The Practice of Law as Structured Action: The Role of Lawyers in the Criminalization of Violent Men and Women

By

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A Thesis
Submitted to the Faculty of Graduate Studies
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for the Degree of

Doctor of Philosophy

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THE PRACTICE OF LAW AS STRUCTURED ACTION: THE ROLE OF LAWYERS IN THE CRIMINALIZATION OF VIOLENT MEN AND WOMEN

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GILLIAN BALFOUR

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University

of Manitoba in partial fulfillment of the requirements of the degree

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Abstract

The study explores the paradox between the principles of fundamental justice and disparate rates of criminalization across marginalized groups, particularly economically-marginalized Aboriginal men and women accused of violent crimes. By attending to the process of criminalization, the practice of criminal law is theorized as structured action constrained and enabled by the form of law, the neo-conservative socio-political context, cultural presupposition of race, class, gender and violence as well as the agency of lawyers.

The strategies of lawyers in cases of violent crime are critically examined using a multiple-method design of twelve interviews with defence lawyers and a content analysis of twenty-three Crown Attorney case files. Analysis of these data suggests that the practice of law normalizes Aboriginal women's violence and violence between young men according to scripts of the "drunken Indian," hetero-masculinity and neo-conservative notions of 'responsibilization.' Strategies of lawyers in sexual assault cases continue to be constrained and enabled by rape myths that normalize men's sexual violence towards women and children, while women's sexual aggression is cast as erotic lesbian fantasy or pathology. In domestic violence cases, specialized prosecution policies have produced subversive lawyering strategies and not a 'new paradigm of justice.'

The study concludes that the influence of inequality upon the criminal justice system cannot be isolated into discrete variables of race, class and gender; the over-representation of Aboriginal men and women in the critical justice system is a product of a complex interplay of various stereotypes. In these terms, efforts to remedy the paradox between inequality and the principles of fundamental justice will need to be wary of the complexity of the criminalization process.

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Introduction

Over the last two decades, prison populations throughout North America have risen dramatically, even though crime rates have generally decreased. Between 1986 and 1996, the number of offenders in provincial institutions in Canada rose 25 percent while federal inmates increased an even more substantial 34 percent (Statistics Canada, 1996a). In 1999, more than twice as many offenders were admitted to prison than were placed under supervision in the community (Statistics Canada, 2000a). More troubling, perhaps, is that approximately half of adult offenders admitted to provincial or territorial jails in 1998/99 were accused adults who were denied bail and were remanded to await a court disposition (Statistics Canada, 2000a: 2). The length of time spent in pre-trial custody has increased by 27 percent since 1995 (Statistics Canada, 2000a: 4). This means that more people are being held in pre-trial custody for longer periods of time than ever before. Canada has one of the highest incarceration rates in the Western world, second only to the United States where prison populations have increased by 350 percent since 1980 (Bureau for Justice Statistics, 1996). Crime rates, in contrast, have been decreasing. As of 1999, the national crime rate in Canada (based on data reported by the police) fell for the eighth consecutive year, the lowest rate in 20 years (Statistics Canada, 2000a). The rate of violent crime fell for the seventh consecutive year. Homicides decreased by 5 percent and reported sexual assaults decreased by 7 percent. Minor assaults accounted for 62 percent of all reported violent crimes in Canada.

Who are the individuals most likely to be represented in these statistics? It is by and large economically-marginalized and racial-minority men and women who fill the remand centers, prisons and jails across North America. According to the U.S. Department of Justice, 65 percent of prison inmates belong to a racial or ethnic minority and only half of the U.S. prison population has completed high school. In Canada, 48

percent of women and 46 percent of men in prison have a grade nine education or less (in contrast to a national average of 19 percent). Sixty-four percent of female prisoners and 43 percent of male prisoners were unemployed at the time of admission (in contrast to a national average of 10 percent) (Statistics Canada, 1999b). As a group, Aboriginal peoples are most likely to be reflected in these statistics.

Although Aboriginal peoples represent only 2 percent of the Canadian population, they make up 17 percent of the overall prison population (Statistics Canada, 2000a). The situation is even more severe in the Prairie region. Aboriginal men account for 57 percent of all adults in provincial and federal custody in Manitoba (Statistics Canada, 2000a). Seventy-six percent of Saskatchewan inmates on register in adult correctional facilities are Aboriginal (Razack, 2000:103). For Aboriginal women, the disparate rates of criminalization are even more startling. Aboriginal women make up 80 to 90 percent of the provincial jail population in Saskatchewan (Monture-Angus, 1999b). While the overall rate of incarceration in Saskatchewan increased by 46 percent between 1974 and 1992, the increase for Aboriginal women during that same time period was 111 percent (Harding, 1993). As well, Aboriginal inmates are younger, have less education and are more likely to be unemployed than non-Aboriginal inmates (Statistics Canada, 1996b: 10). For example, in the city of Regina, 90 percent of all high school drop-outs are Aboriginal young people and 80 percent of Aboriginal children live in poverty (Razack, 2000:102).

To make sense of the disparities between decreasing crime rates and increasing rates of imprisonment (or rates of criminalization in general) one could simply claim that 'prisons are working.' In other words, the crime rate is dropping because more criminals are incarcerated. In this view, the disproportionate incarceration rates of Aboriginal peoples and other racialized minorities in North America are caused by the criminogenic conditions in their communities and families: poverty, addiction and violence. Justice

systems, therefore, are understood to be responding appropriately to the 'crime problem' posed by these populations. This way of thinking has provided the rationale for the exponential growth of the prison industry in Canada. For example, in 1995 the Canadian government spent $9.9 billion on the administration of criminal justice (policing, prosecutions and youth and adult corrections) – a 35 percent increase in justice spending since 1989 (Statistics Canada,1996a).

Yet, focussing on the criminogenic conditions of marginalized communities is not the only possible explanation for the dramatic increases in rates of criminalization and prison industry expenditures. A potentially more productive approach is to locate these trends in their broader political context. Laureen Snider (1998), for one, points out that prison industry expenditures are often driven by neo-conservative policies, not actual increases in criminal activity. In these terms, increased rates of criminalization reflect wider political interests as governments endeavour to promote an image of being "tough" on crime.

> Thus, increasing penality – through criminalizing behaviours that were formerly tolerated, abolishing parole and statutory remission, lengthening prison sentences, replacing police discretion with mandatory charging directives and judicial discretion with minimum sentences – has become both symptom and symbol of the modern state. Proving such measures are effective has never been necessary. Penality, and the businesses and sciences that support it, is a growth industry. The politics of law-and-order guarantees a steady supply of politicians promising to get 'tough on crime'; arguing that such policies are futile, cruel, or racist is electoral suicide. (Snider, 1998:3)

Attention to the broader political context in which penality flourishes suggests the need to examine not simply the *rates* of criminalization (that is, who is made subject to the criminal law), but the *process* of criminalization (that is, the selecting out and defining of particular groups and individuals as 'criminal'). Using this approach, we can look at

criminalization not as a narrow measure of criminality, but rather as an expression of broader socio-political interests.

Within criminology, the criminalization process has been defined and studied in a variety of ways. Most empirical work in North America, Britain and Australia has focussed on different points in the criminal justice system (such as arrest, prosecution and sentencing). For instance, John Hagan and Marjorie Zatz (1985) attribute the discipline's focus on policing to the low-level visibility of police work and its impact on police use of discretionary powers:

> The low visibility of street-level policing contrasts with the more formal and symbolic character of later stages in the process. [Our] point is that the environment of the court room may be more conducive to equality and due process than the environment of the street. . . . The implication is that the police are most likely to play fast and loose with the law, prosecutors less so, and the courts least of all. (Hagan & Katz, 1985 cited in Mosher, 1998:51)

Richard Ericson and Patricia Baranek (1982) also claim that the study of police discretion and decision-making is key to understanding the criminalization process. They suggest that "the ordering of justice is very much under the influence of the police because their versions of the truth are routinely accepted by the other criminal-control agents, who usually have neither time nor the resources to consider competing truths" (1982:51). In his historical analysis of systemic racism in Ontario's legal and criminal justice systems, Clayton Mosher (1998) points out that law enforcement has targeted inner-city minority communities as police have been enabled by legislation (such as vagrancy, pan handling and drug laws) that has worked to the disadvantage of relatively powerless groups.

It is sentencing studies, however, which have dominated criminology's empirical approach to measuring the inter-play between inequality and criminalization. Nevertheless, sentencing studies have produced inconclusive and inconsistent findings.

Criminalization appears to be conditioned by case facts (seriousness of offence and credible witnesses) and extra-legal factors (age, race, ethnicity and gender), but not in a consistent fashion. Marjorie Zatz (1984) captures the tentative nature of these findings when she writes: "the sum of our knowledge is that for some offences, in some jurisdictions, controlling for some legal and extra-legal factors, at some historical points and using some methodologies, some groups are differentially treated" (Zatz 1984 cited in Mosher, 1998:41). As outcome measures, sentencing studies may demonstrate disproportionate treatment, but they do not explain the process of *how* inequality and criminalization are woven together.

A patterned relationship between inequality and criminalization becomes especially troubling when one considers that the legal system is founded on the presumption of innocence and universal equality. These principles of fundamental justice are the basis of the procedural fairness that ensures the Crown must prove its case against the accused beyond a reasonable doubt and that the defence must only raise reasonable doubt for the accused to be acquitted or found not guilty. It would seem that the principles of fundamental justice constrain the state's power to criminalize by protecting the rights of the accused and enabling the powers of defence counsel to limit the likelihood of criminalization. The disparate incarceration rates of marginalized groups, however, tell otherwise.

It is the paradox of the principles of fundamental justice yet disparate rates of criminalization across marginalized groups that will be explored more fully in this study. Although criminalization is an outcome of the criminal justice system, it is also a process that selects out and defines particular groups and individuals as 'criminal.' By shifting our definition of criminalization to grasp the process rather than the outcome, the role of lawyers as agents of criminalization comes into view. For instance, if, as Hagan and Katz (1985) claim, the courtroom is closer to equality and due process than the street, then the

influence of race, gender and class biases upon court processes should be minimized by the principles of fundamental justice. Given the disparate rates of criminalization for economically-marginalized and racial-minority men and women, however, these principles appear to be breached in the practice of law.

A focus on lawyering will enable a more thorough analysis of how criminalization happens than conventional sentencing studies allow. To this end, lawyering will be understood as "structured action." This term is borrowed from James Messerschmidt's (1997) conceptualization of crime as social action structured by historically-specific definitions of masculinity, femininity, race and class. Messerschmidt points to how structures are shaped by experts whose actions, in turn, inform the social relationships within social structures. In this respect, lawyering is structured action that takes place within a socio-political context. The specific socio-political context to be examined in this study is the current neo-conservative law-and-order state that has renewed the retributive model of crime control, calling for zero-tolerance, mandatory charging and compulsory criminalization (Garland, 1996). Criminalization is mediated by the agency of lawyers within this neo-conservative context. While the strategies of lawyers are constrained and enabled by the organizational framework of the justice system, they are also constituted by discourses of race, class and gender.

Chapter One lays out an intellectual history of how criminologists and sociologists of law have theorized the inter-play between inequality and criminalization. Conservative, liberal, radical, feminist, neo-conservative, critical race and post-structuralist theorists have defined the criminalization process from distinctive and sometimes opposing perspectives. While each of these theories offers a particular interpretation of the interplay between inequality and criminalization, explaining the paradox of how the principles of fundamental justice fail to protect against inequitable rates of criminalization will require a theoretical synthesis.

Chapter Two explores what this theoretical synthesis might look like by proposing a theoretical framework which integrates the form of law, race, class and gender presuppositions, the neo-conservative socio-political context and the agency of lawyers in the criminalization process. Rather than an outcome of criminal justice intervention, criminalization is conceived of as a process mediated by discourse, structure and the agency of lawyers.

Chapter Three describes the multi-method qualitative approach of this study. Hypothetical cases or 'mock police reports' are used as the basis for interviews with defence lawyers while Crown attorneys' case files are examined in order to uncover prosecution strategies in cases involving men and women accused of violent crimes. Because crimes involving violence – such as manslaughter, assault causing bodily harm, sexual assault and domestic violence – are ostensibly ones where the seriousness of the charge is an overriding consideration in the criminalization process, 'extra-legal' factors – like the socio-political context and the race, gender and class of the accused – should (at least in theory) not be likely to influence the strategies of lawyers.

Chapters Four, Five, Six and Seven, however, explore how the strategies of defence lawyers and Crown attorneys are, in fact, shaped not only by the nature of the charge and principles of fundamental justice, but also by a neo-conservative socio-political context and discursive constructions of Aboriginal identity, femininity, masculinity and poverty. Each chapter focuses on a hypothetical case to highlight particular issues.

Chapter Four brings together the oral narratives of defence lawyers and the textual narratives found in Crown files to explore the strategies used in cases of "drinking-party" homicides involving Aboriginal women and men in inner-city communities. These strategies are juxtaposed with those found in a Crown case of a young Caucasian woman accused of assaulting another young Caucasian woman in a suburban neighbourhood.

The strategies of defence lawyers rely on images of the "drunken Indian" to minimize the seriousness of the violence, particularly when the victim is Aboriginal. Crown strategies rely on racialized as well as gendered presuppositions. While Aboriginal accused are cast as dangerous and violent, presuppositions of respectability and femininity come into view in cases involving young white women in middle class neighbourhoods. The lawyering strategies in these cases normalize inner-city Aboriginal communities – not middle class neighbourhoods – as dangerous places.

Chapter Five uses the oral and textual narratives to examine the practice of law in cases of aggravated assault. The focus of this chapter is on a hypothetical case involving an Aboriginal man labelled by police as a 'sniffer' who is accused of assaulting two Caucasian men at a gas bar. Crown files of other aggravated assault cases involving young Caucasian males and Aboriginal women are also examined. Interviews with defence lawyers reveal that young Aboriginal men – especially those labelled by police as a sniffers – have little credibility before the courts, even when alleging self-defense against a racist attack. Crown data show how stereotypes of masculinity and race influence prosecution strategies. Violence amongst young men is typified as a part of (hetereo)masculinity. However, when a Black homosexual man is seriously wounded by a Caucasian homosexual man, the defence is able to undermine the victim's credibility by relying on racialized and sexualized stereotypes. In contrast, in a case of an Aboriginal woman charged with assaulting a Caucasian man, the Crown successfully casts her as a danger to the public, despite the violence used by the complainant against the accused. Across these cases, both Crown and defence lawyers rely on strategies to undermine credibility, rather than legal arguments of self-defense.

Chapter Six looks at the practice of law in the context of sexual assault cases to assess the impact of recent reforms to sexual assault legislation upon the practice of law. Issues of complainant credibility and consent are examined in cases involving men and

women accused of sexually assaulting child and teenaged complainants. A mock police report involving the alleged sexual assault of a minor by her mother's boyfriend acts as the focal point for this discussion. Young people – especially those living in care or on the street – who claim to have been sexually assaulted are presented by defence lawyers as troublemakers, liars or easily manipulated by therapists. Other presuppositions are used strategically to position mothers of complainants as blameworthy by failing to protect their children, whereas men accused of sexually assaulting teenaged boys and girls are cast as unsophisticated. Interview and case file data suggest that rape myths continue to influence the strategies of lawyers.

Chapter Seven assesses the strategies of lawyers in cases of domestic violence, as well as the attitudes of defence lawyers towards the criminal justice response of 'zero-tolerance' for domestic violence. A mock police report involving an alleged assault with a weapon by a Caucasian woman against her ex-common law spouse (an Aboriginal male) over visitation access is used to highlight these issues. Similar to other chapters, the strategies of defence lawyers are found to rely on presuppositions of femininity, masculinity and race to cast complainants as mutually combative, liars, "drunken Indians" or breadwinners. The Crown's strategies, however, are influenced by claims of public denunciation and seriousness of the charge. Defence lawyers resent zero-tolerance and engage in strategies that sabotage or undermine the intention of the policy to improve the quality of lawyering in domestic violence cases.

These studies are drawn together in the Concluding chapter, where I argue that the practice of law is an important dimension in building our understanding of how the structure of the administration of justice is enmeshed with gendered, racialized and class-based presuppositions, and that lawyers do engage in social action in their practice of the law. As important, however, is the finding that criminalization is an expression of broader socio-political interests.

Chapter One

An Intellectual History of the Meaning of Criminalization in Criminology and the Sociology of Law

One of the central issues to confront criminologists and sociologists of law has been the overrepresentation of marginalized groups within the criminal justice system, that is, how inequalities of poverty, racism and sexism come to affect the criminalization process. The intellectual histories of criminology and the sociology of law have not been clearly defined by moments where theories are disproven and have given way in a linear fashion to new ideas about crime and punishment. Rather, each discipline has developed via simultaneous debates that continue to be reshaped by historical events and empirical evidence. Nevertheless, conservative, liberal, radical, feminist, critical race and postmodern theories have become prominent in the disciplines at various points in time. These theories define the criminalization process from distinctive and sometimes opposing perspectives, and each offers a particular interpretation of the links between inequality and criminalization. What is offered here, then, is an account of how criminology and the sociology of law have unfolded in most Western societies (especially since the end of World War II) with the aim of mapping out these various responses to the issue of inequality and criminalization

Conservativism: Crime and punishment as functional

For the first part of the twentieth century, criminology and the sociology of law in Westernized countries were grounded in the conservative assumptions of structural functionalism. At that time, crime and punishment were considered ultimately useful or

even necessary, since they affirmed cultural values and norms, clarified moral boundaries, promoted social unity and encouraged certain types of social change. Structural functionalists claimed that law evolved from a consensus of social values. Following on Durkheim's (1893/1933) work, crime is a normal phenomenon and law is an embodiment of the normative order of society, a reflection of the community's collective conscience. The power of law to criminalize, therefore, flows from society itself.

Criminologists working in the tradition of structural functionalism claimed that increasing crime rates (such as those witnessed throughout most of North America in the post-World War II era) occurred because society had not made cultural goals accessible by providing access to institutionalized means (Merton, 1968). Robert Merton argued that if a "strain" or dissonance existed between a person's aspirations and the institutionally available means to achieve those goals, then conformity was unlikely. Thus, inner-city working-class crimes were explained as a lack of 'fit' between individuals' goals and means. Similarly, sub-cultural theorists variously explained inner-city delinquency as a function of differential social organization, a reaction to status frustration (Cohen, 1955) or the breakdown of legitimate opportunity structures (Cloward & Ohlin, 1960). In each of these theories, deviant subcultures were seen to emerge primarily within working-class neighbourhoods.[1]

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1 Although it should be noted that Edwin Sutherland (1966) and his student Donald Cressey (Sutherland & Cressey, 1966) did direct criminologists' attention to the issue of white-collar crime.

A closer reading of structural functionalism reveals that while these were indeed theories of working-class male criminality, attention to the race, class and gender position of their subjects was notably absent. Criminal populations in North America have tended to consist of people of colour (African Americans, Natives and Hispanics). Yet, the racial structuring of opportunities and associations in contemporary society was obscured in structural functionalist accounts. Structural functionalists entertained no discussion of the power dynamics inherent to criminalization and, conversely, the powerlessness of some social groups to avoid criminalization. Neither was the role of the state called into question in terms of the disparate rates of criminalization across working-class men and women and minority groups. Instead, because the state was theorized as a neutral force which acted in the interests of the society, criminalization (arrest, prosecution and incarceration) came to be understood as a straightforward or uncomplicated function of criminal behaviour.

Liberal Pluralism

By the end of the 1960s throughout North America, liberal pluralism had emerged within criminology and the sociology of law as part of a wider academic challenge to structural functionalism's consensus-based, conservative orientation. Influenced by the more turbulent social and political climate of the times, liberal pluralism understood society as rooted in conflict amongst social groups with competing interests that must be formally mediated. Given the power differentials between groups, the liberal-pluralist study of crime focussed on the ability of some groups to create rules and thereby define others as criminal. Howard Becker's (1963) labelling theory posited that criminals were labelled or

socially constructed based on the inclinations or claims of more powerful individuals (such as lawyers, psychiatrists and religious leaders). These individuals were "moral entrepreneurs" who used their status to stigmatize members of less powerful social groups (Becker, 1963). In this way, liberal-pluralism sought to explain the disparate rates of criminalization of marginalized groups.

According to liberal pluralism, the criminalization process involved groups of individuals with competing interests and role expectations. However, labelling theorists suggested that defence lawyers, prosecutors and judges used their status to influence the outcome of the trial process. The administration of justice was a process that was affected by interests of professional advancement as well as organizational goals of case completion and efficiency. These interests resulted in a system of justice that routinely violated procedural guidelines. In addition to lawyers asserting their status, David Sudnow (1965) claimed that over time, lawyers develop routinize characterizations of accused persons and crimes. These characterizations focus on extra-legal factors, such as the social characteristics of the persons and the settings of the crimes.

In his classic study of plea negotiations, Anthony Blumberg (1967) revealed that the role of defence counsel as an officer of the court does not "square with" the social reality of the criminal justice system. The role of the defence attorney is that of a "double agent" who is instrumental in securing a plea bargain (the entering of a guilty plea by the accused). Far from being an adversarial system between defence and prosecuting attorneys, Blumberg asserted that defence and prosecution personnel become co-opted by the organizational goals of the criminal justice system. As such, Blumberg argued that criminalization is better understood as an outcome of the organization of the court.

