts-end-era-bc-women>>.

In 2003, the justice branch of the Ministry of the Attorney General withdrew from the *Violence Against Women in Relationship Policy*,<sup>108</sup> while advocating for the use of restorative justice in intimate violence cases where “...the case is not likely to produce a conviction or the survivor is unwilling to testify...”<sup>109</sup> They replaced VAWIR with an in-house spousal assault policy, which emphasized Crown discretion in pushing charges ahead and referral for Alternative Measures.<sup>110</sup> It is under this highly discretionary regime that I conducted my empirical research. The lack of clarity in policy and practice that began in 1998, despite a changed policy regime, persists in the justice system in the Lower Mainland in British Columbia. As I will describe in subsequent chapters, it is still unclear to justice officials what constitutes Alternative Measures, and whether it is indeed applicable in cases of intimate violence. There is no easily discernable policy position either way, making it nearly impossible to count, measure or evaluate Alternative Measures interventions in cases of intimate violence in British Columbia.

There have been several developments of note since 2003. The first is the opening of the Community Court in downtown Vancouver in 2008.<sup>111</sup> This court is designed specifically with restorative justice principles, including a built-in reduction in the use of incarceration. I conducted some of my interviews on intimate violence at this courthouse, although the official policy position is that the Community Court does not deal with cases of intimate violence.

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<sup>108</sup> This policy had been in place in 1984.

<sup>109</sup> The Honourable Geoff Plant, Q.C., “Reforms to Spousal Assault Policy” (2003) 61*The Advocate* 589 at 590.

<sup>110</sup> BC Institute Against Family Violence, “Critical Elements of an Effective Response to Violence Against women; Briefing Document” (2007) at 1.

<sup>111</sup> The Honourable Wally Oppal, “The Attorney General’s Page”, *The Advocate* (May 2009) Volume 67. The Community Court has recently been reviewed for the first time. See: Jeremy Hainsworth, “Vancouver’s Innovative Community Court Evaluated” *The Lawyers Weekly* (1 October 2010) at 3.

Second, the British Columbia government continues to espouse restorative justice principles generally, noting in their 2008-2010 Attorney General Service plan that they would be:

Determining opportunities to integrate restorative justice principles into existing criminal justice responses, with a view toward ensuring offender accountability, survivor satisfaction and community participation in addressing local crime problems.<sup>112</sup>

Finally, in partnership with the federal Aboriginal Justice Strategy, British Columbia is now home to approximately twenty Community-based Aboriginal justice programs, located to serve particular Aboriginal nations. A number of these programs accept cases of intimate violence. Unlike the first generation of Aboriginal justice projects (such as Hollow Water), these programs are not generally conducted under a negotiated protocol with the federal government and local Crown attorney's office. Rather, many are considered part of the province's Alternative Measures programs and are co-funded by the provincial and federal governments,<sup>113</sup> removing some of the certainty in programming and policy reflected in negotiated protocols. These programs now fall under the hazy rubric of Crown discretion brought into play in 2003. The Vancouver Transformative Justice Society, for example, has a federal policy that officially keeps them from taking cases of intimate violence into its restorative justice programs. However, two of my research participants referred to intimate violence cases which had been dealt with by this program through provincial Crown, under the discretion allowed to them under Alternative Measures.

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<sup>112</sup>British Columbia, *2008-2010 Attorney General Service Plan* (Victoria, 2010).

<sup>113</sup> British Columbia, *Restorative Justice Handbook for Crown Attorneys* (Victoria, 2007) at 7.

## **Chapter Four : State Inaction in Cases of Intimate Violence**

### **Introduction**

In the Lower Mainland of British Columbia, particular institutional (mis)understandings of restorative justice have been deployed by successive provincial governments over a period of approximately ten years in ways that have badly skewed the starting place for evaluating restorative practices in relation to intimate violence. This is due in large part to the tension between conflicting views of justice offered by restorative justice, which is entrenched in Canadian and British Columbia law, and feminist political activism advocating the criminalisation of intimate violence. This is reflected in the texts that govern decisions about how cases of intimate violence are dealt with; both pro-arrest/prosecution *and* restorative justice policies exist as options within the justice system in the Lower Mainland.

These conflicting policies reflect an institutional inability or unwillingness to commit fully to either arrest/prosecution or restorative justice as the primary justice intervention in cases of intimate violence. Instead, the criminal justice system has taken a middle ground: *simply not prosecuting*, while simultaneously failing to provide the material resources that an effective restorative justice program would require to address intimate violence. In the following sections, I will explore how certain non-restorative practices came to be labeled 'restorative justice', and how that affected understandings of both restorative and non-restorative responses to intimate violence.

Having framed the current debates in relation to intimate violence, restorative justice and pro-arrest/prosecution policies in the previous chapters, I want to explore these questions from a slightly different angle. I want to interrogate a foundational starting point within this debate. That is, what practices are being called restorative justice, by whom, and to

what ends? How do these ideas about restorative justice inform whether we support or critique it? My research shows that the mislabeling of restorative justice can skew the ways we interrogate and evaluate criminal justice practices, both ‘restorative’ and non-restorative. Research participants in my study held negative opinions about using restorative justice in cases of intimate violence, however the practices they were critiquing were never intended to be classified as such. Measuring whether restorative justice is an appropriate response to intimate violence is, at least in part, underpinned by a particular understanding of restorative justice.

In the final analysis, I argue that while ‘restorative justice’ is blamed in several quarters for revictimising survivors of intimate violence, the actual practice being interrogated is the conventional criminal justice intervention of a peace bond. In investigating the contours of this non-restorative practice, I suggest that by exploring what is *not* an appropriate response to intimate violence (peace bonds), research participants identified practices (restorative and non) that *would* constitute a better response to intimate violence. This response is, at least in part, restorative in nature. In Chapter Five, in conjunction with parameters set out in other empirical research, I explore what may constitute a more effective response to intimate violence than is currently deployed in the Lower Mainland.

### **Social Organisation and Ruling Relations in Justice Practices**

According to Dorothy Smith, a focus on ruling relations:

...(D)irects attention to the distinctive translocal forms of social organisation and social relations mediated by texts of all kinds that have emerged and become dominant in the last two hundred years. They are objectified forms of consciousness and organisation, constituted externally

to particular people and places creating and relying on textually based realities.<sup>1</sup>

In other words, our local everyday actions are shaped and organised by extra-local interests and power, in ways that may not always be apparent to those situated in the everyday. It is the role of the sociologist to take on a specialised inquiry, using several data sources to “...investigate the relations that shape and determine the everyday.”<sup>2</sup> This chapter explicates the ruling relations (or systemic and structural problems) of peace bonds and Alternative Measures evident in the interview and textual data I collected and analysed for this project.

### *Data Analysis*

Once the interviews were completed, and I had reviewed the transcripts twice, I turned to institutional ethnographers for guidance on how to process or analyse the several hundred pages of interview transcripts I was faced with. How would I talk about, and identify ruling relations within restorative justice? Where should I begin?<sup>3</sup>

I turned to research by institutional ethnographer and co-founder of the Duluth Model, Ellen Pence. She has completed several major research projects employing institutional ethnography, investigating the ruling relations of the criminal justice system as they relate to battered women.<sup>4</sup> I employed Pence’s conception of ‘processing interchanges’ as

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<sup>1</sup> Dorothy Smith, *Institutional Ethnography: A Sociology for People* (New York: Altamira Press, 2005) at 227.

<sup>2</sup> Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987) at 110.

<sup>3</sup> A note on verbatim transcription: all quotations included in this chapter are from verbatim transcriptions of audio-recorded interviews that I personally conducted with participants. They are edited only to remove repeated words, or non-verbal utterances such as ‘um’ or ‘ah’.

<sup>4</sup> See for instance: Melanie Shepard & Ellen Pence eds, *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (California: Sage Publications, 1999) and Alex Wilson & Ellen Pence, “US Legal Interventions in the Lives of Battered Women: An Indigenous Assessment” in Dorothy Smith, Ed, *Institutional Ethnography as Practice* (Oxford: Rowman & Littlefield, 2006) at 199.

an entry point to the interviews with Crown counsel. According to Pence, a processing interchange is “...any part of the process where a worker does something to a case.”<sup>5</sup>

We viewed each interchange as part of a sequence of institutional actions. Steps before and after this interchange helped to determine the worker’s actions in a case and reasons behind the action taken....we interviewed several workers who performed the task related to each interchange.<sup>6</sup>

Within the institution of criminal justice in British Columbia’s Lower Mainland, there are numerous interchanges that could possibly be examined. Peace bonds, Alternative Measures, and prosecution are all deeply embedded in the criminal justice system; therefore, right from the moment a survivor calls the police, a complex set of systems and workers is set in motion, starting with the 911 operator. My research does not map out the entire system, but concentrates on the work processing interchanges of Crown Prosecutors, service providers to survivor and abuser, and, to a lesser extent, probation officers. I looked at the choices each actor had, and the texts that helped them make these choices.

To do this I began to examine the interview data, associated texts, and the process as outlined by the interchanges for ways of doing things that seemed to be problematic, or what Pence calls “ideological practices”.<sup>7</sup> It is important to note that this is not a statistical analysis of how often a certain thing happened, or how many participants shared a particular experience. The aim behind this step in the data analysis is to scrutinise how these *processes* worked, and to establish whether these problematic

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<sup>5</sup> Wilson and Pence, *supra* note 4 at 204.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid* at 207.

practices are consistently evident throughout the portion of the institution that I have mapped.

These ideological practices are integral to explicating Smith's ruling relations; they are the on the ground manifestation, in practice, of institutional preoccupations and priorities. They are the traces of ruling relations, of "...translocal and discursively organised relations."<sup>8</sup>

The following section examines the decisions taken by Crown Attorneys on whether to divert the case to Alternative Measures, to proceed with a charge and a trial, to place the accused on a recognisance under section 810 of the *Criminal Code*, or to stay the charges altogether. By examining the ways in which these decisions are made, I explicate the ways that the criminal justice system functions to discourage the prosecution of intimate violence cases. In Part Two, I examine the work performed by women's service providers, explicating the ways, according to these workers, that this informal policy of non-prosecution negatively impacts survivors.

### **Alternative Measures and Section 810 Recognisances: The Implications of a False Double**

#### ***The Work of the Crown Attorney***

When a survivor calls the police to report violence against her by her partner, the call goes to the 911 operator, who dispatches police. When the police attend, according to police policy, they must arrest the partner accused of violence, and hold him in jail overnight. The accused must then go before the court to obtain bail, rather than having

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<sup>8</sup> Marie Campbell and Frances Gregor, *Mapping Social Relations: A Primer in Doing Institutional Ethnography* (Aurora, Ontario: Garamond Press, 2002) at 90

the police release him on bail, and the Crown must include a no-contact provision in the bail conditions.<sup>9</sup>

“(T)he police, right now have no discretion. Or very little discretion and they feel very frustrated and every time there’s an allegation of spousal abuse they have to arrest, somebody....but the police are obliged to arrest and lodge over night and we’re obliged to seek no contact.” - Crown Participant 11 at 7.

“(T)here’s a presumption in favour of...arrest and holding somebody who’s accused. ...Holding overnight and pre-court release on the basis that there’s this assumption of a sort of zero tolerance. Whereas I think generally we would say that the same bail conditions should apply and, and if somebody is eligible for release they should be released by police.” - Crown Participant 9 at 2.

The Crown Attorney who appears on the bail hearing of the accused is the first of five or six Crown Attorneys who will do work on this reported incident of violence.<sup>10</sup>

Once the accused is released from police custody on bail conditions, the Crown Attorneys take up the primary role; they not only conduct any witness interviews and hearings that are required, they also take primary decision-making power over how to proceed with the case. In other provinces, the police are more involved in making decisions about whether and how to lay charges.<sup>11</sup>

The police are the ones who conduct the investigation and ..., unlike Ontario, we conduct the charge approval, so the files would be forwarded to us. - Crown Participant 11 at 1.

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<sup>9</sup>See also: Crown Counsel Policy Manual at 4 (‘Bail’).

<sup>10</sup> Crown Participant 12 at 24. These Crown Attorneys will co-ordinate their work across time and space through a case file which is a collection of forms and papers that speaks to the institutional progress of this incident. Despite a Freedom of Information Application through the regional Crown Attorney’s office I was denied access to case files.

<sup>11</sup>See also Crown Counsel Policy Manual at 1.

This brings us to a primary processing interchange: the decisions taken by Crown Attorneys on whether to divert the case to Alternative Measures, to proceed with a charge and a trial, to place the accused on a recognisance under section 810 of the *Criminal Code*, or to stay the charges altogether. I interviewed four Crown Attorneys, and examined two relevant texts: The Crown Counsel of British Columbia's Policy Manual, in particular the Spousal Assault and Alternative Measures policies in place to guide the decisions of Crown Attorneys in cases of intimate violence, and the text of the charging standard in place to guide the charging decisions of Crown Attorneys more generally. Interviews with service providers and government officials also included data on this processing interchange, offering information and commentary on how Crown Attorneys make their charging decisions in cases of intimate violence.

If the Crown Attorney decides to divert the accused into an Alternative Measures program, the accused must admit to having committed the offence.<sup>12</sup> The accused is then referred to a probation officer for an initial assessment, and if it is found that they require counseling or other resources, they are officially disqualified from Alternative Measures.<sup>13</sup> However, if the Crown and defense counsel are willing to set up a 'diversion plan' where the accused will pay for private counseling, and if the approval of the regional Crown Attorney is given, the accused may be allowed to participate in an Alternative Measures program.<sup>14</sup> The Alternative Measures program does not offer anti-battering programming, and can only be imposed for up to four months.<sup>15</sup> If the accused completes the conditions of the program (which may include up to ten hours of

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<sup>12</sup> Crown Participant 11 at 3.

<sup>13</sup> Crown Participant 12 at 3 and Crown Counsel Policy Manual ALT1 at 5.

<sup>14</sup> Crown Participant 12 at 4 and Crown Participant 13 at 2.

<sup>15</sup> Crown Participant 11 at 7 and Crown Participant 12 at 7.

community service over three months, writing an essay or work service,)<sup>16</sup> then the accused does not receive a criminal record.<sup>17</sup>

Crown Counsel may also opt for a stay of proceedings under section 579 of the *Criminal Code*, which essentially means that unless they pursue the matter again within one year, the charges are dropped. A third option is to proceed with a charge under the *Criminal Code*, and a trial.

The fourth option, and one that all Crown Counsel participants discussed extensively, is the use of a recognisance order, or a ‘peace bond’ under section 810 of the *Criminal Code*. In this case, the Crown Attorney appears before a court or a justice of the peace, and has the survivor swear that the accused gives them cause to be fearful. If the application is successful, the judge or justice of the peace will issue an order setting out conditions to which the accused must abide by for a term of up to a year. Conditions usually include a no-contact provision with the survivor, and possibly with her children, and often include mandatory anti-battering counseling, alcohol, or drug treatment.<sup>18</sup> Because the accused does not plead guilty, there is no criminal record associated with an 810, unless he breaches the conditions, in which case he can be charged under section 811 of the *Criminal Code* for violating a peace bond. Probation officers supervise those subject to 810 peace bonds.<sup>19</sup>

What guides Crown Attorneys in choosing between these four options? The implications of each choice for both the accused and the survivor are very different, and range from no

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<sup>16</sup> Crown Participant 12 at 7.

<sup>17</sup> Crown Participant 12 at 11.

<sup>18</sup> Crown Participant 12 at 19 and 17.

<sup>19</sup> Crown Participant 12 at 16, Service Provider Participant 1 at 5, Crown Participant 13 at 4.

action on the part of the Crown, to court-mandated counseling, to a full trial and possible conviction. Crown Attorney participants spoke at length about this decision-making process, both in terms of the formal, legal requirements, and in terms of the informal, unwritten criteria that they, and colleagues working in their offices, applied in the decision-making process.

### **Official Texts Informing Crown Work**

Crown Counsel's work on intimate violence files is informed by an important text: the Crown Counsel Policy Manual. According to the British Columbia Crown Counsel Policy Manual, Crown Counsel are responsible for assessing whether charges should be laid in all cases. The Manual mandates that:

In discharging that charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether a prosecution is required in the public interest.

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court.<sup>20</sup>

The Manual also notes that there are some cases that should be prosecuted in the public interest, even in the absence of evidence supporting a substantial likelihood of conviction. These cases include where "...the survivor was a vulnerable person, including children, elders, *spouses and common law partners*."<sup>21</sup> In other words, even where it may appear that there is a dearth of evidence to support a charge, in the public interest, cases of

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<sup>20</sup> Crown Counsel Manual, CHA1 at 1.

<sup>21</sup> *Ibid* at 4.(emphasis added)

intimate violence should be prosecuted, rather than diverted to Alternative Measures, stayed or become the subject of an 810 peace bond.<sup>22</sup> This portion of the policy manual reflects the pro-arrest and prosecution position taken by many feminist anti-violence advocates as described in Chapter One, and reflected in the former VAWIR policy.

The Manual also provides guidance on suitable cases for diversion into Alternative Measures. The Crown must establish that there is a substantial likelihood of conviction, and the accused must plead guilty.<sup>23</sup> The policy is a broad one, allows for any offence that is not expressly excluded to be diverted through Alternative Measures.

...(E)xcept where an offence is expressly excluded from alternative measures consideration by this or another Branch policy, alternative measures should be considered for all cases in which the successful completion of an alternative measures program can achieve the most important objectives of a court prosecution.<sup>24</sup>

Intimate violence is not on the list of expressly excluded offences, however the policy does provide some parameters for using Alternative Measures in such cases.

First, the Manual reiterates that “a referral is always unsuitable if programming or treatment is required,” and that “...programming or treatment is often required in the rehabilitation of offenders found guilty of sexual or domestic violence offences”<sup>25</sup>. In other words, if an accused is going to require anger management, drug or alcohol treatment, they are not officially<sup>26</sup> eligible for Alternative Measures, and the policy cautions that this will include many cases of intimate violence. Again, this policy seems

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<sup>22</sup> Other offences that mitigate in favour of prosecution in the public interest include offences related to terrorism, organised crime and hate crimes.

<sup>23</sup> Crown Counsel Policy Manual ALT1 at 1.

<sup>24</sup> *Ibid* at 2.

<sup>25</sup> *Ibid* at 5.

<sup>26</sup> Although several Crown participants indicated that if the accused can pay for the counseling themselves, probation will sometimes agree to accepting them on a ‘diversion plan’ set up by the Crown and defense counsel.

to line up with feminist positions on pro-arrest/prosecution in cases of intimate violence, rather than diversion to this form of justice response.

Second, the policy on Alternative Measures cross-references the Policy on Spousal Assault:

Where a review of the risk factors outlined below indicates a low risk of future violence and the offence is not of a serious nature, Crown Counsel may refer a case for alternative measures consideration. Crown Counsel should make the final decision on whether to approve alternative measures after careful consideration of the probation officer's risk assessment report. While an alternative measures referral may be considered at any stage of the proceeding, in some cases it may be advisable to approve a charge and have conditions of release in place before making the referral.<sup>27</sup>

A close reading of the Manual up to this point shows that Crown Counsel must decide to proceed with charges in all cases of intimate violence based on the two-part test, but even where the first part of the test (the evidentiary threshold) is not made out, all intimate violence cases *may* require prosecution in the public interest. Secondly, Alternative Measures (which is not considered a prosecution) should generally *not* be used in cases of intimate violence, as in these cases the accused will require services that Alternative Measures cannot offer them. However, this does NOT entirely preclude Crown from referring cases of intimate violence to Alternative Measures so long as the risk of future violence is low, the reported violence was not of a serious nature, and a probation officer provides a positive risk assessment.

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<sup>27</sup>*Ibid* at 9.

Effectively, the policy allows Alternative Measures to be used in limited number of cases, and only after a risk assessment is completed by a probation officer.<sup>28</sup> This could be seen as an appropriate compromise between the feminist pro-arrest/prosecution stance, and the desire to reduce incarceration for appropriate offenders as outlined in the *Criminal Code* as part of a restorative justice agenda. As this policy seems to funnel very few accused into restorative justice, and *only* those who have been deemed at low risk to re-offend by criminal justice professionals, one could argue that these exceptional cases are precisely those that should be diverted to restorative justice. Cases that are serious are prosecuted, abusers are held accountable via criminalisation, and a public record of the violence is established through a criminal record.

However, these are not the options Crown most often turn to, for reasons that are discussed in detail below. Crown are most often left with two extremes: lay charges and proceed with a full prosecution; or, opt for an 810 peace bond, which provides resources to the offender, but which creates no public record of the violence unless the bond is breached, reported, and prosecuted.

The gap between prosecuting in the public interest, no matter what the evidence or desire of the survivor, and deciding to turn to an 810 peace bond is where Crown Counsel must exercise their discretion. This gap is where the work on these intimate violence files really happens, and where we can begin to see problematic institutional concerns that are either not explicit in, or that even run contrary to the officially documented institutional

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<sup>28</sup>As outlined in Chapter Three, in 2003 the Criminal Justice Branch, Ministry of Attorney General, introduced changes to its pro charge spousal assault policy (VAWIR policy). Instead of vigorous prosecution of these cases, Crown was given greater discretion to consider alternatives to prosecution, which include both Alternative Measures and 810 peace bonds. My data shows that Crown use peace bonds rather than Alternative Measures as their preferred alternative to prosecution.

concerns for survivors' safety laid out in the charging standard policies. This work is profoundly shaped by *informal factors* that Crown participants take into account in deciding which option to choose.

### **Informal Factors Influencing Crown Work**

A starting point for understanding the profound role played by informal factors in making prosecution decisions is the fact that the policy texts themselves are inherently contradictory.<sup>29</sup> The Manual refers to a number of conflicting but equally legitimate courses of action including proactive prosecution in the public interest, alongside peace bonds in lieu of prosecution. Both the Manual as a whole, and the Spousal Assault policy in particular 'makes gestures'<sup>30</sup> to feminist concerns about intimate violence as a set of background factors. I argue that these ambiguities and internal contradictions have, to a great extent, been interpreted for the Crown participants by senior administration, and ultimately the provincial government through the Attorney General. This explains, at least in part, how this set of highly ambiguous, publicly available documents comes to be almost uniformly interpreted across time and place in my interviews with Crown Attorneys. This has no doubt been accomplished in large part through formal verbal advisories. For instance, Crown Attorneys in British Columbia hold an annual meetings in Whistler, British Columbia where they are educated on how to uniformly interpret policies and laws. In fact, it was at this meeting in 2002 that then Attorney General,

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<sup>29</sup>It is worth noting that even if the decision was made to prosecute, and an accused was found guilty, similar internal conflicts exist in the sentencing provisions of the *Criminal Code*. See *Criminal Code* R.S.C. 1985 c.C-46 s 718.

<sup>30</sup> This is a term used by Lise Gottell in her work on the neoliberal capture of feminist sexual assault reforms. (Lise Gottell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 127). I think it really captures the way in which a government or policy text deploys well chosen language from within the feminist movement to discursively call upon a set of feminist practices and theories to legitimate itself, without actually committing to setting those practices or theories in motion.