> Largely overlooked is the variable of the court organization itself, which possesses a thrust, purpose, and direction of its own. It is grounded in pragmatic values, bureaucratic priorities and administrative instruments. These exalt maximum production and particularistic career designs of organizational incumbents tend to generate a set of priorities. These priorities exert a higher claim than the stated ideological goals of 'due process' and are often inconsistent with them. (Blumberg, 1967: 215)

Liberal criminologists claimed that the nature of the working relationship between defence counsel and the prosecution is not adversarial, but rather one based on the need for efficiency. Criminalization, therefore, appears as the routine, boring and unproblematic processing of defendants. In fact, within the criminal justice system, lawyers rely upon one another's cooperation "for their continued professional existence and so the bargaining between them tends to be reasonable rather than fierce" (Blumberg, 1967:219). The subculture of lawyering seems to valorize relationships amongst defence counsel and prosecution, and generally "overshadows the relationship between clients and their lawyers" (Blumberg, 1967:219). Blumberg (1967) likened the working relationship of defence and prosecuting attorneys to a "confidence game": lawyers manipulate the basic dishonesty of their client toward their own ends. In this view, the rules of legal representation are not rooted in the principles of due process, but are in fact "pressure tactics" aimed at achieving a guilty plea.

In a later study of the administration of justice, John Hagan and his colleagues (1979) described the organization of the criminal justice system as a:

> .... [l]oosely coupled system where structural elements are only tentatively linked to one another, rules are often violated, decisions often go unimplemented, techniques are often of uncertain efficacy and evaluation and inspection systems are subverted or rendered so vague as to provide little coordination. (Hagan, Hewit & Alwin, 1979)

In this way, the criminalization process was governed by conflicting self-interest and organizational demands. Within this 'loosely coupled system,' individual actors manipulate and undermine the principles of the rule of law.

Following the work of Sudnow (1965) and Blumberg (1967), other labelling theorists have looked to the routine activities of criminal justice professionals. For example, Kriss Drass and William Spencer (1987:287) studied the routine activities of probation officers as social control agents whose decision-making processes were an expression of a "theory of office: a set of simple working categories for defining and responding to so-called deviants with which agents must deal." Drass and Spencer (1987) suggest that cases are routinely processed according to recognizable typifications of offenders (age, gender, race, marital status and employment status).

Although liberal pluralists drew attention to the role of individual power in the criminalization process, there was little clarification as to what this power looks like and where it comes from (Lynch 1996). As well, the role of the state was idealized as the site of formal mediation; any conditions of inequality can be ameliorated by the state. While the administration of law was understood as a reflection of group interests, these interests were not specifically identified. Consequently, like structural functionalism, liberal pluralists did not provide an adequate explanation for why marginalized groups are more likely to be criminalized.

Radical Criminology

Liberal pluralists were not the only ones influenced by the turbulent social and political climate of the 1960s and early 1970s. Within criminology and the sociology of law, there

was a paradigm shift toward a more radical explanation of crime and criminalization. Radical criminologists like Ian Taylor, Paul Walton and Jock Young (1973) claimed that there was a theoretical and aetiological crisis within criminology; structural functionalist and liberal pluralist theories could not explain what caused crime nor why working-class minorities were more likely to be criminalized than middle-class white people. Deeply influenced by a Marxist perspective, radical criminology challenged the fundamental premises of conventional criminology by focussing on the role of class conflict as the basis of society and the cause of crime. While liberal pluralism understood conflict as generated by competing interests and the state as a mediator of these contestations, radical criminology put forward a materialist understanding of conflict and a very different analysis of the role of the state.

In its initial stages, radical criminology was rooted in an instrumental Marxist view of the state. The capitalist state functioned coercively through the criminalization and incarceration of the working class to maintain the material and social relations of industrial capitalism, while the "real" crimes – actions of the ruling class, such as price fixing, strike breaking and pollution – occurred with impunity (Quinney, 1973). Thus, the radical criminological project was aimed at exposing the designation of crime and the crime categories themselves as imbued with the interests of the ruling class (Lynch & Groves, 1989; MacLean & Milovanovic, 1990).

As well, radical criminologists working within an instrumental Marxist approach claimed that the criminal justice system – as a part of the broader capitalist state – functioned *at the behest* of the capitalist elite (Panitch, 1977). The inattention to corporate and white-collar crime was considered a necessary pre-condition of capitalist

expansion and entrenchment (Chambliss & Seidman, 1971). By invoking a Marxist perspective, the strategic relationship between capitalism and the criminal justice system was exposed; the conditions of inequality endemic to industrial capitalism were revealed in how the law, police and prisons functioned. In relation to the over-representation of young, working-class men in prisons, Richard Quinney (1977:3) argued: "In capitalist society the healthy order is the one that benefits the capitalist class, the class that owns and controls the productive process. Capitalist justice is by the capitalist class, for the capitalist class, and against the working-class." In these terms, radical criminology challenged the functionalist position that law flowed from the collective conscience of society. Instead, from a radical perspective, law reflected the interests of the ruling class.

Marxist scholarship in criminology and the sociology of law also introduced historical materialism as a method for understanding how the economic context shaped the state response to crime and social control. Marxism's historical materialist method exposed the dialectical relationship between the mode of production (such as capitalism) and social relations (class conflict). As the mode of production expands to conquer new markets and exploit new resources for production and profit making, the state is transformed as well. For criminologists and sociologists of law, historical materialism was a means to examine the interplay between economic conditions and the state's response to crime. For instance, radical criminologists used this method to explain the over-representation of working-class men in the criminal justice system as the criminalization of surplus populations: those workers unable to compete or deemed as not committed to the work ethic of capitalism (Quinney, 1970). In this view, the process of criminalization was enmeshed with economic interests of capital as the state endeavoured

to manage the social relations of production.

Despite its contribution to the method of criminology, instrumental Marxist theory was criticized for positioning the state simply as a mechanism that rules by coercion and purely at the command of the ruling class (Poulantzas, 1975). Subsequently, structural Marxists redefined the role of the state as an ideological apparatus that manages the conflicting interests of the capitalist class and those of the working class. Rather than functioning at the behest of the ruling class, the state functions *on behalf of* capital (Panitch, 1977). This subtle shift in redefining the role of the state marked a crucial step toward understanding the state as relatively autonomous from capitalist class interests and appearing to rule by consensus rather than coercion.

According to structural Marxism, domination is rationalized via ideologies that become hegemonic. Ideologies are "beliefs deriving from real social relationships that hide or mask the precise nature of such relationships [thereby] masking from exploited classes the nature of their oppression and its precise source" (Beirne & Messerschmidt, 1991:342). Ideologies are a form of power (hegemony) used by the ruling class to engineer consensus through controlling the content of cultural forms and major institutions, such as the criminal justice system. Whereas the rule of law is defined under instrumental Marxism as a mechanism of class power (Quinney, 1973), under structural Marxism the rule of law is a means of both coercive and ideological domination that ensures the long-term interests of capital. For example, the rule of law claims that no person is above the law and all are equal before the law. In promoting the 'appearance' of equality, this ideological form of law is aimed at achieving the consent of the subordinate classes to the capitalist order (Hunt, 1976).

The role of law as a means of ideological domination was reflected in moral panics of crime and lawlessness evoked by the state in times of economic recession. For example, Stuart Hall and his colleagues (1978) explained how, in Britain, the state converted public anxieties of mass unemployment and economic recession into social concerns over inner-city Black youth crime. Hall *et al.* (1978) argued that because of the economic conditions in Britain during the 1970s, the newly elected conservative government faced a crisis of hegemony in that its legitimate authority was being undermined by public discontent. Writing later about these crime control policies, Ratner and McMullan (1983) claimed that the strategy of the British government at that time was to use the rule of law to evoke a "moral renaissance of austerity and discipline" that enabled the intensive use of criminalization against inner-city Black youths.

> The chief instrument in effecting this moral renaissance was the Rule of Law – an ideological artifice which served to refute the workability of liberal economics, sociology and criminology, and which relied instead upon a set of popularly constructed wisdoms about social order. (Ratner & McMullan, 1983:34)

The structural Marxist scholarship of Hall *et al* (1978) and Ratner and McMullan (1983) was influenced by the earlier works of Antonio Gramsci (1971). Gramsci described the power of the state as "hegemonic"; the state rules by consensus, not exclusively by coercion, as the instrumental Marxists would claim (Milliband, 1969). Using this model of the state, the criminal justice response to crime was situated as one component of the production or manufacture of consent. Unlike the liberal pluralist view of the state as an impartial umpire, radical theorists located the state as deeply vested in the interests of the ruling class and the long-term viability of capitalism.

Another criticism of liberal pluralism's view of criminalization was brought to

bear by Marxist socio-legal theorist Doreen McBarnet (1981), who pointed out that labelling theories have only studied the administration of law, not the content of law itself. McBarnet claimed that law is a sociological problem, not merely a backdrop of the criminal justice system. She went on to explain that the *content* of law itself allows for the manipulation of justice in the interest of the state, not the accused. In short, officers of the court do not disregard the law to achieve their own organizational ends. Rather, they are empowered by its very content. McBarnet's work is significant in that she bridges the macro and micro dimensions of radical and labelling studies of criminalization. She writes: "it's a long way from a Saturday night affray to the Law Lords – a world of meaning separates the breach of the peace or burglary or assault and theories of how the state rules. Yet the two are inexplicably interlinked" (McBarnet, 1981:8).

McBarnet (1981) also noted that labelling theorists were misguided in their understanding of lawyers as neutral bureaucrats. Labelling theories do not explain the paradox that a vast majority of cases processed through a criminal justice system result in a finding of guilt. She also made the point that this view obscures the reason why efficiency (guised as plea bargaining) is so important to the criminal justice system: it ensures a guilty conviction. This claim was later supported by a major study by a group of researchers from the University of Toronto (Ericson & Baranek, 1982), who examined discretionary decision-making in the criminal justice process from the perspective of the accused. The researchers found that court actors (police, defence lawyers, Crown Attorneys and trial judges) have a vested interest in maintaining mutually beneficial relationships amongst themselves, rather than acquiring a satisfactory outcome for the complainant or the accused. Ericson and his colleagues (1982) also revealed that

negotiations between the Crown and the defence as to the possible outcome of a case (entering of a guilty plea) take place without any scrutiny of the Crown or formal protection of the accused. Such empirical outcomes point to some unsettling truths about how power, status and organizational structures shape the outcome of the administration of justice.

Nevertheless, structural Marxism is not without its own limitations as a theory of criminalization. The class-based analysis of structural Marxism was inattentive to the over-representation of racial minorities in the criminal justice system. For example, although racial minorities are vastly over-represented in courtrooms and prisons across most Western countries, a structural Marxist account of crime control claims that criminalization is an expression of the exploitation and repression of the working-class or, more simply, of class conflict (Horton, 1981). Because class oppression was primary, racialized groups (such as Black and Aboriginal peoples) were referred to as 'super-exploited classes,' thus neglecting the specifics of how race functions to affect the criminalization process.

Marxist criminologists were not the only ones to dispute the claims of liberal pluralism. Spurned on by rising crime rates and the resurgence of conservative political administrations in the United States and Britain, neo-classical and neo-conservative criminologists were launching their own critiques.

Neo-classical Criminology: the due process model

Neo-classical theorists were concerned about the erosion of civil liberties that were becoming noticeable under the rehabilitative model (such as with indeterminate

sentencing and involuntary treatment). Neo-classical criminologists like Andrew Von Hirsch (1976), David Fogel (1975) and Norval Morris (1974) claimed that the rehabilitative model of liberal pluralism allowed for too much discretion in the decision-making of criminal justice professionals. Therefore, the process of criminalization was arbitrary and resulted in the discriminatory treatment of racial minority men and women.

Neo-classical criminology was influenced by the classical theories of punishment put forward by Cesare Beccaria (1764/1963) and Jeremy Bentham (1765/1948) who argued for a radical reformation of the barbaric practices of torture. Beccaria held that the law at that time only represented "the interests of a few powerful members of society and was a massive obstacle to human liberation" (1764/1963:46). Classical theorists believed that just as men are governed by reason, so too should the systems of governance, such as the criminal justice system. Therefore, criminalization was to be a process founded on principles of reason rather than tradition and custom.

The resurgence of classical criminology's principles of fairness, certainty and swiftness of prosecution was rooted in the conceptualization of criminal behaviour as being the outcome of rational choices made by individuals in certain situations (Clarke & Cornish, 1983). To this end, neo-classical criminology emphasized the importance of crime prevention through a model of general deterrence that did not operate at the expense of individual rights. Criminalization is considered a necessary process that allows for the individual to be held accountable for infringing on the rights of others (victims) and for restoring the balance assumed to exist in society (Von Hirsch, 1976).

Neo-classical criminologists were critical of the growing popularity in the United States and Britain of a neo-conservative crime control model that sought to increase the

use of punishment and limit the protection of civil liberties. Neo-conservative criminologists were reasserting anti-abortion, anti-homosexual, and anti-immigration and anti-Black moral principles into the administration of justice through building up a stronger and more authoritarian state apparatus.

Neo-conservative Criminology: a crime control model

During the 1980s, another challenge to liberal pluralism – as well as Marxism – was underway within conservative circles of criminology and socio-legal theory that coincided with the newly elected administrations under Margaret Thatcher in Britain and Ronald Reagan in the United States.[2] Neo-conservative criminology was also referred to as an 'administrative criminology' in that its focus was on the control of crime via the administration of justice. Whereas the due process model of neo-classical criminology emphasized the protection of individual rights, this crime control model valued social order over procedure at the expense of individual rights.

Administrative criminologists did share an affinity with neo-classical criminology's attention to rational choice as the cause of crime. It is for this reason that the due process model and the crime control model are believed to share similar assumptions about criminalization. However, neo-conservative criminology is concerned with achieving very different ends: general deterrence via a punitive approach to crime control based on the belief that rules of procedure impede swift convictions (Packer,

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2 In Canada, neo-conservativism was first introduced in a modified form in the late 1970s under Canadian Prime Minister Pierre Trudeau as localized right-wing populism rather than as a profound economic and political shift (Ratner & McMullan, 1983).

1968).

Neo-classical criminologists and administrative criminologists were aligned in their critique of liberalism, albeit from very different perspectives. Neo-classical criminologists were concerned about discriminatory sentencing practices against Blacks and other minorities and advocated for sentencing guidelines so as to minimize judicial discretion and ensure the protection of civil liberties. By contrast, administrative criminologists such as James Q. Wilson (1985) and Ernest Van den Haag (1975) were scornful of attempts to reduce crime through social programs, economic redistribution or rehabilitation in prisons. Wilson and others argued for an intensive use of criminalization, including fixed terms of imprisonment and the rigorous enforcement of deterrent penalties. From their perspective, crime rates were rising because the likelihood of detection, conviction and punishment had become very low.

This shift towards neo-conservativism was linked to two events. First, in 1974, Robert Martinson published a meta-analysis of correctional program evaluations from across the United States. In his report, Martinson argued that correctionalism was a dismal failure as a crime control strategy. This report alone, however, was not enough to sway the course of criminal justice policy that for decades had been committed to the ideals of liberalism's rehabilitation model. In fact, subsequent reviews of Martinson's report found significant methodological problems in his interpretation of program evaluation data (Allen, 1981). Nevertheless, the claim that "nothing works" had a particular socio-political saliency at the time that allowed for its dramatic impact upon criminology and the administration of justice. Marxist criminologists pointed out that the saliency of the 'nothing works' campaign could be explained by the second event, the

emerging global crisis of capitalism and the role of the state to protect the long-term interests of capital.

The crisis in production across most Westernized countries in the early 1970s gave way to the dismantling of Keynesian economics and the emergence of neo-liberal economic principles, such as deregulation and privatization (Ratner & McMullan, 1983). A political watershed in the United States and in Britain ushered in a neo-conservative socio-political era that advocated for a minimalist state in terms of economic regulation, yet expanded and further entrenched a reactionary criminal justice state (Platt, 1987). As a result, neo-conservative administrations in Britain and the U.S. began dismantling the welfare side of the state through massive cuts in spending on social services, health and education, while bolstering coercive institutions, such as the military, police and prisons (Platt & Takagi, 1977).

Whereas Marxist criminologists explained the problem of crime in industrialized societies as a problem of working-class crime brought on by the inequities of capitalism, under neo-conservativism, crime became *street crime* (Horton, 1981) brought on by "the shiftless poor who were dangerous and permissive people victimizing decent citizens" (Edsall, 1991:214). Across most Westernized countries – especially Britain, the U.S. and, to a lesser degree, Canada – neo-liberal economics and neo-conservative politics dramatically changed the form of the state's response to crime from one of penal welfare to crime control.

While radical criminologists were debating over instrumentalist and structuralist models of crime and punishment, the new right in criminology was chastizing liberalism for failing to control crime. At the same time, feminists were also beginning to express

concern about the invisibility of women in criminology and the sociology of law. Feminists claimed that while liberalism had merely "added women and stirred" (Eichler, 1980), Marxism paid little attention to how working-class men were treated differently than working-class women. Consequently, feminist criminologists began their own critique of liberal and radical theories' male-centred approaches. Of specific concern for feminists was the state's failure to criminalize men's physical and sexual violence against women. It was at this time that a convergence between some feminists and neo-conservative criminologists started to emerge over the mutual desire for harsher punishments of violent offenders.

Feminist Criminologies

Up until the 1970s, the issue of gender had been ignored in both criminological theory and research. Even the most devastating critiques of mainstream criminology put forward by radical criminologists completely overlooked the criminalization of women. Alongside radical criminology's attack on liberal pluralism, early feminist criminology claimed that liberal "malestream" criminology was sexist in that it failed to address the apparent increase in the number of criminalized women.

Liberal feminism

In their efforts to address the invisibility of women in criminology and socio-legal theories, liberal feminists introduced the "women's liberation thesis" (Adler 1975; Simon, 1975). This thesis held that what appeared to be an increase in the number of women coming into conflict with the law could be explained as a consequence of the

women's movement: as women became 'liberated' (meaning equal to men), their involvement in crime would increase. Liberal-feminist criminologists pointed to a dramatic increase in the number of women charged with property and violence-related offences in the early 1970s – the same time that the women's movement was working toward formal equality in the public sector.

The liberation thesis as an explanation of women's law breaking was challenged by feminist criminologist Carol Smart (1976). Smart's book, *Women, Crime and Criminology,* was "explicitly written with the goal of critically challenging the emerging moral panic over the relationship between women's emancipation to increasing participation by women in criminal activity" (Smart, 1976: xv). In her work, Smart explained that criminalized women are not 'equal' to men. Rather, they are most often poor women of colour who are criminalized for writing bad cheques or working as prostitutes as a means of survival, not because they are emancipated. Furthermore, Smart (1976) pointed out that the increase in the number of crimes committed by women is a reflection of more aggressive criminalization practices against women. Another feminist criminologist, Meda Chesney-Lind (1977), claimed that the women's liberation thesis was part of a backlash against the women's movement that was trying to reinforce women's traditional roles in society. Chesney-Lind suggested that any increase in the number of women charged, convicted or incarcerated could easily be a product of an "if it's equality they want, we'll see that they get it" attitude on the part of law enforcement personnel (Chesney-Lind, 1980 cited in Simon & Landis, 1991:14). Empirical findings of a study conducted by Darryl Steffensmeier (1978; 1981) in the United States also demonstrated that women most likely to be arrested or brought before the courts

continued to be low-income and minority women "who were most likely to be affected by deteriorating economic conditions and persistence of sex roles in the labor force" (1978:580).

Marxist feminism

The work of Carol Smart and others represented a shift within feminist criminology away from liberal feminist theory and towards a materialist analysis of the criminalization of women. A materialist analysis acknowledged how the feminization of poverty resulted in more women being arrested for crimes of petty theft and prostitution. Other Marxist feminists (Klein & Kress, 1976; Rafter & Natalazia, 1981) claimed that the criminal justice system was instrumental in preserving women's economic dependency upon men via the criminalization of prostitution. Because women were not free to work in the sex trade, they were forced to depend financially on husbands or fathers. Marxist feminists pointed out that a majority of criminalized women were single mothers relegated to the lowest-paid occupations and welfare dependency. "Thus, women's lives are already enmeshed in the state apparatus therefore are most apt to be criminalized, passed from one state agency to another" (Klein, 1981:64).

There were, however, some limitations to a Marxist-feminist understanding of women's criminalization. Marxist-feminist theory was criticized for not addressing how the courts treated working-class men differently from working-class women. For example, there was a double standard under law in that women were criminalized for prostitution, whereas male customers of prostitutes were not. Men were seldom criminalized for crimes of rape and domestic violence. It would seem that the law was

male, as much as it was a means of ruling class power. Some feminists began to assert a need for a theoretical framework that was unmodified by male-centred theories, such as liberal pluralism and Marxism (MacKinnon, 1987).

Radical feminism

At the same time that Marxist feminists were developing their class-based account of criminalized women and liberal feminists were advocating for formal equality, radical feminists were also building a critique of both liberal and Marxist theories. Radical feminist Shulamith Firestone (1970) claimed that women should revolt against liberal feminism's "myth of emancipation" and the sex-blind view of Marxism's materialist account. Firestone's work used Marxism's dialectical materialism as a method to argue that patriarchy (male domination and oppression of women) was the basis of social order – not capitalism's exploitation of workers. Sex, rather than one's relationship to the mode of production, was the basis of class membership. The omnipotence of the male sex was achieved via the eroticization of women's subordination to men (Firestone, 1970).

Legal theorist Catharine MacKinnon (1987:515) stated that radical feminism is a "feminism unmodified" by considerations of class or race; "sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away." MacKinnon disagreed with liberal feminism's claim that the law was "mistaken" in its unequal treatment of women. She also asserted that law is incapable of assuming an ungendered form. Rather, the law is male as "the law sees and treats women the way men see and treat women" (MacKinnon, 1987:641). According to MacKinnon, the principles of law (e.g. impartiality and neutrality) that underpin the criminalization process are strategies of

male domination. As a result, radical feminism challenged the claims of legal discourse to represent the interests of women as well as men (MacKinnon, 1987).

Eventually, radical feminism's materialist method was replaced by a methodology for theory building linked to women's experiences. Feminist methodology drew on the practice of consciousness-raising and stressed the importance of women's experiences as the basis of knowledge (Stanley & Wise, 1983). For example, MacKinnon (1982; 1983) argued that through women's accounts of rape and domestic violence, feminism could achieve a grand theory of patriarchy and women's oppression.[3] Yet, radical feminist theory seemed to fall short as an analytical framework for understanding the criminalization of women. In particular, because radical feminist criminology concerned itself primarily with women as victims of male violence, it did not extend its analysis of patriarchy to how it would affect the criminalization of women, especially in light of the empirical findings of sentencing studies which revealed law's apparently chivalrous treatment of some groups of women (primarily white middle-class mothers).

Several studies conducted in the United States to assess the differential treatment of men and women by the criminal justice system found that women tended to receive more lenient sentences than men. One sentencing study (Nagel & Weitzman, 1971 cited

3 It is important to note that radical feminist theory continues to shape the nature of inquiry and analytical frameworks of criminology and socio-legal theory. For example, Liz Kelly (1988) – drawing on women's stories of male violence – developed the concept of the 'continuum of sexual violence' to draw attention to the range of male behaviour that abuses and violates women's bodies, as well as the many ways that women cope with, resist and survive male violence. Another radical feminist, Marianne Hester (1992) stated that men maintain their power over women in many different ways and on many different levels: at work, in the home and through law. However, Hester argued that women's sexuality is the "central dynamic of male domination over women" (1992:1). For these reasons, the sexual victimization of women (rape, pornography, incest and sexual harassment) is the focus of radical feminist theory, research and activism

in Simon & Landis, 1991) found that chivalrous treatment by trial court judges had positive outcomes for women. Women were less likely than men to remain in custody during the pretrial period. Women were less likely to be convicted and, if they were, they were more likely to receive milder sentences. But women were also less likely to have proper legal representation. In a later study, Linda Temen (1973) found that men were allowed more opportunity to appeal their sentences with proper legal representation, whereas women's appeals were decided by a parole board and women were afforded no procedural rights of legal representation.

Research in the United States during this time also revealed that judges were more inclined to impose probation on women than men, but only a few judges were less likely to convict a woman. Most judges differentiated between men and women only at the time of passing sentence (Anthony, 1973). Angela Musolino (1988) conducted interviews with judges and found that all of them tended to treat women more 'gently' than men because they saw women as being responsible for child rearing and they were taught to view women differently than men (like a sister or mother). Incarceration as a means of punishment was considered by judges to be far more degrading for women than for men. Ghali and Meda Chesney-Lind's (1986) study of women in Honolulu found that women were more likely than men to enter a guilty plea for less serious offences. No evidence of gender effect on the courts' pretrial dismissal, adjudication or sentencing decisions were found. However, at the more serious felony level, there was a measurable gender effect on the courts' passing of sentence. Women were more likely than men to receive probation. According to Ghali and Chesney-Lind (1986), chivalry or preferential

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(Burstow, 1992).

treatment of women is evident at sentencing but not at the determination of guilt or innocence.

More recent sentencing statistics in the United States reveal that in most cases, women are less likely than men to be imprisoned (Daly, 1983; 1987; 1989a; 1989b). Moreover, when women are incarcerated, it is for a shorter period of time than men convicted of similar offences. Kathleen Daly (1994) found that gender presuppositions are more inherent in the punishment of *men* (especially Black men) than in the punishment of women. Men are seen as more blameworthy and less likely to succeed in treatment while on probation.

It would seem that the radical feminist critique of law as phallocentric or male was contradicted by outcomes of sentencing studies. Patterns in sentencing suggest that law criminalizes men more readily than it does women. Such evidence raised uncertainties about radical feminism's exclusive focus on patriarchy as the basis of social order and control of women (Hartmann, 1981). Radical feminism could not explain why certain groups of women – most notably, poor women and women of colour – were more likely to be criminalized than others. In addition to the empirical questions raised by sentencing studies, a paradox began to emerge with regard to radical feminism's political strategy. Despite the critique of law as male, radical feminists demanded that the criminal justice system act punitively against men accused of sexual and domestic violence. In these terms, feminism became unwittingly aligned with neo-conservative crime control policies.

The critique of feminist criminologies thus far . . .

In the early 1980s, feminist scholarship appeared to be at an intellectual crossroads. Empirical evidence had revealed that despite the rhetoric of formal equality, most criminalized women continued to be working-class single mothers with little or no education and employment. As such, liberal feminism's claim that women's increased rates of criminalization could be explained by their emancipation was rejected by most criminologists (Leonard, 1982; Naffine, 1987). Other feminist criminologists and socio-legal theorists were struggling to fit the criminalization of women into Marxism's class-based analysis, as it did not account for the distinctive ways that men and women were criminalized. Radical feminism was also being scrutinized for its inattention to criminalized women and the inability to account for the differential levels of criminalization across groups of women. At the same time, in light of the efforts of radical feminists to politicize women's victimization, there was a growing public awareness of the prevalence of male violence against women (Standing Committee on Social Development, 1982) and increasing demands by women's groups for harsher punishments of violent male offenders (Status of Women, 1991). It would seem that criminal law could not be simply categorized as either sexist, male, racist or as a means of class rule. Feminists were also starting to realize that a relationship with the state was necessary if women's interests were to be legitimated and resources were designated to address their concerns (Currie, 1990).

Socialist feminism: dual systems of oppression

By the late 1980s feminist criminology began to frame its analysis of criminalized

women within a socialist feminist framework. Socialist-feminist criminologists brought together the important contributions of radical feminism and Marxist theory in their efforts to explain why working-class women were more likely to be incarcerated than middle-class women. Socialist feminists agreed with radical feminism's powerful claim that patriarchal oppression is the context for understanding women's victimization and sexual exploitation, but they added to this the insight that the sexual division of labour under capitalism also fails to protect women from violence and poverty (Barrett & McIntosh, 1982; Eichler, 1988; Gavigan, 1988; Carlen, 1988). The criminal justice response to women was enmeshed with class-based as well as sexist assumptions about women's place in the home as a mother and a wife (Worrall, 1990). The dual systems of capitalism and patriarchy had an impact upon the criminalization of women in that certain groups of women – married women with children – were likely to be treated leniently by the courts. Indeed, empirical evidence of sentencing studies seemed to indicate this to be the case.

Kathleen Daly's (1994) research demonstrated that the differential sentencing of women was more likely explained by the accused's family status; judicial decisions were more likely to be based on concern for dependent children. These findings are similar to those of Candace Kruttschnitt's earlier research (1980; 1982; 1984), wherein she found that that being married lessened the probability of women being sentenced to prison but not men. Single women and childless women were treated more harshly. Kruttschnitt asserted that the preferential treatment of women was most oftentimes extended only to women of a specific class or "respectability." Women who were financially well off were more likely to receive lenient treatment (less severe court sanctions) and childless women

were treated more harshly. The findings of these sentencing studies seem to validate the socialist-feminist assertion that both class location and gender have an impact upon the criminalization process. Certain groups of women are differentially criminalized according to their class location and marital status. Hence, the criminalization of women appeared to be affected by both patriarchal and capitalist interests.

Despite the important synthesis of class and gender into feminist theorizing on the criminal justice response to women, women of colour continued to express concerns over how liberal, radical, Marxist and socialist feminists had failed to address the number of minority women who were arrested, prosecuted and incarcerated. As part of a wider critical race movement within academe, Black feminist academics began to challenge the feminist understandings of family, work and victimization in the lives of women of colour.

Critical Race Theories of Criminalization

In the early 1990s, criminology and the sociology of law increasingly came under fire for their inattention to how racialized groups were treated by the criminal justice system. Earlier, criminologists (Hall *et al.,* 1978) had examined the criminalization of urban Black youth in England, but within a Marxist framework; the criminalization of inner-city Black youth was attributed to a crisis of capitalism and the over-representation of racialized groups within the criminal justice system was linked to their economic marginalization. Contributions of Black criminologists (Rice, 1990) were to dispute the stereotypes of inherent violence amongst Black men by pointing to the processing of Black men by the criminal justice system. For example, Black criminologists who studied

the treatment of Black men in the court system found that Black men were ten times more likely to be apprehended by police than their white counterparts and that those Black men arrested reach the courts at an earlier stage in their criminal careers (Smith & Gray, 1983; McConville & Baldwin 1982; Crow 1987). However, as Black feminists pointed out, none of those studied included women, despite the fact that Black women at that time made up 20 percent of prison populations but only 5 percent of the general population (Rice, 1990).

Critical race scholars (Hill-Collins, 1990; Morrison, 1992) noted that feminism, too, was not the best place for Black feminists to frame their understanding of these disparate rates of criminalization of Black women. Critical race scholars claimed that radical, Marxist and socialist feminists had either been inattentive to the issue of race or had merely added it into their class-based or gendered theoretical frameworks. For example, liberal feminism claimed that like gender, race could be simply written into the law to reflect the needs of racialized groups. Radical feminist theory was also challenged for its narrow view of the criminal justice system as phallocentric, thereby rendering the experiences of white women and women of colour to be the same. Similarly, early socialist-feminist formulations viewed women as a homogeneous collectivity that shared similar experiences and degrees of power. If minority women were considered, they were merely added onto women-centred theories. Despite feminism's claim to embrace the voices of economically-marginalized, Black and Aboriginal women, critical race feminists insisted that "white women still don't get it. What they don't get is that these dimensions of women's lives are not mutually exclusive fields of domination, but intersecting matrices of domination operating indivisibly" (Crenshaw, 1994:94).

Within criminology, a Black feminist critique emerged to challenge feminist criminology's failure to recognize that not only was malestream criminology sexist, it was also racist. For example, although white feminist criminologists had claimed that notions of femininity and sexuality were social constructs, they had failed to account for how the social origins of these gender roles differentially affected Black women given the historical importance of slavery. In this way, white feminist criminologists had engaged in their own ethnocentric thinking; they required a much broader conceptual framework, one that examined the inter-relationship of race, class and gender in a historical context.

In Canada, critical race theory was used to examine the criminalization of Aboriginal and Black peoples. Marlee Kline (1994), for instance, offered a rich analysis of the "colour of law" in respect to the representations of First Nations peoples in Canadian law. Kline explained that the over-representation of Aboriginal peoples in the criminal justice system is the result of how susceptible the rule of law is to racist ideologies of the wider society. Kline's work is shaped by Gramsci's notion of ideology as being constructed historically in conjunction with and in relation to material and cultural conditions and power relations. Ideologies are used to present these conditions as naturally occurring, inevitable and necessary (Kline, 1994:452). Racist ideologies of Aboriginal peoples expressed through law become taken for granted as 'just the way things are.' Kline (1994) focuses on three ideological representations of 'Indianness' within law: the devaluative ideology that represents Aboriginal peoples in terms of their lack of European ways; the ideology of "homogeneous Indianness" that obscures the diversity of Aboriginal cultures; and the ideology of "static Indianness" across time

despite the changes to the material and political conditions of Aboriginal communities. Such ideologies perpetuate the supposed inevitability and necessity of the criminalization of Aboriginal peoples.

Sharene Razack (1998) – whose writings are influenced by bell hooks (1992), Patricia Collins (1990) and the earlier work of critical race scholar Frantz Fanon (1967) – situates the criminalization of Aboriginal and Black men and women as an act of colonialism. In her book, *Looking White People in the Eye*, Razack (1998:4) maintains that the process of criminalization is embedded in the interests of colonialism: "the condition that enables the story of Western civil progress to be told, the bedrock upon which the emergence of bourgeoisie society is founded." Razack explains that criminalization is a process engaged in the depersonalization of Aboriginal peoples that uses representations of race and culture (such as the "drunken Indian" and the "squaw") to enable white supremacy and patriarchy.

In response to the writings of critical race academics, some socialist feminists working within criminology turned to standpoint epistemology to better understand the role of race as well as class and gender inequalities in women's lives. Standpoint epistemology relies on women's experiences of oppression to inform theory building so as to avoid reductionist explanations of women's lives (Harding, 1987; Hartsock, 1983). Maureen Cain (1990b) noted, however, that by focusing on women's subordinate position, early standpoint epistemologies tended to essentialize women and to take women's experiences as self-evident and the only basis of knowledge production. Cain (1990b:129) proposed that standpoint epistemology be used to create a transgressive feminist criminology that locates women "within a changing web or configuration of

relationships." An example of such an approach is Elizabeth Comack's (1996) study of incarcerated women, wherein she argued that women's experiences of sexual violence, racism and poverty transgress conventional criminology's understanding of criminalized women.

Transgressing Criminology

The inattention to the criminalization of racialized groups was not the only challenge facing criminology and the sociology of law. Some feminists were beginning to query the effectiveness of working within any of the traditional paradigms on a number of fronts. Because of the nature of criminology's project – to formulate causal explanations and solutions for crime – criminologists tended to expound on the importance of experts and punishments, contrary to much of feminism's agenda of social change and empowerment (Cain, 1990a; Currie, 1992). As Carol Smart (1990; 1993) pointed out, feminist theorizing should not be constrained by the positivistic premise of conventional criminology as, in doing so, feminists will always be marginalized within criminology. In these terms, feminism needed to transgress criminology. Implicit in this critique of a feminist criminology were three general concerns. First, feminists had developed what appeared to be a strategic alliance with neo-conservativism's punitive, state-centred crime control model (Smart, 1993; Snider, 1994; 1998). Second, feminists needed to re-examine their narrow view of gender as a social construct. Third, it was important for feminists to address women as perpetrators of violence.

Punishment versus Empowerment

Across various formulations of feminist thought, there has been considerable debate as to the state's role in ameliorating the conditions of women's lives and the potential for the state to punish rather than empower women. Law-and-order solutions to crimes such as domestic violence were sought by some feminist criminologists and women's advocates who saw the criminalization of domestic violence as necessary for the safety of women and children (Matthews & Young 1986; Rodgers, 1994; Stanko, 1990; Ursel, 1992). This alignment of feminist and neo-conservative interests stems from "the realization that disengagement from legal institutions and structures often translated into isolation and marginalization, preventing feminists from helping women in crisis" (Chunn & Lacombe, 2000:8).

Other feminists, however, have been critical of strategies for empowerment that rely upon the coercive apparatuses of the state, such as the criminal justice system. Laureen Snider, (1998:147), for instance, suggests that criminalization cannot provide long-term assistance to those who are victimized; it is a strategy which empowers officials and court systems rather than women. As well, writers such as Currie (1999), Fudge (1990), Snider (1994) and Comack (1993) point out that feminist engagement with the state, in some instances, had resulted in greater harm to women. Snider (1998:147) explains that in the context of domestic violence, the incarceration of men places women at risk because "in truth, prison makes those subjected to it (disproportionately poor Native, minority men) more bitter and unemployable. The average prison subculture typically reinforces patriarchal and misogynist attitudes as well." From this perspective, men's violence against women stems from a myriad of issues, such as women's poverty

and a reduction in social services that can be reconnected back to the neo-conservative dismantling of the welfare state. As such, feminist strategizing for social change should look towards empowering options such as reforms to labour laws in those sectors of the economy employing mostly minority women (service and manufacturing industries) to address the feminization of poverty (Snider, 1994; 1998).

Problematizing Gender

Throughout the late 1980s, feminist criminologists had problematized the way malestream criminological theory was both conservative and androcentric. Criminology had either ignored gender completely or cast women according to stereotypes of irrationality and pathology (Naffine, 1987; Daly & Chesney-Lind, 1988). To overcome these limitations, some feminists sought to introduce women's experiences of subjugation "as the dominant account" (Smart, 1990) and to develop a "successor science" (Harding, 1986). In these ways, feminist criminology brought women into view as subjects of criminological theory and research.

However, by the mid 1990s, some feminist academics had become critical of how feminism appeared to be premised upon a universal identity of women as white, Western, middle class, heterosexual and able-bodied (Rice, 1990; Smart, 1990). It was also time for feminist scholarship to extend its own theorizing of gender to include masculinity. James Messerschmidt (1993; 1997) and Tim Newburn and Elizabeth Stanko (1994) challenged standpoint feminism's apparent unwillingness to examine the concept of masculinity in criminology. Opening up the gender question within feminist criminology to include masculinity was an important conceptual development.

Robert Connell's (1987) work was instrumental in bringing the issue of masculinity to bear on criminological research and theorizing. Drawing from Gramsci's (1971) notion of hegemony as a site of contestation and struggle, Connell conceptualized masculinity as hegemonic; it was never a complete means of domination as subordinate masculinities (for example, male homosexuality) continually challenged the gender order between men and women. Following from Connell, criminologists such as Elizabeth Stanko and Tim Newburn (1994) claimed that crimes like rape, murder, theft, fraud, child abuse, drunk driving, hooliganism and even road rage are "doing masculinity"; these crimes represent unemotional, independent, non-nurturing, violent and dispassionate or inappropriately passionate action. Criminalization is dependent on hegemonic masculinities. Connell (1987) points out that gay men and lesbian women who were assaulted or harassed were not seen by the courts as real "victims." As well, much male violence against women has been rationalized as "crimes of passion." In short, much male criminalization itself is as much about "doing masculinity" as is criminal behaviour.

Despite these important challenges to feminist criminology by Connell and others, some feminist criminologists were at odds with how to address the issue of women's own violence. This lapse in theory building and research left some feminists criminologists ill-prepared to address the growing media attention in the 1990s to criminal cases involving women who engaged in violence. This issue produced an important re-examination of the victim/offender dualism that had cast women's violence as self-defense against male violence. In the process, women's understandings of power and violence came into view.

Violent Women

Traditionally, most of the analytical frameworks within feminist criminology had identified with criminalized women as victims of sexual or economic exploitation. Anne Campbell (1987; 1990; 1991; 1993) argued that feminist criminology is constrained by this conceptualization of femininity, as it has limited feminism's ability to address women who use violence. Campbell argued that feminist criminology had not adequately addressed women's own violence and aggression outside the context of victimization. Her own research showed that women accused of violent crimes viewed their violence very differently from how feminist criminologists had conceptualized them. Campbell claimed that women understand their own violence as a means to empowerment and status, rather than as only as a means of self-defense.

In Canada, Karlene Faith (1992) and Margaret Shaw (1992) have also argued that feminism has come to understand women's violence only in the context of victimization. Faith (1992) refers to the blurring of victimization with criminalization as a continuum that forges a causal relationship between women's experiences of violence and their own use of violence. In this way, women continue to lack agency and are viewed as both "helpless and monstrous" (Faith, 1992:107). Margaret Shaw (1995) claims that the state response to criminalized women in Canada is limited to a narrow view of women as victims in need of programs to enhance their self-esteem and eliminate their dependency on men. Shaw points out that this essentialist understanding of women rests upon a

selective reading of women's own accounts of their lives.[4] As Shaw explains:

> What is at issue here is not whether the women are right or wrong or politically correct in their judgements, but that there is in fact a range of views, and that some of these may be antithetical to a feminist viewpoint. They do not all hate men, or see themselves as victims. The plurality of their views needs to be recognized. We need also to recognize that it is paternalistic to assume that they are necessarily 'misguided', or want to have their consciousness raised. (Shaw, 1995:448)

Given its inattention to women who use violence and its privileging of a narrow Eurocentric meaning of (hetero) femininity and masculinity, feminist criminology was at another impasse. Further to these challenges, feminist-advocated reforms to rape laws and domestic violence policies were criticized by some as failing to improve women's lives and, instead, reproducing class and race inequalities because they did not empower women politically or economically (Currie, 1992; Snider, 1994). In light of these debates, many feminists began to rethink some of their preconceptions of race, class and gender as well as the implications of engaging with the criminal justice system. Some criminologists and sociologists of law began to examine the possibilities of post-structuralism, especially those ideas of French theorist, Michel Foucault.

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4 Margaret Shaw, along with a team of feminist researchers within the federal Solicitor General's department, designed and implemented a survey on federally sentenced women for the National Task Force on Federally Sentenced Women (Correctional Services Canada, 1990). The researchers' findings offered a detailed account of women offenders' lives, including issues of racism and poverty, as well as abuse (see Shaw et al., 1992; 1991).

Post-structuralism

In the late 1980s and throughout the 1990s, North American criminology and sociology of law came under the influence of European post-structuralism – "a broad philosophical movement with intellectual roots in France and Germany born out of twentieth century misgivings about modernity" (Einstater & Henry, 1999:277). Of particular importance to criminologists and sociologists of law was Michel Foucault's genealogy of punishment and social control (Foucault, 1977). Foucault's ideas challenged modernity's concept of power as being institutional or material, especially the Marxian view of power as a commodity to be used in exchange for rights and freedoms by the individual (Gordon, 1980). Foucault was less interested in law as a site of power, as he viewed law to be merely an institution of commands and obedience (Taylor, 1986). As such, Foucault focused on the non-legal relations of power that sought to normalize rather than punish.

For feminist and critical race scholars, Foucault's attention to normalization was an important shift in the understanding of how gender and race affect the criminalization process. Foucault's ideas radically decentred the role of the law (and the criminal justice system) in the process of social control. Foucault's post-structuralism explains that juridical power – such as the rule of law – is only one form of social control. Power extends beyond the state and operates discursively via the claims of experts, such as lawyers, psychiatrists and criminologists (Henry & Milovanavic, 1996). In his later writings, Foucault (1991) examined the governing of the self and others via the technologies of self-regulation. Foucault's notion of "governmentality" enabled

criminologists to identify the various modes of power that are used to govern populations and how the modes of governance are socially and historically generated, rather than naturally occurring phenomenon (Garland, 1999; 2000).

Criminalization as a discursive practice

Post-structuralist criminologists influenced by Foucault asserted that modernity's theories of criminalization were grand theories which put forward totalizing explanations that could not capture the complexity of the criminalization process. In contrast, post-structuralist criminologists claimed that criminalization was a process that rests upon the truth claims of law and science, particularly the 'psy' disciplines of psychiatry and psychology. The power of these knowledges lies in their legitimacy, and also their capacity to essentialize the identities of subjects under law (such as men and women accused of crime). Law, criminology and the 'psy' disciplines operate to define and treat someone as criminal on the basis of certain essentializing presuppositions. These presuppositions operate as dominant discourses or as claims to truth that subordinate other knowledges, such as faith, biography and experience (Gordon, 1980). Foucault's attention to the role of discourses and expert knowledges in the erasure of subordinated claims to truth enabled feminists to reassess the viability of engaging with the law as a means of ameliorating conditions of women's poverty and sexual exploitation.