Geoff Plant, announced changes to the ways Crown Attorneys were to (not) prosecute cases of intimate violence.<sup>31</sup>

There are remarkable similarities in the language Crown participants used to describe their individual professional experience, and the choices they make. This speaks, I argue, to the ways in which discourse<sup>32</sup> mobilizes ambiguous texts in particular ways within disciplines (or in this case within a profession). In this instance I draw upon Smith's later work on texts, which expands her understanding of the role of texts beyond coordinating through written texts alone. Smith explores the ways discourse, in a dialectic with written texts, effects everyday life. Smith's definition of discourse is: "...what we are part of and active in, including, of course what we think, write and interpret others' texts with, since these are the local practices of discourse..." In this case the text 'gestures' to a number of prosecutorial choices in cases of intimate violence, including a nod to feminist reform, but in the end the text is consistently interpreted by discursive forces outside of the text which defer to particular institutional priorities.

Smith argues that "[l]anguage is the property of groups and relations. Styles of usage are established among groups or forms of organization, professions, bureaucracy, trades, social circles, social movements, generations, regions and so on..."<sup>33</sup> In other words, Crown Attorneys become "...competent practitioners of the speech genre bearing the social organization of [their] place of work..."<sup>34</sup> According to Smith, alongside texts,

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<sup>31</sup>The Honourable Geoff Plant, Q.C., "Reforms to Spousal Assault Policy" (2003) 61 *The Advocate* 589.

<sup>32</sup>Dorothy Smith, *Writing the Social: Critique, Theory and Investigations* (Toronto: University of Toronto Press, 1999 at 134).

<sup>33</sup>*Ibid* at 136.

<sup>34</sup>*Ibid* at 137.

“...[t]he organizing work that language (in this case speech) will do , its selecting, ordering, assembling operations, and is transferred from setting to setting.”<sup>35</sup>

Carol Smart, a feminist theorist, argues that this effect of organizing or coordinating discourse is an especially potent one. According to Smart, law, and those who speak and write under its authority (such as Crown Attorneys), wield a mighty discursive power, one which (through the exercise of specialized, disciplined knowledge and language) “disqualifies subjugated knowledges”.<sup>36</sup> In other words, not only does Smith’s theory of non-textual discourse explicate how Crown Attorney’s uniformly interpret an internally contradictory text; coupled with Smart’s insights it becomes more clear how these tropes which account for survivors in Crown Attorney’s language (the ‘reluctant witness’ for instance) can shape the outcome of multiple legal interventions across time and place. The accounts delivered below by service providers (arguably (more) subjugated knowledges) do not carry with them the same power to shape outcomes for survivors; they represent neither the law’s knowledge, nor language; nor do they correspond to the dominant institutional interest of ‘non prosecution’.

Notably, however, the tropes called upon by Crown Attorneys to justify their decisions are not uniformly underscored by sexist stereotypes.<sup>37</sup> In fact, most Crown participants supported their prosecutorial decisions with reasoning gleaned from feminist insights into

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<sup>35</sup> *Ibid* at 142.

<sup>36</sup> Carol Smart, “Law’s Power, the Sexed Body, and Feminist Discourse” (1990) 12 *Journal of Law and Society* 194 at 198.

<sup>37</sup> George Rigakos, in his research on British Columbia police, found that their decisions not to pursue charges when peace bonds were breached were underpinned by deeply sexist notions about female complainants. Rigakos notes: “Not only are these women constructed as cunning, calculating lairs, who often deserve abusive partners, they are typically ungrateful when ‘rescued’, fostering an unhealthy ambivalence, even hostility, towards battered women’s calls for assistance.” (George Rigakos, “The Politics of Protections: Battered Women, Protection Orders, and Police Subculture” in George Rigakos & Kevin BonnyCastle eds, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 82 at 91.

intimate violence. Crown participants expressed frustration at the lack of services for survivors, the gendered, economic oppression that prevented survivors from testifying unsupported against abusers, or from leaving the relationship altogether. In some ways their feminist insights into the experiences of survivors echoed those of the service providers. The primary difference was in the Crown participants' confidence that they were helping to address these negative experiences through peace bonds. I argue that this disconnect is caused by a chronic lack of coordinated, system-wide communication. While coordinated communication is dealt with more extensively in Chapters Five and Six, I want to draw attention here to one of the key consequences of this lack of communication. Crown participants believe that the batterer intervention programs attached to a peace bond are largely effective in reducing violence. They also assert that for those men who do not successfully change their abusive behavior through such a program, if they are brought before the Crown again, they will be prosecuted. Data from service providers who work within these batterers programs, and with survivors, tells a different story; namely, some abusive men are repeatedly given peace bonds, and repeatedly cycle through batterer intervention programs, yet the violence continues. The upshot, according to service provider participants, is that survivors stop calling the police for help, and choose instead to live with the violence; making use of shelters when the violence is too much to handle. There is no nexus of communication between service providers (who know that men are receiving multiple peace bonds, and who see the consequences of this for survivors), and Crown participants who insist, as a matter of unwritten policy, that men are not receiving multiple peace bonds.

### *Informal Factors: Charging Standards*

All Crown participants made reference to the charging standard, and related policies in regards to cases of intimate violence.<sup>38</sup> For example:

We prosecute, every case...were we have a substantial likelihood of conviction. We prosecute, because it's always in the public interest to proceed where there's viable, admissible evidence on a spousal assault. -  
Crown Participant 11 at 1.

However, Crown Counsel's work on intimate violence files is deeply informed by informal factors outside of this charging standard. The first informal standard used by Crown in making decisions about the disposition of intimate violence files is that, despite the policy allowing its use in cases where "... a low risk of future violence and the offence is not of a serious nature",<sup>39</sup> there is a contrary, informal, standing directive from the Attorney General restricting or eliminating the use of Alternative Measures in such cases.<sup>40</sup> Some participants saw the informal directive as a complete ban on the use of Alternative Measures. For example, Crown Participant 11 notes:

...(O)ur direction from the Attorney General was Alternative Measures was not available for most cases involving domestic violence. And that went from most cases to no cases. I have not referred a case to Alternative Measures probably in six or seven years.  
- Crown Participant 11 at 1

Other participants saw the policy as seriously limiting but not completely eliminating the availability of Alternative Measures. Some participants referred to the Alternative Measures and Spousal Assault policies to support the position that cases of intimate violence can be referred to Alternative Measures in exceptional circumstances.

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<sup>38</sup> For example: Crown Participant 9 at 7, Crown Participant 11 at 2, and Crown Participant 13 at 4.

<sup>39</sup> ALT1 at 1.

<sup>40</sup> See Crown Participant 9 at 6, Crown Participant 12 at 13, and Crown Participant 11 at 8.

...(Y)ou know the policies of course deal with this and the policy says we can (use Alternative Measures) ...if we believe that they the...risk factors are minimal or non-existent and, and that sort of thing....

- Crown Participant 12 at 1

Alternative Measures, was a [sigh] a remedy that we used, or it was a process that we could apply, at the low, the very lowest end.

- Crown Participant 11 at 4

Others noted that there is an official protocol in place, requiring the approval of a regional Crown in order to divert such cases.<sup>41</sup>

... (O)ur Alternative Measures policy does not preclude diverting for Alternative Measures for domestic violence but there's it's now ... a category of offence that requires senior management and a Regional Crown to... sign off on it.

- Crown Participant 13 at 2-3

...(T)echnically because of our policies it has to go through a Deputy Regional. - Crown Participant 12 at 5

Another informal criteria applied by Crown in making charging decisions is their ability to place accused on conditions. In particular, Crown were eager to provide conditions that monitor the accused' behaviour, provide accountability in the event that he assaults his partner again, and also provide him with services such as drug and alcohol counseling, anger management, or anti-battering courses over a long period of time.<sup>42</sup> Crown participants noted that Alternative Measures had no appropriate services attached, minimum supervision standards, and lasted a maximum of four months. Participants instead turned more frequently to an 810 peace bond in cases where the complainant was unable or unwilling to testify (thus making it difficult or impossible to meet the charging standard), but where Crown suspected that the assault had taken place, and that further violence was possible or likely. Crown view the peace bond as a vehicle to supervise and

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<sup>41</sup> This was noted by a Regional Crown, along with other participants.

<sup>42</sup> See Chapter Four at 140.

treat an abuser, without prosecuting him, and without having to rely on scant survivor support services to ensure that a complainant can choose to testify.

And so there are cases that do not meet the Criminal Code assault or threatening threshold or proof beyond a reasonable doubt, but do meet the balance of probabilities test and in that case we would approve a section 810 peace bond... We, can ask the court to bind that person, by way of a recognizance for one year with the statutory condition to keep the peace and be of good behaviour and also comply with any other reasonable conditions, generally counseling for anger management, alcohol those sorts of issues. So that is often used.

- Crown Participant 11 at 2

And of course even on 810s probation would supervise those but, ... that's to the extent you attach conditions... which would include counseling... But at least you could enforce them ...

- Crown Participant 12 at 17

...Alternative Measures... it is used on a discretionary basis by Crown, but it doesn't really have programs that are suitable for or specifically tailored for domestic violence... There are no...restorative justice programs that now exist... So if someone were to be diverted they would probably go and do community work service... Which I wouldn't see in most cases as a particularly responsive outcome.

-Crown Participant 13 at 3

...(A)n 810 still applies... if you don't have a substantial likelihood, but you still want to ensure her protection, and whether that's through a continuation of a no-contact order, and programming for him, or, if she wants him back, its, programming, so, when he's back hopefully he's getting some tools to, that'll continue to, assist him in dealing with his anger management issues...and his relationship issues...that route can be taken.

-Crown Participant 9 at 8

And others feel like me, that it's better to get some counseling, rather than simply staying the charge. And, we have three Crown that handle the arraignment, that comprise the arraignment to appear in \*\*\*and we deal with nine thousand files a year, probably, one to three thousand, one to two thousand are, are domestic violence... And without a section 810, we would have, probably, 30 to 40 percent of our cases would be stayed without any, lasting consequence... it would be a stay of proceedings and

we would get no counseling. A lot of our counseling comes through section 810.

- Crown Participant 11 at 4

The lack of resources for offenders attached to Alternative Measures coupled with the fact that this option has been informally restricted, or even eliminated, effectively leaves only charging, an 810 peace bond or a stay as viable choices.

In choosing between the remaining three dispositions, Crown also employ informal criteria in their work. These informal criteria overlap with one another to an extent, but all were officially attributed to a failure to meet the first stage of the charging standard. Crown participants explained each of these as an informal measure of whether one would have a substantial likelihood of conviction.

First, Crown participants indicated that they will most often choose a peace bond where they encounter a complainant that is reluctant or refusing to testify at a trial.

...(In fact it's (a peace bond) often used in cases where we initially have enough evidence. ...And it's not uncommon, in fact I've had, I've done eight of nine spousal interviews today, and on two of them, the complainant said, I lied to the police. I was very angry. He was bothering me. But I lied to the police and he did not hit me. And so ...I have no corroborative evidence. It's her evidence or nothing. And I know, well, because of the amount of detail that was provided that an assault occurred, but I'm not going to get a conviction...

-Crown Participant 11 at 3

We have to assess each and every case and ...each one is different .. but the most of them will follow a general theme of course right... a reluctance on the part of the complainant to, participate in... sometimes you know ranging from just reluctance to outright hostility right... So obviously a lot of our decision making is guided by, our charging standard and ...we... continually have to asses...likelihood..... In a way we use the 8-10 as a way...not as a substitution for diversion but.... simply as an alternative way to deal with something..... better than a complete stay.

-Crown Participant 12 at 16<sup>43</sup>

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<sup>43</sup> See also Crown Participant 13 at 5 and 8, and Crown Participant 9 at 8 and 3.

(I) If we have a complainant who refuses to come in, or is recanting, then we're looking at it strictly from a viability perspective. See whether we're gonna stay it, or try and get something less like a peace bond if it's appropriate.

- Crown Participant 9 at 3

Notice that Crown participants refer to the official charging standard, and the evidence that they will require to prove the case. In both instances participants rely on a highly selective reading of the governing text (the policies). They make no reference to the necessity to prosecute intimate violence cases in the public interest, regardless of the available evidence or the wishes of the survivor, and instead focus on the reluctance of the complainant as the determining factor in deciding not to proceed with charges.

Crown participants also characterised a peace bond as an informal compromise between staying the charges entirely, and pursuing prosecution purely on the public interest standard without 'sufficient' evidence. Crown Participants indicated that unless they had testimony from the survivor, they would be unable to make the charging standard, and that rather than stay the charges altogether, they would use a peace bond as a protective measure.<sup>44</sup>

...(O)nce we've made a decision, that the evidence doesn't meet the threshold, then we can, and it's prove beyond a reasonable doubt. We do look to section 810, which is a very common remedy...or middle ground that we use in BC.

- Crown Participant 11 at 2

...(A)ll 810s are plea resolutions...the plea resolves. So they're deals, right.

- Crown Participant 12 at 17

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<sup>44</sup>I contacted both the British Columbia Attorney General's Office, and the Justice Branch by telephone and email to ascertain how often Crown opted to stay cases of violence against women. They responded that "...they do not have the resources to provide such information right now." (personal communication, August 18, 2011)

So, sometimes the act of laying the charge, perhaps on a diminished charge approval, people still have the policy which stands substantial likelihood. But if it falls a little below, there's probably a protective measure involved ...an 810.

- Crown Participant 9 at 7

Other participants noted that police were reluctant, or untrained to collect evidence outside of the testimony of survivors in intimate violence cases, and this was in part why Crown have to rely so heavily on survivor testimony.

Inability to collect evidence...that would be our major concern. And it's not inability. [pause] They [police] bloody well refuse...they don't take pictures. They don't take forensics, they don't map the scene. They don't interview neighbours. They don't treat it as a serious crime scene...They won't even take written statements. ...They will only listen to her and write notes.

-Service Provider Participant 7 at 9

There is extensive evidence from other research that supports this statement. Other studies have shown that in both American and Canadian jurisdictions, despite mandatory arrest policies, police often fail to respond to calls for help in a timely manner,<sup>45</sup> and many do not effectively investigate the violence as a crime.<sup>46</sup> In Chapters Five and Six I will explore the particular impacts of this practice on communities marginalized by race, in particular Canadians of South Asian descent living in the Lower Mainland.

Related to the notion of a compromise in using a peace bond, is the fact that Crown are aware that survivors get insufficient support throughout the trial process. Crown participants stated that they would proceed with a peace bond rather than push a reluctant

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<sup>45</sup>Kim Davies, Carolyn Block & Jacquelyn Campbell, "*Seeking Help from the Police: Battered Women's Decisions and Experiences*" (2007) 20 *Criminal Justice Studies 1* and Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation (Ottawa: Department of Justice, 2003).

<sup>46</sup>Robert Apsler, Michael Cummins & Steven Carl, "Perceptions of the Police by Female Victims of Domestic Partner Violence" (2003) 9 *Violence against Women* 4, Lauren Bennett, Lisa Goodman & Mary Ann Dutton, "Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective" (1999) 14 *Journal of Interpersonal Violence* 761.

complainant to testify at a trial because they knew that she would be almost completely unsupported, making it difficult for her to testify against an abusive partner, and therefore difficult for them to prove the case.

So people will see a stay rate and think, oh, Crown stayed it or Crown takes 810s...it's not like someone's sitting in our office, doing nothing. Or they're, oh how can I get rid of my files today? I, they're trying to weigh, what at times is a very, difficult balance.... [pause] Well, [chuckle] and the only reason I'm laughing is um, [pause] the services that are available affect whether she'll participate. And if the service available is a, I through my job I believe it's protection through prosecution. If I didn't believe that I would go sell shoes. And I don't think we can provide that protection. ...  
 – Crown Participant 9 at 12 and 13

It's the resources that I would want to see improved... the assistance to the complainant, after the accused has been arrested and removed. Because we, invariably get no contact orders, and, these women are stuck alone with the children. A lot of them are immigrants. They've not been, in the country long enough to develop any, [sigh] social network that they can rely on. And we have, relatively poor resources, whether it's interpreters people who are familiar with ...their culture. So that they would understand what they're peculiar needs are. Financial support, day care, these, well you can imagine. Women phoning two weeks after having been battered, and anguished because they have no money. Because the person that has been charged is the breadwinner and is not providing financial support and is blaming, the survivor, for, ...their predicament. And so there is, it's remarkable how quickly fathers, turn their back on children, to get back at their wife. And it, I'd like to see the resources there...  
 -Crown Participant 11 at 5.

...(H)ow can we do a better job of supporting complainants and in K (intimate violence) files.... they're difficult ...you know ...some jurisdictions and we've had pilots as you know... Langley and New West and...you know this is a big place. I mean and ... we have staffing challenges now... we have resourcing challenges now....  
 - Crown Participant 12 at 21

Notice in the quotations above that Crown expressed frustration at the lack of services for the survivor, both in terms of potential negative public perception of too many stays or peace bonds in cases of intimate violence, and in terms of having to use peace bonds in

cases where survivors feel too vulnerable to testify. All four participants see this lack of support as a frustrating impediment to their ability to do their job according to Crown policy, and as a source of revictimisation for marginalised complainants.<sup>47</sup> One participant even argued that this lack of support for survivors makes pursuing a prosecution against an abuser dangerous to her:

...And ... the other view I had about it and again not just me but you know the sometimes the actual conviction might actually add to risk factors. I mean it seems to be probably you didn't wanna take somebody who's at risk of... recidivism of this nature and then ruin their life by having to lose their job... So ...but I know others who have the view and in fact it's been expressed that well that's ridiculous there shouldn't be a stay. This is a breach of trust and you know the maximum sort of sentence should be imposed. ...which is fair enough but...that would mean a lot more trials.

– Crown Participant 11 at 2

Every other research participant confirmed the lack of services to survivors who wish to proceed with a trial. For instance Participant 6, a provincial government justice official, noted that there are only 150 survivor services counselors who support survivors across the whole province.<sup>48</sup> Other commentators have noted the serious paucity of services to survivors of intimate violence in British Columbia.<sup>49</sup> Research in other Canadian

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<sup>47</sup> Scholars Merali and Das Gupta have also noted negative impacts on marginalised survivors caused by a lack of support services during prosecution. See for instance: Noorfarah Merali, “Experiences of South Asian Brides Entering Canada After Recent Changes to Family Sponsorship Policies” (2009) 3 *Violence Against Women* 321 and Shamita Dasgupta, *Body Evidence: Intimate Violence against South Asian Women in America* (New Jersey: Rutgers University Press, 2007).

<sup>48</sup> At 6. Crown participant 11, at page 154 notes that his courthouse alone deals with up to five thousand intimate abuse cases per year.

<sup>49</sup> British Columbia Housing and British Columbia Society of Transition Houses, “Review of Women’s Transition Housing and Supports Program Consolidated Report: Key Findings and Recommendations” (Vancouver: BC Housing and BC Society of Transition Houses, 2010) at 7

jurisdictions notes similar shortages of support services for survivors.<sup>50</sup> Chapters Five and Six examine some of the harms this lack of resources can cause for survivors.

In some cases Crown participants indicated an informal policy of placing ‘first time’ offenders on peace bonds as a matter of course.<sup>51</sup>

And on the fairly minor assaults, where there’s no previous conviction, where there’s going to be reconciliation, where it would really be counterproductive for, the man, who’s the accused in 99 percent of the cases, to end up with a criminal record. Because a criminal record affects the family. It affects livelihood, it affects the ability to travel.  
- Crown Participant 11 at 1.

...And a section 810 would not be an option for repeat offender. We give people an opportunity, a break quite frankly [sigh] once, not twice or three times. So we’re quite, inflexible for repeat offenders.  
- Crown Participant 12 at 4.

...[R]epeat offender...there’s greater likelihood he’ll be set for trial. That’s not a greater likelihood we’re gonna have a trial, because if the complainant hides or runs or refuses to cooperate, it’s gonna make it more difficult. But those people don’t get any benefit...because they’ve had their shot. They’ve had their sentence already and they need to be, either in jail, or on longer periods of ... supervision.  
- Crown Participant 9 at 3

... [G]enerally speaking they’re first time offenders first time in the sense that... on the evidence it’s never happened before.  
- Crown Participant 12 at 5

Crown also looked to the possibility of reconciliation as an informal measure of how to proceed. Several noted that in the case of a reconciliation between intimate partners

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<sup>50</sup>See for instance: Dianne L Martin & Janet E Mosher, “Unkept Promises: Experiences of Immigrant Women with The Neo-Criminalization of Wife Abuse” (1995) *Canadian Journal of Women and the Law* 14 and Trevor Brown, *Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses*” (Ottawa: Department of Justice, 2000).

<sup>51</sup> It is important to note that this conflicts with accounts from other research participants who directly supervise men placed on peace bonds. (See Chapter 4 page 192). These participants assert that recidivist offenders are placed on peace bonds more than once, causing their female partners to stop calling the police during incidents of violence out of a feeling of hopelessness. The implications of this are discussed more fully in Chapters 5 and 6.

following an assault that an 810 peace bond served the needs of the survivor and the family by placing the accused under conditions, and allowing the accused to avoid a criminal record, and continue working and earning money.

...And... the parties are obviously... both very much want to be together and... you know they don't want the conditions restricted. They, they want to work on their issues. They want to stay together...they've identified they agreed on what the problem is and they've agreed that you know the steps need ...that need to be taken.

- Crown Participant 12 at 5

In their work on intimate violence Pennell and Francis, family group conferencing practitioners,<sup>52</sup> also emphasize the role of reconciliation in appropriate safety planning for women and their children. They note "...many women who were abused saw their social connections at the heart of their decisions. They knew some bonds endangered their lives; however they also would never feel safe and empowered without links to others."<sup>53</sup> Longitudinal research by several teams of American sociologists shows that most women do eventually leave abusive relationships, but reconcile several times before finally leaving permanently.<sup>54</sup>

While Crown Attorneys spoke to the ways in which official policy texts shaped and mediated the work that they performed on intimate violence files, they were more influenced by institutional concerns and priorities that were not fully articulated in the texts themselves.

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<sup>52</sup> Joan Pennell & Stephanie Francis, "Safety Conferencing: toward a coordinated and Inclusive Response to Safeguard women and children" (2005) 11 *Violence against Women* 666 at 669.

<sup>53</sup> *Ibid* at 671.

<sup>54</sup> Jacquelyn Campbell, Linda Rose, Jona Kub & Daphne Ned, "Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering" (1998) 13 *Journal of Interpersonal Violence* 743, Lewis Okun, *Woman Abuse; Facts Replacing Myths* (New York: SUNY Press, 1996), Jacquelyn Campbell, Paul Miller, Mary Cardell & Ruth Belknap, "Relationship Status of Battered Women over Time" (1994) *Journal of Family Violence* 99.

Many of the informal guiding institutional priorities ran counter to the written policy, and the priorities laid out there. For instance the official policy calls on Crown to prosecute cases of intimate violence, even in some cases where there may be insufficient evidence, or where the survivor is recanting, deploying the notion of ‘public interest’ to demonstrate the seriousness of this crime to the public at large. On the other hand the informal institutional priorities, understood by Crown in offices all over the Lower Mainland, *all* militate in favour of not prosecuting cases of intimate violence except in rare circumstances. “Avoid prosecution” is the unofficial institutional mandate shaping their work on these files.

In lieu of prosecution, Crown are informally<sup>55</sup> directed to use 810 peace bonds rather than Alternative Measures under certain circumstances. This is motivated, on the part of the Crown, by a desire to attach meaningful conditions to the accused, who they often suspect of being guilty of abuse, over a longer period of time, while ‘avoiding prosecution’, and taking into account the fact that there are very few support services for the survivor should they proceed with a trial. In fact several Crown participants characterised peace bonds loosely as a form of ‘diversion’, a term associated with both Alternative Measures specifically, and restorative justice more generally.

You know it’s sort of like a diversion almost right... without going through the diversion.

- Crown Participant 12 at 19

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<sup>55</sup> In the written policies peace bonds are only one of four choices, with an emphasis on prosecution as the prime option. See SPO1 par 2.

...[B]ut apart from Alternative Measures there certainly are situations where we have in effect diverted ...spousal assault...cases but just not using Alternative Measures, programs... Typical one is the peace bond the section of you know the 810... So that's ...certainly frequently used.  
- Crown Participant 13 at 3

Crown participants relied on official and unofficial rationales for choosing peace bonds as their favoured option in intimate violence cases. Data requested from the Criminal Justice Branch of the British Columbia Ministry of the Attorney General shows that between 2006 and 2010 Crown used stays and peace bonds in 46.7% of intimate violence cases referred to court, which is almost as often as they prosecute (52.9%).<sup>56</sup>

This begs the question: are peace bonds in and of themselves problematic? The research shows this is not necessarily so. James Ptacek, in his empirical research study on survivors' experiences with peace bonds notes: "...battered women, regardless of their background, overwhelmingly preferred legal recourse to struggling on their own, and despite inconsistent responses of judges, many found that restraining orders (another word for peace bonds) helped to shift the balance of power between themselves and abusers."<sup>57</sup>

However, I argue that the *particular practice* of peace bonds in British Columbia is problematic. This is supported by my own interview data with service providers, discussed below. Also, research indicates that in British Columbia, in domestic violence

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<sup>56</sup> In summary these statistics show: From 2006 to 2010 of the cases which were referred to court and concluded in a given year peace bonds were used in 14% of cases, perpetrators were found guilty in 49.3%, and 37.3% were granted a stay of proceedings. In 3.6% of cases the perpetrator passed away before the proceedings completed. (personal correspondence, Neil MacKenzie, Criminal Justice Branch, Ministry of the Attorney General, British Columbia, August 19<sup>th</sup>, 2011)

<sup>57</sup> Cited in Joan Pennell & Stephanie Francis "Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children" (2005) 11 *Violence Against Women* 666 at 670.

cases, the rate at which peace bonds are breached is very high.<sup>58</sup> However it remains unclear how often charges are laid for breaches of peace bonds.<sup>59</sup> Earlier research by Canadian criminologist George Rigakos involving police response to such breaches indicates that there exist significant barriers to having breaches investigated, and recommended to the Crown for trial.<sup>60</sup> In Chapters Five and Six I will discuss other significant barriers to the effective use of peace bonds in the Lower Mainland.

### **Service Providers Work**

My entry point into the interviews with service providers is different than the approach I used for Crown participants. The concept of a ‘process interchange’ worked well with Crown participants, as they viewed each case of intimate violence individually, as a specific incident, frozen in time, and subject to a set of formal and informal factors which guide how they are to perform their work on ‘the file’. The service providers, on the other hand, had a very different outlook on both the survivors, and on the particular incident of violence that resulted in the police being called. Their focus is the survivors themselves, rather than the incident. The service provider participants had prolonged and frequent contact with survivors, through several stages of the peace bond process, often over

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<sup>58</sup>See also: EKOS Research Associates Inc. *New Identities for Victims of Abuse: Client Survey Final Report* (Ottawa: Human Resources Development Canada, 2000), Mary Russell, *Measures of Empowerment for Women who are Victims of Violence and Who Use the Justice System* (Victoria: Victim Services Division, Ministry of Public Safety and Solicitor General, 2002), Colleen Varcoe, Fatima Jaffer and Pat Kelln, *Protecting Women? Women’s Experiences of Seeking Protection From Abuse by Intimate Partners* (Vancouver: Health Research Foundation, 2000).

<sup>59</sup> I contacted both the British Columbia Attorney General’s Office, and the Justice Branch by telephone and email to obtain this statistic. Officials responded that “they do not have the resources to provide such information right now.” (personal correspondence, August 18<sup>th</sup>, 2011)

<sup>60</sup>George Rigakos, “The Politics of Protections: Battered Women, Protection Orders, and Police Subculture” in George Rigakos and Kevin BonnyCastle eds, *Unsettling truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 82

months or years. They were able not only to articulate their concerns about individual survivors; their experiences with multiple survivors within the criminal justice system over a long period of time also allowed them to speak to institutional concerns and priorities. According to these research participants these institutional concerns regularly trumped those of survivors.

My entry point for the interviews with service providers was to listen to the ways they articulated ‘problems’ created for survivors by ‘restorative justice’, and to explicate how these problems revealed the “... translocal forms of social organisation and social relations...”<sup>61</sup> driving the criminal justice system. They spoke specifically to the ways they perceived Crown participants’ work choices on intimate violence files to affect survivors in their everyday lives.

### **Women’s Advocates, Peace Bonds and Alternative Measures**

One of the service provider participants had a clear sense that peace bonds were not

Alternative Measures:

...I think it’s really important to talk about the current crisis...which it is actually, the diversion to restraining orders and peace bonds...Which I think are diversions. ...And are watching repeated murders. [pause] And what we see is, a collusion between, police and Crown, at that point. Inadvertent, unconscious half the time, but, collusion none the less. Between police, who won’t do their job and, then the Crowns who won’t do their job. And there’s a, there’s an operating presumption and institutionalized presumption now, that you don’t arrest a guy, you get a restraining order. Either a civil restraining order, or a criminal restraining order. But what you don’t get is an arrest. And so repeatedly we’re in the situation of saying the crime is already committed. [pause] Why, is it two before you get anywhere?

– Service Provider Participant 8 at 8

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<sup>61</sup> Campbell and Gregor, *supra* note 8 at 94.

In pointing out the technical differences, however, the participant notes that both peace bonds and Alternative Measures create the same problems, from her point of view. That is they divert the crime of intimate violence from the court, and prevent a trial, especially for first offenders. This informal criteria is echoed in the data provided by Crown participants above. From the perspective of this service provider, by systemically refusing to prosecute cases of intimate violence the first time around, the police and Crown are opening the door to escalating violence on the part of the abuser, to the point of lethal force. Alternative Measures are classified as ‘restorative justice’ under official British Columbia policy, and federal law. Peace bonds are not, yet both forms of intervention fall short of what this service provider sees as the best way to protect survivors: through prosecution of intimate violence cases. The role of prosecution and incarceration in responses by service providers will be discussed in depth in Chapter Five.

All of the remaining service provider participants misunderstood the technical difference between peace bonds and Alternative Measures. This misunderstanding is significant in at least two ways. First, it animates a question within the literature about the use of restorative justice in cases of intimate violence. How do we know whether existing models are effective, if we what we are evaluating is not, in fact, restorative justice? In the case of the service provider responses in my own data, criticisms of ‘restorative justice’ were misdirected. Although I demonstrated in Chapter One that restorative justice is an elusive concept, I would argue that neither peace bonds nor Alternative Measures meet the basic definition of restorative justice; although one of them carries the name.

Secondly, and more specifically, it highlights the lack of communication and knowledge sharing within the criminal justice system in the Lower Mainland. The difference between Alternative Measures, and peace bonds was quite clear to Crown participants and government officials. Service providers, however, had not been correctly updated on Crown charging policies (since the 2002 changes). This lack of communication and misunderstanding is exacerbated, as demonstrated in the data below, as service providers are often the first line of information and knowledge about the criminal justice system to both survivors and men who have used violence. Service providers' misunderstandings are communicated, and amplified by the stress and turmoil caused by violence and its legal aftermath. In Chapters Five and Six I discuss the role of coordinated communication in an improved justice response to intimate violence.

When asked about their thoughts and experiences concerning Alternative Measures, participants spoke exclusively about peace bonds, stating that they understood them as the same thing.

(I)...deal with men who are in peace bonds. And now I don't know what, under definition whether that's part of the restorative justice piece or not. But, my understanding is that men who are on peace bonds, is a lesser, or not so severe of a sentence. The idea is that the person, the man in this case, receive some counseling, and...makes a choice for alternative behaviour.

-Service Provider Participant 1 at 2

When I think restorative justice, I think usually like things like healing circles and that kind, but in our work... peace bonds, anger management. Those sorts of things...

- Service Provider Participant 3 at 2

...[B]ut what I do come across is a lot of women who, for the, due process is segued into you know, well, there's peace bond or there's something alternative...to going to the court and dealing with the women then.

- Service Provider Participant 2 at 2

My research findings then, provide an in-depth study of peace bonds, not Alternative Measures. My data speaks to the kinds of trouble that service providers think peace bonds are causing for women. This begs the question: what do participants want instead, and is that alternative 'real' restorative justice? I have two sources to turn to from research participants. First, having the participants frame peace bonds as 'restorative justice' gave them an opening to talk about how they would improve 'Alternative Measures' as a 'restorative practice': they effectively identified ways in which a good restorative justice project would function to avoid the problems caused by 'Alternative Measures'.

Secondly, because the Crown participants had a more clear understanding that peace bonds were not Alternative Measures, but that peace bonds themselves were problematic for women survivors, they also spoke to ways in which they would like to see Alternative Measures transformed into a 'real' restorative justice model which they would then use *instead* of the ineffectual peace bonds. The Crown participants spoke to the characteristics of a good restorative justice program as solutions to problems they were encountering with peace bonds in the conventional criminal justice system.

The following section identifies the problems with 'Alternative Measures' (sic) (peace bonds) as recounted by women's anti-violence service providers.

### ***Service Providers and Peace Bonds***

First and foremost, service providers identified the decriminalisation of intimate violence via peace bonds as a critical issue. According to service providers, many survivors call the police because they want to have charges laid, and to go to trial. Applying a peace bond in such circumstances, according to service providers, runs contrary to their clients' desire to see the crime prosecuted. Service providers recounted multiple circumstances

where survivors phoned the police, and then contacted service providers to seek assistance in preparing for a trial, undertaking the difficult work of preparing to testify, only to have the Crown choose a peace bond rather than a trial.<sup>62</sup>

Well the most recent one<sup>63</sup> which happened I guess two weeks ago...She had her date for trial so she's been preparing for it...very violent relationship...very abusive in the sense that physical and emotional, broke her finger, all kinds of things are going on and I believe he ... takes off after the last assault. She calls the police, the police attend...I believe she goes to the hospital, she's looked over. There is enough evidence for charges to be laid and approved. The D-VAC Unit Domestic violence unit is great....worked with her as well...so everything is going along perfectly...you know were there witnesses, she's given a statement, like everything is going along in the sense that we've got charges here and there is a likelihood of prosecution. So when we end up in court and the trial's supposed to start at 9:30 but [her co worker] finds out that there's some negotiation that's going to start happening between Crown and the defense. ..even though there was enough evidence ...the Constable was quite satisfied with there being enough evidence...I don't know what happened but anyways its bargained down to a peace bond. ... in this particular case like we get ready to the day like we're in court and...now what with my client language was a big issue. She did not have the language and she was depending on the interpreter and the other thing is that she was scared...to go up, but she was there. She was all ready to do it...

-Service Provider Participant 2 at 4-5

... [S]ometimes for the clients... for the woman who's been assaulted it's kind of a shock, slap in the face, because for her it's kind of like, well I, went out on a limb and called the police, and now they've decided, it doesn't have to go through the system and he can just be, gone. ..And then, nothing's changed, it's all the same, right? So it's almost for her it's ..[pause] like she's been assaulted, or all over again. And now that she's got, basically screwed over... And that's why some of the clients don't bother phoning the police.

- Service Provider Participant 3 at 4

For them to go through the court system, for the women, it feels like, they've been listened to I think. And that, being, that the assault or the abuse that they faced has been taken seriously. You know, that, by going

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<sup>62</sup>Participant 2 at 5.

<sup>63</sup>According to Participant 2 this survivor's experience is one of three similar experiences she dealt with in the three weeks prior to our interview.

through the court system, it brings a legitimacy to it. And saying, yes, this is a serious issue. Because it went through the whole system, but if it doesn't go through, oh this isn't as serious as breaking another law, so we'll just send you here. But if you, were to go and to have a bar fight, then, you would be charged. But if you hit your wife, then, oh it's not that serious. You can just, send you to anger management... They, that's how they categorize it. Especially for a lot of our clients who are not as knowledgeable, about restorative justice and what that means. Going to court is a serious issue. So if my husband is going to court, and there's a trial, this must be really serious. Rather than, oh, well you know he just needs anger management. So, okay, and he'll be let out again. And we'll get back together again. So then she's probably thinking, ok, if this happens again. He's not going to court. Or if he continues to do it. So then, [pause] Cause that's how a lot of clients, even with family court the categorize it. If it's not going to court, it must not be a serious issue. Or they're not doing anything about it.

- Service Provider Participant 4 at 5

So he's given her what could be possibly five years of hell. And so when she decides to pick up the phone, she has the courage to call for help and... like this (peace bond) is the response that she gets.

- Service provider Participant 1 at 8

In their research on survivors within the criminal justice system, Bennet, Goodman and Dutton,<sup>64</sup> as well as the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation<sup>65</sup> found these to be common experiences across other Canadian jurisdictions. In fact the Ad Hoc Committee recommends "... (w)here the pro-prosecution policy's test has been met, recognizance orders under section 810 of the *Criminal Code* should not to be used in lieu of a prosecution."<sup>66</sup> In British Columbia, even before the 2003 changes to charging policy, less than 50% of intimate violence cases were prosecuted.<sup>67</sup> Data requested from the Criminal Justice Branch of the British Columbia Ministry of the Attorney General shows that

<sup>64</sup>Lauren Bennett, Lisa Goodman & Mary Anne Dutton, "Systemic Obstacles to the Criminal Prosecution of a Battering Partner" (1999) 14 *Journal of Interpersonal Violence* 761.

<sup>65</sup>Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 45.

<sup>66</sup>*Ibid* at 36. Emphasis added.

<sup>67</sup>Varcoe et al, *supra* note 58.

between 2006 and 2010 Crown uses stays and peace bonds in 46.7% of intimate violence cases referred to court, which is almost as often as they prosecute (52.9%).<sup>68</sup> These statistics support research participants' assertions.

Relatedly, participants saw the retrenchment from the pro-charge policy as politically regressive for public recognition of intimate violence as a serious crime.

I think, there just has to be more consequences tied to, when they're going through the system. And like I said before, it's not just a slap on the hand, like you've done it, you've pled guilty, like participant 4 was saying there needs to be more of a consequence, because for some people, for some clients, their husband, or boyfriend, or whatever, [pause] don't see it until, their faced with something and they're going to jail. And all of a sudden, it's, oh God, I'm getting eighteen months, in jail. And, that's when the realization kicks in. Oh they spent two days in jail for beating her, and you know, then they get out and go, okay, I've really screwed up. Right? sometimes that's some of them, need that piece to the anger management, and the AA. That's really important as well...

- Service provider Participant 3 at 8 and 9

And, essentially our agreement is, we don't endorse any, pre-judgment diversion, from the criminal justice system, that our objective at the moment is to get, judges, to actually rule on the basis of law, [chuckle] and evidence and then, apply whatever progressive sentencing, people are into these days. But we want the judgments recorded. We want them to happen and we want them to be recorded. So we can critically examine the judgments. And that it's...one of the functions that all these things are planning at the moment is to allow the system to not reveal the judgments. So that's a critically important piece for us, right? -Service Provider Participant 7 at 3

The second general problem according to service provider participants is that constantly choosing peace bonds, a form of pre-charge diversion, prevents abusers from being held accountable in a variety of ways. In the first instance, service providers note that abusers are receiving peace bonds multiple times, contrary to assertions by Crown participants,

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<sup>68</sup> Personal correspondence with Mackenzie, *supra* note 56.

and have learned to manipulate the administrative controls associated with peace bond conditions to lessen or even avoid completely the court-imposed treatment.

...[W]hat I have seen though, over the years, a trend the men have become more...knowledgeable about how the system works...and finding ways to you know avoid having to come, to groups. So letting the probation officer know, like look I work and if I, if you send me to this group I'm gonna lose my job....so what happens in that case is that you get men who don't even make it to treatment. And if they get there there's much more resistance, and reluctance to continue.

- Service Provider Participant 1 at 7

What we do is train them, by our, systemic response, train them, how to expect to get away with it.

-Service Provider Participant 7 at 13

Other participants saw a lack of accountability in the way abusers, extended families, and communities viewed peace bonds. Participants stated that by giving a peace bond the Crown sends a message that the abuser did nothing wrong.

And then the man in most of these cases is usually, going to our family, or to people that they know and saying, ha, ha. She did this and look, I didn't even, nothing even happened to me. I'm going to go to this class, once a week and whatever, ...I...know the system. They know what they have to say, and they just say it and they walk out.

- Service Provider Participant 3 at 4

And I think then, when they're trying to justify it to their families and all that, who are forcing them back into these relationships. Trying to justify why I left, when the man hasn't had to go to court. The family is like, well, the police didn't even think it was serious enough, how bad can it really be? And if he wasn't charged, if he didn't have any jail time, or, you know any of that stuff. How serious was the assault?

- Service provider Participant 4 at 5

Participants also noted that peace bond breaches were not charged, and that men were not held accountable for further violence. Although recent data on how often men are

charged for breaching peace bonds in British Columbia is not available,<sup>69</sup> Colleen Varcoe, and others, have found that the rate at which breaches occur is quite high.<sup>70</sup>

(A)lot of our clients come and say, you guys don't understand that, yeah, I have a peace bond, but to him, all that is, is a piece of paper. If he's gonna come after me, he doesn't care if there's a peace bond restraining order. There could be a whole army of police officers at my, outside my house. But if he's gonna come after me, he knows where I am, where I live, where the kids go to school. He knows my whole routine. He'll come for me. - Service provider Participant 4 at 9

Finally, one participant noted that due to a serious lack of services across the province that some men placed on peace bond conditions simply had no access to counseling or anti-battering groups, and were therefore not obliged to attend.

What's happening in our province, right now, is we, do not have services available, for men, across the province, in a inconsistent way. It's very patchy. ...we, have one contractor right now, that the Ministry has funded, that provides services across the province....This changed when the Liberal government came in. Before that we had various communities addressing men's treatment programs in their own way and, there were many programs that existed for years, and years. And the government, dismantled all those. Gave it to one contractor. That contractor is now, has been in the last four years trying to, get these programs, started. In the, across the province. I've been involved with some of the research. And consultations with individuals across the province. And, many, many of the smaller communities are saying, we have no services for men in our communities. That's really problematic because on one hand you're telling women, that, okay, we're not gonna charge the guy. The judge is saying, I'm not gonna send him to jail, I'm gonna send him to counseling. And then there's like no counseling, in smaller communities. But even in the larger ...you know in the larger, cities...it's not consistent. Particularly for mainstream Men.. ..now... some of the cultural counseling there's gaps

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<sup>69</sup>As I noted above, I contacted both the British Columbia Attorney General's Office, and the Justice Branch by telephone and email to obtain this statistic. Officials responded that "they do not have the resources to provide such information right now."

<sup>70</sup> EKOS Research Associates Inc. *New Identities for Victims of Abuse: Client Survey Final Report* (Ottawa: Human Resources Development Canada, 2000), Mary Russell, *Measures of Empowerment for Women Who are Victims of Violence and Who Use the Justice System* (Victoria: Victim Services Division, Ministry of Public Safety and Solicitor General, 2002), Colleen Varcoe, Fatima Jaffer & Pat Kellen, *Protecting Women? Women's Experiences of Seeking Protection From Abuse by Intimate Partners*(Vancouver: Health Research Foundation, 2000).

too, I mean, we have, very kind of few services. So I think that's important in this. Because for me, it's like, [pause] ...it's kind of a set up for women.  
- Service Provider Participant 1 at 14

The combination of these systemic problems with the peace bond process can produce a chilling result according to service providers. Several participants stated that some of their clients simply stopped calling the police when they experienced violence. Survivors were no longer activating the criminal justice system put in place to protect them, because they find it ineffectual at best and revictimising at worst.

...And if that happens (peace bond) they don't have very much faith in the system. So if the abuse continues I've had women say to me: "you know what I don't care, you know this is my destiny"...they don't call the police anymore...and that is really scary for some of those cases that were really severe. And what do we offer these women? We can't offer anything. If the larger system is letting them down what can we do? Other than continue with the emotional support... - Service Provider Participant 2 at 13

So it's almost for her it's (peace bond) [pause] like she's been assaulted, or all over again. And now that she's got, basically screwed over...And that's why some of the clients don't bother phoning the police. When things happen, because, they say, well we heard so and so tell us, or we tried to call the police before and they just give, literally like a slap on the hand. And said, "Oh you hit your wife, don't do it again." They think "What's the point?" Because it's not gonna go anywhere. The don't lay charges, or if it did, it didn't go very far in the process. So, what's the use?  
- Service Provider Participant 4 at 4

While national rates for reporting intimate violence to the police are down,<sup>71</sup> the most recent statistics from police data in British Columbia indicate a rise of 3% in reporting between 1999 and 2000;<sup>72</sup> although comparative data has not been made public since 2000,<sup>73</sup> the period of time during which most of my research took place.

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<sup>71</sup>See Chapter one note 11.

<sup>72</sup>*Police and Crime Summary Statistics* (British Columbia: Police Services Division, 1991-2000).

<sup>73</sup>See: Ministry of Public Safety and Attorney General, police services, reports and statistics. Online: [www.pssg.gov.bc.ca/police\\_services/](http://www.pssg.gov.bc.ca/police_services/)

**Conclusion**

My findings illuminate how research participants perceive prosecuting intimate violence in the Lower Mainland. If Crown do not have the cooperation of survivors, they will not proceed with charges, due to a lack of support services for the survivor, and a lack of other sources of evidence. Instead, Crown opt for peace bonds, and are under the impression that they effectively hold abusers to account, and provide them with necessary services.

Data from service providers tells a different story. It is clear from their interviews that they believe that men are not held accountable in the peace bond process, and that survivors and their families remain unprotected. More than that, survivors are revictimised by the decriminalisation of intimate violence, and view it as de-legitimizing their claims to justice. Some survivors stop calling the police following multiple peace bonds.

In the next chapter this data will be used alongside the data from Crown participants and empirical data from other studies to glean characteristics of a better criminal justice intervention that may more effectively address the needs of survivors.