In 1989, Carol Smart's book, *Feminism and The Power of Law,* re-oriented feminist criminology and socio-legal theory much like her first book, *Women, Crime and Criminology* (Smart, 1976) did. In her later work, Smart is critical of the feminist strategy of resorting to law to resolve the problems of women's oppression. Smart examines rape

trials, child sexual abuse prosecutions, surrogacy and censorship of pornography as sites where feminists have sought to achieve legal reforms. She explains that law is resistant to the challenges of feminism because of its capacity to disqualify women's experiences. For example, because of the power of law to reconstruct women's experiences of rape according to normalized discourses of masculine sexuality, rape trials become "pornographic vignettes" and a "celebration of phallocentrism" (Smart, 1989:35). Smart contends that law fails to understand women's accounts of rape because the law demands that women's accounts conform to the dualism of consent/non-consent. The binary logic in law of truth/untruth, guilty/innocent and consent/non-consent "is completely inappropriate to the 'ambiguity' of rape" (Smart, 1989:33).

For Smart, the power of law lies in its capacity to disqualify other knowledges and experiences. For instance, everyday experiences "must be translated into another form in order to become 'legal' issues and before they can be processed through the legal system" (Smart, 1989:11). What Smart suggests is that law's method makes sense of women's experiences of patriarchy, racism or poverty according to legal principles. Applying Smart's ideas, if an Aboriginal woman living on welfare is charged with a prostitution-related offence, her law-breaking behaviour is viewed in isolation from her social position of welfare dependency. Instead, her culpability is assessed in terms of the 'legally-relevant facts' of the case that can be proven in court. Arguments aimed at placing prostitution in the context of the feminization of poverty or racial oppression are excluded from the criminalization process, as they are deemed to be non-legal issues. Thus, by excluding the wider social context, the method of law reproduces women's subordination.

Another feminist socio-legal theorist, Ngaire Naffine (1990:24), examines what she calls the "Official Version of Law"or the claim that law is an impartial, neutral and objective system for resolving social conflict. Law's claim to objectivity is legitimated by several elements: legal method, legal positivism, the adversarial system, the doctrine of precedent and the rule of law. The method of law is ostensibly one that separates out the facts of the case from moral and political beliefs. In this way, the administration of justice is safe from bias. The practice of law is a technical exercise informed by and limited to the principles of legal positivism; what is true is only that which has been proven or shown to be true. Mary Jane Mossman (1986) lays out the three main elements of the traditional legal method. First, lawyers must be able to identify when certain matters are outside the law; that is, if they are political or moral issues. Second, lawyers must be able to ascertain what is legally-relevant information. For example, the sexual history of a rape victim is viewed as legally-relevant information, although the sexual history of an accused rapist is not. Third, through the method of case analysis, lawyers must be able to identify 'good law' and ignore 'bad law.'

Law's claim to objectivity is further enhanced via the doctrine of precedent or *stare decisis*: "to stand by decided matters." Law is an accumulation of wisdom that is gathered pragmatically, case-by-case (Cotterrell, 1984.) The doctrine of precedent constrains the flexibility of the trial judge to interpret the facts of the case in accordance with the decisions made by a higher court. To ensure that impartiality and fairness is preserved, the administration of law takes place within an adversarial process in accordance with principles of procedural fairness or due process.

Naffine (1990:24) asserts that law maintains its reputation by presupposing

certain universal truths that can be observed and proven (such as innocence and guilt, consent and non-consent). Nevertheless, a paradox emerges within the method of law: "law proclaims itself to be a near perfect impartial process, yet opinion and belief are in fact integral to much of its operation" (Naffine, 1990:44). Naffine (1990:44) points out how legal method is used to give judicial weight to decisions that legitimate lawyers' and judges' opinions or beliefs "about the nature of people and the purpose of society."

In her subsequent writing, Smart (1992) continued to explore how feminists should engage with law as a site of struggle to "dismantle patriarchy." Following from her earlier thesis, Smart asserts that feminists should be careful not to reify the power of law as a strategy for empowerment. She explains that law is not simply "sexist" as liberal feminists were asserting. Nor, however, is law expressly male, as radical feminists had claimed. Instead, Smart (1992) suggests that law is a "gendering strategy" which she defines as a series of processes which "will work in a variety of ways and in which there is no relentless assumption that whatever it does law exploits women and serves men" (Smart, 1992:33). What is useful here is Smart's appreciation of how law affects women and men differently as not all men benefit from how law operates, especially economically-marginalized minority men.

Smart (1992:36) further explains that law constitutes a Woman of legal discourse who is both a type of woman (prostitute, bad mother or rape victim) and a discursive construction of Woman (in contradistinction to Man). She uses the example of the bad mother under nineteenth century common law "as a particularly significant moment in the fixing of gendered identities" (Smart 1992:37). According to Smart (1992), statute law defined the bad mother as unmarried and occupying a specific class position; her

child dies because she is deprived of the material conditions to raise a child. Laws prohibiting "dangerous motherhood" (Smart, 1992:38) constitute a type of woman, yet normalize the assumption that "Man is the solution, he signifies stability, legitimacy and mastery." Nevertheless, the actual process of how law operates as a gendering strategy remains uncertain, as Smart does not address the application of the law, only the text of laws governing marriage, age of consent and infanticide. Smart (1992) does, however, make the important point that law enables discipline and surveillance of women-as-a-group via social workers and health care professionals. These non-legal forms of social control have led some criminologists to consider Foucault's later writings on governmentality.

Criminalization as governmentality

A more recent "Foucault effect" (Burchell, Gordon & Miller, 1991) in criminology and the sociology of law can be found in the works of Nikolas Rose (1996), Mitchell Dean (1996) and Pat O'Malley (1996) who examine the genealogy of non-legal forms of social control or governmentality. "Governmentality" refers to a process of social control where the state works through civil society, not upon it (Garland, 2001). There are three significant ways in which governmentality differs from the crime control models of liberal pluralist, Marxist and feminist theories discussed earlier, particularly in terms of how each view the role of the state. First, according to governmentality theorists, the work of crime control is more diffused across private and public domains, involving technologies of surveillance and risk assessment that are oftentimes administered by the private sector, not the criminal justice system (Ericson & Haggerty, 1997). Second, crime

control policies are an "expressive mode of action determined by the demands of the liberal elites" (Garland, 2000:355). The liberal elites (middle and professional classes) insist on being protected from "ungovernable and dangerous populations" (Dean, 1999). This leads to the third unique quality of governmentality: crime control strategies are populist and not premised on the views of criminologists or other criminal justice experts.

Governmentality theorists suggest that increases in criminalization are not influenced by expert discourses of social scientists. Rather, crime control policies (such as zero tolerance and compulsory criminalization) are shaped by the demands of civil society that crime be managed effectively to minimize the likelihood of victimization. For example, Garland (2000) asserts that liberal elites are receptive to crime control policies such as zero-tolerance for domestic violence – not because women should be protected from men's violence – but because women who are abused by their partners are part of a wider collective of victims of crime. The experiences of crime victims are now routinely evoked in support of punitive responses, such as mandatory criminalization and an intensive use of incarceration (Garland, 2000). In this way, strategies of crime control are not gendering strategies, as Smart (1992) would suggest. Nor is the state acting at the behest of the capitalist class, as instrumental Marxists would argue. Rather, criminalization is a "strategy of sovereignty" (Garland, 1996) aimed at achieving particular political outcomes that resonate with the middle-class who has become disillusioned with the capacity of the rehabilitative crime control model to prevent crime.

Foucault's concept of governmentality has been used by criminologists to make sense of increased rates of criminalization – despite decreasing crime rates – in most Western countries. By recognizing criminalization as a political strategy that resonates

with the middle classes and draws on the sacredness of the crime victim, intensified punitive practices become rational or common sense. Yet, this conceptual framework is not without its limitations. For one, the populist model of crime control suggests that all victims' experiences have equal resonance with the middle-class. For example, the experience of an Aboriginal woman working as a prostitute who is sexually assaulted would be located as part of the "public interest that guides prosecution and penal decisions" (Garland, 2001:51). Nonetheless, disparate rates of criminalization discussed earlier suggest otherwise, as Aboriginal peoples are over-represented in the prison system, yet they are also more likely to be incarcerated that non-Aboriginals, and are also more likely to be victims of violence.[5]

In more general terms, Foucault's work remains Eurocentric and sexist in that he does not identify how racialized groups and men and women are governed differently.[6] The extension of Foucault's ideas to include race, class and gender has been left to criminologists and socio-legal theorists wishing to move beyond or transgress the structures of modernity. This desire to move beyond structure presents a problem in the study of how conditions of inequality affect the process of criminalization. Because Foucault decentres any structural or institutional forms of power and focuses on non-legal forms of power, law is cast as relative or as an episteme one *could* accept to be true. Yet,

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5 Overall, rates of violent victimization are highest amongst Aboriginal peoples, with rates that are two and one-half times higher than the national rate (206 incidents per 1,000 versus 81 per 1,000) (Statistics Canada, 2001b). These victimization statistics suggest that by assuming a homogenous victim, some interpretations of Foucault's notion of governmentality do not adequately address issues of race and class.

6 Despite these limits, there are fruitful aspects of Foucault's work which I will draw upon in developing my theoretical synthesis.

law is not relative knowledge to be deconstructed and rendered unimportant. Rather, law's power to define identities and meaning is structurally legitimated via the division of labour and coercive state apparatuses (Snider, 1994). Similarly, because Foucault's notions of power are expressed as rationalities and technologies, there is little attention to processes, or how these notions of power operate in the everyday world (Garland, 1999). How are 'ungovernable populations' identified and managed? What are the processes of identification and governance?

Concluding Remarks

This intellectual history of criminology and socio-legal scholarship has exposed a diverse body of theory and research. In the process, it has laid bare some important considerations for future theory building. Criminology and the sociology of law have assessed the normative function of criminalization, the role of moral entrepreneurs in the criminalization process, the material conditions and elite interests that inform the administration of justice, as well as the important patriarchal and racist underpinnings of the criminalization of men and women. Some criminologists have been self-reflective of the need to move beyond traditional theoretical perspectives to problematize the narrow conceptualization of gender that has excluded masculinity. As well, scholars have expressed serious reservations about engaging with the law to achieve equality, and have asserted that non-legal strategies should not be overlooked.

Despite this important theoretical work, the intellectual histories of criminology and socio-legal theory reveal that the interplay between inequality and the administration of justice has been a relatively recent development. Indeed, conditions of structural

inequality were not fully appreciated by criminologists until the latter half of the twentieth century. Moreover, the way inequality has been conceptualized by criminologists and socio-legal theorists has shifted from a somewhat rigid materialist account of early Marxism and radical feminisms towards near relativism of some post-structuralist thought. In addition, there has been the divergence of views as to the role of the state – if any – in this process. For example, it is not sufficient to say – as earlier Marxist theory would suggest – that the justice system is a coercive means of imposing the will of the ruling elites. Similarly, feminist theories have also been incomplete in how they have conceptualizd the experiences of women of colour, as well as the agency of women. Some feminists have also relied heavily on the state to protect women's interests as victims of crime. Post-structuralist criminologists, by contrast, have decentred the state and rejected the materialist analysis that power is structural and suggested that it is the power of discourse that defines the criminalization of process. More recently, Foucault's idea of governmentality has been used to explain that punitive crime control policies are political strategies that are socially and culturally conditioned by the desire of liberal elites to be protected from dangerous populations. Yet, Foucault's ideas of governmentality (the state governs through civil society, not upon it) seems to overlook the capacity of the state – particularly the criminal justice system – to act coercively against certain social groups.

Across these theoretical approaches to understanding the law and society relationship, a complex inter-relationship between class, race and gender and the criminal justice system starts to emerge. In trying to make sense of why certain social groups are more likely to be criminalized, criminologists and sociologists of law have looked to law

as a neutral arbitrator, an arm of the ruling elite, an ideological apparatus, a means of white domination, a strategy of normalization, a gendering strategy and a strategy for public protection and risk management. However, what is missing is an analysis of the process that brings law to life. How do certain interests (e.g. those of moral entrepreneurs, the capitalist class, men and liberal elites) get expressed through law so that social order is achieved? In the following chapter, I discuss how the practice of law is an important methodological device that allows us to see law in action. The practice of law is where discourse, structure and human agency come together to achieve crime control.

The criminalization process is shaped by many forces that operate inside and outside the justice system, such as the principles of fundamental justice that prohibit disparities in the administration of justice, the codes of professional conduct that constrain and enable lawyers, as well as the socio-political context that surrounds the administration of justice. Such realizations suggest that it is important for criminologists and socio-legal scholars to attend to the complexity of the criminalization process in their theory-building and empirical research. The following chapter presents one possible contribution to that undertaking.

Chapter Two

Towards a Theoretical Synthesis: Lawyering as Structured Action

A paradoxical relationship exists between the principles of fundamental justice and the disparate rates of criminalization of the most marginalized groups in society: economically-marginalized and racial-minority men and women. If the law is intended to protect the rights of the accused and the integrity of the justice system, how is it that some people are more vulnerable to criminalization? This paradox leads us to examine how and where inequality intersects with law's claims to fairness, justice and equality and to consider the role of lawyers in the criminalization process.

While lawyering has been scrutinized at the micro level of symbolic interaction using ethnographic studies, as well as by studies that frame the administration of justice as routine activities, such research has not attended to the socio-political context that shapes the practice of law. When radical criminologists and sociologists of law turned their attention to the role of the criminal justice system in reproducing social order, they invariably adopted either overly structuralist or instrumentalist accounts of the role of the state in capitalist society. While "the rich get richer and the poor get prison" (Reiman, 1979) may capture the net result, we get little sense of the processes and strategies that bring it into being. Similarly, while the postmodern perspective directs our attention to the discursive nature of law, to see law only as a discourse or claim to truth overlooks the material basis of law and assumes the solution to inequality is to deconstruct the categories of race, class and gender or to decentre law. Although some post-structuralist writers have posited law as a 'gendering' and 'racializing' strategy, the process of how that actually 'works' remains unclear. How does law 'do' gender, race and class? How do

law's discursive claims play out in such a way that disparate rates of criminalization result? Post-structuralism has been relatively silent on the issue of how law's discursive claims are framed in the everyday practice of law.

Unravelling these questions about the relationship between inequality and criminalization will require a theory capable of linking micro processes of human agency with structural inequalities (of race, class and gender) and explaining how these forms of social action are conditioned by wider socio-political forces. A starting point for such a theory can be found in the work of James Messerschmidt.

In *Crime as Structured Action*, Messerschmidt (1997) explains how relations of ruling get worked out in people's everyday lives in a theoretical approach that integrates race, class and gender into an understanding of criminal behaviour as structured action. Structured action is a conceptual tool that "focuses on people in specific social settings, what they do to construct social relations and social structures and how these social structures constrain and channel behaviour in specific ways" (Messerschmidt, 1997:3). Three layers of structured action can be identified in Messerschmidt's analysis: normatively-defined interaction, structurally-defined power and historical specificity.

Race, class and gender are not simply static categorizations or identities. Rather, they are normatively constituted via social practices in specific settings. Criminal behaviour is a social action, according to Messerschmidt, because it 'does' gender, race and class. For example, Messerschmidt looks at the lynching of Black men by white men in the southern United States as an expression of white masculinity. Similarly, violence amongst working-class gang girls is a result of a specific race and class femininity (1997:13). All social action, such as lynching and gang violence, 'does' race, class and

gender according to specific normative conditions of the social situation.

Structured action is also influenced by social structures such as the capitalist division of labour and patriarchy. Messerschmidt (1993; 1997) focuses on the division of labour as the fundamental structure that constrains and enables social action and forms power relations. Structures are formed via human agents or social actors "who know what they are doing and how to do it" (1997:5). These agents put into practice their structured knowledges and reconfigure the shape of the structures that influence them (1997:6).

Race, class and gender constitute a form of structured action in that people act according to the social-structural constraints they face. Therefore, according to Messerschmidt, "race, class and gender relations arise within the same ongoing structural practice" (1997:8). This is a meaningful way of understanding the intersections between race, class and gender in the everyday world. Any theory of social action must address how gender, race and class relations operate within ongoing structural practices that are imbued with power. Messerschmidt's theory compliments a materialist analysis of power in that he claims power is located or realized at the inter-personal level as well as the material and institutional level: "The capacity to exercise power is, for the most part, a reflection of one's position in social relationships" (Messerschmidt 1997:9).

Messerschmidt (1997) attends to how personal relationships are expressions of broader social relations by looking specifically at gender relations as expressions of power between and among men and women. For example, writing of the United States, Messerschmidt notes that "in the antebellum South, white men as husbands had control over their wives and as fathers control over their children's marriages and access to family property, but Black male slaves had no such patriarchal rights" (1997:9). This

example illustrates how propertied white males assume power over white women and children, and Black men and women through culturally dominant discourses of white supremacy and patriarchy.

Messerschmidt's ideas of how power is historically specific suggest power is relative to the relations of ruling (such as white supremacy in the United States in the mid twentieth century). This is an important refinement of post-structuralist discussions of discourse as power. As outlined in Chapter One, post-structuralism refers to law as relative truths that are subjectively defined. Law, then, is merely a discourse of relative statements to be deconstructed and decentred (Hunt, 1991). However, Messerschmidt (1997) locates discourses such as white supremacy in a historical context. For example, Messerschmidt (1997:36) explains that lynching in the United States was legitimated by an "alarmist ideology about African American male sexuality" in the struggle to abolish slavery and enfranchise Black men.

Messerschmidt's work offers a means by which to grasp the complex layers of the law and society relationship. Specifically, structured action enables us to draw connections between the macro dimensions of social structure and power relations and the localized context of social action within relationships. Nevertheless, while we can identify some of the key conceptual pieces that explain the paradox of the principles of fundamental justice yet disparate rates of criminalization within Messerschmidt's work, situating the work of lawyers as structured action requires that we go beyond the three layers of his theory. More specifically, I propose a theoretical synthesis that involves extending the theoretical premise of structured action to include the discursive content of lawyering and how the socio-political context frames the strategies of lawyers.

The theoretical model to be developed in this chapter is comprised of four main dimensions. The first is the form of law, embodied in the Official Version of Law. Elements of due process and professional codes of conduct which prescribe the role of lawyers within the adversarial trial process promote the appearance of legal practice as a series of procedural requirements and technical exercises that both constrain and enable Crown attorneys and defence lawyers. The second dimension is the discursive nature of legal practice, specifically, the ways in which lawyering strategies constitute legal subjects in gendered, racialized and class-based ways by weaving together cultural constructs such as masculinity, femininity, dangerousness and victimization. The third dimension is the broader socio-political context in which discursive claims are made. This section will focus on how neo-conservatism has affected the practice of law in recent times. The fourth dimension of the theoretical model is the agency of lawyers. It will be argued that lawyering is one site of structured action where structure, discourse and socio-political context assemble.

The Form of Law: the 'Official Version of Law'

As examined in Chapter One, the Official Version of Law asserts itself to be impartial, neutral and objective. This is, of course, "what the legal world would have us believe about itself" (Naffine, 1990:24). A central doctrine of the Official Version of Law is the rule of law. The rule of law sets forth two claims. First, everyone is subject to the law, including the sovereign, because law is separate from the interests of particular groups. 'Equality of all before the law' speaks to a claim central to Western liberal democracy that all persons accused of a crime are entitled to a full and complete answer to a charge

before a trier of fact. Second, everyone is treated the same or as 'legal equals' under the law. Together, these principles are designed to ensure that the civil liberties of citizens are protected against the arbitrary exercise of power by the state. Thus, law is held to be dispassionate, predictable, objective, impartial and, above all, 'just' in its search for the truth. From these two fundamental principles of common law flows a set of procedural requirements – referred to as "due process" – that are designed to ensure prosecution takes place in accordance with lawful procedures and fairness before an independent and impartial tribunal.

Due process – or procedural fairness – is at once a "moral imperative of a democracy" and a "managerial concept of crime control" (Lacey & Wells, 1998). Although due process is cast as the procedural means by which the rule of law is administered, it also connotes a rationalized bureaucracy in which bureaucrats (officers of the court) execute their professional duties. In these terms, the administration of justice involves legally trained experts (defence counsel, Crown prosecutors and trial judges) whose power is legitimated by the state. Within this system, Crown attorneys and defence lawyers function as adversaries.