## **Chapter Five: Justice Systems and Practices in the Lower Mainland: Some New Directions**

### **Introduction**

So then numbers, numbers, numbers. Right? So first of all, only 30 percent of the women who call us, try and get a police response. Of the 30 percent, very, very few, perhaps two percent, get to a conviction of any significance...and, the greatest percentage of those are, women in couples whose men have been arrested and who plead guilty. So then they're diverted. [chuckle]

– Service Provider Participant 8 at 13

In the Lower Mainland of British Columbia women who call the police to report a crime of violence against them by their intimate partner will encounter one of a few justice response options. First, should they appear co-operative, Crown will proceed with a charge, and possibly a trial. If survivors follow this route they shoulder much of the responsibility for proving the charge themselves, through testimony, and have very few public resources at their disposal to support them through the prosecution. Women who live at the intersection of multiple oppressions, such as recently immigrated women whose first language is not English, face even greater challenges in the courts, with even fewer resources.<sup>1</sup> The second option is for survivors to agree to a peace bond. In this case, they must accept that the violence against them will not be marked by Canadian society as a crime, although their partners (but not themselves) will receive resources such as counseling and drug and alcohol treatment. This is the option that Crown

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<sup>1</sup>Himani Bannerji, "A Question of Silence: Reflections on Violence Against Women in Communities of Colour" in Katherine McKenna & June Larkin, eds., *Violence Against Women: New Canadian Perspectives* (Toronto: Innana Publications, 2002) at 353; Andrea Smith, "Beyond Restorative Justice: Radical Organising Against Violence" in James Ptacek Eds, *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press, 2010) 255 at 258; Dianne Martin & Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the neo-criminalisation of Wife Abuse" (1995) 3 CJWL 14. See Chapter Six for more discussion.

participants in my study seemed most likely to choose. The third option is a stay, which will be imposed upon them by Crown if survivors seem particularly uncooperative, or resistant to participating in the prosecution, as the Crown generally has no other evidence to support the charge. In this case, it is as if they never phoned the police. A fourth, and unlikely option, is for their intimate partners to participate in Alternative Measures, which has no officially sanctioned resources such as counseling or drug and alcohol treatment for either the survivor or the accused.

None of these options, whether we call them restorative justice or not, are adequate responses to the systemic, gendered crime of intimate violence.

In Chapter Four I examined peace bonds, and some of the implications of this practice for survivors of intimate violence in the Lower Mainland of British Columbia. Both Crown and service provider participants identified peace bonds as the prevalent criminal justice response to intimate violence, and spoke to several ways that they thought peace bonds revictimised survivors. Participants also indicated that although an official ‘restorative justice’ option exists in cases of intimate violence (Alternative Measures), both formal and informal policies militated against its use. Ironically, while peace bonds are not officially named restorative justice, they are an institutionalised form of pre-charge diversion, and in fact have attached to them more resources such as counseling, therapy and offender supervision than does Alternative Measures.

The following chapter goes deeper in analyzing the interviews, laying out what we can learn from justice practice in the Lower Mainland, and what might constitute a better response to intimate violence. This chapter speaks specifically to what can be learned

from pre-charge diversion in British Columbia, with a focus on specific problematic practices and systems, and possible directions to take based on the more successful justice interventions discussed in Chapter Two.

## **Part One: Justice Systems and Practices in the Lower Mainland: Some New Directions**

### *Coordinated Communication*

#### *a) Hyper-specialisation*

**So to me, it's kind of like, you know, the right hand not speaking to the left hand.**

- Service Provider Participant 1 at 13

**...our systems tend to be operating in kind of different silos...**

-Government Official Participant 6 at 5

In her study of the American justice system's treatment of cases of intimate violence, Ellen Pence notes that the American legal system "...divides its response to that incident [of violence] into a series of precise and distinct steps, each of which has its own specialists and none of whom has oversight of the whole case."<sup>2</sup> Charging and diversion practices in the Lower Mainland of British Columbia show a similar pattern. Crown and service providers, although dealing with the same 'clients' (accused and/or survivors), while intimately familiar with their own institutional roles and mandates, were almost completely disconnected from the process as a whole or the role of other workers. Crown and service providers were effectively siloed. The result was that workers were often at cross purposes, with only community-based service providers for women taking as their institutional mandate the safety of the survivor.

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<sup>2</sup> Alex Wilson & Ellen Pence, "US Legal Intervention in the Lives of Battered Women: An Indigenous Assessment" in Dorothy Smith, ed., *Institutional Ethnography as Practice* (Toronto: Rowman and Littlefield Publishers Inc, 2006) at 208.

Take as an exemplar the service provider who works with men. Service provider 1 (SP1) is one of several who supervise or provide the court-mandated counseling men must participate in as a condition of a peace bond. However, SP1 is disconnected from the criminal justice process, and the charging choices made by Crown Attorneys. In fact, SP1 understood the peace bond to be a mitigated sentence following a trial or a guilty plea, rather than a pre-charge diversion.

I..deal with men who are in peace bonds. And now I don't know what, under definition whether that's part of the restorative justice piece or not. But, my understanding is that men who are on peace bonds, is a lesser, or not so severe of a sentence. The idea is that the person, the man in this case, receive some counseling, and makes a choice for alternative behaviour.

– Service Provider 1 at 2

SP1 expressed frustration at being disconnected from the criminal justice system, and the larger implications for clients.

I, don't really have...any, I don't really know, what all the different pieces are in the justice system that play out.

– Service Provider 1 at 8

SP1 has prolonged professional contact with men on peace bonds, and is able to obtain a unique, deep perspective on their histories of abusing, their reception to counseling, and the likelihood that they will re-offend. There is, however, no institutional nexus between SP1 and Crown Participants, who would no doubt benefit from this in depth knowledge, particularly with accused whose intimate partners call the police more than once over a period of time. SP1 communicates directly only with the assigned probation officer. Even communication with the probation officer, however, is perfunctory:

We submit a report back to the probation officer, telling them about, a little bit of a narrative, but primarily we don't, get into any kind of assessments. Like we don't give... the probation officer a huge, psycho analysis, report. It's more like he attended this much...he seemed to have gained...you know seemed to have worked for him. Still recommend some alcohol and drug counseling, or something like that. You know, that type of thing.

– Service Provider 1 at 6

The hyper-specialisation, and siloed working conditions of SP1 dictate that the knowledge that this worker possesses, which is vital to the safety of survivors, is never fully shared with other workers in the criminal justice system.

This is due in large part to the fact that, unless men are charged with breaching a peace bond, there is no criminal record attached to the survivor's call for help. According to SP1, this allows men to obtain pre-charge diversion through a peace bond on multiple occasions. In other words, this lack of communication between workers is allowing men to recidivate, to assault their partners again, with no accountability or meaningful consequences.

[There are some clients] ...That are, just, they've learned the system and, they just continue to kind of, figure out how to, [pause] And some of them haven't had a jail sentence. So it's interesting. That you see repeat offenders, not getting any jail time. So....

– Service Provider 1 at 7<sup>3</sup>

This can be contrasted with Crown participants who insist that repeat offenders are never given the 'gift' of a peace bond.<sup>4</sup>

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<sup>3</sup>See Participant 4 at 9.

<sup>4</sup>See Chapter 4 note 51.

One possible point of connection exists between SP1, and survivors themselves. SP1 has a mandate to include survivors, to a limited extent, in the men's treatment program. The treatment program, however, is not provided with sufficient human resources to pursue meaningful contact with survivors.

And we contact the partner, like we get a consent form, from the men, that we can contact your partner and your probation officer. So it may be then within, you know, three or four weeks into the sessions, or sometimes longer, but mainly pretty well at the front end of treatment. We like to contact the women. The one of the challenges is that sometimes when the couple are not together. We'll struggle to get a hold of her. So one of our challenges is that, um, even after trying and trying sometimes we don't even connect with the partner, at all. Throughout the whole treatment. I mean while it is a priority, that doesn't always happen.

– Service Provider 1 at 9

SP 1 notes, however, that even where contact is made with the survivor, the men's treatment program is not resourced to support her, and that existing outside resources for survivors are either unknown to them, or are minimal. SP1 expresses frustration that work with abusive men cannot take into account the needs of the survivors due to the specialised mandates of various service providers, and the inability to share knowledge across specialised categories of worker.

I think victims services, step in, ...I mean police victims services. I mean they're kind of the first, point of contact for victims...and I know that systemically there's been all sorts of struggles with, proper, referrals from, that service to community based victims services, and so on. I mean, there's those challenges...but you know, in a perfect world, ...victim services would be right there, in contact with the woman the next day. And really willing to walk her through the whole process. I think one of the limitations of our services, whether it's victim services, or even offender programs, such as ours, I think one of our limitations, is that, we, we're stuck in, fairly narrow mandates. And we don't really, you know,

have the, resources, or ability to step outside, and really meet the individual needs.

- Service Provider 1 at 12

The trend towards hyperspecialisation has manifested itself in two particular ways that warrant attention. The first, already mentioned in Chapter Four, is that the lack of communication between service providers and Crown means that recidivist men are receiving more than one peace bond, contrary to the Crown's assertion that only 'first time' offenders escape prosecution. According to service providers this has a negative impact on survivors, who become frustrated with what they view as the criminal justice system's lax response to ongoing intimate violence. According to service providers this results in survivors ceasing to seek police assistance during violent episodes, and means they live with the violence.<sup>5</sup>

The second impact of siloing is a systemic misunderstanding of what constitutes restorative justice, which has implications for evaluating current justice practices. Again, a lack of communication between those who work within the justice system means that there is no opportunity to clarify or correct incomplete or incorrect understandings that may be informing workers' decisions or opinions. The problems created for survivors by peace bonds should not be attributed to restorative justice, yet both Crown and service provider participants understood peace bonds as in some way related to restorative justice, and provided negative feedback about this justice practice. Service providers identified peace bonds when asked about restorative justice in their work,<sup>6</sup> and several Crown participants viewed peace bonds as a form of pseudo restorative justice.<sup>7</sup> In the

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<sup>5</sup>See Chapter 4 at page 86.

<sup>6</sup>See Chapter 4 page 178.

<sup>7</sup> See Chapter 4 page 174.

final analysis (as stated by service provider participant 8),<sup>8</sup> if the effect of peace bonds and Alternative Measures are both negative (i.e. no record of the violence, no accountability, no services) then what does it matter what we call it? On the other hand, at the level of policy debates about the utility of restorative justice in cases of intimate violence, it is very significant. The failure of peace bonds and Alternative Measures to protect survivors from reoccurring violence is incorrectly attributed to a failure of restorative justice.

*b) Communication with the Survivor and Offender*

**They [women] just get told, their victim service worker, or you know, somebody from pre-trial or whatever phones up and, this is what happened in court today. Your husband pled guilty, and, this is what. And we'll send you the, order [chuckle] or whatever happened.**  
- Service provider Participant 2 at 7

Closely related to the phenomenon of hyperspecialisation is a profound lack of meaningful communication between the survivor and/or the offender and those making decisions at process interchanges. This is due in large part to a lack of human and financial resources, which is discussed in detail in Chapter Six. Workers simply do not have time during their work days to prioritise meaningful contact with survivors and/or offenders. There are two junctures where this lack of communication was noted. The first is leading up to and during the charging decision by Crown. According to service providers, some survivors who phone the police prepare themselves for the daunting task of testifying in a trial, and want to pursue charges against their abuser.<sup>9</sup> Both clients and service providers are regularly informed at the last moment (sometimes even after the

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<sup>8</sup> See Chapter 4 page 177.

<sup>9</sup> Research by McGillivray & Comasky (see Chapter 5) also showed that the majority of survivors interviewed wanted to proceed with prosecution. Research by Minaker (see Chapter 5) came to the opposite conclusion.

survivor has testified and been cross examined) that the Crown has decided to proceed with a peace bond rather than run the full trial. According to service providers, survivors are shocked, disappointed, and fearful.

The second key juncture is in the days and weeks following the issue of a peace bond.

Crown Attorneys simply do not have the time, human resources, or mandate to support survivors, and cuts to victim services leave them virtually unassisted. Responsibility for monitoring the offender's behaviour during a peace bond falls to a probation officer.

Responsibility for supporting the survivor falls to chronically under resourced provincial victim's services, and feminist-run community services, such as the ones many service provider participants work or volunteer for.

Rather than empowering survivors, pre-charge diversion is silencing them, and taking all manner of control and participation from them. They are not supported to participate in or understand the peace bond process, which only increases their fears and anxieties about more assaults by their partners.

So there's no one really kind of feeding any information back to her. She's pretty isolated...and things can just keep going. And then, a year goes by, six months goes by and, she hasn't had any contact. She doesn't know what he wants. She thinks he's gonna kill her now. You know, she thinks he's gonna, do something horrible because he's so angry. And, so in an intimate relationship, for her, she knows ...what's gonna happen with him. And the justice system, doesn't sort of take those things into account.  
- Service Provider Participant 1 at 11

... Or she goes there, stressing out, thinking the trial's happening and this and that. And she gets called at nine, "Oh don't bother showing up, because we've already agreed to..." Yeah, whereas she's spent the last two weeks, where she got a subpoena, stressing out, and you know, oh I have to go face him and I have to go do this and then. Half an hour before, don't bother coming because we've decided to do this, right...  
- Service Provider Participant 7 at 6

The negative impact of poor communication on survivors in legal responses to intimate violence has been very well documented in other research.<sup>10</sup> Empirical research by Canadians Trevor Brown,<sup>11</sup> Peter Jaffe,<sup>12</sup> Linda Light and Susan Rivkin,<sup>13</sup> and Jane Ursel<sup>14</sup> all point to the immense importance of communication between those working in the justice system and survivors. Brown conducted a review of the current research (including the work of Jaffe, Light, Rivkin and Ursel) and concluded that: "...much of the frustration felt by victims appears to stem from the inadequate provision of information about the prosecution process itself, and about the progress of victims' individual cases."<sup>15</sup>

According to service provider participants' poor communication with offenders can lead them to be angry with survivors, thinking the survivor has caused delays, or is driving the peace bond process.

That they [men] don't have, they don't know what happened to them. They don't know, the police came. They had no information. They didn't know what was the next step. They're, they've been separated from their partner....they don't know what that's about. Their partner wants to meet them. ..He wants to meet em, the kids. There seems to be this real lack of

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<sup>10</sup> Lauren Bennett, Lisa Goodman & Mary Ann Dutton, "Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective" (July 1999) 14:7 *Journal of Interpersonal Violence* 761; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston: Northeastern University Press, 1999) at 137; Woman Abuse Council of Toronto, *Women's Court Watch Project: Court Watch IV 2006*, online: Woman Abuse Council of Toronto <www.womanabuse.ca>. at 16-18 and 31.

<sup>11</sup>Trevor Brown, "Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses" (Ottawa: Department of Justice, 2000).

<sup>12</sup>Peter Jaffe et al., "The Impact of Police Laying Charges" in NZ Hilton, ed., *Legal Responses to Wife Assault* (Newbury Park, CA: Sage Publications, 1991) 62.

<sup>13</sup>Linda Light & Susan Rivkin, "Power, Control and Violence in Family Relationships: A Criminal Justice Response" in M Russell, J Hightower & G Gutman, eds., *Stopping the Violence: Changing Families, Changing Futures* (Vancouver: British Columbia Institute on Family Violence, 1996) 175.

<sup>14</sup> Jane Ursel, "Mandatory Charging: The Manitoba Model" in K Bonnycastle & GS Rigakos, eds., *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 73; "The Impact of Family Violence Court on Corrections" in M Russell, J Hightower & G Gutman, eds., *Stopping the Violence: Changing Families, Changing Futures* (Vancouver: British Columbia Institute on Family Violence, 1996) 201.

<sup>15</sup> Brown, *supra* note 11 at 6.

knowledge and information about the justice system. And that seems to...it feels like the system hasn't worked for those people at all. And certainly the families, not only the men.

– Service Provider Participant 1 at 9

Participants assert that this increases risk of more violence against the survivor.

... [A]nd, and, what happens in that process is that, sometime the woman hasn't had any support either. So she's sitting there isolated. Meantime, she's being blamed by him and his family for calling the police. So she's dealing with all that stuff.

– Service Provider Participant 1 at 11

...[C]ause a lot of time men will say, "Oh she did this to me." "She did this to me."... So, that information, doesn't come to the man until six months later. And then they're like, "Oh! [chuckle] I understand now. She had nothing to do with it... And, higher safety, issues that emerge for women, that the justice system, implements and becomes somehow part of... that, like, by protecting, by trying to protect women, sometimes that they can...increase risk factors for her. If we don't deal with...providing enough information to both of them around what's really going on...

- Service Provider Participant 2 at 13

Several proposals for justice system reform in other jurisdictions have also noted the danger of "retaliation assault"<sup>16</sup> and emphasized the role of communication with perpetrators as a means of reducing this type of recidivism.<sup>17</sup> Alongside clear communication with those charged with intimate violence, research points to other, more statistically significant indicators of reoccurring violence. Current Canadian research shows that the gender (male), and age (18 to 34 years) of the offender, prior convictions for intimate abuse, the severity of previous violence, and previous threats of violence are

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<sup>16</sup> Retaliation assault occurs when an intimate partner commits violence against his partner in retaliation for her calling the police or cooperating with prosecutors in previous cases of violence. Deborah Epstein, "Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Courts" (1999) 11 *Yale Journal of Law and Feminism* 3 at 5.

<sup>17</sup> Deborah Epstein, "Rethinking the Roles of Prosecutors, Judges and the Court System" (1999) 11 *Yale Journal of Feminism* 3 at 24-22. Communication with offenders is also stressed as an important component of restorative interventions in intimate violence. See for instance: Bruce Winick, "Applying the Law Therapeutically in Domestic Violence Cases" (2000-2001) 69 *UMCKL rev.*33.

likely indicators of recidivism.<sup>18</sup> American research also includes experiencing childhood abuse as a frequent indicator of recidivism in cases of intimate violence.<sup>19</sup>

At a more general level, my research findings also speak to a lack of communication within the criminal justice system in the Lower Mainland. While service providers lack knowledge about Alternative Measures and peace bonds, both survivors and those accused of assaulting them lack knowledge about the criminal justice system in general.

### *c) A Co-ordinated Response*

As discussed above, hyper-specialisation, or siloeing, was identified by research participants as a systemic problem in the current justice response to intimate violence. Research participants identified current and potential practices to address this issue, calling for a more co-ordinated response to intimate violence across specialisations. In this way the safety and dignity of the survivor more easily becomes a shared institutional priority. Co-ordination across criminal justice institutions was also found by Pence to be key in her study of the American justice response to crimes of intimate violence,<sup>20</sup> and by Pennell and Burford in their study of family group conferences as a response to family (including intimate) violence.<sup>21</sup>

Some Crown participants pointed to Vancouver's new community court as one possible model for a just response to intimate violence. Crown noted that many vital services (from offender supervision to housing authorities, risk assessments, victim services, and

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<sup>18</sup> *Offender Profile and Recidivism among Domestic Violence Offenders in Ontario*, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06\\_fv3-rr06\\_vf3/p6.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_fv3-rr06_vf3/p6.html)>.

<sup>19</sup> Mo Yee Lee, John Sebold, & Adriana Uken, *Solution-Focussed Treatment for Domestic Violence Offenders* (New York: Oxford University Press, 2003) at 179.

<sup>20</sup> See: Melanie Shepard and Ellen Pence, eds, *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (London: Sage Publications, 1999).

<sup>21</sup> Joan Pennell and Stephanie Francis, "Safety Conferencing; Toward a Coordinated and Inclusive Response to Safeguard Women and Children" (2005) 11 *Violence Against Women* 666.

counseling) were available in one building, and that the different service providers were mandated to share information with one another regarding progress on particular files.

It's [community court] going well. It certainly deals with a high volume of cases. [pause] there's so many different parts of it. I would say some parts of it are going very well. The integrated stuff is you know the way Corrections and Crown and police and health working together and forensics is ...probably heading in the right direction They're all located in the same building. Yeah so that's something. It does make a lot of sense.

– Crown Participant 13 at 19

Other participants thought that specialised units at the police or prosecution stage, coupled with better coordination, would make a difference from the moment a survivor phoned the police.

... [Y]ou know I suppose in the ideal world you know, we could have a dedicated team of prosecutors that do nothing but K files [intimate violence files]... the police could have dedicated units ...you know dedicated units that support and have a lot of resources and in house counseling and, and support the complainants and. ...in the ideal world they, they should be done for every single case you know. The police should have resources for every single case every Crown officer should have a dedicated team or, or group of prosecutors that deal with these things.

– Crown Participant 13 At 21

The Crown, [sigh] should strive to... in large centres... should strive to have... you know a team of prosecutors that, that can handle these cases. Cause here as you know the problem is you know we, we go through these different stages of prosecution and we have different prosecutors touching them all right. So, there's, there's not a continuity in terms of you know it goes through bail and then you go through arraignment and then you go to trial and you could have minimum of three likely five or six prosecutors touch that file. Right before it gets to, to trial. Um and we just can't it's not, feasible.

- Crown Participant 11 at 22

A coordinated response to intimate violence, according to Pennell and Burford, and Ellen Pence, requires communication not only between professionals within the justice system,

and survivors and offenders; but also between those actors and the feminist anti-violence community.<sup>22</sup> This includes both state funded and independent women's groups, shelters, rape crisis centers, and advocacy groups. In the Lower Mainland many of the women's service providers interviewed worked in paid or volunteer positions in such organizations. Those who provided services to men who batter were employed by state funded community groups, although not specifically women-centred organizations. According to my research data there is a lack of communication between these community level organisations in the Lower Mainland and justice system professionals, and this is having negative impacts on survivors and men accused of battering.

This may, in part, be due to the economic and political marginalization of women-centred and feminist-run services in both the province and across the country in the 1990s and early 2000s. According to Melanie Beres, Barbara Crow, and Lise Gotell, these organizations in British Columbia and across Canada are currently in a state of economic crisis, leaving them little or no time for important outreach and communication work.<sup>23</sup>

Gillian Creese and Veronica Strong-Boag documented the systematic defunding of women's centres across British Columbia in the wake of the provincial Liberal's election, as well as the increased economic pressures on feminist-run services to accept state funding to provide services, but under a 'gender neutral', apolitical mandate.<sup>24</sup> At the

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<sup>22</sup> Joan Pennell & Gale Burford, "Feminist Praxis: Making Family Group Conferencing Work" in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 108; Ellen Pence & Melanie Shepard, *Coordinating Community Responses to Domestic Violence: Duluth and Beyond* (London: Sage Publications, 1999).

<sup>23</sup>Melanie A. Beres, Barbara Crow & Lise Gotell, "The Perils of Institutionalisation in Neoliberal Times: Results of a National Survey of Canadian Sexual Assault and Rape Crisis Centres" (2009) 34 *Canadian Journal of Women and the Law* 135 at 153.

<sup>24</sup>Gillian Creese & Veronica Strong-Boag, *Losing Ground: The Effects of Government Cutbacks on Women in British Columbia, 2001-2005*, (Vancouver: BC Coalition of Women's Centres, The University of British Columbia Centre for Research in Women's Studies and Gender Relations The B.C. Federation of Labour, 2005).

national level, Lise Gottell,<sup>25</sup> Judy Rebick,<sup>26</sup> Marina Morrow, Olena Hankivsky, and Colleen Varco,<sup>27</sup> feminist anti violence advocates and scholars, have documented a similar trend as federal economic and social policies also took a neo-liberal turn. The effects of a neoliberal political agenda at the provincial and federal levels will be discussed in further detail in Chapter Six.

*d) Timeliness*

Both Crown and service provider participants pointed to time lags and delays in dealing with offenders and/or supporting survivors as a serious flaw in the current justice response to intimate violence. According to participants, time lags of weeks or months, coupled with poor communication and coordination across the justice system, resulted in a heightened risk of more or escalating violence against survivors. Service providers noted that the passage of time also enabled the survivor, the Crown, and the offender to minimize the assault.

...Maybe in the system if we could, do something, that would allow that person, to, to right away, start to, address what those issues are. Like, right off the front and, deal with what it means to be not going back home and, and, have him start to talk about what it means to be away from his children. And, what supports he can put into place, for himself, ...so, to me, I think that would be really effective... So that's one of my recommendations is that we intervene much earlier. Because sometimes we don't see these guys 'til six months after they have actually been involved with the police. And in the meantime, they are separated from their families. .. So, you know I think if the process, kicked in a little bit faster in terms of supporting her and, and him. That, to me that would be great.

– Service Provider Participant 2 at 6

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<sup>25</sup>Lise Gottell, “The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship” in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007).

<sup>26</sup> Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005) at 76.

<sup>27</sup> Marina Morrow, Olena Hankivsky and Colleen Varcoe, “Women and Violence: The Effects of Dismantling the Welfare State” (2004) 24 *Critical Social Policy* 258.

So the difficulty is one, getting that risk assessment done in a timely fashion, because it has to be pretty immediate. And then, two, getting that entire agreement in place and fulfilled within a four or five month period....but we don't get it.

– Crown Participant 9 at 1

Um [pause] you know I'm not sure these are getting set down [for trial] as fast as they should be. I mean ideally K file [intimate violence files] should be sent down for trial within a month or two right? So I don't think that's happening. – Crown Participant 11 at 22

Evidence from both the Duluth Model and Family Group Conferencing<sup>28</sup> demonstrate that timely, responsive coordination, and co-leadership between the state, the program, and antiviolence advocates are important features of successful justice interventions in cases of intimate violence. Justice practices in the Lower Mainland would benefit from formal agreements mandating timely, coordinated communication between justice personnel, as well as less formal efforts at effective communication between justice response participants. FGCs and the Duluth model actively solicit input from survivors and anti-violence workers in planning and carrying out justice interventions. In my opinion, given their knowledge and expertise, Crown Attorneys, police, government officials and parole and probation officers would benefit from similar, mandated input from survivors and anti-violence workers in the Lower Mainland. As the example of SP1 above illustrates, valuable experience and knowledge regarding the safety of survivors is lost to the justice system when survivors and anti-violence workers are excluded from official lines of communication.

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<sup>28</sup> See Chapter 2. See also L Bennett, L Goodman & MA Dutton, “Systemic Obstacles to the Criminal Prosecution of a Battering Partner” (1999) 14 Journal of Interpersonal Violence 761.

## Human and Financial Resources

### *a) Under Resourcing and Resource Distribution*

**I mean, we have, very ...few services. So I think that's important in this. Because for me, it's like, [pause] it's, it's kind of a set up for women.**

**- Service Provider Participant 1 at 15.**

Both under-resourcing and resource distribution were flagged as serious problems by research participants in relation to Alternative Measures and peace bonds. They noted that a shortage of human and financial resources for both accused and survivors create concerns for the safety of survivors, and often forces them to return to their abusers for economic support.

First, under-resourcing peace bond practice, coupled with an offender focus, results in virtually no government support for survivors. Crown research participants consistently noted that they chose peace bonds over other charging options because, unlike a stay or Alternative Measures, they allowed accused to access important resources such as counseling, drug and alcohol treatment and supervision by a probation officer. Crown also noted that they avoided pursuing charges and a trial where a survivor was unable, or unwilling to testify, because she would have few or no support resources available to her that might ensure a more successful prosecution.

This underlines two systemic problems. The first is that resources that support the safety of survivors (i.e. resources to help change and supervise abusive behaviour) are guaranteed only with peace bonds, a non-prosecutorial choice. In fact, the ability to prosecute is undermined by the lack of support services for survivors. The unofficial institutional mandate to avoid prosecution, to decriminalise intimate violence, is maintained by the paucity and distribution of resources. Secondly, the available resources

are completely offender centred. The application of a peace bond ensures that the offender receives access to counseling and other services, while the survivor is cut off from even the few survivor support systems associated with a trial process.

Service provider participants spoke at length about the chronic lack of services and resources for survivors generally.

And we don't really, you know, have the, resources, or ability to step outside, and really meet the individual needs. So even victim services, might phone the woman and say, oh yeah, did you know you had this no contact order? Can I mail you a copy? Can I send you a copy? You know the woman has just been through assault last night. She's still trying to, figure out you know, how to comfort her kids and whether she should drop them off at school. Whether he's gonna go pick the kids up and what she should be doing. You know, it's good to get a call that day, but you need to get a call the fifth day as well. And the tenth day. And, then, you know, so to me, I find that, [sigh] those are some of the limitations of our system. I mean if we had victims who are totally healthy and, they knew what they were doing and they're, they speak the language and, they know the constructs and the systems. But what about, you know, the majority of the, population, doesn't know, that.

-Service Provider Participant 1 at 12

I had a client...she called the cops. She's all ready to you know go to the transition house, gets herself a suite...but what happens is that again this around the time the government changed right, four or five years ago whatever. She can't get welfare. She can't get legal aid, it's really tough...you know what happened. About three months later she called me and says you know I can't pay the rent anymore. Because people will not lend me any more money. I haven't seen welfare. So I'm going back to him...so she went back to him...but the systems were supposed to be in place to support her.

- Service Provider Participant 2 at 16

Notice how service providers link the lack of services to negative outcomes for survivors.

Women are unable to navigate the justice system, or find support in gaining independence from their abusers because the resources to support them are either inadequate or non-existent. Criminal justice responses such as peace bonds (pre-charge diversion) with no resources for survivors attached are punitive to survivors, not to

abusers. Women are entitled neither to the full protection and due process of the law through a prosecution, nor to the promises of support and empowerment of restorative justice. As survivors are faced with virtual inaction on the part of the state they are left instead with two unconscionable choices: live with the abuse to survive economically, or leave and suffer the consequences of women and children's economic and social inequality first hand. At the same time, the state fails to mark their abuser's behaviour as criminal, making it less likely that they will call the police the next time an assault takes place.

There has been extensive Canadian research showing that poverty drives survivors back into abusive relationships, as they cannot support themselves and their children on a single income.<sup>29</sup> For instance, a recent study by Sylvia Novak for the National Clearinghouse in Family Violence shows that, of women leaving shelters,<sup>30</sup> more than 12% report returning to an abusive partner.<sup>31</sup> My findings support this research.

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<sup>29</sup> Amanda Dale, "Beyond Shelter Walls: No More Running in Circles", online: YWCA Canada <[ywcacanada.ca/data/publications/00000007.pdf](http://ywcacanada.ca/data/publications/00000007.pdf)>. ; Jill Davies, "Building Comprehensive Solutions to Domestic Violence, Policy Blueprint on Domestic Violence and Poverty", online: National Resource Centre on Domestic Violence <[http://new.vawnet.org/Assoc\\_Files\\_VAWnet/BCS15\\_BP.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/BCS15_BP.pdf)>. ; Peter Jaffe, "ACCESS DENIED: The Barriers of Violence & Poverty for Abused Women and Their Children's Search for Justice and Community Services After Separation", online: Atkinson Foundation <[http://www.lfcc.on.ca/access\\_denied.html](http://www.lfcc.on.ca/access_denied.html)>. ; METRAC, "No Cherries Grow On Our Trees": A Social Policy Research Paper for the Take Action Project to Address Women's Poverty and Violence Against Women", online: METRAC <[www.metrac.org/resources/downloads/take.action.report.dec08.pdf](http://www.metrac.org/resources/downloads/take.action.report.dec08.pdf)>. ; Janet Mosher & Patricia Evans, "Welfare Policy – A Critical Site of Struggle for Women's Safety" (2006) 25: 1-2 *Canadian Woman Studies* 162.; Colleen Purdon, "Women Abuse and Welfare in a Rural Community: Rural Women Speak About Their Experiences of Ontario Works", online: Centre for Research and Education on Violence Against Women <[www.crvawc.ca/.../FinalRuralwomenspeakAboutOntarioWorksEdited.pdf](http://www.crvawc.ca/.../FinalRuralwomenspeakAboutOntarioWorksEdited.pdf)>. ; Jody Raphael, *Saving Bernice: Battered Women, Welfare and Poverty* (Boston: Northeastern University Press, 2000); Richard Tolman & Daniel Rosen, "Domestic Violence in the Lives of Women Receiving Welfare: Mental Health, Substance Dependence, and Economic Well-Being" (2001) *Violence Against Women* 141.

<sup>30</sup> Women who flee to shelters have faced the worst kinds of violence, and often over a long period of time. Statistics Canada, *Shelters for Abused Women in Canada* by Marta Burczycka & Adam Cotter (Ottawa: Juristat, Canadian Centre for Justice Statistics, 2011).

<sup>31</sup> Sylvia Novak, *Family Violence and Homelessness: A Review of the Literature*, (Ottawa: National Clearinghouse on Family Violence, 2006).

*b) Resources for Women Regardless of the Justice Response*

**How do you solve that... I mean... it's not like you can build a transition home for 5,000 people. I don't know maybe that's what you know that's what's needed. I don't know right. [chuckle] So...**

- Crown Participant 12 At 27

Both Crown and service provider participants identified women's social and economic dependence on abusers as one key barrier to achieving just outcomes in cases of intimate violence. The solution offered by many participants is the addition of economic and social resources for survivors, *regardless* of the type of (criminal) justice intervention being pursued, whether it be a charge, a peace bond or Alternative Measures. No matter what charging choices are made by Crown, access to these resources is key to ensuring real choices for survivors.

No, what you need for that, all that to happen, [whispering] is resources. [normal voice] But see, you know you can have the most beautiful crafted legislation that has tears flowing down everyone's cheeks, and if you don't resource it, um, there's no efficacy to it.... But it, but it's true of everything... if you have a woman, that's so dependent on her husband, and his family, and she might have the kids, and they have all the cash. It's never gonna work. She's starving. Her kids have nothing. And they'll resent her for it. And the parent, like the grandparents will play them... If you can't give someone food and shelter, you're never gonna get uh, to love or those other things. If they can't eat and they're not clothed, and they have nowhere to live, we've lost 'em...

- Crown Participant 9 at 10

It's the resources that I would want, to see improved, would be the assistance to the complainant, after the accused has been arrested and removed... Financial support, day care, uh these, well you can imagine. Women phoning two weeks after having been battered, and anguished because they have no money. Because the person that has been charged is the breadwinner and is not providing financial support and is blaming, the victim, for, the, their predicament.

- Crown Participant 9 at 3

[Y]eah, I think that would include, that would include additional resources to address...the issues faced by many of our complainants.

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- Crown Participant 11 at 8

Both the Duluth model, and FGCs<sup>32</sup> are well resourced. FGCs are able to provide survivors, abusers and their entire families with social, educational, and material resources to complete a detailed family recovery plan. The Duluth model provides counseling and support services to both the survivor and the abuser, as well as community-based prevention programs in marginalised communities. In the Lower Mainland, abusers receive available services only if they are placed on a peace bond. Some research participants noted that even these services are not entirely adequate. Survivors receive state funded victims services only if a charge is laid. Each and every research participant characterised these services as inadequate. If charges are not laid, the survivor is not entitled to services or support of any kind through the justice system. Unless child welfare authorities are involved with a family where intimate violence is occurring, families are not entitled to services through the justice system.

### **Punishment and Incarceration**

#### *a) Participants' Understandings of Justice: Punishment and Incarceration*

But we know as workers that she could have gotten a lot more justice. Um and uh so it's ...the diversion is not working for women.

-Service Provider Participant 2 at 13

[A client said] I might as well stay with him and get beat a couple of times a day. It's okay. It's better that I get a roof over my head. The kids get fed then. Go through all this again? And he just has to get, a couple of classes? Or just plead guilty and get a one-year peace bond. He won't stop harassing me, anyway. [pause] So they just feel, that there's no, justice.

- Service Provider Participant 6 at 6

Research participants, not surprisingly, gave complex, sometimes contradictory, accounts of what justice would look like in cases of intimate violence. While there was no one, unified notion of justice across the participants, there were certainly identifiable themes.

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<sup>32</sup> See Chapter Two.

Research participants' understandings of justice were highly contextualised, meaning that in many cases they framed justice one way when discussing current peace bond practices, but very differently when framing an *ideal* justice intervention.

In the context of the current peace bond system, Crown participants spoke less in terms of justice *per se*, and more in terms of meeting their charging standard as the first priority, and providing offenders with some counseling and supervision as a result of a peace bond.

So it's a scenario where you're not gonna get a conviction. But you need to do something to, help protect the complainant, for long term. ...protect her through counseling and other programs for him. So hopefully he won't batter again.... So. If we could have something like that, where, he gets the treatment he needs. Um, and we're preventing it from happening again. [pause] I mean at the end of the day, that's really what we're aiming for.

– Crown Participant 9 at 8

For more 'serious' intimate violence, Crown saw prosecution (and by implication jail time) as just in the circumstances, particularly in light of the public interest; framed as a concern that later partners of the same offender might get beaten too, or about escalating violence against a current partner.

So the... battered one, the ongoing, [pause] future is bleak, we wanna prosecute. – Crown Participant 11 at 7

And so the work that we do is, [pause] well, [sigh] we like to say that if we can catch it early enough, ...we will prevent some of those murders ...cause you know a lot of our, our most serious offenses stem from domestic violence or jilted lovers, or relationship violence going south.

– Crown Participant 11 at 8

For service providers, justice connoted punishment, including incarceration for abusers in the current peace bond system.

[Long pause] I think the idea about having to, maybe attend, some sort of educational and those, is it probably works, for some people. For some people, it's probably that light bulb goes off, right? So that piece, I think is good. But it's gotta also go with, a consequence piece. Not just, you go to, class. Right, so they need to be educated, but there's also gotta be a, consequence for what they've done, so... I think it's gotta be as serious as jail time. Because that's the biggest, thing people don't want to go to jail. So that's not, they're there for two hours and, they're out on the street before she even gets home from the hospital... So, jail time, it's gotta show up on the criminal record. Because that's the biggest thing, people giving peace bonds is, they, [sigh] if they're truck drivers, or they're working in security or whatever, they need that clean...record.

- Service Provider Participant 4 at 6

...[A]nd then you know we're finding that a lot of our...of the victims are not getting their day in court...she had to weigh the pros and cons of some of the things she actually wanted to get out...but the majority no, they want their day in court...the majority are wanting to have some justice, and a lot a little bit more than just a you know no contact no go.

- Service Provider Participant 2 at 6 to 7

..It just didn't make sense how this alternative to the court and trial process, due process, would work, in terms of giving justice to the women.

- Service Provider Participant 2 at 2

...I think, there just has to be more consequences tied to, when they're going through the system. And like I said before, it's not just a slap on the hand, like you've done it, you've pled guilty... there needs to be more of a consequence, because for some people, for some clients, there husband, or boyfriend, or whatever, [pause] don't see it until, their faced with something and they're going to jail. And all of a sudden, it's, oh God, I'm getting eighteen months, in jail. And, that's when the realization kicks in. Oh they spent two days in jail for beating her, and you know, then they get out and go, okay, I've really screwed up. Right? Sometimes that's some of them, need that piece to the anger management, and the AA.

- Service provider Participant 4 at 8

Note in the quotations above that service providers see incarceration as a deterrent to further violence, as punishment for the violence already committed, and as a way of giving survivors a public voice ('their day in court').

Service providers' willingness to ask for jail time as justice is, in part, a reaction to the deep sense of injustice service providers expressed at the unconscionable choices currently available to women. They were firm in the belief that complete decriminalisation of intimate violence was incompatible with justice, as this practice eliminated public censure or the marking of acts of intimate violence as wrong.

For them to go through the court system, for the women, it feels like, they've been listened to I think. And that, being, that the assault or the abuse that they faced has been taken seriously. You know, that, by going through the court system, it brings a legitimacy to it. And saying, yes, this is a serious issue. Because it went through the whole system, but if it doesn't go through, oh this isn't as serious as breaking another law, so we'll just send you here. But if you, were to go and to have a bar fight, then, you would be charged. But if you hit your wife, then, oh it's not that serious. You can just, send you to anger management.

- Service Provider Participant 4 at 5

Compared to how they, are taking this [intimate violence] so seriously in [another jurisdiction]...you know that message that has been given there is very clear, that we are taking this very serious. If you ever touch this woman again, using violence, that, you know you are going to be seriously, uh you know, taken very seriously...So it's very interesting. How, how our response [in British Columbia] is actually digressed.

- Service Provider Participant 1 at 15

I mean way back when this thing was announced the restorative justice was announced then we have the government changing and then we have the VAWIR policy, kind of falling through the cracks, and nobody giving a damn, right. I mean it was tough enough to, to get them to do things with the policy in place. I mean you and I we both know this, right. Um but then to have somebody say oh well you, you know there's too much court time being taken up. There's too many stays and there's too many witnesses that don't show up and yadayadayada, right. Um so all this is going on and then you know we're finding that a lot of the victims are not getting their day in court.

- Service Provider Participant 2 at 6

In criticizing the current justice response to intimate violence, service providers point out two key failings. First, is the fact that removing these cases from the courts, and by analogy public scrutiny, survivors *feel* that they are being ignored, and silenced, while

men who abuse are not *seen* to be held to account. Second, the peace bond system itself *does*, in fact, fail to hold men who abuse to account by allowing them to abuse their partners repeatedly with no legal or social consequences.

However, when discussing possible alternatives to peace bonds and/or Alternative Measures, another narrative of justice began to emerge for both Crown and service provider participants. Some participants noted that prosecution and incarceration were in and of themselves not always a just response. These doubts about incarceration are explored more fully below.

So, you have unfair trials, and unfair legal processes, including these Alternative Dispute processes, because the sexism is already there to call forward and, there's no compensatory, structure or intervention that works the other way. You know if we could get there, I'd be okay with that.

[pause] But it's not there.

– Service Provider Participant 7 at 4

### **Other Empirical Studies on Punishment and Incarceration**

Other Canadian researchers have completed empirical work in the area of punishment and incarceration in cases of intimate violence, drawing on interviews with survivors.

Both *Black Eyes All of the Time* by Anne McGillivray and Brenda Comasky,<sup>33</sup> and

“Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women’s Needs” by Joanne Minaker,<sup>34</sup> are informed by a series of interviews. McGillivray and

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<sup>33</sup> Anne McGillivray & Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at xiv.

<sup>34</sup> Joanne Minaker, “Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women’s Needs” (2001) 13 *Canadian Journal of Women and the Law* at 81.

Comasky deal exclusively with Aboriginal women, while Minaker's sample includes both Aboriginal and non-Aboriginal women.<sup>35</sup>

When participants were questioned on what justice responses should be used in cases of intimate violence, the results were contradictory. In McGillivray and Comasky's study, participants were supportive of punishment (in the form of incarceration) *and* treatment for the offender. The study concludes:

Alternatives to the criminal justice system will not be acceptable to victims of intimate violence unless diversion can do what jail is now seen as doing, however unsuccessfully- punish, visibly, actually and symbolically, and protect, at least long enough for victims to get their lives back on track. Alternatives will not be acceptable without reliable indications of successful treatment for abusers in programs that also guarantee victims' safety for the duration of treatment.<sup>36</sup>

Minaker notes, however, that “[i]n contrast to the findings of Anne McGillivray and Brenda Comasky, the Aboriginal women in this study did not view treatment and jail as most effective.”<sup>37</sup>

To greater or lesser extents in both studies, survivors viewed punishing their abusers and having them made accountable as important. McGillivray and Comasky found overwhelmingly that participants in their study prioritized punishment both symbolically and actually through incarceration. Minaker found that a minority of participants in her study had a “[n]eed for accountability...reflected in their concern with the consequences for their partners by way of incarceration or punishment”<sup>38</sup> More participants, however,

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<sup>35</sup> Joanne Minaker's study consisted of fifteen women, six of whom were Aboriginal, while Brenda Comasky and Anne McGillivray's study represented twenty-six Aboriginal women.

<sup>36</sup> McGillivray & Comasky, *supra* note 33 at 131.

<sup>37</sup> McGillivray & Comasky, *supra* note 33 at 100.

<sup>38</sup> McGillivray & Comasky, *supra* note 33 at 89.

expressed a general need to have their partner to take accountability for their actions, and to send a message that the abusive behaviour is not appropriate.

These studies also documented that survivors of intimate violence looked to incarceration as a means to secure short and long term physical protection from their abusers.

McGillivray and Comasky found that this could best be accomplished in the short term by removing the offender to incarceration for a short period of time so that survivors could "...get their lives back on track."<sup>39</sup> Participants in the McGillivray and Comasky study overwhelmingly saw non-incarceral options as too lenient, and instead emphasized incarceration coupled with treatment as the best method to secure their safety. Minaker's study also prioritizes "[t]he need for protection, safety and an escape from abuse...."<sup>40</sup> In the short term, Minaker's study saw this as being facilitated by the intervention of police or other service providers.<sup>41</sup> Some participants saw this short term need being met by having their partners arrested, but the majority saw this as a role for social services and other community supports.

In both studies, however, the most important aspect of feeling safe in the long term was 'being involved' and 'knowing what was going on.' This included knowing the whereabouts of the offenders, information on the process itself, and consequences for breaches of protective measures such as no contact orders.<sup>42</sup>

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<sup>39</sup> McGillivray & Comasky, *supra* note 33 at 131.

<sup>40</sup> Minaker, *supra* note 34 at 93.

<sup>41</sup> *Ibid.*

<sup>42</sup> James Ptacek, in his book *Battered Women in the Courtroom* also found that, alongside information sharing, having the violence against them marked as significant by the legal system was important to the American survivors in his study. Ptacek's work examined these responses in the context of peace bonds. James Ptacek, *Battered Women in the Courtroom*, (New York: Northeastern University Press, 1999) at 136-138.

My research supports these findings at several levels. First, participants saw individual and systemic accountability for men who abuse as key both to deterrence, as to legitimating the experiences of survivors. As in McGillivray and Comasky's study, most service provider participants viewed incarceration as an important tool in reaching these goals, within the context of the current system of repeat peace bonds. Finally my research supports the call for social and other community based supports for both men who abuse, and survivors.