Under the requirements of due process, it is the responsibility of the Crown to meet the burden of proof and establish the guilt of the accused beyond a reasonable doubt. The Crown must establish the criminal liability of the accused in terms of action (*actus reus*) and intent (*mens rea*). All actions of the accused are assessed in terms of voluntariness: did the accused voluntarily and intentionally commit the act or fail to act? Intentionality of the accused's actions is assessed in accordance with an objective standard: would a 'reasonable person' perceive the accused as intentionally committing a

criminal act or failing to act? The Crown is required to prove that the accused's intent was not diminished by forces such as mental illness, extreme intoxication, provocation or duress. As well, the Crown's case must be supported by sufficient factual and persuasive evidence. Due process requires that evidence be assessed in terms of its rational connection to the offence. Justice Rand has summarized the role of the Crown in a criminal prosecution:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. (*Boucher* v. *The Queen*, [1955] S.C.R. 16 at 23-25 cited in Hamilton & Sinclair, 1991: 65)

In addition to the prescribed role of the Crown as not being one influenced by notions of 'winning or losing,' Crown powers of prosecution are constrained by a complex bureaucratic structure of senior Crown attorneys, regional Crown attorneys and Attorneys General. Moreover, the decision of the Crown to prosecute is informed by two fundamental principles: is there enough evidence to justify the continuation of the proceedings? If there is, does the public interest require a prosecution to be pursued (Pomerant & Gilmour, 1997)? Crown counsel is expected to continually re-evaluate the decision to prosecute throughout the entire trial process as "not all offences must be prosecuted as the resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases" (Pomerant & Gilmour, 1997:3). [7] As well,

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7 Despite statutory provisions that the Crown will not pursue a prosecution unnecessarily, there is little in the way of formal constraints placed on prosecutorial discretion (Griffiths & Verdun-Jones, 1994). For example, in *R* v *Beare* (1988), the Supreme Court of Canada ruled that broad prosecutorial discretion did not *per se*, infringe principles of fundamental justice guaranteed by the *Charter*. Rather, the Crown's discretion to prosecute is viewed

throughout the entire trial process, the Crown is obligated to disclose to the accused, on request, the evidence on which the Crown intends to rely at trial, as well as any evidence that may assist the accused. [8]

In contrast, the role of the defence counsel is to ensure the Crown proves its case against the accused beyond a reasonable doubt. Defence counsel is not required to prove or disprove any fact (except in rare situations). Reasonable doubt can be raised, for example, by presenting evidence of a defense (like an alibi) or by challenging the credibility or believability of witnesses and evidence (Knoll, 1994). The zealous representation of the accused is seen as a necessary means by which his/her rights to a full and complete defense are protected. [9] This includes the vigorous cross-examination of witnesses and/or complainants to establish the truthfulness of their testimony. In fact, to not probe the credibility and character of a witness/complainant is considered unethical professional conduct.

Defence lawyers, however, are prohibited by codes of professional conduct from engaging in needless abuse and harassment of a witness/complainant. Rather, their role is

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as necessary to *prevent* zealous prosecutions that are contrary to the public interest.

8 The rationale for pre-trial disclosure is to ensure that the accused knows the case to be met and is able to make a full answer and defence, and to encourage the resolution of facts, including (where appropriate) the entering of a guilty plea at an early stage in the proceedings. However, the Crown is *not* obligated to disclose reply evidence (that which is used to respond to issues raised by the accused at trial), or evidence which should not be disclosed in the public interest (including information which could identify a confidential police informant or prejudice a police investigation) (Pomerant & Gilmour, 1997:22). The Crown is also not obligated to disclose to the accused evidence deduced from privileged communication (such as doctor-patient communication). The law of privilege sets out that evidence deduced from privileged communication may be withheld from the accused at the Crown's discretion.

9 Although this zealousness is constrained by certain ethical limits, including offering false evidence, misstating the facts of law and relying on false affidavits or sworn statements (Proulx & Layton, 2001: 48).

to expose any frailties or inconsistencies in witness/complainant testimony (Proulx & Layton, 2001). Vigorous cross-examinations of Crown witnesses are warranted even if the accused has voluntarily confessed to the defence as to his guilt. In this context, the defence can argue that the Crown has failed to make its case, but he/she cannot assert a false claim as to the innocence of the accused. It is also an acceptable practice in such cases for the defence counsel to raise the possibility of the accused's innocence, despite knowing that it is not true. The only constraint placed on the defence is that they do not assert their client's innocence (Proulx & Layton, 2001). The defence's strategies are also constrained by a voluntary admission of guilt by the accused as to the mental and factual elements of charge. Once an admission of guilt has been made, defence counsel cannot suggest to the court that someone else committed the crime. In light of this requirement, a defence lawyer must warn her/his client of the consequences of making such an admission, as it would severely limit the strategies available to the defence in court. As Proloux and Layton (2001) point out, a dilemma for defence counsel is when the accused voluntarily admits his or her guilt before trial. The defence is obligated not to mislead the court, but s/he must also test the validity of the Crown's case against the accused. Although professional codes of conduct prescribe that defence lawyers must ascertain whether the accused is guilty in law, this is unknowable prior to a verdict. Therefore, admissions of guilt by the accused should play no part in a lawyer's role as an advocate for the accused (Ross, 1998 cited in Proulx & Layton, 2001:48).[10]

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10 The strategies available to the defence counsel under the circumstances of a voluntary admission of guilt are: to restrict communications between counsel and client so that the conduct of the case is limited to the known facts of the case, and to instruct the client to reconsider their account of events so they reflect the evidence disclosed by the Crown.

Under the Official Version of Law, then, the roles of the Crown and defence counsel are prescribed according to different codes of professional conduct. The backdrop to these role performances is the criminal trial process itself that brings together the procedural requirements of due process, the rights of the accused and the professional obligations of Crown attorneys and defence lawyers. Within the court structure, more serious criminal matters – such as crimes against the person – are most often heard before the Court of Queen's Bench. Most cases appearing before this court will have a preliminary hearing (except when a trial proceeds by direct indictment) and a pre-trial conference prior to the criminal trial proper. Across these two stages, Crown attorneys and defence lawyers will oftentimes become engaged in sentence resolution negotiations or plea-bargaining.

The contrasting roles of Crown attorneys and defence lawyers are clearly marked at the preliminary hearing of a criminal trial. The purpose of the hearing is for a judge to determine whether there is sufficient evidence to warrant committing the accused to trial. The judge does not rule on guilt, but must decide if the Crown, on the face of it, has evidence that could prove guilt (Hatch & Griffiths, 1997:182). Strategically, the preliminary hearing is where the Crown's theory of the case and evidence is revealed to defence counsel. The defence may vigorously cross-examine the statements of complainants and witnesses to challenge the credibility of the Crown's case against the accused. Discredited witness and complainant testimony can be used to raise reasonable doubt as to the Crown's case.

In addition to the preliminary hearing where a trier of fact determines the weight of the Crown's case against the accused, proceedings may also include a pre-trial

conference. At a pre-trial conference, the defence counsel, the Crown and a trial judge meet to "promote a fair and expeditious hearing" (Abell & Sheehy, 1998:118). These conferences are mandatory when an accused elects a jury trial. [11] Conference judges may advise lawyers as to the strength of their case and suggest a possible pre-trial resolution or plea bargain (Griffiths & Verdun-Jones, 1994). The pre-trial conference can often serve as an opportunity for the accused to obtain discovery of the Crown's case or to discuss the possibility of making an agreement to plead guilty in return for some concession from the Crown (Griffiths & Verdun-Jones, 1994).

Plea-bargaining between the Crown and the defence counsel is intended to "lead to a narrowing of the issues at trial which may avoid unnecessary litigation altogether, and forms an important and necessary part of the criminal justice system" (Pomerant & Gilmour, 1997: 27).[12] Securing a guilty plea of an accused person in exchange for a more lenient sentence is not a formalized process that is bound by statutory provisions. Rather, it is a practice that includes a broad range of outcomes that can involve informal negotiation between the accused and the Crown "at the eleventh hour on the courtroom steps" (Cunningham & Griffiths, 1997:182). Plea negotiations take many forms, including charge bargaining (the reduction of the charge to a lesser or included offence),

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11 Pre-trial conferences are becoming commonplace in non-jury cases as they present an opportunity to resolve any potential problems and prevent excessive pre-trial motions, as well as for a trial judge to assess the strategies of the Crown and defence (Cunningham & Griffiths, 1997).

12 A study of criminal prosecutions in Britain reveals that plea-bargains account for the outcome of over 80 percent of criminal matters (Ashworth, 1995). In Canada, going to trial is the exception rather than the rule. Sixty-two percent of all cases result in a finding of guilt, however 90 percent of those accused persons plead guilty as part of a plea-bargain with the Crown (Statistics Canada, 1999b:75).

sentence bargaining (promise by the Crown to make a particular recommendation in relation to sentencing or the promise not to appeal a sentence imposed at trial) and fact bargaining (promise by the Crown not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor) (Griffiths & Verdun-Jones, 1994). Although plea negotiations encompass a wide range of stages in the trial process, the Crown and the defence counsel have clearly defined roles throughout the process.

Codes of professional conduct[13] typically mandate that a plea bargain must satisfy a number of principles, including: that the defence lawyer foresees that the accused will not be acquitted of the charge; the accused must fully admit the factual and mental elements; that the accused has been fully advised by the defence as to the implications and consequences of a guilty plea, and that the sentence is at the discretion of the judge; and that the accused instructs his/her defence lawyer in writing of his/her agreement to the terms of the plea negotiation. The plea negotiation entered into by the accused and the Crown must not compromise the 'public interest.' Throughout the negotiation process, the defence plays a key role in advising the accused, although to enter into a plea-bargain is ultimately the client's decision. Throughout the negotiation process, the role of the defence counsel is ostensibly not to function as a double agent trying to facilitate assembly-line justice. Rather, it is to support their client's freedom to choose by providing quality legal advice (Proulx & Layton, 2001).

If the Crown has presented a *prima facie* case against the accused at the preliminary hearing, a plea-bargain cannot be reached between the Crown and the accused or the accused pleads not-guilty, the matter proceeds to the trial proper. The aim

13 See, for example: Law Society of Manitoba, 1992.

of a criminal trial is to preserve societal standards of conduct laid down in legislation and precedent (Smith, 1987:165). The criminal trial engages several legal actors within a series of rationalized and highly formalized events that have an array of possible outcomes for the accused. As described earlier, the roles of defence counsel and the Crown are prescribed according to different codes of professional conduct. The backdrop to these role performances is the criminal trial process itself that brings together the procedural requirements of due process, the rights of the accused and the professional obligations of Crown Attorneys and defence lawyers.

In most cases, the accused can elect a trial by a provincial court judge, trial by a superior court judge (Court of Queen's Bench) sitting alone, or trial by a superior court judge and a jury.[14] Once the trial has begun, the Crown calls witnesses (including the complainant(s)) to testify and presents evidence in support of the position that the accused is guilty. The Crown must adduce evidence covering all the major elements of the offence (*mens rea* and *actus reus*). After the Crown has presented its case to the court, the defence cross-examines the witnesses and complainant(s) to challenge the admissibility of the Crown's evidence and to put forward "any claim which, if accepted, would lead to an acquittal." (MacIntosh, 1995:327). The accused is not required to testify on his/her behalf, but if s/he decides to do so, the Crown is then free to enter in as evidence the accused's criminal record. If the accused does not testify, the judge and jury are not apprised of the accused's prior convictions (until sentencing). The outcome of the case is decided by the trial judge who rules on whether the Crown has proven all

14 The *Charter of Rights and Freedoms* guarantees the right to a jury trial if the alleged offence carries a maximum sentence of more than five years' imprisonment (Hatch-Cunningham & Griffiths, 1997:183).

elements of the offence and if the defence has offered a credible claim which acquits the accused of the charge(s), finds the accused not-guilty, or excuses or justifies his/her actions.

Under this rights-based adversarial system, it is the interests of the accused – not the state – that are ostensibly paramount. Specifically, the adversarial process is premised on the presupposition that the accused is entitled to access all the resources of the court to prepare a full and complete defense to be heard before a neutral trier of fact who establishes the veracity of the Crown's case against the accused (Proloux & Layton, 2001). In this way, the adversarial process is held to be non-partisan.

According to the Official Version of Law, therefore, the criminalization process is one which unfolds in a context of rationality and objectivity. In this view, the legal system is founded on a series of procedural requirements and technical exercises that constrain the discretion of legal actors and protect the rights of the accused. In other words, while principles of fundamental justice and professional codes of conduct appear to *constrain* the case-building strategies of the Crown in the prosecution of the accused, they *enable* the strategies of defence lawyers in defending their client. Yet, the over-representation of marginalized groups in the criminalization process reveals a paradox between this Official Version of Law and the actual practice of law. The disconnection between 'what the legal world would have us believe about itself' and law in practice raises the possibility that – contrary to the rule of law – the criminalization process is influenced by gendered, racialized and class-based presuppositions. To this end, we can look to the contributions of post-structuralist and critical criminologists who suggest that the power of law is not limited to the principles of fundamental justice. Law is not

monolithic in its capacity to protect the interests of marginalized groups. Rather, law is a contested terrain on which various discourses operate to produce and reproduce certain claims to truth.

Law as a Discursive Practice

Post-structuralist criminologists influenced by Michel Foucault (1979, 1984) and critical criminologists influenced by the Frankfurt School and Antonio Gramsci assert that the rule of law and the state are not fixed or immutable expressions of class conflict, patriarchy or white supremacy. Rather, both the rule of law and the state are culturally-specific constructs embedded in particular social relations and assume new forms with different content over time (Chunn & Lacombe, 2000:9). This view of law as a practice or process calls into question the instrumentalism of earlier Marxist and radical feminist theories of law's omnipotence to sustain inequalities.

From a post-structuralist perspective, law is a complex apparatus composed of practices, discourses, experts and institutions that contribute to the legitimation of social order (Boyd, 1989; Gavigan, 1986; 1988). In these terms, law and legal institutions (such as the criminal justice system) do not have uniform effects, either good or bad (Gavigan, 1989; Gordon, 1987). To view law as a site of struggle enables us to distinguish between law as legislation and law as a practice (Chunn & Lacombe 2000), and even to suggest that law is a game (Bordieu, 1987). The practice of law – specifically the practice of criminal law – is a game constituted by rules (such as due process) and players (such as lawyers, judges, police, complainants and the accused). Lawyers play the game of law using strategies of persuasion and negotiation. In these terms, the practice of law must be understood as more than professional codes of conduct and prescribed roles of legal

actors.

Feminists working within post-structuralism suggest that law is a process that weaves together various cultural constructs (such as masculinity, femininity, dangerousness and victimization). Thus, law is a series of strategies that constitute the identities of legal subjects as well as multiple social relations. As discussed in Chapter One, Smart's (1992) critique of liberal and radical feminist theories of the law (law as sexist, law as male) was followed by the suggestion that law is a gendering strategy. Smart (1992) claims that women do not enter the legal process already gendered or sexed. Rather, women's identities as rape victims or murderers are scripted according to dominant discourses of femininity. Smart's assessment of the power of law as a gendering strategy is influenced greatly by the ideas of Foucault (1984) and de Lauretis (1987). Foucault asserted that rather than coming from above and imposing its will on people, power emanates from below, exercises itself everywhere and produces a multiplicity of effects and resistances (Foucault, 1984:138). Viewed in this way, law has the power to create the identity of its subjects. Smart (1995) borrows from de Lauretis (1987) the idea that there are technologies of gender (such as the media) that actively produce gender differentiation.

While Smart elaborates on the significance of law as a gender strategy for women, we should also consider how law genders men's lives. To do so, we can borrow from Connell's (1987) work. As explained in Chapter One, Connell's notion of hegemonic masculinity is a powerful tool for understanding how gender roles function as a means of social ordering. Following on Connell's work, criminalization can be seen as fundamental to the reproduction of hegemonic masculinity *and* femininity. Accounting

for a hegemonic femininity is an important extension of Connell's work, because women are often obscured and/or distorted as "other" than men in criminological theory (Naffine, 1987). In these terms, both men and women are criminalized according to hegemonic gendered presuppositions that exist in opposition with each other. The dualism of gender as masculine/feminine constrains and enables how the criminal justice system responds to men and women accused of a crime. For instance, taking from Smart (1992) the idea that law is a gendering strategy, it is possible that law makes sense of men accused of violence according to scripts of masculinity. These hegemonic forms of femininity and masculinity, however, also rest upon powerful presuppositions of race and class.

Working with Smart's typology of law as a gendering strategy, U.S. criminologist Kathleen Daly (1994:433) asserts the criminalization process is a "simultaneous expression of multiple social relations" of race, class and gender. Daly (1994) admits, however, that conceptualizing and empirically demonstrating how class also shapes the criminalization of racial minority men and women is "a formidable goal." Daly (1994) adapts Smart's typology of the law to suggest that the law is not racist, nor white. Rather, law is racialized in that it constitutes the meaning of Black men's and women's experiences and their behaviour.

The constitutive nature of law is also addressed by Marlee Kline (1994). Kline introduces us to an understanding of how judges and lawyers, as social actors, bring with them into the court racist ideologies that are rooted in the wider society. For example, juridical discourse is susceptible to – or mediated by – racialized presuppositions about Aboriginal families and culture. In her examination of child welfare practices involving Aboriginal children and families, Kline (1994) proposes that racism flows from the

ideological content of law.

> Judges like other members of dominant society operate within discursive fields in which racist ideology helps constitute what is and is not to be taken for granted as 'just the way things are'. The appearance of racist ideological representations within judicial discourse may be more of a reflection of the power and pervasiveness of such dominant ideology in the wider society and the particular susceptibility of legal discourse to it, than individual racial prejudice on the part of judges. (Kline, 1994:452)

According to Kline (1994:458), ideological representations of Aboriginal peoples developed out of the material relations of colonialism and continue to be constructed, reproduced and reinforced in a wide variety of discursive contexts, including what she refers to as the "abstracted and indeterminate form of law." Yet, Kline inquires as to how it is that judges are allowed to import ideological frameworks of Indianness into law. She suggests it is the appearance of the neutrality of law that obscures law's power to naturalize and legitimize racist ideologies.

Sharene Razack (1998) refines the discussion of law-as-racialized. Razack claims that under law, Aboriginal peoples are also culturalized. For example, addiction and violence are understood to be a normative part of Aboriginal relationships and culture; violence has come to be associated with racialized spaces of inner-city and Aboriginal communities, especially in the Canadian prairie provinces where inner-city neighborhoods are heavily populated by Aboriginal peoples. Violence within white middle-class neighbourhoods is constituted as different from "other" Indian spaces (Razack 1993; 2000). Writing of the murder of Pamela George – an Aboriginal woman who worked as a prostitute – Razack cites lawyers' descriptions of where George was murdered as "a romantic place where couples are often necking or petting in vehicles" (Razack, 2000:114). Throughout the trial, George was referred to as the "hooker" or the

"Indian," whereas the accused men (two white middle-class university athletes) were characterized by defence lawyers as "boys who did pretty darn stupid things" (Razack, 2000:117). Razack (2000:117) argues that these strategies constitute the identities of the men and Pamela George as well as where the death occurred in such a way that "no one could be really held accountable for her death, at least not to the extent that there would have been accountability had she been of [white] spaces within the domain of justice."

The Pamela George case is important because it highlights not only the role of gender and race in law, but also the role of class.[15] As pointed out earlier, prisons and jails across North America are filled with men and women who are economically-marginalized. Therefore, to separate out race from class (and gender) is problematic. Daly (1994) suggests that to see law-as-white is to recognize law's class and cultural dimensions. The race and class composition of the criminal justice system (and criminology) is "colour-coded and class-compounded" (Daly, 1994:451). Therefore, criminal justice practices are imbued with whiteness and middle-class values. She explains:

> [Law] includes notions of appropriate dress, demeanour, ways of speaking and child-rearing practices; it means believing that existing rules and authorities are legitimate and fair; and it implies trust that schooling is related to paid employment and that decisions in school and work sites are based on meritocratic principles of ability and discipline. (Daly, 1994:451)

Further to this, Daly (1994:438) makes the important point that it is necessary to

15 The two men convicted of manslaughter in the death of Pamela George were white middle-class university students who used their parents' credit cards to obtain cash to pay George for oral sex and to later purchase plane tickets to Banff to hide from police.

move beyond comparisons of outcomes (for instance, how Black and white women in the U.S. are treated before the court) and to understand the routine ways that race works in the criminal justice system. This is a meaningful departure from most sociological approaches to understanding racial disparity in court statistics. Borrowing from Smart (1992), Daly (1994:463) suggests that routine justice system practices are structured by racial and ethnic relations. Therefore, men and women of colour "can be expected to be saturated with racializing qualities."

In Canada, such racializing qualities include the images of "the drunken Indian." Teresa Nahanee (1994) and Margo Nightingale (1991) have shown how stereotypes of the "drunken Indian" influence how the courts minimize the culpability of Aboriginal men accused of sexual assault. Alcohol abuse is often raised as a mitigating factor when an Aboriginal man is accused of rape, "even as the root cause of violence against women" (Nahanee, 1994: 198). This strategy contradicts the form of law, as intoxication is not a defence to general intent offences like sexual assault. Rather, intoxication can only be taken into account as a mitigating factor at sentencing. Nahanee's (1994) findings suggest how law allows certain racialized qualities to become normalized under law. Similarly, law as a gendering and racializing strategy comes into view when examining how Aboriginal women's credibility is assessed according to the image of the "drunken Indian." Nightingale (1991) suggests that either an Aboriginal woman is not likely to be believed by the police or band leaders when she alleges to have been raped because she was intoxicated, or her claim of being passed out during the rape is over exaggerated to enable lawyers to argue that the rape was less traumatic.

By bringing the ideas of Smart (1992), Daly (1994), Kline (1994), Nahanee (1994), Nightingale (1991) and Razack (1998) together, we can extend Messerschmidt's concept of structured action to examine how gender, racialized and class-based truth claims that are used to make sense of violence committed by men and women in inner-city Aboriginal communities and suburban neighbourhoods. How does law become enmeshed with these truth claims? Why is the rule of law susceptible to such claims? By attending to the socio-political context, we begin to recognize how certain claims have greater salience in the strategies of lawyers and how the socio-political context of neo-conservativism enables these claims to be made successfully. Post-structuralism offers some useful tools to help conceptualize how identities are constituted under law. However, there remains a need for a materialist analysis that examines the role of the state in the criminalization process. Said differently, the over-representation of economically-marginalized Aboriginal men and women suggests that the state does not "govern at a distance" – as governmentality theorists would assert. Rather the state remains a coercive means of social control.

Socio-political Context: The practice of law under neo-conservativism [16]

The socio-political context can be defined as the institutions, practices and discourses which legitimate modes of domination and control (Kellner, 1989). In his own work, Messerschmidt (1997) explored slavery as a socio-political context that enabled lynching

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16 While some writers might refer to the present socio-political context as a 'neo-liberal' one, I am using the term 'neo-conservative.' As will become clear in this section, 'neo-conservativism' denotes a political ideology which has emerged alongside a neo-liberal economic regime (Garland, 2001).

by legitimating claims of white supremacy. In today's context, we should assess how neo-conservativism affects the practice of law; that is, how it frames the legal process.