#### **a) Theories of Punishment and Incarceration**

In the previous chapter, and in the section above, I have demonstrated that the current justice response (810 peace bonds) is problematic for survivors of intimate violence, and that both Crown and service provider participants are calling for punishment (in the form of incarceration) as part of a better response. This is echoed in Monaker and Comasky's empirical work with survivors. In each case the desire for punishment is motivated in large part by a desire to have intimate violence publicly marked as a form of gendered oppression; a desire that closely echoes one of the motives behind feminist legal reform resulting in mandatory arrest and prosecution policies. Research participants and feminist anti violence activists are, I think, legitimately worried that a failure to prosecute means that, once again, violence against women becomes an invisible private problem that underpins and supports other forms of gendered subordination.

In part, this dissertation is aimed at sketching the outlines of a better justice response. How do we mobilize these understandings of punishment and incarceration in building a

better justice response? Is it appropriate to endorse incarceration in light of the fact that<sup>43</sup> criminalization has disproportionately negative impacts on marginalized populations, and has been shown to be neutral at best in ending violence against women? If more restorative responses are part of a better justice response, how do we reconcile this with the desire for punishment?

Kathleen Daly, a prominent feminist and restorative justice theorist, has explored theoretical understandings of punishment and retribution within criminology generally, and within the restorative justice movement particularly.<sup>44</sup> Daly usefully teases apart several key elements in the discussion of punishment and incarceration that assist in responding to these dilemmas.

First, she notes that traditionally, punishment is the "intentional" or "deliberate imposition of pain" while retribution is the *justification* for punishment those feelings of loss, revenge and societal censure that provoke the infliction of pain or discomfort.<sup>45</sup>

Secondly, she notes that punishment does not necessarily have to be doled out in the form of incarceration; there are other, perhaps more productive, ways to inflict pain on offenders.<sup>46</sup> The type of pain or punishment is dictated in part by the goals of the pain or punishment. Pure retribution calls for punishment that only causes pain, while deterrence, denunciation, and rehabilitation are secondary. Research participants, although at least in part retributive, also underlined other reasons for punishment than the simple infliction of pain. They hoped that punishment would encourage individual and systemic

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<sup>43</sup>As outlined in Chapter One.

<sup>44</sup> Kathleen Daly, "Revisiting the Relationship between Retributive and Restorative", in Heather Strang and John Braithwaite, eds. *Justice Restorative Justice: From Philosophy to Practice* (Aldershot: Dartmouth: 2000).

<sup>45</sup>*Ibid* at 10.

<sup>46</sup>*Ibid* at 12.

accountability, and would provide abusers with supported avenues to change their abusive behaviour. For research participants, punishment had several, related goals, indicating that forms of punishment aside from incarceration may better answer their visions of justice.

Daly suggests that restorative justice is not an alternative to punishment, but an alternative form of punishment. Punishment in restorative justice theory and practice is not incarceration, but other forms of reintegrative shaming, such as family group conferences, where the pain inflicted as punishment is in the public acknowledgement, and marking of wrongdoing. This form of punishment should be forward looking, in that it is retribution for past conduct, and a signal that the wrongdoing will not continue.

Punishment in restorative justice theory does not simply function to inflict pain or discomfort on an offender as a form of retribution, but has a secondary, and more important role. Non- incarceral forms of punishment use the infliction of pain as a way to ensure the accountability of the offender, in a number of senses. First, as a way to ensure an offender takes individual responsibility for their wrongdoing, and acknowledges this to those who have been hurt. Secondly, and in the case of intimate violence most importantly I think, as a way to ensure that the behaviour of the individual offender is publicly, and permanently marked as socially unacceptable, and worthy of censure.

Daly's position, which allows for the separation of the functions of punishment<sup>47</sup> from incarceration itself, I think serves a useful analytical purpose in carving out a clear, mindful position on the role of punishment and incarceration, and has resonance with the

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<sup>47</sup>These are: causing pain to an offender in order to stop wrongdoing, and mark wrongdoing as socially unacceptable.

views of justice expressed by research participants. Both Crown participants and service providers expressed frustration at the lack of accountability for men accused of violence, when they equated accountability with prosecution and incarceration. Yet, both Crown and service providers, when exploring more ideal justice responses, were positive about non-incarceral alternatives, almost all of their proposed improvements called for better resourced, non-prosecutorial approaches to intimate violence rooted in improved supports for both survivors and marginalised communities.<sup>48</sup>

Research participants saw punishment as having two purposes. First, in some cases, to inflict pain and discomfort, as a form of retribution. Secondly, and I argue most importantly, as a way to ensure offender accountability at the individual and community level. An approach to intimate violence that allows for offender accountability through non-incarceral forms of punishment, such as family group conferences, may satisfy their visions of justice; providing both retributive pain, and accountability. If a justice intervention, such as a family group conference, can perform both functions of punishment, while better supporting survivors, families and communities, it may be a better justice intervention in some cases.

The analysis of incarceration does not end there, however. Feminist critiques of restorative justice models raise important concerns about FGCs that may obviate their use in some cases. First feminist critics argue<sup>49</sup> that in some cases intimate violence in a particular family is so serious and systemic that survivors should never have to meet with their abusers face-to-face, or negotiate with them, even in a supported setting such as an

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<sup>48</sup>These approaches are discussed in detail below.

<sup>49</sup>See Chapter One.

FGC. In fact, the FGC program in Hawaii *Pono Kaulike* never allows face-to-face meetings, unless specifically requested by the survivor.<sup>50</sup> The Burford and Pennell FGC project in Newfoundland also dealt with extreme cases of violence by avoiding direct contact between survivors and abusers.<sup>51</sup> In both cases, however, the survivor is still able to participate in counseling and support, and able to access economic and social services to fulfill her own family healing plan.

Secondly, the Burford and Pennell FGC project in Newfoundland recommended that FGCs be used *only* in cases where the survivor intended to reconcile and continue a conjugal relationship with the abuser, or where the ex-couple would continue to have contact due to shared childcare responsibilities.<sup>52</sup> In cases where the ex-couple will not continue to have contact, or the survivor does not wish to reconcile, the Duluth model, which eliminates the need for face-to-face contact provides a non-incarceral option that supports women alongside providing abusers a supported opportunity to end abusive behaviour, through a court mandated batterer intervention program.

What are the practical upshots of these feminist critiques? First, justice responses to intimate violence cannot be envisioned as ‘one size fits all’, and must entail timely, supported, and informed choices by survivors. The level and duration of violence, whether the survivor wants to reconcile, and shared childcare responsibilities will dictate in part what kind of justice response should be pursued. This requires a timely safety assessment by trained professionals, and timely counseling for survivors and men who batter to support them in making informed choices about reconciliation, and which justice

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<sup>50</sup> Chapter 2.

<sup>51</sup> Chapter 2.

<sup>52</sup> Chapter 2.

model to pursue. The implications of pursuing an FGC, rather than a Duluth model intervention, are profound for survivors, and should be made clear and plain.

### **The Long and the Short View**

But what of incarceration itself? In the final analysis, the strategic deployment of incarceration as a tool against intimate violence is a complex and difficult calculation.

One principled approach, I argue, is to take a long and a short view of justice reform.

In the short term, the current justice system in the Lower Mainland is not serving survivors of intimate violence well. The Aboriginal Women's Action Network (AWAN), in concluding their study on the use of non-incarceral approaches to intimate violence in British Columbia (including the Lower Mainland), called for a moratorium on the use of non- incarceration approaches, including restorative justice.<sup>53</sup> AWAN worried that, unless and until a feminist-inspired restorative justice process is set up and running, failing to prosecute will inevitably revictimise survivors, and eliminate any accountability for abusers. This instrumental position was supported by service provider research participants who called for prosecution *under the current justice conditions* primarily in order to promote individual and systemic abuser accountability through record keeping.<sup>54</sup> In other words, if the justice system is not going to change, and we are left with the choice of either using an 810 peace bond or prosecuting the offender, then the Crown should prosecute.

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<sup>53</sup> Aboriginal Women's Action Network, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley & Fay Blaney (Vancouver: AWAN, 2001).

<sup>54</sup> At the individual level a record of charges against an individual abuser, and at a systemic level the generation of jurisprudence which can be scrutinised as a text to ensure judicial reasoning reflects a feminist understanding of the causes and cures for intimate violence.

In the long view, however, incarceration alone is not going to reduce intimate violence. Justice reform is badly needed, and should include both the FGC and Duluth models. The choice of which path to take (between Duluth and FGC) should be made based on informed decision making by the survivor. With either choice, the survivor must be provided with resources to assist her, and the abuser must be provided with supported opportunities to end his abusive behaviour.

However, for both the Duluth model and FGCs, should justice responses prove unable to hold an offender individually accountable, then abusers should be charged with breaching conditions put in place under this regime, and incarcerated. Here, incarceration fills a number of roles. First, it is a mechanism to separate the survivor from a recidivist abuser, giving her respite. Second, it operates as a form of public censure and accountability for intimate violence generally. Third, it provides a clear message to individual offenders that violence against intimate partners is a crime, and that it is being taken seriously. In other words, I advocate a progressive, strategic use of incarceration, with protection of survivors and denunciation of violence as the guiding principles.<sup>55</sup>

### **Individual Offender Accountability: Practical Mechanisms**

Non-incarceral justice responses such as an FGC or the Duluth Model must be preceded by a guilty plea by the abuser. This ensures that the offender has acknowledged their wrong doing, that there is an official record of the same, and that should violence re-occur, there is already a legal lever to begin prosecution. This avoids both the political, and individual consequences of completely decriminalising intimate violence: that is,

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<sup>55</sup> Having said that protection and denunciation are the key objectives, a mindful position on incarceration must acknowledge that, especially from the perspective of the person being incarcerated, pain (punishment) is an inevitable part of this strategic deployment of incarceration, even if it is not one of the objectives.

failing to censure or mark gendered violence as a socially unacceptable behaviour.<sup>56</sup> In their study of family (including intimate) violence and FGCs, Burford and Pennell noted that having guaranteed state control over protective consequences for recidivism was a key factor in ensuring both the success of the restorative intervention, and the safety of survivors and children.<sup>57</sup> This position is supported by my own research findings:

I mean what I really think is that the programs will work when there is a, critical mass of men wanting to change. But until there is, and there won't be until there is, a systemic response that actually censures the behaviour. When we get to there, then I think it will matter that there's education programs available, and progressive sentencing available. But until then, it's just pissing in the wind.

– Service Provider Participant 7 at 14

If diversion is still kept in place and like what changes should come to that? There should be more conditions. One of the diversion cases that we had, the guy had to do like 30 hours of community service... Um lets make it more realistic. So he's given her like out of five years of marriage he's given like three years of hell... Or it could be could possibly be five years of hell. And so when she decides to pick up the phone she has the courage to call for help um like this is the response that she gets... So that's it, he's on a peace bond. Okay so if he's on a peace bond the conditions that are in there let's make them a little bit more realistic and a little bit more I, I feel like saying the work punitive but, he could be made to do thing which he sees as punitive.

- Service Provider Participant 2 at 6

And if, diversion is going to happen I can't give an example of, of a real severe condition but like they have to be realistic and kind of like be in on equal footing with crimes that have been committed upon her... So like 70 hours of community service doesn't make sense...to me.

- Service Provider Participant 7 at 12

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<sup>56</sup> One service provider also noted that creating a written record of the offence helped to ensure institutional accountability as well. “And, uh essentially our agreement is, we don't endorse any, pre-judgment diversion, from the criminal justice system, that our objective at the moment is to get, judges, to actually rule on the basis of law, [chuckle] and evidence and then, apply whatever progressive sentencing, people are into these days. But we want the judgments recorded. We want them to happen and we want them to be recorded. So we can critically examine the judgments. And that it's the, one of the functions that all these things are planning at the moment is to allow the system to not reveal the judgments. So that's a critically important piece for us, right?” – Service Provider Participant 8 at 4.

<sup>57</sup> Joan Pennell & Gale Burford, “Making Family Group Conferencing Work” in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (New York; Cambridge University Press, 2002) at 125.

Crown participants were also concerned with individual offender accountability, and explored potential institutional mechanisms to ensure supervision and reporting in restorative scenarios.

But if you have a first time offender, who, undergoes a risk assessment, and it's someone that's viable for counseling and isn't gonna change, you run a program where, you either lay the charge to keep their terms and conditions going, or you PTA/UTA them for an extended period of time so those protective conditions are in place. And you give them, four months, um because we can never go beyond that, because of the six month limitation period. You give them four months and then... Well it's six months for, to lay the charge. Six month limitation period to lay the charge. .. So in that first four months you give 'em an option to enter into, a, a program. Now, through corrections probably the first one they have is respectful relations. So it has to be something along those lines. But you want something intensive. And if they can complete, in that four or five month period, all of the appropriate programming for the risk factors. Then you divert them.... But you make them absolutely complete it and they need a risk assessment at the beginning to ensure that you're addressing the appropriate areas, before it has any value.

– Service Provider Participant 9 at 1

### **The Long View**

Taking the Lower Mainland's current justice response as a starting point, I think that a better justice model would combine aspects of the Duluth Model and FGCs, while deploying incarceration as a strategic, progressive tool to ensure individual and systemic accountability, and as a way to ensure or enforce the physical protection of survivors. In my opinion, the current policy of charging and holding abusers overnight where there is evidence of criminal violence should remain in place. It provides survivors with respite in their own homes, to receive medical care if necessary, or an opportunity to safely remove themselves and their children in the absence of the abuser. Police must apply their training in forensics and evidence gathering as they would with any other crime in order

to allow for the accused to be charged, and to remove the sole burden of proving those charges from the survivor. The accused should be charged in order to facilitate the use of progressive, strategic prosecution as needed, and to ensure individual and systemic accountability through record keeping. Survivors would immediately begin receiving information on justice response options, combined with the economic, political, and social supports necessary to make an informed decision on which route is best for their family. If the survivor is hospitalized because of injuries, this information would be brought to her in hospital. This support would continue throughout the justice intervention, regardless of the justice option chosen by the survivor, and regardless of the choices made by the abuser.

Accused who plead guilty would immediately be placed on court-mandated conditions to attend an FGC or batterer's program through probation, thus creating a record of the offence, and the necessary institutional lever should strategic prosecution and incarceration prove necessary; yet avoiding a criminal record and jeopardizing their employment and thus their ability to earn money. This is particularly important if the male partner is the breadwinner. An accused who did not plead guilty would be charged and prosecuted, relying on the properly collected evidence furnished by the police. If found guilty, they would be given a conditional sentence, or placed on probation, with conditions mandating attendance at either an FGC or a batterer's program.

How, then, might one choose between the Duluth model and the FGC model? The founders of each model, Ellen Pence and Joan Pennell, have debated the merits of their relative justice models in academic literature. For instance, Ellen Pence advocates the Duluth model in part because it avoids feminist concerns about the possibility of

revictimisation of survivors during face-to-face meetings.<sup>58</sup> These fears are made out in recent research on the impact of restorative, face-to-face interventions in cases of intimate violence. There have been several well-documented cases of survivor revictimisation, either through trauma during the encounter, or through violence caused or increased by the encounter.<sup>59</sup> It is important to note, however, that these encounters were not FGC conferences, but other models of restorative justice.

On the other hand, Joan Pennell has noted that for survivors who wish to reconcile with their partners, a Duluth intervention that does not allow them to speak to one another can also be counter-productive.<sup>60</sup> Pennell argues convincingly that a supported, supervised conference is the safest place to begin a dialogue between survivors and abusers who are going to reunite.

I argue that survivors should have an informed choice. The Duluth model would be one option for survivors wishing to avoid contact with their ex-intimates, while simultaneously providing support and counseling for both. The FGC option would be available to those survivors who have made an informed, supported choice to continue their relationship with their partner. All of the necessary resources for a successful FGC

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<sup>58</sup>Chapter Two.

<sup>59</sup> Joan Ryan & Brian Calliou, "Aboriginal Restorative justice Alternatives: Two Case Studies" (Ottawa: Law Commission of Canada, 2002); Mary Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* 159; Ruth Busch, "Who Pays if We Get it Wrong?" in Heather Strang & John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 223; *ibid* at 223; Ruth Busch, Neville Robertson & Hilary Lapsley, "The Gap: Battered Women's Experience of Justice System in New Zealand" (1995) 8 *C.J.W.L.* 190; Bruce Miller, *The Problem of Justice* (Nebraska: University of Nebraska Press, 2001) at 175-199.

This last source documents a Canadian restorative justice project, the South Island project located on Vancouver Island, British Columbia, in a Coast Salish Community. The program was cancelled when it was revealed that community Elders were refusing to punish family members for sexual assault and intimate violence.

<sup>60</sup> Joan Pennell & Stephanie Francis, "Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children" (2005) 11 *Violence against Women* 666 at 670.

as documented by Pennell and Burford would be made available in this case as choice is shaped by one's social position, personal history and the resources available to them. Prosecution and incarceration would only be used should violence continue during the batterer's intervention program, or the FGC.

## **Chapter Six: Contextual Analysis**

Chapter Five provides practical insight into systems and practices that may optimise an institution's capacity to provide just outcomes in cases of intimate violence. Drawing on empirical evidence from the Lower Mainland, FGC, and the Duluth model, these practices provide some functional foundation for better justice practice. However, improving the ways a justice system functions at an instrumental level is not sufficient to achieve and maintain a truly just response to intimate violence. As Ellen Pence has noted, it is difficult to hold "criminal justice institutions accountable to the communities they supposedly serve."<sup>1</sup> Pence argues that feminist (and I would add restorative) justice reforms to laws and practices that are easily co-opted by criminal justice institutions, and turned against women.<sup>2</sup> This is amply illustrated in the current justice practices in the Lower Mainland, which were deeply influenced by both the feminist anti-violence movement and the restorative justice movement, and yet remain uncoordinated, under resourced, and effectively unable to deliver justice to battered women and marginalised communities.

A set of theoretical, ethical, and political considerations is also necessary to ensure that daily decisions, systemic overhauls, and evaluations are constantly (re)oriented towards not only optimizing, institutional systems and priorities, but also towards the support of survivors of intimate violence, and towards marginalised communities. In this section, using the lenses of feminist intersectional theory and feminist critique of the neoliberal turn, I examine some of the implicit theoretical, ethical, and political foundations that have shaped justice practices in the Lower Mainland to date. I argue that these

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<sup>1</sup>James Ptacek, ed., *Restorative Justice and Violence against Women* (Oxford: Oxford University Press, 2010) at 13.

<sup>2</sup> ChapterTwo.

foundations need to be consciously reshaped and politicised, and I suggest options that I think would support a better justice response. Applying these two critical lenses generates considerations for moving forward in the future, first with respect to a more complex understanding of the role and engagement of the state in terms of its internalization of neoliberal values across the law/policy spectrum. The first set of considerations will give activists, policy development and state actors in this area insights into the way in which feminist rhetoric can overlay a deeply conservative and ultimately sexist approach to intimate violence. The second set of considerations generated by the intersectional analysis gives activists, policy development and state actors a set of questions to constantly examine and return to in pursuing initiatives in different communities and social locations.

### **Part One: The Neoliberal Capture of Restorative Justice**

**...[T]he Crown here, in our office will have contact with the complainant prior to a trial date being set. It may be telephone contact or in person contact. Really we're gauging the viability of the trial... if we have a complainant refuses to come in, or is recanting, then we're looking at it strictly from a viability perspective. See whether we're gonna stay it, or try and get something less like a peace bond if it's appropriate.**

**-Crown Participant 9 at 3 (Emphasis added)**

Andrew Woolford, a Canadian restorative justice scholar and practitioner, reminds us that restorative justice exists in a political context.<sup>3</sup> The rise of restorative justice in Canadian and British Columbian legislation and practice has occurred within the larger context of a burgeoning neoliberalism.<sup>4</sup> This section traces the impact of these political trends on

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<sup>3</sup>Andrew Woolford, *The Politics of Restorative Justice* (Halifax: Fernwood, 2009) at 10. I'd like to thank my friend and colleague Professor Val Napoleon for repeatedly reminding me to "think of the political."

<sup>4</sup> See Chapter One.

justice responses to intimate violence in the Lower Mainland, and also on the practice and theory of restorative justice in the same context.

As outlined in Chapter One, Canadian feminist scholars Janine Brodie, Brenda Cossman, and Judy Fudge have traced the political, economic, and social trajectory of a neoliberal political move in Canada over the past 15 years.<sup>5</sup> Lise Gottell, in her work on sexual violence against women, charts the specific impacts of this political turn on feminist rape crisis centres across Canada, and on Canadian sexual assault jurisprudence.<sup>6</sup> My research shows similar economic, social, and political trends in British Columbia during the same time period, and parallels between Gottell's findings on sexual assault centres and British Columbia's feminist anti-violence community.<sup>7</sup>

The chronic lack of funding for services to survivors of intimate violence is a repeated theme in my own research, in existing studies,<sup>8</sup> and in Gottell's work.<sup>9</sup> This can be attributed, in large part, to the recent history of the federal and provincial governments' hollowing out both feminist organizations<sup>10</sup> and the welfare state.<sup>11</sup> As Lise Gottell documents in her work on federal neoliberalism and sexual assault,<sup>12</sup> this larger trend has

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<sup>5</sup> See Chapter One.

<sup>6</sup> Melanie A. Beres, Barbara Crow & Lise Gottell, "The Perils of Institutionalisation in Neoliberal Times: Results of a National Survey of Canadian Sexual Assault and Rape Crisis Centres" (2009) 34 *Canadian Journal of Women and the Law* 135.

<sup>7</sup> In fact in many cases sexual assault centres and women's anti-violence organizations are one and the same. *Ibid* at 137.

<sup>8</sup> See Chapter Five.

<sup>9</sup> Beres, Crow & Gottell, *supra* note 6 at 153.

<sup>10</sup> See Lee Lakeman, *Canada's Promises to Keep: The Charter and Violence Against Women* (Vancouver: Canadian association of Sexual Assault Centres, 2007).

<sup>11</sup> See: Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1 *Studies in Social Justice* 93; Janet Mosher, "Welfare Reform and the Re-Making of the Model Citizen" in Margot Young, Susan B. Boyd, Gwen Brodsky & Shelagh Day, eds., *Poverty, Rights, Social Citizenship and Legal Activism* (Vancouver; UBC Press, 2007) at 119.

<sup>12</sup> Lise Gottell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship" In Dorothy Chunn, Susan B. Boyd & Hester Lessard eds.,

manifested itself in a series of coordinated moves by the federal government to defund sexual assault centres, and the welfare state at the federal level.<sup>13</sup> Carroll and Little note that the federal government simultaneously downloaded many of these responsibilities onto the province by cutting their contribution to key social services, forcing provinces to cut their own social service budgets.<sup>14</sup> The impact on survivors of sexual assault has been notable: community-based feminist services are stretched to the limit, and victims services associated with prosecution have been cut to the bone.<sup>15</sup>

The same temporal and political trajectory can be traced in British Columbia. In May of 2001, with the election of the provincial Liberal government, massive cuts to women's centres, income assistance, and victims' services took place.<sup>16</sup> Not long after, in 2002, the provincial government moved to the official stance that peace bonds or Alternative Measures were preferable to prosecution in many cases.<sup>17</sup> The impact on survivors can be seen in my own and other's research: community-based feminist organizations are stretched to the limit, victims' services associated with prosecution have been slashed, income assistance rates have been lowered, and qualification for welfare was made more

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*Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 and Beres, Crow & Gotell, *supra* note 6 at 131.