Neo-conservativism is a powerful political ideology that coincides with a neo-liberal economic regime which emphasizes the globalization of trade and restricting government regulation of the economy. Neo-liberalism is rooted in a backlash against the Keynesian social welfare state that provides income assistance and publicly-funded services such as education and health care. Neo-liberals claim that the welfare state model has resulted in massive government bureaucracies that have incurred a deficit crisis throughout the Western world (McQuaig, 1995, 1998; Workman, 1996; Knuttila & Kubik, 2000). The neo-liberal state is grounded in the principles of privatization, individualism and decentralization that remove the state from any responsibility to remedy unequal economic conditions (Brodie, 1999). The result of this socio-political context is a deepening of the inequitable distribution of wealth that has created increasingly powerless and marginalized populations vulnerable to punitive state controls of surveillance, arrest and incarceration (Brodie, 1999; Snider, 1998).[17]

The new global economy demands a specific ideology (neo-conservativism) that appears anti-state in its rhetoric, yet relies on an expanding criminal justice system premised on principles of "responsibilization": to re-construct self-reliance in those who are dependent upon the welfare state (Rose, 2000; Hannah-Moffat, 2000). In these terms,

17 Laureen Snider (1998) points out that the intensification of penal regimes has historically followed the demands of capitalism. For example, the use of incarceration during the transition from feudalism towards industrial capitalism stemmed from the displacement of peasants into the urban centres who were forced to migrate to the cities in search of waged labour. Those who could not find work or work that paid adequate wages were homeless and warehoused under the vagrancy laws.

the interests of the state (dismantling of the welfare state at the behest of the capitalist class) coincide with criminal justice practices.

Prior to the rise of the neo-conservative state in late 1970s in North America and Western Europe, crime control strategies were rooted in the welfare state or what David Garland (2001) calls "the penal welfare model": crime prevention through social engineering and rehabilitation. However, increasing crime rates and a growing economic recession in the 1980s gave way to a crime control strategy that rejected liberal claims that poverty and racism caused crime. In these terms, the state was no longer committed to public spending to reduce poverty or improve educational and employment opportunities for marginalized groups. As discussed in Chapter One, the role of criminalization became a "strategy of sovereignty" used by the neo-conservative state to appease the liberal elites (middle and professional classes) whose quality of life was threatened by market instability and what was perceived to be a Black crime problem in the U.S. and Britain, and a growing urban Aboriginal population in Canada.

On the one hand, neo-conservative ideology rationalizes and legitimates the dismantling of the welfare state and, on the other, the retrenchment of penality. Thus, some criminologists assert that we are currently witnessing the "second great confinement that is linked to the creation of consumer societies whose populations, now totally dependent on wage labour, are seeing the disappearance of secure, well-paying jobs and the stable communities that went with them" (Snider 1998:32). The neo-conservative state has enabled increased surveillance and criminalization, evoking such practices as preventative detention, indeterminate sentencing and mandatory charging by police.

Neo-conservative ideology advocates for a rigid law-and-order approach that promotes zero-tolerance crime control policies. Criminalization is understood to be the most effective means to reduce crime and, as a result, police resources and charging practices are strengthened. Similarly, important aspects of the trial process have been altered to better enable successful prosecutions. For example, since 1990, zero-tolerance policies have been implemented in most provinces across Canada. These programs include mandatory charging directives and vigorous prosecution policies. Other similar law-and-order strategies in Canada include anti-gang legislation (enacted in 1997). This legislation enables the Crown to designate certain social groups – alleged to be assembled to commit a Criminal Code offence – to be criminal organizations. Judges are also able to deny pre-trial release for those accused under the legislation for up to two years. Both zero-tolerance policies and anti-gang legislation enable the Crown to proceed where it might previously have been prevented. Snider (1998) points out that zero-tolerance has led to an over-representation of working-class men within the "net" of the criminal justice system because these men often possess little education or resources to acquire adequate legal counsel. Snider (1998) claims that these types of criminal justice policies are a form of "compulsory criminalization" in that they target groups incapable of resisting the power of the state (such as inner-city Aboriginal peoples). This would help to explain the disparate rates of criminalization for specific crime categories (like domestic violence and gang-related activities) that have been targeted by neo-conservative politicians and lawmakers.

How can we make sense of these law-and-order crime control policies? As discussed in Chapter One, Foucault's ideas of governmentality provide a framework that

addresses the intention and consequences of law-and-order solutions (Garland, 2001; Rose 1996; Dean 1999; O'Malley, 1998). Governmentality scholars have pointed to law-and-order crime control policies as a form of rationalism or 'systemic managerialism' (Bottoms, 1995; Foucault, 1991) that identifies and controls 'dangerous populations.' Yet, these identified populations are economically-disadvantaged and disenfranchised people (Pratt, 1999). As the re-emergence of neo-conservative law-and-order social policies parallels the rise of a neo-liberal market economy (Pratt, 1999), the use of imprisonment has been "re-legitimated" [18] as a rationalized means of controlling or governing those bodies cut loose by the shrinking welfare state (Pratt, 1999).

> The subjection of economies to market forces and the cutting back of welfare programmes of assistance has led to the re-creation of risk which welfarism had alleviated – poverty, unemployment and the formation of new indigent class of vagrants, beggars, homeless, the mentally ill with criminal tendencies all find themselves left to roam the streets; an assortment of 'social junk' (Box, 1987). Here, perhaps, is the sum of the cuts to welfare budgets and services which neo-conservativism had demanded. (Pratt, 1999:149)

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18 Under the governance of neo-conservativism, the increased use of imprisonment is not viewed as a return to 'warehousing' – a term used to criticize the use of imprisonment in the 1960s and 1970s. "Re-legitimation of the prison" (Pratt, 1999) under neo-conservativism distinguishes itself from warehousing of inmates in that the use of imprisonment now is much more efficient. Therefore there is never an 'unacceptable' level of imprisonment, only a necessary level that is justified by the prediction of risk that dangerous populations pose.

Pratt's work is important because he links the capitalist interests of the state with the designation of 'risk' or 'dangerousness,' reminding us that economic marginalization is key to how the neo-conservative state governs.

Nikolas Rose (2000) suggests another view of the neo-conservative state. Rose argues that the neo-conservative state is more complex and fragmented than theorists such as Snider (1998) and Pratt (1999) claim. For example, the crime control strategies in Western countries are not exclusively punitive. Rather, as Rose (2000:321) describes it: "the political programmes of crime control appear to have little stability, cycling rapidly through all the alternatives from 'prison works' … through to 'community corrections' and 're-integrative shaming' via 'therapeutic intervention' to 'nothing works'." Rose (2000) echoes Garland's (1996) assertion that criminal justice practices have more to do with moral order than crime control. For example, Rose suggests that individuals who are too dangerous to be monitored in the community are confined "not so much in the name of law-and-order, but in the name of the community they threaten, the name of the actual or potential victims they violate" (Rose, 2000:334). According to Rose (2000), the rule of law is suspended for the protection of the community against a growing number of predators. Yet, are all communities viewed worthy of protection? In Canada, disparate rates of criminalization and victimization within inner-city Aboriginal communities suggest otherwise.

Following from Rose (2000:333), the paradox between the rule of law and disparate rates of criminalization can be explained as the an outcome of the state seeking to manage the "excluded." The excluded inhabit "marginalized spaces" and "savage spaces" and "anti-communities" because of an adjudged lack of competence or capacity

for responsible, ethical self-discipline. They are

> ....[n]on-citizens, failed citizens and anti-citizens, comprised of those who are unable or unwilling to enterprise their lives or manage their own risk, incapable of exercising responsible self-government, either attached to no moral community or a community of anti-morality. (Rose, 2000:331)

Rose (2000) explains that neo-conservativism locates the unwillingness of the excluded to exercise responsible self-governance as being rooted in the dependency fostered by the welfare state. The excluded are "victims of a culture of dependence spawned by well-meaning but misguided liberal policy and they have lost their capacity for work" (Katz, 1993 cited in Rose, 2000:331). Rose's notion of marginalized spaces extends the view of Razack (1998; 2000), who describes inner-city crime-ridden communities as racialized spaces. Marginalization is a construct that captures the various methods of exclusion and isolation that includes poverty and racism.

The criminalization of marginalized men and women is a kind of "moral rearmament and ethical reconstruction so that they can be reinserted into family, work and consumption" (Rose, 2000:335). According to Rose (2000:334), criminalization is intended to "transform and to reconstruct self-reliance in the excluded." Do the strategies of lawyers reflect this new penology intended to manage the exclusion of those who lack self-governance and are in need of moral reformation?

Thus far, the disparate rates of criminalization have been examined as resulting from a process that brings together the structures of the rule of law and the racialized, gendered and class-based inequalities that flourish in a neo-conservative socio-political context. However, what needs to be examined is the site wherein these elements come together; that is, where the rule of law, discursive claims of masculinity, femininity, poverty, race and dangerousness and neo-conservativism are woven together. The

practice of law is one possible site of structured action where truth claims, the form of law and the socio-political context combine and are expressed through the agency of lawyers.

The Agency of Lawyers

In his theory of crime as 'structured action,' Messerschmidt (1997:3) refers to human agency as normatively-defined interaction that is influenced by social relations (e.g. race, class and gender) and social structures (e.g. the criminal justice system and the neo-conservative state). Human interaction or personal relationships are expressions of broader social relations. Borrowing from Messerschmidt, we can make sense of the paradox between the form of law and the disparate rates of criminalization as stemming, in part, from the practice of law. Lawyering can be viewed as normatively-defined interaction as lawyers make sense of criminal events according to cultural presuppositions. In these terms, lawyers imbue the meaning of the events with their own racialized, gendered and class-based assumptions. Yet, as Kline (1994) asks, how does law permit these assumptions to influence justice practices? Perhaps the form of law itself is susceptible these normative definitions. What is the role of lawyers in the process of influencing the form of law so that disparate rates of criminalization result?

The role of lawyers in the administration of justice has received little attention in recent socio-legal theory. As discussed in Chapter One, the application of routine activities theory to the study of lawyers has not included a critical analysis of the power of law to uphold social relations of inequality. At the same time, critical-legal theorists have dismissed the importance of lawyering and instead have focused their attention on

law as an “ideological apparatus” or a “discursive field.” For example, Carol Smart (1989) claims that to locate the power of law, we need to assess even the “mundane aspects of law such as solicitor-client interactions.” Rather than merely a ‘mundane’ aspect of law, the practice of law can be understood as an expression of how truth claims, neo-conservative structures and human agency intersect in the everyday world.

Lawyers must be considered as powerful social actors in the administration of justice. Within their prescribed roles, lawyers possess agency and are empowered by the very form of law to legitimate normative definitions of gender, race and class. In terms of understanding how presuppositions of race, class and gender shape human interaction, Margaret Wetherall and Jonathon Patter (1992) suggest that our material position influences what we perceive to be knowledge or truth. In this respect, lawyering strategies flow from a specific vision or angle on the social world. For instance, lawyers draw from their experiences of working in the criminal justice system where poverty, addiction and violence are pervasive features of Aboriginal peoples’ lives. These everyday experiences of lawyers shape the explanations that normalize racialized truths about Aboriginal peoples and communities.

Wetherell and Patter (1992) look at the efficiency and the effectiveness of racist ideologies, claiming they have visible results; racist ideologies have a concrete life within institutions and fix the identities of individuals. Angela Miles and Geraldine Finn (1982:31) claim that racist ideologies are so enduring – regardless of empirical evidence to the contrary – because they possess "practical adequacy; they provide explanatory validity." Said differently, racist claims of the “drunken Indian” can operate to provide

common sense explanations for violence that are uncontested because of the status and legitimacy of lawyers.

Maureen Cain further describes how lawyers are instrumental in the process of criminalization:

> Lawyers know they create law and are organized to police effectively the discursive mode of this creativity; the unanimity achieved by this policing enables them to see the law as unchanging, while in all its particulars it is infinitely malleable. Those wishing to understand lawyers should read what they say about themselves, no matter how pompous, tedious or self-adulatory the text may be. Lawyers are not wrong about themselves. The problem is rather that they do not understand the implications of their being so right. (Cain, 1994:20)

From Cain's work, we are reminded that lawyers have a great deal of agency in terms of not only how they devise their strategies, but also how their strategies impact upon the form of law. Lawyers also have considerable agency in the course of a trial. Mike McConville and his colleagues (1994) explain the influence of lawyers at trials:

> It lies in their capacity to question witnesses, how hard they push certain points, their use of irony or ridicule and a whole range of rhetorical devices; the quality and thoroughness of their preparation; the astuteness of the way in which they use their knowledge not only of the law, but of jury reactions, those of a particular judge. In these ways, these agents materially affect the outcome of the cases in which they are involved and in ways which do not relate directly to substantive rules or principles of criminal law. (McConville, et al cited in Lacey and Wells, 1998:76)

To be effective, the strategies of lawyers must be buttressed by a socio-political and institutional framework; that is, the agency of lawyers to evoke certain normative claims is constrained and enabled by broader social structures. As McConville *et al* (1994) describe above, the role expectations of lawyers enable their agency to choose or exploit non-legal strategies to influence the trial process. Yet, law must be susceptible to such strategies. On the one hand, the form of law must allow for certain truth claims to be

put forward. On the other hand, the socio-political context must endorse or encourage certain normative assumptions. As described earlier, the current neo-conservative context enables lawyers to normalize criminogenic conditions of inner-city communities and obscure the deepening of social inequality brought on by neo-conservative economic and social policies. However, the agency of lawyers is also influenced by the contested terrain of law. As Cain points out, "in all its particulars [law] is infinitely malleable."

Concluding Remarks

In order to unravel the complex relationship between inequality and the law, this discussion has laid out a theoretical synthesis that captures the micro and macro processes that inform the practice of law. James Messerschmidt's (1997) theory of structured action provides us with an analytical framework that encompasses the role of structure and agency. This conceptual model is an important step towards building a theoretical synthesis that resolves some of the uncertainties and limitations of earlier socio-legal theories and criminologies discussed in the first chapter. Structured action theory allows us to reconcile the overly instrumentalist and structural accounts of state-centred Marxism and the relativism of postmodernism; it also reconnects routine activities theory to an analysis of power and context. However, to locate lawyering as structured action requires going beyond Messerschmidt's work to identify how law draws on normative conceptions of race, class and gender in the practice of law.

The practice of law is a key site in the administration of justice. It is here that the rule of law becomes enmeshed with normalizing, gendering and racializing presuppositions that are used strategically by lawyers in building their case. Lawyering

strategies are also framed by neo-conservative crime control policies that focus on public safety via criminalization. But are the strategies of lawyers affected by race, class and gender presuppositions of the accused and victim to the same degree across all crime categories? Empirical studies discussed earlier suggest that economically-marginalized groups and Aboriginal peoples are more likely to be criminalized for violent crime in Canada. Therefore, focusing on violent crime will allow us to address certain questions about the practice of law:

1. How do racialized, gendered and class-based presuppositions affect the case-building strategies of lawyers?
2. How is violence normalized? How and where is it made typical?
3. What influence does the neo-conservative socio-political context have on the practice of law?
4. How does the agency of lawyers play out in the practice of law?

The following chapter explores the importance of using multiple methods to answer these questions.

Chapter Three

Methodological Concerns

In the previous chapter, I argued that to account for the paradox of principles of fundamental justice yet disparate rates of criminalization of the most marginalized groups in society, we need to focus on how the agency of lawyers is structured by the rule of law, racialized, gendered and class-based presuppositions and neo-conservatism. Understanding lawyering as structured action will require a methodological shift away from quantitative measures of outcomes and toward a qualitative analysis of processes.

Within criminology, sentencing studies have been the dominant approach used to measure the interplay between inequality and criminalization. In the Canadian context, sentencing studies have been constrained by a lack of national sentencing data, as well as the removal of race characteristics in data collection (LaPrairie, 1998; Roberts & Mohr, 1994; Roberts 1994, 1998; Roberts & Cole 1998). As a result, most Canadian sentencing studies have focused on sentencing disparity in terms of variations from statutory sentencing provisions (mandatory, minimum and maximum sentences) and the variability of judicial discretion (Roberts, 1994). These limitations aside, Clayton Mosher makes the important point that sentencing studies are inherently flawed because they seek to measure race, gender or class bias as a manifest function of law. As Sue Lees (1997: 126) notes, "law often constitutes [race,] gender [and class] relations in its discretionary spaces rather than in its explicit rules." As outcome measures, therefore, sentencing studies do not adequately explain the process of *how* inequality and criminalization are woven together. If the case-building strategies of lawyers are enabled and constrained by the form of law, then we need a qualitative methodology which can grasp how that process 'works.' The purpose of this chapter, therefore, is to lay out a methodological approach capable of capturing how it is that the practice of law can produce disparate rates of criminalization.

One way of exploring the inter-play between inequality and criminalization is to concentrate our focus on the criminalization of men and women accused of violent crimes. Crimes involving violence – such as manslaughter, assault causing bodily harm, sexual assault and domestic violence – are ostensibly ones where the seriousness of the charge is such an overriding consideration in the criminalization process that 'extra-legal' factors are not likely to invade the practice of law. Focusing on violent crimes, therefore, will allow us to investigate the extent to which the agency of lawyers is, in fact, structured not only by the rule of law, but also by racialized, gendered and class-based presuppositions and a neo-conservative socio-political context. More specifically, a narrative approach will be used to explore the case-building and courtroom strategies of defence lawyers and Crown attorneys in the specific context of cases involving violence.

Oral and Textual Narratives

Narratives are spoken or written accounts of events that are guided by social norms and situated within particular cultural and institutional contexts (Mumby, 1993). In legal proceedings, for instance, narratives of the accused, victims and witnesses are utilized in court as a means of presenting evidence before the trier of fact. In their study of courtroom discourse, John Conley and William O'Barr (1990) identified the manner in which legal norms operate in relation to two different narrative styles adopted by litigants when giving their testimonies in court: "rule-oriented" and "relational-oriented." While the former focuses on legal rules and principles, the latter relies on details of social statuses and relationships. Conley and Barr (1990: 58) argue that the relational-oriented style of narrative violates the court's definition of what is a legitimate account of the facts: "predictably, the courts tend to treat such accounts as filled with irrelevancies and

inappropriate information, and relational litigants are frequently evaluated as imprecise, rambling and straying from central issues." Conley and Barr also point out that judges are influenced by the length, type and amount of the accounts that are included as legally-relevant information.

To the extent that narratives are consciously constructed around the rules, expectations and conventions of particular situations, such accounts are strategic. As Patricia Ewing and Susan Silbey (1995:209) note:

> As members of an audience we purposefully participate in the production of stories, requesting certain details and ignoring others, validating or rejecting plot, characterization or ending. The strategic use of narrative is nowhere more developed than in legal settings where lawyers, litigators, judges and juries all participate in the telling of tales.

In sum, narratives are not simply unique individualized accounts. Like other social practices, they are expressions that bear the imprint of dominant cultural meanings and relations of power. Oral and textual narratives are social practices that can be critically analysed for evidence of the relations of ruling.

Narratives have been used as a research tool in various settings of social science research. In her critical analysis of the relations of ruling, Dorothy Smith (1987) adopted a method of "institutional ethnography" to expose how localized processes of domination and subordination are co-ordinated and concerted. In her more recent study of sexual discrimination on a university campus, Smith (1999) tracks the textual narratives of reports and letters written by a Chilly Climate committee and male faculty members, and carefully documents how juridical discourse erases or reconstitutes the experiences of women (sexual harassment, failed applications for tenure and promotion, etc.). Smith shows that women's narratives are reshaped by the subsequent narratives of male faculty

members so the original story becomes distorted and discredited. By overlaying the principles of juridical discourse on top of the everyday experiences of female faculty members and students, male faculty are able to successfully argue that claims of sexual harassment and discrimination are not based on credible evidence.

Following Smith's method, the present study investigates the role of legal practice in the criminalization of women and men accused of violent crime. Oral narratives of lawyers – obtained through in-depth interviews – are used to locate the strategies lawyers use to translate the everyday experiences of women and men accused of violent crimes into legally-recognized accounts. Oral narratives have the potential to reveal how lawyers negotiate their roles and strategies within the structure of procedural fairness, as well as the extent to which the neo-conservative socio-political context informs their case-building strategies. Smith (1999), however, makes the important point that ethnographers must also critically examine the textual narratives of professionals, as these provide a glimpse into how juridical discourse can reinterpret narrative accounts. In these terms, interview data should not stand alone; textual data should be examined as well to verify the validity of the narratives. As such, textual narratives found in Crown Attorneys' files will be used comparatively with oral narratives of defence lawyers to investigate the legal construction of violent crime cases and the particular ways in which lawyers' case-building strategies play out in the courtroom.

The Research Process

The research process consists of three distinct stages: 1) a review of Crown files and the construction of mock police reports; 2) interviews with defence lawyers; and 3) an analysis of selected Crown case files.

Stage One: The mock police reports

A review was conducted of 90 Crown counsel files of cases tried before the Manitoba Court of Queen's Bench between 1996 and 1999. Forty-five cases involving women charged with violent offences (murder/manslaughter, assaults (all levels), robberies, sexual assaults and other violence charges) were drawn [19] along with a sample (stratified by offence type) of 45 cases involving men-only defendants (see Table 1). The Crown files contained such documentation as: police incident reports; copies of police notes; correspondence with defence lawyers; memos to the Senior Crown (which outline the main facts of the case, the Crown and defence positions and descriptions of the Crown's witnesses); transcripts of preliminary hearings; and forensic evidence. In some instances, files also held such information as pre-sentence reports, relevant case law, sentencing decisions and copies of appeal court decisions. [20]

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19 Nine of the 54 cases involving women defendants were not available for inclusion in the research as they were currently under appeal and/or had been signed out by Crown prosecutors.

20 Transcripts of sentencing submissions and reasons for sentence were ordered for several of the cases and a review of Quick Law produced further documentation on those cases which had been reported.

Table 1: Breakdown of cases heard before Manitoba's Court of Queen's Bench by gender and crime category (1996-1999).

Offence Type	Men Accused Total Cases		Men Accused Cases Sampled		Women Accused Total Cases		Women Accused Cases Sampled	
Murder Manslaughter	68	10%	4	9%	6	11%	5	11%
Assaults (all levels)	189	26%	13	29%	26	48%	21	47%
Robberies	98	14%	6	13%	14	26%	13	29%
Sexual assaults	302	42%	20	44%	5	9%	5	11%
Other charges	54	8%	2	5%	3	6%	1	2%
Total	711	100%	45	100%	54	100%	45	100%

The first stage of the research process had three main purposes. First, it familiarized me with the nature of cases involving violent crime charges heard before the Court of Queen's Bench. Second, it provided a means to identify lawyers who had experience defending clients in this court and who could therefore be contacted for an interview. Third, and most significant, the information gathered at this stage was used as a basis for constructing a series of "mock" police reports involving four different crime categories (homicide, aggravated assault, sexual assault and assault causing bodily harm). Designed intentionally to approximate official police incident reports in terms of style and rhetorical content, the mock reports were used in the interviews with lawyers.

Interviewing lawyers about the nature of their work is difficult, as it means having to navigate around professional codes of conduct and confidentiality. It is not possible to ask lawyers to speak directly about their cases, as the relationship between a lawyer and

his/her client is privileged communication. Mock police reports provide a way of circumventing this issue; they allow respondents to discuss issues relating to case-building strategies and the practice of law without violating norms of confidentiality.

Drawing on the information gathered in the initial review of Crown cases, special care was taken to construct the mock police reports in a way that would attend to the social characteristics of the accused and the complainant and their potential influence on lawyering. An earlier Canadian study (Palys & Divorski, 1986) used hypothetical criminal cases when surveying provincial court judges. The researchers focused on provincial court judicial decision-making and if sentencing disparity could be attributed to personal demographic characteristics of judges, the sentencing environment, subscription to particular legal objectives and/or perceptions of important case facts. The researchers found that sentencing disparity is most affected by differential subscription to legal objectives (such as rehabilitation and general deterrence) and perceptions of case facts (such as seriousness of offence and degree of remorse). In looking closely at the research design, however, little attention was paid to controlling for the race, class and gender of the accused. In fact, in one of the cases that the judges were asked to assess a likely disposition, one accused was identified as Aboriginal. In comparison to all other offenders, this accused received the harshest recommended sentence. Yet, this finding was not discussed by the authors. As well, women were not depicted in any of the scenarios presented to the judges. It would appear that studies of judicial discretion and sentencing disparity have assessed the potency of only certain "inputs" (such as offence seriousness and criminal record of the accused) and have ignored extra-legal factors such as the race, class and sex of the accused.

In constructing the mock police reports, therefore, care was taken to vary the socal characteristics of both the accused and the complainant in order to gage the potential effect on defence lawyers' case-building strategies. As such, in addition to the description of the event (which takes the form found in a typical police incident report), respondents were provided with information on the social history of the accused and the complainant (sex, race, age, employment, status, education and marital status). This is information which also typically provided in a police incident report (see Appendix A).

The first mock police report depicts a "North End drinking party" involving two Aboriginal women fighting with a broken beer bottle. The intention here is to highlight characteristics of similar cases found in the Crown files: the racialized and gendered context of the violence, the issue of intoxication and the racialized space of the North End of Winnipeg. The second mock police report focuses on an Aboriginal male – described as a "sniffer" – who is accused of assaulting a Caucasian male store clerk. The aim of this report is to bring out the issues of inter-racial violence and the potential influence of stigma upon lawyers' perceptions of the accused. The final two mock police reports focus on the inter-gendered relationships of sexual and domestic violence. These two reports are designed to reflect some of the themes found in the cases processed by the Crown Attorneys' office, such as the sexual abuse of children by adult men and women and the practice of counter-charging women with domestic violence. Specifically, the third mock police report outlines a charge of sexual assault made by a teenaged girl against her mother's fiancé. The aim is to explore how the issue of consent in sexual assault cases is made sense of by lawyers, as well as the extent to which sexual violence is normalized in legal practice. The fourth mock police report portrays an incident of domestic violence

wherein a Caucasian woman is charged with assaulting her Aboriginal ex-common law husband over his access to their child. The aim here is to examine whether gender presuppositions influence the meaning of the violence and to explore the impact of zero-tolerance initiatives upon defence lawyers' legal strategies.

Stage Two: Interviews with defence lawyers

The second stage of the research process involved interviews with 12 defence lawyers. This sample represents 40 percent of all lawyers in the city of Winnipeg who exclusively practice criminal defence law (30 in total). [21] Eight of the respondents were private bar criminal defence (4 women and 4 men) and the remaining four respondents were legal aid lawyers.

Participants were initially contacted by a letter (see: Appendix B) which outlined the nature of the research project and requested those lawyers who were interested in participating in the research to contact the researcher by telephone.[22] Those lawyers who expressed their willingness to participate in the study were sent copies of the four mock police reports to review prior to our meeting. [23] The interviews took place in the lawyers' offices. Each interview took approximately two hours and was audio recorded for

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21 This information was provided by the Law Society of Manitoba

22 The research design, as originally proposed, called for interviews with both Crown prosecutors and defence counsel. However, despite having the support of the Crown's Office and the Assistant Deputy Minister of Justice for the research project, Crown prosecutors when contacted indicated their unwillingness to participate, citing reasons of time constraints and workload demands.

23 In total, 25 letters were sent to defence lawyers. Follow-up voice mail messages were left with the remaining 13 defence lawyers, but none of these lawyers responded to the request for an interview.

transcription.[24] Overall, those who responded were very willing to participate in the study.

Using the four mock police reports as a basis for discussion, each defence lawyer was interviewed about the case-building strategies which s/he would use to represent men and women with varying social histories who are accused of violent crimes. The second part of the interview focused on the nature of respondents' working relationships with Crown counsel and police officers and their experiences in pre-trial conferences and resolution hearings (see: Appendix D).

One important ethical issue that arose when conducting this study was the risk of defence lawyers being identified by the nature of their comments. This is especially a concern amongst a small legal community. As the defence lawyers are cited verbatim in the presentation of the findings, it is critical that the anonymity of the respondents be ensured. To this end, each defence lawyer was assigned a code for the purposes of transcription of the interview data (ie. D1 to D12). These code names are reassigned for each chapter so that no identities can be determined. In addition to this precaution, the sex of the lawyer is not revealed when discussing a defence lawyer's strategies.

24 There was only one participant who wished not to be tape-recorded as s/he felt that his/her comments could be too easily attributed to him/her. Many defence lawyers described the legal community as very small, therefore professional credibility was perceived as crucial to maintaining a successful law practice.

Stage Three: Analysis of Crown case files

In the final stage of the data collection, an in-depth analysis was conducted of 23 Crown counsel case files which matched the crime categories constituted in the four mock police reports. Crown cases were sampled based on their affinity with the mock police reports. These files were then organized chronologically to map out the criminalization process. Special attention was paid to the preliminary hearing transcripts and internal memos to the Senior Crown for each case.

As discussed in Chapter Two, the hearing is where the Crown must present their case and evidence for the court to decide if a *prima facie* case can be made against the accused. The defence will also cross-examine Crown witnesses to challenge the Crown's case against the accused. As such, preliminary hearing transcripts offer an important source for revealing the case-building strategies of lawyers. Because each preliminary hearing is transcribed so that it may be referred to at the actual trial (for example, when cross-examining a complainant and/or witnesses) there was a transcript available in each of the case files sampled.

Since interviews with Crown attorneys could not be carried out, another way to access prosecution strategies involved using confidential internal memos to the Senior Crown from the Crown Attorney assigned to handle the case. These documents are type-written briefs that outline the evidence against the accused, the names and descriptions of the witnesses to be called to testify at the preliminary hearing, the strategy of the Crown (including any anticipated difficulties with the prosecution), as well as an assessment of the defence counsel's likely position. Like the preliminary hearing transcript, the memos to the Senior Crown are included in each case file, thus providing a valuable and

consistent source of prosecution strategies. To ensure the anonymity of the Crown Attorneys and defence lawyers named in the memos, no identifying information is used in the reporting of the findings, including the use of pronouns that may signify the sex of the parties involved.

To match the first mock police report (an Aboriginal female charged with murder), five Crown files were selected on the basis of the sex and race of the accused, as well as the drinking party context. Four of these cases involved Aboriginal women accused of murder and one pertained to a Caucasian woman charged with aggravated assault with a beer bottle at a "birthday party" in a suburban neighbourhood. Another five Crown files were selected to match the second mock police report (aggravated assault of a Caucasian gas bar attendant by an Aboriginal male). Four of these cases involved Caucasian males accused of assaulting other young men with a variety of weapons (such as wrenches, metal bars, knives and broken beer bottles). One case involving an Aboriginal female accused of aggravated assault was also studied in order to explore any gendered and racialized differences in the lawyering strategies. Overall, the sample of Crown files for these first two mock police reports were selected to investigate the way gender, race, class and community are used in the strategies of lawyers. More specifically, the aim was to compare inner-city with suburban violence as well as how racialized identities are understood within legal practice.

The remaining thirteen Crown files were selected for comparative analysis with the third and fourth mock police reports. Nine cases of sexual assault against a minor and three cases of domestic violence were examined. The nine sexual assault files focused specifically on child victims assaulted by their caregivers (including four Caucasian

women, three Aboriginal men and two Caucasian men). Four domestic violence-related files were pulled (as identified by the nature of the relationship between the accused and the offender). Two of these cases involved women (one Caucasian and one Aboriginal) charged with assault with a weapon and two involved men (one Caucasian and one Aboriginal) charged with domestic violence.

Data Analysis

The thematic analysis of the interview data flowed from the elements of lawyering as structured action outlined in Chapter Two: the form of law, discursive constructs, the agency of lawyers and how these are framed by a neo-conservative socio-political context. Interview data from the first two mock police reports were organized according to the following themes: legal defense arguments of self-defense and intoxication, and normalization strategies used to assign credibility or culpability of the accused and to characterize the victim. The second phase of the interview data (the organizational context of legal practice) was analyzed according to specific trial processes: bail hearing, plea-bargaining, preliminary hearing, pre-trial resolution hearing, pre-trial conference and sentencing. For each of these processes, the data were examined for the strategies used by defence lawyers to advocate for their client's interests, and for whether these strategies were influenced by racial, gendered or class-based presuppositions. These findings are presented in Chapters Four and Five.

Interview data on the third mock police report were again analyzed thematically according to the legal doctrines that would be raised in cases of sexual assault: consent, the use of private records and the admissibility of the complainants' sexual history. Respondents discussed various strategies to undermine the credibility of the complainant

and to suggest that the complainant consented to sex with the accused or was lying about the allegations. The second phase of the interview analyzed how defence lawyers perceive laws that circumscribe their access to evidence, such as the Rape Shield law and recent case law that places restrictions on the ability to question complainants in sexual violence cases about their sexual history or to use materials found in their personal records as a basis for challenging their credibility. Preliminary hearing transcripts and internal Crown memos were analyzed to assess the strategies of the Crown, specifically, how they perceived the credibility of the complainant in terms of her age, class, race and gender. Crown cases that involved women charged with sexual assault of a minor were also examined in terms of case-building strategy so as to locate the differences and similarities with those cases involving a male accused. These findings are presented in Chapter Six.

The final mock police report involves a domestic violence incident. Interviews with defence lawyers were assessed as to how current zero-tolerance policies shape their strategies (for instance, in terms of how the charging of women in such cases affects lawyers' defense strategies). Preliminary hearing transcripts and internal Crown memos were again analyzed to uncover the prosecution strategies under zero-tolerance policies. These findings are presented in Chapter Seven.

Concluding Remarks

When brought together, oral and textual narratives of lawyering contained in the interviews with defence lawyers and the case files of Crown Attorneys allow for a different perspective of the criminalization process. Although the findings of this study may not be generalizable beyond the legal community in the city of Winnipeg, the

research design is intended to begin a process of uncovering how the practice of law is structured by the form of law, racialized, gendered and class-based presuppositions, the agency of lawyers, as well as the socio-political context. In the next chapter, the first mock police report is presented along with a thematic analysis of the lawyering strategies which emerged from these data.

Chapter Four

The Criminalization of Violent Women

In Chapter Two, I noted that the disparate rates of criminalization for inner-city Aboriginal men and women, especially for violent offences, raise certain questions about the practice of law. Do racialized, gendered and class-based presuppositions contour the case-building strategies of lawyers? How and where is violence normalized and made typical? How and where does violence remain unlikely and atypical? How is the practice of law shaped by a neo-conservative ideology? These questions guided the construction of four mock police reports used in the interviews with defence lawyers. The focus of this chapter is the first mock police report which describes a homicide of an Aboriginal woman that occurred at a drinking party in a rooming house in the North End of Winnipeg.

In addition to the interviews, Crown Attorney files were also examined in five cases. C1 is a case involving an Aboriginal woman charged with second-degree murder of an Aboriginal man and aggravated assault of an Aboriginal woman at a house party. C2 and C3 each involve an Aboriginal woman accused of stabbing another Aboriginal woman with a broken beer bottle. In these three cases (C1, C2 and C3), police incident reports describe the homicides as occurring at a "drinking party." C4 is a case of aggravated assault involving a Caucasian woman accused of slashing another Caucasian woman with a broken beer bottle at what police describe as a "birthday party" in a middle-class neighbourhood in Winnipeg. The final Crown case (C5) involves an

Aboriginal woman who – along with her Aboriginal boyfriend – is accused of beating his common law wife (an Aboriginal woman) to death in a parking lot near a downtown bar. The Crown cases are differentiated from one another depending on whether they were tried before a judge and jury or judge alone. Crown cases C1, C2 and C3 were heard before a judge and jury, whereas C4 and C5 were heard before a judge alone without a jury present.[1]

A comparative analysis of the narratives of defence lawyers and the contents of Crown attorneys' files will reveal that the practice of law is framed by the Official Version of Law but also by particular race, class and gender presuppositions about the accused, the victims and the witnesses involved in violent events. The legal doctrines of self-defense and intoxication and presuppositions about Aboriginal women and other Aboriginal witnesses featured in the mock police report are woven together by defence lawyers to portray them as "pathetic" or "untrustworthy." In a similar fashion, Crown attorneys use different presuppositions about Aboriginal women and North End drinking parties to cast the accused as "sinister" and "out of control."

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1 According to the Criminal Code, all non-electable offences (murder, treason and piracy) are to be heard before a judge and jury. However, the Code does provide that an accused person charged with one of these offences may be tried by a Superior Court judge without a jury, provided both he or she and the Attorney General of the province give their consent (Griffiths & Verdun-Jones, 1994).

Mock police report 1: North End drinking party

The accused (Native female, age 31) and the victim (Native female, age 39) were attending a drinking party in a North End rooming house with several acquaintances. Previous to this, they had been at the Occidental Hotel on Main Street in downtown Winnipeg. The accused claimed in her statement to the police that the victim (a friend of the accused) was accusing her of flirting with her boyfriend throughout the evening, which the accused denies doing. The accused also stated that the victim repeatedly told her she would "make her good and ugly" the next time she saw her near her boyfriend. The police incident report states that the accused had been drinking excessively as her speech was slurred and she had difficulty recalling where she had been earlier in the day. Police interviews with the boyfriend of the victim were of little help as he claimed he did not remember anything about that night. When the accused left the Occidental at closing, she was to meet her sister along with several of her friends at a house party. The accused claims that the victim followed her up Main Street, threatening and yelling to her that she was going to tell everybody what a slut she was.

Upon arriving at the rooming house, the accused went into the shared bathroom down the hall from the party, closing the door behind her. The victim pushed her way through the door and grabbed the accused by the back of the hair, pushing her face into the wall. The accused smashed the beer bottle she was holding and slashed the victim across the face. The victim threw her to the floor on her back and lunged at her, placing her hands around her neck. The accused then slashed the victim's throat. The victim fell off of her, grabbing her neck. The accused got up and ran out into the hallway screaming for someone to call 911. However, by the time the police and ambulance arrived, the accused had climbed out a window and fled down the street.

It was later determined that the accused had outstanding charges for prostitution and theft-related charges. When she was later apprehended at the Savoy Hotel, she claimed that she did not attend a party at the rooming house, and that she had been at the Occidental and Savoy Hotels all night. Eye-witness accounts of friends in attendance at the party stated that the accused had arrived at the party "really loaded" and very upset (crying, etc) about being hassled at the bar by the victim. She was yelling that she wanted to "make her shut up." None of the eyewitnesses could recall overhearing the victim threaten the accused because of the noise of the party and the location of the bathroom. Witness accounts also stated that they had often seen the accused with a knife to protect her. The victim later died of her injuries in hospital.

Social characteristics of the accused	Social characteristics of the complainant
Aboriginal female (age 31)	Aboriginal female (age 39)
Single	Single
Mother of 2 children	Mother of 2 children
Welfare	Welfare
Grade 8 education	Grade 10 education

The Official Version of Law: The doctrines of drunkenness and self-defense

The practice of law, as structured action, is framed by principles of fundamental justice that assign juridical meaning to what are understood to be the legally-relevant facts of the case. As discussed is Chapter Two, criminal liability is premised upon the Crown establishing that the defendant acted voluntarily and possessed *mens rea*. As such, individuals whose criminal acts are not of free will or whose actions are justified because of extraordinary circumstances are deemed to be either less responsible or not responsible for their behaviour. In the case of criminal homicide, the law recognizes a number of legal justifications or defenses which would either mitigate or absolve the accused's criminal liability. Two of these are the criminal defenses of intoxication and self-defense. The defense of intoxication excuses the accused, whereas self-defense justifies the actions of the accused. In what follows, the juridical meaning of intoxication and self-defense is outlined as a backdrop to a discussion of the lawyering strategies that emerge from the first mock police report depicting a homicide of an Aboriginal woman by another Aboriginal woman at a drinking party at an inner-city rooming house.

Prior to 1996 in Canada, there was no formal mention of the defense of intoxication in the Criminal Code. Historically, intoxication has been an aggravating

factor in a criminal prosecution. However, English common law has come to view intoxication as a partial defense because it operates to reduce the severity of the charge against the accused (Verdun-Jones, 2002). The defense of intoxication can only be raised in crimes of *specific intent*, such as murder, robbery and break and enter, but not for crimes of *general intent*, such as manslaughter, aggravated assault and sexual assault. Specific intent offences are those offences where the accused focuses on producing a particular outcome, therefore highlighting a greater element of criminal intent. General intent offences are those acts that do not produce a specific consequence, as the mental element is minimal (Abell & Sheehy, 1998; Verdun-Jones, 2002). Thus, the intoxication defense could result in a finding of not guilty of murder but guilty of manslaughter. Defence counsel may argue that the level of intoxication impaired the accused's capacity to form specific intent.[2] Unlike the general rule of the burden of proof resting with the Crown to prove its case against the accused, when using the excuse of intoxication it is the defence counsel who must prove beyond a reasonable doubt the viability of

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2 In *R.* v *Daviault,* the Supreme Court of Canada struck down an earlier test that established the criteria of general and specific intent offences; in this instance extreme intoxication could be a defence to sexual assault (a general intent offence). Following this ruling, several cases of violence (primarily against women and children) resulted in an acquittal. This gave rise to section 33.1 of the Criminal Code which outlines the following:

> [T]he Parliament of Canada considers it necessary and desirable to legislate a standard of care in order to make it clear that a person who, while in the state of incapacity by reasons of self-induced intoxication, commits an offence involving violence against another person, departs markedly from the standard of care that Canadians owe to each other and is thereby criminally at fault. (Preamble to Bill C-72 now enacted as s. 33.1 of the Criminal Code cited in Abell & Sheehy, 1998:269)

intoxication as an issue in the case (Knoll, 1994). For example, when an accused is charged with murder (a specific intent offence), defence counsel can raise the issue of intoxication so that the charge is reduced to manslaughter. In specific intent offences, intoxication has also been used successfully as a complete defense when the intoxication "was so extreme as to produce a state akin to automatism or insanity" (Knoll, 1994: 78). This can be done through expert testimony as to the impact of extreme levels of drugs and/or alcohol upon a person. The trial judge must instruct the jury to consider the impact of intoxication as an inhibitor of a person's normal conduct.

Self-defense, as a justification rather than an excuse of the accused's actions, focuses on the context of the event rather than the accused's "human infirmity" or emotional state. Historically, the premise of the self-defense argument has been for the court to consider the reasonableness of the accused's use of violence against an unprovoked attack, like that encountered in a bar-room brawl between two strangers. This use of force is justifiable and hence lawful if the force was no more than what was necessary for the purpose of self-defense (Knoll, 1994). In the event of a lethal assault (homicide), an accused may also claim self-defense if "appreciable evidence of sufficient and probative value" can be presented to show the deceased's previous acts of violence against the accused or a third person (Knoll, 1994:121). [3]

The legal doctrine of self-defense (Sections 34(1)(2) of the Criminal Code)

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3 The federal government's Department of Justice (2000:2) has conducted a review of the self-defense provisions. It has been noted that the provisions are overly complex and confusing, overlapping and inconsistent, and the provisions are not sufficiently responsive to the accused's individual state of mind.

differentiates between when the assault upon the accused is unprovoked and if the accused did or did not intend to cause death or grievous bodily harm (Verdun-Jones, 2002). Section 34(1) of the Criminal Code states:

> Everyone who is lawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Whereas Section 34(2) states:

> Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if:
>
> (a) He causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) He believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

In sum, section 34(2) applies even if the accused was the initial aggressor of the series of events that led to the use of extreme force in self-defense. As well, section 34(2) does not require that the degree of force used by the accused be proportionate to that inflicted by the deceased or complainant. Rather, the court must decide if the accused believed on reasonable and probable grounds that he/she could not otherwise protect him/herself.