<sup>13</sup> Beres, Crow & Gotell, *supra* note 6 at 131.

<sup>14</sup> William Carroll & William Little, "Neoliberal Transformation and Antiglobalisation Politics in Canada" (2001) 3 *International Journal of Political Economy* 33 at 39.

<sup>15</sup> Lise Gotell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007).

<sup>16</sup> See Chapter 4.

<sup>17</sup> See Chapter 4.

difficult.<sup>18</sup> Both the stand-alone Ministry of Women's Equality and provincial Women's Centres were eliminated.<sup>19</sup>

Every option available to a survivor of intimate violence was affected by these changes. When Crown elect to prosecute, women face a shortage of victims services to support them through the process; when Crown choose a peace bond, survivors receive little in the way of communication, and their partners attend batterer's programs run by community-based organisations whose funding has been cut drastically, leaving them little time to closely monitor offenders, or share their experiences with other workers in the justice system. Survivors whose partners receive peace bonds must seek their own assistance from under-funded, community-run feminist organizations. Survivors who choose to leave an abusive relationship are faced with difficulties qualifying for income assistance, and low rates of state economic support. Extensive Canadian research shows that poverty drives many women back to abusive relationships.<sup>20</sup>

Brenda Cossman, in her work on family law, notes the key role of the family in neo-liberal state's project of 'reprivatisation'.<sup>21</sup> She characterizes reprivatisation as "...a process whereby the costs of social reproduction are being shifted from the public to the private spheres, in this case from the state to the family."<sup>22</sup> A parallel reprivatisation has occurred in the criminal justice system, but in this case the costs of legal responses to intimate violence are being shifted from the state to community-based organizations. This

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<sup>18</sup>See Chapters Four and Five.

<sup>19</sup> Katherine Teghtsoonian, "W(H)ither Women's Equality? Neoliberalism, Institutional Change and Public Policy in British Columbia"(2003) 22 *Policy, Organisation and Society* 26 at 32.

<sup>20</sup> See Chapter 5.

<sup>21</sup> Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatisation Project" in Brenda Cossman & Judy Fudge, eds., *Privatisation, Law and the Challenge to Feminism* (University of Toronto Press, 2002) 169 at 169.

<sup>22</sup> *Ibid*

is true in both the conventional criminal justice response to intimate violence (prosecution and peace bonds) and in restorative justice (Alternative Measures).

Community-based anti-violence organizations play a key role in British Columbia's legal responses to intimate violence. Whether it is a case of prosecution, Alternative Measures, or a peace bond, feminist-run counseling and shelters support survivors through prosecution, filling in for a shortage (or sometimes complete absence) of state-run services. Where peace bonds are issued, the state turns to community-run batterer's programs to provide supported opportunities for men to change abusive behavior. The involvement of community-based, feminist, and antiviolence organizations should be lauded; indeed in their work both Pence and Pennell rely heavily on the voices, opinions, and expertise of such organizations. They play a key role in pushing back against state co-option of feminist legal reforms.

In British Columbia, however, this key role has been circumscribed by economic and political constraints placed on community organizations, in the name of neoliberalism, by the Liberal provincial government. By the 1990s, as in most provinces, many community-based feminist organizations had come to rely heavily on state funding for their anti-violence work.<sup>23</sup> The Liberal's deep cuts to community-based feminist organizations came simultaneously with two complicating factors: first, what Lise Gotell

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<sup>23</sup> Beres, Crow & Gotell, *supra* note 6 at 153. The role of state funding to women's organizations plays a complex role in Canadian politics around intimate violence. Although the women's movement has had a healthy suspicion of the state, we have also not hesitated to make demands on the Canadian social welfare state which (compared to the United States for example) had a history of recognizing and supporting equality-seeking groups within limited contexts. See: Jill Vickers, "Bending the Iron Rule of the Oligarch; Debates on the Feminization of Organisation and Political Process in English Canada 1970 to 1988" in Jeri Lynn Wine & Janice Ristock, *Women and Social Change: Feminist Activism in Canada* (Toronto: Lorimer and Co, 1991) at 75; Kristen Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham and London: Duke University Press, 2008); at 65.

calls the erasure of violence against women from the public purview; and secondly, shifts in criminal justice administration which made more, rather than fewer demands, on these organizations. As outlined above, in British Columbia the move away from prosecution meant that the provincial government relied more heavily on community-based organizations to support survivors and modify the behavior of offenders, while simultaneously cutting funding and restricting their woman-centred mandate.

Gotell argues that, as part of the federal neoliberal project, feminist claims to political legitimacy and funding were undermined by the reconfiguring of the public image of women's anti-violence organizations as 'special interests'.<sup>24</sup> A similar political reconfiguring occurred in British Columbia, marked by the withdrawal of the office of the Justice branch of the Ministry of the Attorney General from the VAWIR policy, and the systemic defunding of women's community-based organizations.<sup>25</sup> Provincial funding for anti-violence work has become de-politicized; in order to receive funding, organizations must self-define as (often gender neutral) service provision organizations, reducing their capacity to engage in public political debate, and to hold government accountable for legal responses to intimate violence.<sup>26</sup>

Community-based feminist organizations were created to assist and support survivors of intimate violence. Community-based batterers programs are run out of organizations that were conceived as community support centres. In both cases, paid and unpaid workers came together under a political umbrella to change their communities. This form of social

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<sup>24</sup> Beres, Crow & Gotell, *supra* note 6 at 127. See also Teghtsoonian, *supra* note 19 at 37 where she notes that women who protested the cuts by the provincial Liberals in the early 2000s were similarly described.

<sup>25</sup> See Chapter Three.

<sup>26</sup> Lee Lakeman, *Canada's Promise to Keep: The Charter and violence Against Women* (Vancouver: Canadian Association of Sexual Assault Centres, 2004) at 112 and Gotell, *supra* note 14 at 132.

organizing has been co-opted by the provincial government in British Columbia.

Community-based groups are performing important functions of the justice system (namely supporting survivors and men who batter) without adequate resources, within a diluted political mandate, and in a policy climate (between stays and peace bonds) that siphons nearly fifty percent<sup>27</sup> of cases of intimate violence into their workload.<sup>28</sup>

The upshot is that the provincial government is able to cut economic costs by diverting abusers away from the costly court system, reducing the need for victims' services, and offloading the responsibility for offender supervision and recidivism onto poorly paid community service providers and probation officers. The survivor requires almost no financial or human resources from any of these government services.

Alongside the economics of privatization, private property, free markets, and free trade, one of neo-liberalisms' basic political tenets is the existence of (fictional) rational, free thinking individuals functioning in an equal world, with equal opportunity to benefit from these economic reforms.<sup>29</sup> According to neoliberal theory, economic opportunity is neutral, unfettered by gender, race, ethnicity or other factors; each individual is free to pursue his or her economic and political freedom within the free market.<sup>30</sup> This fiction is belied by qualitative and quantitative accounts of women's systemic inequality in Canadian society.<sup>31</sup> A consistent feminist critique of neo-liberalism's 'neutrality' is that it

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<sup>27</sup> See Chapter Five.

<sup>28</sup> I have made a similar argument about the perils of downloading justice responses to intimate violence onto community-based organizations without sufficient resources. See: Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2007) 18 *Canadian Journal of Women and the Law* 1019.

<sup>29</sup> Raymond Plant, *The Neo-Liberal State* (Oxford: Oxford University Press, 2010) at 155-171.

<sup>30</sup> *Ibid.*

<sup>31</sup> See for example: Margot Young et al., *Poverty, Rights, Social Citizenship and Legal Activism* (UBC Press, 2007).

is not, in fact, neutral at all, but so normalised a political perspective that it has become invisible to many.<sup>32</sup>

As Chapter Three outlines, starting in 1996 and earlier, the NDP British Columbia government introduced Alternative Measures and other associated 'restorative' programs on overtly political terms; citing these programs as redress for colonial wrongs against Aboriginal peoples, and as a values based, transformative way of delivering justice. The original formulation of restorative justice in British Columbia explicitly recognized the ways in which gender, race, ethnicity, and other factors intersect marginalizing certain citizens. Alternative Measures, and pre-charge diversion (peace bonds), have been applied by the Liberal government in a neo-liberal politically 'neutered' way that belies these political roots.

As practiced in British Columbia, Alternative Measures and peace bonds are excellent examples of this neo-liberal, politically 'neutered' version of (restorative) justice. First, although official policies make reference to the potential for power imbalances between survivors and accused, in practice Crown are unable to take this into account. The institutional processes around Alternative Measures and peace bonds are without the resources that are required to support a woman through the adversarial process. Instead, the processes treat the woman as an equal, rational party to an apolitical 'conflict', and blame her for not actively participating in the criminal justice process intended to resolve that 'conflict'. This illustrates the reconstitution of the neoliberal citizen: women seeking

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<sup>32</sup> Brettel Dawson, "Law and the Legal Person" *Women, Law and Social Change: Core Readings and Current Issues*. 4<sup>th</sup> ed. T. Brettel Dawson, (Concord: Captus Press, 2002) at 123; Mary Jane Mossman, "Feminism and Legal Method - The Difference it Makes" (1986), 3 *Australian Journal of Law and Society* 30; Lucinda Findley, "Laying Down the Masters' Tools: A Feminist Revision of Torts" in Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues*. 4<sup>th</sup> ed. (Concord: Captus Press, 2002) at 160.

support services (a ‘special interest group’) are compared to the gender neutral, self-governing, self sustaining citizen.<sup>33</sup> The decision-making praxis by Crown Attorneys is devoid of the political, transformative language so apparent in government literature on the potential of restorative justice, and emphasizes instead institutional concerns of efficiency and avoiding prosecution. The decision-making matrices are structured to avoid any complex analysis of power and oppression.

Second, Crown are forced to take an incident-based approach to these crimes. They must, legally and practically, think only about the burden of proving that a particular alleged assault happened, rather than taking a systemic view of intimate abuse in either the relationship before them, or in society at large. Crown participants were acutely aware that the alleged, individual assaults may make up part of a systemic pattern of abuse, but were unable to act upon this knowledge within the institutional parameters set for them.

... I think we should have this for first time offenders, that’s first time they’re brought to the attention of the police or the crown.... because, if you believe statistics, that there’s no such thing as a first time offender. Usually they’ve abused, you know double digits, easy... before it ever comes to the police authority.

- Crown Participant 9 at 2

... [G]enerally speaking they’re first time offenders first time in the sense that... First reporting yeah... on the *evidence* it’s never happened before (verbal emphasis by participant).

-Crown Participant 12 at 5

Instead Crown use the mechanisms available to them, the peace bond, to *unofficially* acknowledge, and protect against a pattern of abuse, by providing the accused with counseling and supervision, while simultaneously decriminalising the individual act.

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<sup>33</sup>See Teghtsoonian, *supra* note 19 at 29 where she describes the ideal neoliberal subject.

...[T]he advantage to the peace bond is the offender does not have to admit... that he committed an offence, simply that his behaviour scared somebody. It's not a criminal offense to scare somebody, but it's the foundation for a peace bond. And to get them into counselling. So I think where I was going was, some crown are of the view that where the evidentiary threshold is not met we should be staying that prosecution. And others feel like me, that it's better to get some counselling, rather than simply staying the charge.  
- Crown Participant 11 at 4

This incident based approach allows for the larger politics of gender to be erased, removing the political content from the assault. It renders invisible that fact that men assault their intimate partners as part of larger campaigns of domination and subordination.<sup>34</sup>

## **Part Two: Intersecting Oppressions of Women**

My observations about Lower Mainland's justice responses to intimate violence would be incomplete without consideration of the fact that research participants emphasized that their clients were often racialised, and that they thought this should make important differences in justice interventions, although as discussed in Chapter One feminist contextual theory also reveals ways in which racialised identity may play a secondary role to more broadly conceived understandings of disadvantage.

### **Theorizing Violence in Racialised Communities**

Much theorising and research on criminal justice and racialised communities treats the power relations between racialised accused, and the oppression of the powerful racialising state.<sup>35</sup> Himmani Bannerji,<sup>36</sup> and Sherene Razack,<sup>37</sup> both feminist race

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<sup>34</sup> See: Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford: Oxford University Press, 2007).

<sup>35</sup> See for instance: Carol Aylward, *Canadian Critical Race Theory; Racism and the Law* (Halifax; Fernwood Publishing, 1999); Honourable A.C. Hamilton, *A Feather Not a Gavel: Working Towards Aboriginal Justice* (Winnipeg, Great Plains Publications, 2001); David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).

theorists, remind us, however, that an intersectional approach to intimate violence in the context of racialised communities will deepen this focus to include a more complex web of oppressions *within* a racialised community itself. Bannerji writes:

Inscribed and instituted politically from the outside the [racialised] communities themselves also suppress internal sources of division and seek to present themselves, at least in their representational endeavours, as seamless realisations. Silence, therefore, regarding class, gender and other power relations characterises this voluntary aspect of community making as well.<sup>38</sup>

This section starts from the premise that women's social location (their race, ethnicity, sexual orientation etc.) affects the kinds of services and interventions they require to survive and overcome intimate violence.<sup>39</sup> While violence against women happens in all communities regardless of racialisation, a better justice *intervention* must take into account the specialised resources that may be required by women, depending on where they are socially located. While cultural beliefs or practices *may* add unique barriers and/or opportunities to responding to violence "...cultures *per se* are not the problem."<sup>40</sup> Gendered violence, although it may take particular, socially constructed forms, is ubiquitous across lines of culture and race. What do those particular, socially constructed forms of gender oppression look like in South Asian communities; what are

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<sup>36</sup> Himani Bannerji, *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender* (Toronto; Canadian Scholar's Press, 2000) at 155.

<sup>37</sup> Sherene Razack, "A Violent Culture or Culturalized Violence? Feminist Narratives of Sexual Violence Against South Asian Women" (2003) 3 *Studies in Practice* at 1999.

<sup>38</sup> Bannerji, *supra* note 36 at 155.

See also: Ellen Pence & Alex Wilson, "US legal Interventions in the Lives of Battered women: An Indigenous Assessment" in Dorothy Smith, ed., *Institutional Ethnography as Practice* (Maryland: Rowman and Littlefield, 2006) at 199.

<sup>39</sup> See: Amita Bhandari Preisser, "Domestic Violence in South Asian Communities in America: Advocacy and Intervention" (1999) 6 *Violence Against Women* 684.

<sup>40</sup> Canadian Council on Social Development (CCSD) "Nowhere to Turn? Responding to Immigrant and Visible Minority Women: Voices of Frontline Workers" (Ottawa: Canadian Council on Social Development: 2005) at 3.

the specific barriers to justice that require unique, culturally appropriate justice responses?

According to both Crown and service provider participants, many of their clients self-identify as both South Asian, and newly immigrated. As I noted in the Introduction, by chance, many of the participants in this study either happened to work in Surrey, British Columbia, a suburb of Vancouver with a high concentration of citizens of South Asian origins,<sup>41</sup> or were South Asian service providers in downtown Vancouver offering specialised services to South Asian clients from around the Lower Mainland. The result is a skewing of my results towards a discussion of violence within South Asian families. The emphasis in my data on violence by South Asian men against South Asian women must not be read to imply that South Asian men are more violent than non South Asian men. It is merely an effect of the geographical location of the study (within South Asian communities) that places the emphasis here.

This section first contextualizes these findings in the broader research on the marginalization of South Asian citizens within Canada, then identifies what research participants see as the intersecting oppressions of their client base and the particular issues facing South Asian survivors living at this intersection. Second, I compare research participants' characterisation of the issues with current literature and research on South

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<sup>41</sup> In 2006 the total South Asian population in Surrey City, BC, was 107,810, comprised of 53,730 male and 54,080 female residents. The total population of Surrey was 394,976. Thus, South Asians comprised 27.3% of the population of Surrey. The entire population of citizens that identified as South Asian in British Columbia as a whole is 132,225, thus placing the vast majority of those British Columbians who identify as South Asian in Surrey. (Statistics Canada, "2006 Census, Community Profiles" (Ottawa: Statistics Canada, 2006)).

Asian survivors, and finally I propose how this intersectional analysis can be incorporated into a better justice response.

According to Sherene Razack, in the context of violence against women... “[t]he risks of talking culture are immense” for both offender and survivor, and for their communities marginalized by race.<sup>42</sup> Razack reminds us that the analysis of the role of culture in violence against women is always conducted against the backdrop of an idealised white, western culture.<sup>43</sup> Gendered violence within communities marginalized or categories by race, ethnicity or culture is too easily removed from the larger context of white supremacy, patriarchy and racism, leaving only a dichotomised ‘Canadian’ and ‘other’.

According to Jasmin Yiwani, a feminist race theorist, the “immigrant” has then “come to signify a person of colour whose culture and language are perceived to be different” than the white, national subject.<sup>44</sup> Sunera Thobani draws from anti-colonial race theorists, and Foucault to discuss how ‘immigrants’ have been constituted as “non-western” and non-modern” and therefore not in possession of the exalted qualities of western nationalities. Thobani argues that differences between the white, national subject, and immigrant ‘outsiders’ are exaggerated and that racialized subjects are viewed as primitive and uncivilized.<sup>45</sup>

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<sup>42</sup>Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) at 85.

<sup>43</sup>*Ibid* at 84.

<sup>44</sup>Jiwani, Yasmin. “The Criminalization of Race/The Racialization of Crime” in Wendy Chan & Kiran Mirchandana, eds., *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Scarborough, ON: Broadview Press, 2002) 67 at 75.

<sup>45</sup>Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and the Nation in Canada* (Toronto: University of Toronto Press, 2007) at 6 and 11.

In British Columbia,<sup>46</sup> and across Canada,<sup>47</sup> the media often highlights and sensationalises cases involving domestic violence and South Asian men and women. The same kind of media coverage is rarely extended to white, western violence against women.<sup>48</sup> Instead, according to Yasmin Jiwani, ‘Western’ women can consider their own men ‘gems of enlightenment and kindness.’<sup>49</sup> The forms of violence that underpin ‘Western’ women’s gendered oppression are rendered relatively harmless or invisible. While South Asian men may be cast as ‘uncivilised’ and ‘primitive’ in their attitudes towards violence and women, South Asian women are often cast as “...victims trapped in the patriarchal mold of the east.”<sup>50</sup> Both are, in contrast with dominant white society, inferiorised.<sup>51</sup> In Yawani’s most recent book, *Discourses of Denial: Mediations of Race, Gender and Violence*,<sup>52</sup> she traces the media coverage of two lethal episodes of intimate violence, both in the same small British Columbia town, occurring within six months of one another. One case involved a South Asian man (Mark Chahal) who murdered his wife and eight other families members, and wounded two other family members. The other case involved an attempted murder of a white woman (Sharon Valisek) by her ex-boyfriend, followed by his suicide.<sup>53</sup> Yawani analyses the extensive media coverage of both cases, and notes that the coverage of the Chahal case heavily emphasized the family’s immigrant background, Sikh religious traditions, arranged marriages, and

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<sup>46</sup> Yasmin Jiwani, “To be and not to be: South Asians as victims and Oppressors in the Vancouver Sun”, (1992) 45 *Sanvad* 33.

<sup>47</sup> Razack, *supra* note 39 at 83.

<sup>48</sup> See: Dorothy Chunn, “Take it Easy Girls; Feminism, Equality and Social Change in the Media” in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) at 31.

<sup>49</sup> Jiwani 1992, *supra* note 43 at 14.

<sup>50</sup> *Ibid* at 14.

<sup>51</sup> Jiwani, *supra* note 43 at 76.

<sup>52</sup> Yasmin Jiwani, *Discourses of Denial: Mediations of Race, Gender and Violence* (Vancouver: UBC Press, 2006).

<sup>53</sup> *Ibid* at 90.

religious adherence as “...to some extent responsible for the ensuing violence.”<sup>54</sup> In contrast, “[t]he media reports on the Velisek case do not mention her cultural background, her ethnic community, or her religious affiliation.”<sup>55</sup>

These constructions of South Asian Canadians have a number of implications. The first is for men accused of battering their wives whose interactions with police have been shown to be coloured by racism.<sup>56</sup> The second is in providing services to survivors that are free from these racist stereotypes about South Asian women and their families. According to Sherene Razack, the two main obstacles to immigrant women’s recovery from violence are “...inequality of access to services that assist survivors or violence and provision of services that are suitable for only meeting the needs of Anglo-Saxon or French-Canadian women”.<sup>57</sup>

These forms of inequality speak, I think, to Sylvia Walby’s<sup>58</sup> assertion that a narrow focus on (racialised) identity can be a limiting theoretical field; not only does it carry with it the dangers of stereotyping discussed by Razack, Thobani and Yiwani, it may render invisible forms of oppression experienced by racialised women that do not directly correspond with their racialised identities. For example while a lack of linguistically and culturally appropriate services may be marked as a form of policy neglect<sup>59</sup> bounded by a South Asian identity, the failure of communication within the justice system is not

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<sup>54</sup>*Ibid* at 94.

<sup>55</sup>*Ibid* at 95.

<sup>56</sup> See note 72 *infra*.

<sup>57</sup>Razack, *supra* note 37 at 84 citing Katirai Mahboubeh, *Assessing the Needs of Alternative Services for Culturally Diverse Assaulted Women* 9 (Hamilton, On: Interval House of Hamilton-Wentworth, 1991 at 5). See also: Vijay Agnew, “Tensions in Providing Services to South Asian Victims of Wife Abuse in Toronto” (1998) 4:2 *Violence Against Women* 153.

<sup>58</sup> See Walby, *supra* Chapter One note 203.

<sup>59</sup> See Hunter, *supra* Chapter one, note 215.

similarly bounded, and negatively effects both racialised survivors and their non racialised counterparts. The chronic lack of coordinated communication, the lack of resources, and other institutional shortcomings point to relations of inequality that are created and perpetuated within institutional domains. While these exacerbate existing disadvantage based on racialised identity, identity alone does not capture the full breadth of their effect. Within my research both identity as emphasized by intersectional theorists, and context, as emphasized by Walby and Hunter become important. Unlike Hunter and de Simone<sup>60</sup> in their research on legal aid, I found that some, although not all, forms of disadvantage were based in (South Asian) identity.

As well as viewing my research data through the lens of geography (Surrey has the highest concentration of South Asian Canadians anywhere in British Columbia by a large margin), my commentary should also be understood in terms of the trends outlined by Thobani, Jawani, and Razack. In other words, violence against South Asian women by South Asian men is no more or less ‘civilized’ or ‘epidemic’ than it is in white, western households. What may be different within Canadian communities of South Asian descent is the need for responses to intimate violence that do not isolate or alienate survivors, and which do not continue the legacy or racism against racialised accused in the Canadian criminal justice system

*Research Participants’ Concerns:*

First, service providers note that there are few, if any, culturally appropriate, or even linguistically appropriate, services for newly immigrated South Asian women.

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<sup>60</sup> See *supra* Chapter One.

Because we, invariably get not contact orders, and, these women are stuck alone with the children. A lot of them are immigrants. They've not been, in the country long enough to develop any, [sigh] social network that they can rely on. And we have, relatively poor resources, whether it's a, interpreters uh, people who are familiar with the cult, their culture. So that they would understand what they're peculiar needs are.

- Crown Participant 11 at 5

And this community in particular, is uh, a, a heavy, Indo-Canadian [sigh] population. And it's fairly recent. ...the resources are lacking.

- Crown Participant 12 at 6

Crown participants were concerned that they themselves were unable to provide specialised assistance to survivors, because of 'cultural differences' in marriage relationships.

Because the other reality with dealing with the South Asian community or any multicultural community is that there is the possibility of reconciliation... High possibility... Because the, the intention is that the like try to keep the family together... That happens a lot more than in the mainstream community....

- Service Provider Participant 2 at 6

You know I mean the especially in Surrey people there in the, the incredible volume K files and over half of them are South Asian you know I mean it's, So, that's resourcing from you know from a the different angle right?

- Government official Participant 10 at 26

Essentially, the research participants identify two particular characteristics of the South-Asian population who make up their clients: race/ethnicity, and status as newly immigrated Canadians. In relation to these characteristics, research participants suggest three problems or issues that are barriers to justice for survivors of violence in the South Asian immigrant community they serve. First, participants claims that there is a stronger emphasis in some South Asian families than in some mainstream (read Caucasian) on keeping families together at any cost; thus placing enormous family pressures on South Asian survivors to stay in abusive situations for the sake of keeping the family together.

Second, participants assert that South Asian clients, both survivors and abusers, require particular services that understand and address the challenge of ending violence in a culturally appropriate way. A third problem is that their status as newly immigrated Canadians makes it difficult for some South Asian survivors to reach out to already settled Canadians for assistance and support should they choose to leave an abusive situation.

Recent commentary and research on South Asian survivors of intimate violence both bears out and challenges the issues identified by research participants, and posits some theoretical, political and practical ways forward. First, some research participants (who themselves identified as South Asian) asserted that South Asian survivors are less likely to leave an abusive relationship due to cultural pressures to keep their family together. These concerns are echoed by Canadian race scholars. Both Rashmi Goel<sup>61</sup> and Rakhi Ruperelia<sup>62</sup> have written about particular understandings of gender in some parts of South Asian culture that leave women vulnerable to intimate violence, and also function as a barrier to seeking assistance. According to both Goel and Ruperelia, a ‘model’ South Asian woman practices self sacrifice, especially in maintaining the unity of the family.<sup>63</sup> This social construction of womanhood, coupled with economic dependence on male partners, makes it difficult for South Asian women to avoid the ‘dangerous

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<sup>61</sup> Rashmi Goel, "Sita's Trousseau: Restorative Justice, Domestic Violence and South Asian Culture" (2005) 11 *Violence Against Women* 639 at 645.

<sup>62</sup> Rakhi Ruperelia, "Giving Away the Gift of Life: Surrogacy and the Canadian Assisted Human Reproduction Act" (2007) 23 *Can J Fam law* 11.

<sup>63</sup> Just as a ‘model’ Western woman, I would argue, is able to both work outside the home to earn income, maintain a tidy, beautiful home, and remain sexually attractive to her male partner through diet and exercise. Socially constructed models of womanhood, although different across cultures, are equally damaging to women. Shirwadkar, *infra* note 59 at 868. Shirwadkar notes that for some South Asian couples marriage is considered a sacrament and leaving a marriage may be considered a violation of religious law.

choice’<sup>64</sup> of staying in a violent relationship, or even reporting violence. According to Swati Shirwadkar, some forms of violence against women are considered acceptable by South Asian Canadian women, as women are considered the property of their husbands, and liable to physical discipline if they fail to comply with standards of domestic or personal propriety.<sup>65</sup> While this may ring true for some South Asian women, both my research and other critical race scholars complicate this picture. The portrait of South Asian women painted by both my research participants, and this literature, comes close to the kinds of counterproductive stereotypes scholars like Razack, Thobani and Yawani have warned against, highlighting the dangers of talking culture alluded to by Razack.<sup>66</sup>

Justice responses to intimate violence must take this diversity into account. As with all survivors of intimate violence,<sup>67</sup> a ‘one size fits all’ approach does not adequately meet the needs of South Asian survivors, as this group is diverse and multi faceted. Again, Walby and Hunter’s work becomes relevant: contextual factors such as economic power, place of birth, citizenship, education and linguistic ability in English function to disrupt the homogenous impact of racialised identity on the experience of oppression. Recent work by American scholar Puneet kaur Chawla Sahota, highlights the diversity of South Asian women, and their historical and contemporary strategies for reducing and eliminating violence against women.<sup>68</sup> In these cases South Asian identity within a different set of macrocontexts becomes a delimiter of advantage, rather than disadvantage.

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<sup>64</sup>Goel, *supra* note 55 at 646.

<sup>65</sup>Swati Shirwadkar, “Canadian Domestic Violence Policy and Indian Immigrant women” (2004) 10 *Violence against Women* 860 at 866.

<sup>66</sup>*Supra* notes 39 to 41.

<sup>67</sup> See for instance Chapter Five page 190 for a discussion of the importance of choice for all survivors in justice responses to intimate violence.

<sup>68</sup>Puneetkaur Chawla Sahota, “The Personal is the Private is the Cultural: South Asian Women Organizing against Domestic Violence” in *Incite! Color of Violence Anthology* (Massachusetts, South end Press; 2006).

Sahota notes that South Asian anti-violence activists have successfully deployed an array of strategies, both within South Asian communities, and in the ‘mainstream’ to reduce and end violence against women.<sup>69</sup> In fact, in many cases in my own research, these generalizations were being made by South Asian anti-violence service providers, who themselves represent the strength and diversity of South Asian women’s approaches to families, violence and gender.

Secondly, research participants worried that their South Asian clients were not receiving culturally or linguistically appropriate support services. This is borne out also in research showing that South Asian, and other racialised survivors, are often unable to access victims services because of cultural differences around gender roles and norms,<sup>70</sup> and services being provided only in English.<sup>71</sup> Many newly immigrated women are often economically dependent on their husbands,<sup>72</sup> making it difficult, if not impossible, to support themselves and their children on their own.<sup>73</sup> This is especially true for newly immigrated Canadians whose first language is not English or French.<sup>74</sup> While there has been extensive Canadian research showing that poverty drives survivors back into abusive relationships, as they cannot support themselves and their children on a single income,<sup>75</sup> related research shows that for economically and linguistically marginalized immigrant women, this trend may be even more pronounced.<sup>76</sup>

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<sup>69</sup>*Ibid* at 241.

<sup>70</sup> CCSD, *supra* note 37 at 9.

<sup>71</sup> Goel, *supra* note 55 at 645; Dianne Martin and Janet Mosher, “Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalisation of Wife Abuse” (1995) 3 CJWL 14 at 25 at 32.

<sup>72</sup>Or may be recently sponsored as immigrants by their husbands, necessitating staying together. CCSD, *supra* note 37 at 17.

<sup>73</sup>*Ibid* at 11 and 22.

<sup>74</sup> *Ibid* at 14

<sup>75</sup> Amanda Dale, “Beyond Shelter Walls: No More Running in Circles”, online: YWCA Canada <[ywcacanada.ca/data/publications/00000007.pdf](http://ywcacanada.ca/data/publications/00000007.pdf)>; Jill Davies, “Building Comprehensive Solutions to

Aside from identifying and dealing with particular forms of gender oppression and violence in the South Asian community, anti-racist theorists who write and research in the area of race and violence against women have identified a second, and equally important area of inquiry. Many view racist responses to intimate violence as the primary source of barriers to justice for racialised women.<sup>77</sup> Survivors may be reluctant to call the police when experiencing violence, due to fears that racist police will mistreat their partners.<sup>78</sup> The Commission on Systemic Racism in the Ontario Criminal Justice System found that “..immigration status were often asked of racialized people, and references to foreignness were made in court transcripts; and immigrants whose language is neither French nor English are treated differently”.<sup>79</sup>

What kinds of steps can be taken to integrate these insights into justice reform?

Researchers propose specific, practical ways to address the needs of South Asian

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Domestic Violence, Policy Blueprint on Domestic Violence and Poverty”, online: National Resource Centre on Domestic Violence <[http://new.vawnet.org/Assoc\\_Files\\_VAWnet/BCS15\\_BP.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/BCS15_BP.pdf)>; Peter Jaffe, “ACCESS DENIED: The Barriers of Violence & Poverty for Abused Women and Their Children’s Search for Justice and Community Services After Separation”, online: Atkinson Foundation <[http://www.lfcc.on.ca/access\\_denied.html](http://www.lfcc.on.ca/access_denied.html)>; METRAC, “No Cherries Grow On Our Trees”: A Social Policy Research Paper for the Take Action Project to Address Women’s Poverty and Violence Against Women”, online: METRAC <[www.metrac.org/resources/downloads/take.action.report.dec08.pdf](http://www.metrac.org/resources/downloads/take.action.report.dec08.pdf)>; Janet Mosher & Patricia Evans, “Welfare Policy – A Critical Site of Struggle for Women’s Safety” (2006) 25: 1-2 *Canadian Woman Studies* 162.; Colleen Purdon, “Women Abuse and Welfare in a Rural Community: Rural Women Speak About Their Experiences of Ontario Works”, online: Centre for Research and Education on Violence Against Women <[www.crvawc.ca/.../FinalRuralwomenspeakAboutOntarioWorksEdited.pdf](http://www.crvawc.ca/.../FinalRuralwomenspeakAboutOntarioWorksEdited.pdf)>; Jody Raphael, *Saving Bernice: Battered Women, Welfare and Poverty* (Boston: Northeastern University Press, 2000); Richard Tolman & Daniel Rosen, “Domestic Violence in the Lives of Women Receiving Welfare: Mental Health, Substance Dependence, and Economic Well-Being” (2001) *Violence Against Women* 141

<sup>76</sup> Noorfarah Merali, “Experiences of South Asian Brides Entering Canada After Recent Changes to Family Sponsorship Policies” (March 2009) 15:3 *Violence Against Women* 321; Shamita Das Dasgupta, *Body Evidence: Intimate Violence against South Asian Women in America* (New Brunswick, NJ: Rutgers University Press, 2007).

<sup>77</sup> CCSD, *supra* note 37 at 5, Martin and Mosher, *supra* note 65 at 30.

<sup>78</sup> CCSD, *ibid* at 5, Bannerji, *supra* note 33 at 156.

See also: Karen Flynn & Charmiane Crawford, “Committing ‘Race Treason’: Battered Women and Mandatory Arrest in Toronto’s Caribbean Community” in Kevin D. Bonnycastle & George Rigakos, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998 at 93, Martin and Mosher, *supra* note 65 at 28.

<sup>79</sup> Jiwani 2002, *supra* note 41 at 75.

survivors. I argue that these specific services can be integrated into my broader reform agenda. First, researchers propose South Asian specific transition houses,<sup>80</sup> with South Asian workers. Second, it is important to ensure that information and support services are offered in languages other than French and English where necessary.<sup>81</sup> Third, and very importantly I think, input from South Asian support workers and survivors into reform processes, evaluations and day-to-day operations is absolutely key.<sup>82</sup>

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<sup>80</sup>Shirwadkar, *supra* note 59 at 868. Surrey, in the Lower Mainland has a South-Asian specific transition house, which employs South Asian support workers.

<sup>81</sup>CCSD, *supra* note 37 at 33.

<sup>82</sup>Goel, *supra* note 55 at 661. For an example of a South Asian anti-violence collective see: Puneetkaur Chawla Sahota, *supra* note 62 at 231.

## **Chapter 7: Conclusion**

**Yeah that would be fantastic. If you could have a safe place for the complainant to go to, that had, a safe place for their kids. Yeah, and all those things to ensure, that the economic, depression that's gonna set in, and the threats are all taken away, sure. Cause then they're finally on an equal footing.**

**– Crown Participant 9 at 11**

### **Unanswered Questions**

There are several key questions that cannot be answered within the confines of my research project. First, because I was unable to interview survivors themselves, the accounts of their experiences with justice responses are filtered through service provider participants, and to a lesser extent, Crown participants. While I support these findings with other empirical research, I cannot claim that these accounts speak directly to the experiences of survivors in the Lower Mainland. Secondly, while I set out to examine the effectiveness of restorative justice in cases of intimate violence, I found myself instead confronting a practice of peace bonds. There was, in effect, no restorative justice amongst the justice responses examined here, making it impossible to conclude whether restorative justice is effective or not.

### ***Restoring Women and Communities***

Justice responses to intimate violence in the Lower Mainland for survivors of intimate violence, their (ex) intimates, and systemically for some parts of the South Asian community (in both Surrey and downtown Vancouver), are seen as problematic in a number of ways by research participants. These concerns resonate with other British Columbian, Canadian, and American research on intimate violence, outlining reoccurring patterns within Western criminal justice systems. In Chapters Five and Six I suggested

both practical and theoretical tools to improve justice responses to intimate violence in the context of my research.

One of the pathways that I suggest is a form of restorative justice, a family group conference. Another is a state-community feminist partnership that deploys mandatory batterers' programs, alongside the strategic use of incarceration- the Duluth model. Research shows that survivor's experiences with violence, whether they are going to reunite with their intimate partner, and whether they share children will shape the best justice response for them; one size does not fit all. The discourse of restorative justice, however, was already at play in research participant's commentary on the justice system in the Lower Mainland, but erroneously. This misuse of the term restorative justice is important and instructive. Despite participants naming restorative justice practices as problematic, based on the data from my research, I cannot necessarily say that restorative justice doesn't work. This is because what is being practiced in cases of intimate violence in the Lower Mainland is not actually restorative justice.

While most scholarship on legal responses to intimate violence positions restorative justice and prosecution policies at odds with one another, both must be practiced in the political matrix of neoliberalism. Just as feminist reforms such as pro-arrest and prosecution are liable to be co-opted by state actors, so too is restorative justice. Critical scholars have pointed out the potential for restorative justice to be captured by a neoliberal agenda,<sup>1</sup> despite being, at its roots, a community-based, anti-state project. I

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<sup>1</sup>Andrew Woolford, *The Politics of Restorative Justice* (Halifax: Fernwood, 2009) at 140; Jane Dickson-Gilmore & Carol LaPrairie, *Will the Circle be unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Toronto, University of Toronto Press, 2005) at 57; Evan Stark, "Insults, Injury and injustice: Rethinking State Intervention in Domestic Violence Cases" (2004) 10 *Violence against Women* 1302 at 1326.

argue that this potential is plainly borne out in the one form of restorative justice (Alternative Measures) which is permitted in the few cases of intimate violence that are diverted to restorative justice under the *Criminal Code* in British Columbia.

Alternative Measures fails to conform to the ethos of restorative justice in a number of ways. First, it is disconnected completely from both community, and from communication as a focus of behavioral change. Those diverted to Alternative Measures complete an individual task (most often a letter of apology), and do not communicate in a restorative forum with victims of crime alongside their community. This model fails to ensure the deeper kinds of accountability in offenders required of a restorative justice model.

I do not think that peace bonds, or other forms of unsupported pre-charge diversion, are restorative justice. They are instead poorly resourced alternatives to prosecution, embedded firmly in the criminal justice system. Yet, the ethos and theories of restorative justice still play a role on my research. Participants suggested more restorative responses, coupled with some form of individual and systemic accountability via charging and a strategic use of incarceration, as alternatives to the problems they perceived with peace bonds.

Are the Duluth model and family group conferences restorative justice? These justice practices include incarceration and punishment and the Duluth model avoids face to face contact between the survivor and her ex-intimate. However, I think we can argue that they are. First, we should begin from the premise that it is the survivor, and the community

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that she belongs to who are being restored, not necessarily the intimate relationship between the survivor and her (ex) partner. Both the Duluth model and FGC have the potential to support survivors, families and communities in culturally appropriate ways.

Secondly, from a theoretical perspective, as I have argued in Chapter Four, punishment and incarceration are not entirely anti-thetical to restorative justice theory and practice.

The progressive and strategic use of incarceration in both the Duluth model and FGCs are firmly rooted in restorative understandings of punishment and its purposes.

Do we need to use the label restorative justice? On one hand, the Duluth Model eschews the moniker, equating restorative justice with models such as victim-offender mediation, or sentencing circles. On the other hand, the value in the label 'restorative' is that it is already discursively invested with decidedly non-'neutral' concepts such as values, healing, transformation, and practice that are inherently political. The key is to avoid having restorative justice's unarguably noble 'values' interpreted through a neoliberal lens- by leaving the emphasis on cost savings, by downloading justice work onto under resourced community groups, by equating de facto non-prosecution with restorative justice. In other words, if we are going to deploy the discursive potential of the label 'restorative', it should be to activate a deeper understanding of systemic, political issues such as sexism, racism, poverty and colonialism, and the complex, economically costly responses these issues require.

A sustained level of overtly politicised, community participation in justice models such as family group conferences and the Duluth model are, I argue, one effective way to counter this neo liberal move by the state. Participation by, and accountability to,

community members whose political, ethical and practical compass is constantly (re)-orienting to the interests of women and the communities they come from is a key aspect of an effective justice response.

To reinsert ‘justice’ into state responses to intimate violence, I argue that the role of community-based organizations is key. Community-based organizations take up these practices consciously, as a political tool. Any real potential for justice in such cases lies in the fact that its practice may allow for a conscious shift from neoliberal ‘neutrality’ to a radical political praxis (in particular post colonial, anti-racist and feminist praxis) on a macro and a micro scale.<sup>2</sup>

There are striking parallels between feminist critiques of restorative justice and feminist critiques of the criminal justice system. In both cases, underlying concerns include individual and systemic accountability, and resources for women, families and marginalised communities. Canadian feminists have always put forward a more expansive and complex justice agenda than simple criminalization of intimate violence. It is within the political matrix of neoliberalism that bare criminalization became the sole emphasis.

### ***What is a Feminist To Do?***

What does this mean for feminist anti-violence work?

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<sup>2</sup> By macro and micro levels I mean the socially transformative power of restorative justice lies in the ability of practitioners to show men who abuse their partners that hitting a person he loves is wrong, and to understand the personal and psychological implications for his partner (and possibly his own political history- with abuse or colonisation for instance). And at a macro level that women are equal to men, not just in his relationship with his partner, but that by hitting his partner he is perpetuating and ingraining men’s political, economic and social supremacy over women, regardless of what culture, race or ethnicity they each come from. These overtly political ways of understanding justice (rather than politically neutered ‘conflict’) are animated in research participant’s visions of ‘real’ justice for survivors of intimate abuse.

The dangers of having feminist legal reforms, including feminist-inspired restorative responses, co-opted in an era of neoliberalism (or neoconservatism) are real. Some feminists have suggested that we pull back from the state, including the criminal and restorative justice systems, completely.<sup>3</sup> Although it may be partly attributable to my own privileged position within the law, I hesitate to turn my back on engagement with the state, including its justice systems, completely. My position of skeptical engagement is shared by other feminists such as Joan Pennell,<sup>4</sup> Ellen Pence,<sup>5</sup> Lee Lakeman,<sup>6</sup> Lise Gottell,<sup>7</sup> and Kathleen Daly.<sup>8</sup>

These leaders in feminist anti-violence work provide guidance on how to engage with the state in feminist, (restorative) justice reform. We must continue to act and advocate politically from the grassroots, and demand accountability from the state. Accountability must include funding for independent, feminist anti violence organizations, alongside

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<sup>3</sup> Kristen Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham and London: Duke University Press, 2008); Laureen Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990) 10 *Canadian Journal of Law and Society* 75; Harm Free Zone Collective, *Building Harm Free Zones: An Organising Booklet* (New York: Harm Free Collective, 2007); Sara Kershner et al., eds., *Toward Transformative: A Liberatory Approach to Child Sexual Abuse and Other Forms of Intimate and Community Violence* (San Francisco: Generation Five Collective, 2007); Beth Ritchie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (New York, Routledge, 1996); Andrea Smith *Conquest: Sexual Violence and American Indian Genocide* (Boston: South End Press, 2005).

<sup>4</sup> Joan Pennell & Mimi Kim, "Opening Conversations Across Cultural, Gender and Generational Divides" in James Ptacek, Ed. *Restorative Justice and Violence against Women* (Oxford: Oxford University Press, 2010) 177.

<sup>5</sup> Ellen Pence and Kristine Lizdas, *The Duluth Safety and Accountability Audit* (Duluth, Minnesota: Duluth Program Development, 1998).

<sup>6</sup> Lee Lakeman, "Why 'Law and Order' Cannot End Violence Against Women; and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" (2000) 20 *Canadian Woman Studies* 24 at 24.

<sup>7</sup> Lise Gottell, "The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver, UBC Press, 2007) 127.

<sup>8</sup> Kathleen Daly, "Sexual Assault and Restorative Justice" in Heather Strang & John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 62

state justice apparatus. We must monitor feminist led reforms that are controlled by the state, including alternatives to incarceration.<sup>9</sup>

The important role of community in this is undeniable. Both the Duluth model and Family Group Conferences rely on the work and political (re)-orientation of feminist, anti-racist, and anti-colonial community groups. These overtly political, grassroots enterprises are part and parcel of the processes, not ‘special interest’ groups lobbying from the outside.

Despite the danger that our legal and social reforms may be co-opted by federal and provincial governments (or perhaps because of this danger) feminists must continue to engage with the state. This engagement, I argue, must come from within our own communities, by supporting feminists and their work with whatever skills and resources we have as individuals.

There are some innovative, well-established models to draw upon in mobilizing. Both the Duluth model and Family Group Conferences have been developed within these political conditions. In addition, Joan Pennell, in her current work on Family Group Conferences, has begun to work cooperatively with a grassroots movement of women of colour who position themselves firmly outside of the workings of the state. Mimi Kim, Andrew Smith, and other members of Incite! Women of Colour Against Violence collective have been calling on anti violence feminists to reconsider our reliance on the state in the form

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<sup>9</sup> Australia is an example of a state who has heavily invested in restorative justice, with remarkable success. Notably the Australian model excludes intimate violence. See: Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002).

of the criminal justice system,<sup>10</sup> and restorative justice.<sup>11</sup> This dialogue continues, and is a key site for ongoing feminist anti-violence work. “Multiplying the possibilities continues the conversation across cultural, gender and generational divides while maintaining steadfast commitment to engaging families and communities in stopping the violence.”<sup>12</sup>

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<sup>10</sup> “Incite! Women of Color against Violence, eds. *The Color of Violence: the Incite! Anthology* (Boston: South End Press, 2010).

<sup>11</sup> Andrea Smith, “Beyond Restorative justice: Radical Organising against Violence” in James Ptacek, ed. *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press, 2010) 255.

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