Self-defense is a complete defense, meaning the accused can be found not guilty if the defence surpasses two tests: an objective assessment of the use of force as reasonable rather than excessive and a subjective assessment of the accused's perception of imminent death or serious bodily injury. Canadian case law shows that a greater emphasis has been placed on the subjective assessment of how the accused's perceptions

can be affected by experiences such as domestic violence (*R.* v. *Lavallee*; *R.* v. *Vaillancourt*). However, the Supreme Court of Canada has rejected the argument that an accused's intoxication is relevant in the determination of the validity of the accused's claim of self-defense (*R.* v. *Reilly*). As explained here by Justice Ritchie:

> Although intoxication can be a factor in inducing an honest mistake, it cannot induce a mistake, which must be based on reasonable grounds. The perspective of the reasonable man which the language of s. 34(2) places in issue here is the objective standard the law commonly adopts to measure a man's conduct. A reasonable man is a man in full possession of his faculties. In contrast a drunken man is one whose ability to reason and to perceive are diminished by the alcohol he has consumed. I should not be taken as saying that the defense under s. 34(2) can never be available to a person who is intoxicated. An intoxicated man may hold a reasonable belief, i.e., the same belief as a sober man would form viewing the matter before him on reasonable a probable grounds. Where he does so, however it is in spite of his intoxication. (*R.* v. *Reilly*, cited in Verdun-Jones, 2002:330)

How do the criminal defenses of intoxication and self-defense influence the strategies of defence lawyers and Crown Attorneys in the context of cases such as those described in the mock police report? How is the violence and victimization of Aboriginal women made sense of by lawyers in their practice of the law? It is these questions that the following section attempts to address.

Weaving Legal Doctrines Together

When interviewed, the strategy most commonly reported by defence lawyers was to construct a synthesis of the defenses of intoxication and self-defense. This strategy brings the agency of defence lawyers into view as they attempt to weave these two legal doctrines together. One defence lawyer explained that intoxication could greatly affect

how the accused perceived that she was in imminent danger. Therefore, it is necessary to bring together elements of self-defense and intoxication to put forward an effective defense argument.

> You do not want to say to a jury: my client was trying to defend herself or she was too drunk to know what she was doing. However, the two go hand in hand because there is a reasonableness in the situation and the force used; the measure of the force that is going to be applied is going to be impacted by the level of intoxication. (D9)

Most defence lawyers explained that it is crucial not to present the Crown, the trial judge or the jury with a defense that distinguishes drunkenness from self-defense. Rather, these two defenses need to be interwoven to form a more thorough defense. This strategy is particularly important in jury trials, as defence lawyers recognize the potential for a jury to be confused when trying to decide between two separate defenses. It is more advantageous to the defence counsel to build them into one defense:

> There are differences [self-defense versus drunkenness defense] that you do not want to put to a jury simultaneously because it is confusing. (D11)

This weaving together of intoxication and self-defense doctrines is surprising because of the clear distinction that the Official Version of law makes between intoxication as a partial defense and self-defense as a complete defense. Furthermore, as stated in *R.* v. *Ritchie*, the accused's state of intoxication cannot be considered relevant to the subjective assessment of the accused's perception of imminent danger. To understand why defence lawyers would choose to use a defense strategy that weaves these two doctrines together, it is important to consider the social context of the violence and the identities of the accused, the deceased and the witnesses.

The North End Drinking Party

The North End of the Winnipeg has one of the largest populations of urban Aboriginal peoples in Canada. It is also recognized as the neighborhood having the second highest concentration of poverty in Canada (Kazeimpur & Halli, 2000; Silver 2000.) In these terms, the North End of Winnipeg is a "racialized space" (Razack, 1998) but also a space occupied by disenfranchised citizens with few resources because of brutalizing poverty. In recent years, the North End has become synonymous with gangs, prostitution, booze cans, drugs and arson. Between 1991 and 1996, approximately 48 percent of persons charged by Winnipeg City police with a violent crime were Aboriginal (Comack, Chopyk & Wood, 2000). This is highly disproportionate to the 15 percent of the city's population that are identified as status, non-status and/or Metis (AJIC, 2002). As a result, defence lawyers and Crown Attorneys handle a disproportionate number of cases that involve Aboriginal people arrested and charged with violence-related offences.

How lawyers see the race, class and gender of people accused of violent crime is contoured by the social situations and the social circumstances that pertain to the cases encountered by lawyers in their practice. For example, if lawyers routinely encounter Aboriginal men and women with substance abuse problems who are charged with violent offences, these experiences begin to typify Aboriginal people as being "drunken Indians." Drawing from Messerschmidt (1997:4), the encounters between Aboriginal peoples charged with violent crimes and lawyers are routinized according to "normative conceptions, attitudes and activities appropriate to the specific social situation in which people act." Thus, over time, lawyers may come to assume that Aboriginal people are

violent and drink excessively.

The setting of the North End drinking party provides defence counsel and Crown Attorneys with several strategic advantages. Defence lawyers noted that in their experience, the level of substance abuse amongst their Aboriginal clients is "profound" (D2) and that violence in Aboriginal communities is pervasive. These experiences become what Worrall (1990) calls "known categories" that shape the strategies of lawyers in various ways. The strategies of defence lawyers are enabled by drunken witnesses who cannot clearly recall what happened, or witnesses who will not testify because they are related to the accused. These known categories of profound intoxication and lack of sophistication are an advantage, as the defence can suggest that such witnesses have no credibility.

> Typically when I defend this kind of case, the drinking that is done is in unbelievable amounts. So I would want to set it down for a preliminary hearing just to see what the weaknesses are, as often the drinking is so profound that the witnesses do not remember anything. Or, when you cross-examine them you can usually get them to agree with you on a number of different suggestions just because of the drinking. (D2)

> If the people are intoxicated or have low levels of intelligence and/or lack formal education, you are always hopeful that you can take advantage of that somehow – that their memories might not be as clear. You are always hopeful that there will be a lack of co-operativeness on the part of the witnesses to attend and come through for the Crown. (D11)

> If the Crown's witnesses say they are all drunk at the time and it was a big old drinking party, no one would remember anything, or even show up to court. (D8)

> Anytime you have got a drinking party, it is common to find that nobody has a clear recollection of what occurred. Normally, there will be as many different stories as there are witnesses. (D10)

This lack of credible testimony seriously constrains the Crown's case. The following exchange between an Aboriginal witness for the Crown and defence counsel on cross-examination illustrates how lawyers take advantage of an Aboriginal man's excessive drinking, a strategy which rings true in the court because of the stereotypes that abound.

Defence:	How were you supporting yourself at the time – were you getting band council support because you were going to school?
Witness:	Yes
Defence:	I take it that you had been paid a couple of days before the party?
Witness:	Yes
Defence:	And it's true is it not that you'd been doing some pretty steady drinking since you got your student cheque that week? Can you tell us how much you were drinking? Did you spend the whole cheque?
Witness:	About one hundred for beer and shooters
Defence:	So you had been drinking for 3 days straight?
Witness:	Yes
[…]	
Defence:	When you say sleeping it's fair to say that you were passing out from time to time correct?
Witness:	Yes
Defence:	Rather than sleeping you were at the point where you had so much to drink that it was time for you to just go and pass out somewhere.

Witness Yes (Preliminary hearing transcript, C1)

The lawyering strategies presented in this example reflect the influence of neo-conservative ideologies. The witness is cast as incapable of self-governance and proper moral conduct. For example, he is funded by his Band Council to go to school, yet he fails to adhere to the values of self-improvement, civility and responsible self-management (Rose, 2000:331). Rather, the witness is viewed as someone who is a victim of welfare dependency – a "failed citizen, a non-citizen, an anti-citizen who is unable or unwilling to manage his own risk" (Rose, 2000:331).

A close examination of internal memos found in Crown files illustrates how Crown Attorneys' strategies are also affected by these typifications of Aboriginal peoples. C2 is a case involving a young woman who is accused of slashing her aunt with a hunting knife at a wedding reception. In the memo to the Senior Crown, a Crown Attorney describes what s/he sees as the obstacles that would prohibit him/her from successfully prosecuting the case.

> A resolution by way of agreed plea is not likely. The case presents *the usual sorts of difficulty* in that the witnesses are all either drunk; related to one or both of the accused and victim; reluctant to talk; inarticulate; or all of the above. (Memo to Senior Crown, C2 emphasis added)
>
> I think if anything can be concluded beyond a reasonable doubt in this case at the moment is that there was a considerable amount of drinking going on, and it is a very different shall we say milieu in a small community such as this when drinking is involved, as there would be perhaps *in a different setting* where, when drinking is treated with a different type of attitude. (Memo to Senior Crown, C2)

The drinking party context enables defence lawyers in other important ways. Defence lawyers have come to understand – based on their experiences – that within the

Aboriginal community, people are reluctant to testify against the accused, as often they are good friends or relatives of the accused.

> You would want to set it down for a preliminary just to see if there is any difficulty with her coming to court. Oftentimes, people who are Aboriginal do not want to testify as they are well known to each other or they are friends or relatives. (D3)

In this way, Aboriginal communities are normalized as being spaces of incivility and disrespect for the rule of law and not as communities which have been subject to police harassment and brutality where individuals may be fearful of speaking to police officers.

Preliminary hearing transcripts also indicate the difficulty the Crown faces when questioning an Aboriginal woman who witnessed a stabbing at a drinking party (C1). In this case, a witness (the cousin of the accused) is asked by the Crown to testify against the accused.

> Witness: I don't feel right sitting here
>
> Crown: How come; what doesn't feel right?
>
> Witness: My cousin (the accused) is sitting right behind me. *It hurts me to testify against her*
>
> Crown: But you are here because you want to tell the truth
>
> Witness: Absolutely
>
> Crown: Well. That is what you have sworn to do. You took a bible in your hand and you swore to tell the truth. (Preliminary Hearing Transcript, C1; emphasis added)

The Crown is attempting two strategies in his/her direct examination of the witness. The first is to counter the witness' allegiance to her family by appealing to the rule of law, while the second is to suggest to the judge and jury that the witness' reluctance to testify

is disrespectful of the rule of law. The Crown's conduct in this examination appears to be aimed at the ethical reconstruction of the witness (Rose, 2000), instilling the core values of honesty and self-control.

Another prosecution strategy found in the Crown files to suggest that the accused or witnesses were untrustworthy or disrespectful focused on the accused's behaviour at the scene of the crime. For example, if an accused flees the scene of a crime, it is believed that s/he does so because s/he is guilty of an offence.[4] In one Crown case (C1), an Aboriginal woman fled a house party where she was trying to break up a fight between her cousin and his ex-wife. Ultimately, her cousin was fatally stabbed with a hunting knife. The police later apprehend the woman after she ran to her father's house, changed her clothes and hid her bloodied clothes in a garbage bag. She contacted her lawyer, who advised her to return to the rooming house where police charged her with second-degree murder and assault with a weapon. The Crown describes her behaviour in a memo to the Senior Crown in the following manner:

> The accused explains that she fled from the scene because she panicked and thought that she would be blamed for this stabbing because she was on charge for other matters! The fact that she was trying to hide the knife suggests *to my way of thinking* a more sinister thought process indicative of a consciousness of guilt. (Memo to Senior Crown, C1; emphasis added)

Despite the post-offence behaviour by the accused in this case, the Crown acknowledges in a memo to the Senior Crown that their case is flawed because of the lack of credible

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4 The Supreme Court of Canada has since ruled that fleeing the scene of a crime cannot be used to infer the guilt of the accused. In *R* v *Menard* (1998), the relevancy of post-offence conduct of the accused in this case was ruled inadmissible as it can be the result of many things, such as fear of reprisal and outstanding charges, not only guilt.

witnesses who can identify the accused as being the person who attacked the victim with the knife. The accused was found not guilty on charges of second-degree murder and assault.

When defence lawyers were asked about the relevance of the accused's post offence behaviour that was described in the mock police report, they recognized that the Crown would likely use it to point to her culpability and character. One defence lawyer explained that he would frame the accused's behaviour of running away or lying to the police as to her whereabouts as more the result of her being drunk and scared.

> The fact that she denied having been anywhere near the house party will be used by the Crown to show she has got a conscience of guilt; that she is lying to keep herself out of trouble. The fact is she was drunk and scared, she is trying to make stupid arguments to keep herself out of the situation altogether – *it is more understandable if she is drunk.* (D6; emphasis added)

Defence lawyers suggested that to circumvent the Crown's focus on the post-offence behaviour of the accused, they would move to have the statements made by the accused to the police ruled inadmissible. This could be accomplished by claiming that the accused was too drunk to understand that she spoke to the police without her lawyer present. When coupled with a lack of credible witness testimony, this strategy would seriously weaken the Crown's case. Without police statements and credible witness testimony, the Crown would not be able to prove beyond a reasonable doubt the accused was at that rooming house and stabbed the deceased.

> You could make an argument that she could not have understood her rights and the statement would be inadmissable, which would definitely be advantageous. If you can keep that statement out then it doesn't portray your client as a liar. If you can keep all the statements out *on the basis of*

> *the drinking*, then the Crown may not be able to establish the identification of the accused as being the person at the rooming house. (D2; emphasis added)

> You could fight the admissibility of the statement on the basis that she wasn't aware of what she was saying to the police. Maybe she was being interviewed and didn't have the right to counsel at the time, didn't know she didn't have to answer questions, maybe she was drunk and it wasn't voluntary, maybe the police held out threats or promises to her. (D9)

In sum, rather than relying on strict legal arguments (for example, that the rights of the accused have been violated by the nature of the police investigation), the strategies of lawyers are based upon presuppositions about Aboriginal peoples as "drunken Indians." Defence lawyers are able to call upon such typifications because they hold purchase in the wider society. Other strategies revealed during the interviews with defence lawyers focused on delaying the preliminary hearing.

Delaying the Preliminary Hearing

One of the most common strategies reported by the defence lawyers was to have the accused released on bail and to delay the preliminary hearing. This delay could be used strategically by the defence as it would likely result in fewer witnesses being located to testify at the preliminary hearing.

> I would apply for bail prior to the preliminary hearing with my client being agreeable to some sort of substance abuse program. I would go through to a preliminary hearing and find out what I could create with respect to the memories of the witnesses. (D10)

At the same time, pre-trial release would be an opportunity for the accused "to prove herself" (D2), especially in a jury trial. Another defence lawyer (D10) explained

that it is also a valuable strategy in cases heard before a judge alone. S/he claimed that Aboriginal people who come before the courts are often unemployed and uneducated; it is strategic to provide the judge with "something positive to focus on about the accused." S/he explains here,

> I would try and get somebody to testify in court on her behalf. Many times when judges are looking at something like this, there is not a lot in the background of a person they can focus on. They are an alcoholic or have a history of unemployment, history of transciency, history of not being able to follow through with things and finally a violent crime. *Many times the only positive type of history you can get is what has happened after the crime.* So you have to get them into a program and then come nine months later have somebody show up and say 'when she came here she was a hopeless alcoholic, had all sorts of problems and we worked through her anger problems, we worked through her prior abuse, we worked through the domestic problems, we worked through all of that, now she has been dry for nine months and she is on the road to rehabilitation.' That will often temper dramatically what occurs. (D10; emphasis added)

This strategy of pre-trial release is conditioned by the neo-conservative value of responsibilization. Responsibilization is "to reconstruct self-reliance in those who are excluded" (Rose, 2000:334). Accordingly, problems of substance abuse and violence are moral or ethical problems in how a person conducts herself, thus requiring the person to make an ethical choice to seek help. Defence lawyers are cognizant of the importance placed on self-change and moral conduct by the courts.

One defence lawyer (D9) did not agree with the strategy of delaying the preliminary hearing, especially in cases of women charged with serious violent offences who are held in pre-trial custody. S/he explained that in his/her experience, women do not want to delay the preliminary hearing and remain in custody, as it is difficult on their families. Instead, women would rather proceed

with the preliminary hearing to have the matter disposed of as quickly as possible. This defence lawyer stated that it is important to respect how his/her client wants to proceed regardless if it is not the best strategy for avoiding conviction.

> My strategy depends on my client. If she is in custody, she maybe more anxious to have the matter dealt with and my instructions come from her. She may be overwhelmed with remorse and feel that she is totally responsible for what happened and doesn't want to pursue a defense. (D9)

Another defence lawyer discussed the subtle differences between advising his/her client and taking her/his client's instructions. S/he acknowledged that s/he is in a very powerful position to influence the accused's decisions and that a client's instructions are merely a reflection of what s/he has advised.

> Lawyers are very powerful and influential people, by and large, and they have the ability to manipulate some things and still work within the law. (D11)

In general, most defence lawyers agreed that it is in their client's best interest to be released on bail rather than remanded into custody because "once someone's in jail, it is easier for the courts to leave them there" (D9). However, the agency of defence lawyers comes into view when they need to reconcile the needs of their clients, their own power to influence the choices of their clients and the best defense strategy. In many ways, the strategies of defence lawyers are intended to emphasize their client's capacities for self-change and ethical reconstruction.

Inner-city Violence

In addition to the drunkenness of the accused and the witnesses, the drinking party provides other important strategic advantages to both the Crown Attorneys and the defence lawyers. The North End of Winnipeg is a community characterized by problems of violent crime and poverty. Interviews with defence lawyers indicate that presuppositions about the normalized or typical use of violence by the accused, the deceased and the witnesses frame their strategies. For example, nowhere in the mock police report does it state anything about the deceased having a violent criminal record. Yet, one defence lawyer states that it is "totally understandable that [the accused] would think the victim was coming after her and she needed to defend herself" (D12). These normative conceptions of Aboriginal women frame how defence lawyers build their case.

When violence as a criminal event is steeped in the social context of a "North End drinking party," the nature of the violence takes on a less brutal quality because of who was killed and how they were killed. When speaking about the first mock police report, one defence lawyer (D5) suggested that a jury is more likely to perceive the severity of the violence as less brutal because the case involved a slashing or stabbing between two Aboriginal women who were both drunk at a rooming house in the inner-city. This lawyer believes that a judge and jury will view inner-city violence as less tragic. It is not domestic violence, nor does it involve a real weapon such as a gun – only a broken beer bottle.

> As far as manslaughters go, one of the things that you have going for you here is that *it is not a particularly brutal killing*. There are no loaded

> firearms and it is not a domestic violence situation. So three of the big aggravating factors are not there. (D6; emphasis added)

This quote clearly illustrates the influence of neo-conservativism upon the practice of law. As Rose (2000) points out, neo-conservative politics are the politics of conduct. Those who fail to conduct themselves according to the ethics of self-control, independence, work ethic and respectability are *excluded* from civil society either through incarceration or management by agents of moral regulation (social workers, police, psychologists and employers). The problems of the excluded groups are rooted in how they choose to conduct themselves. Aboriginal peoples are excluded communities whose victimization and exploitation are viewed as less serious because they have chosen to not conform to the codes of moral and ethical conduct: hard work and self-governance.

One defence lawyer noted that s/he is not constrained by a judge and jury sympathetically viewing an Aboriginal woman killed at a drinking party. These perceptions of the deceased enable him/her to argue that his/her client was protecting herself or that the assault was victim-precipitated.

> D5: The worse thing you can do is to kill a white woman. And there's a ladder from there.
>
> GB: So in [mock police report] number one, the violence is not that serious?
>
> D5: I am not saying it's not serious, I am just saying that you do not have to worry about the aggravating factor of your client having killed someone who is particularly deserving of protection by society.

Another defence lawyer also recognized that how the judge and jury view the deceased is likely to have an impact on how s/he defends the accused. S/he explained that

when defending someone before a jury who is accused of killing an Aboriginal person, his/her job as a lawyer is

> to understand and manipulate the psyche of the juror. The sad reality is that the jury is going to have a hard time associating with these people. And they are going to care less for the victim in that circumstance than they will for Jeff Giles [5] who gets shot in the face because he is one of ours, you know? (D4)

Not all defence lawyers interviewed agreed with the strategy of focusing on the character of the deceased. One defence lawyer (D5) explained that for him/her, it is unethical to "slam the victim" when defending the accused in a murder trial. Rather, s/he treats the deceased with a great deal of respect. By way of example, s/he talks about a case involving the murder of an Aboriginal woman who worked as prostitute. His/her client had admitted on six separate occasions that he had planned her murder, yet a jury found him guilty of manslaughter. This defence lawyer attributes his/her success in defending his/her client to the jury's racist perspective that the decease deserved to die.

> From their point of view, they are thinking, 'Well she deserved it.' You see the undercurrent of racism. Well, I think that was a factor in this case. (D5)

> Where was the vigil for her? Why didn't anyone say that what he did was murder? (D5).

This lawyer's reflections on how the character of the deceased gets used in courtroom strategies points to the choices that lawyers make in how they represent their clients, and how these strategies are framed by race and class-based presuppositions of inner-city

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5 Jeff Giles – a young white middle class male – was working at a local grocery store when a group of young people attempted to rob the store using a shotgun. He confronted

violence.

Crown file notes also acknowledge the credibility of the deceased in a drinking party homicide as the weakest part of the prosecution's case against the accused. Crown Attorneys are aware that they are constrained by the deceased being viewed by the judge and jury as a violent woman who provoked the assault. In one case (C2), the deceased was the aunt of the accused. The lethal assault took place at a wedding reception where the deceased was characterized by witnesses as belligerent and confrontational.

> The character of the victim will be the subject matter of evidence. She is described by witnesses as a big mean-spirited, vindictive and jealous woman who loved to fight and throw her weight around. The accused was sent to live with the victim and her family as a child. The accused was abused physically and verbally by the victim. (Memo to Senior Crown, C2)

To counter the defence strategy of casting the deceased as the aggressor, the Crown focused on emphasizing the violence that the accused has witnessed or experienced. This strategy is used to portray the accused as conditioned to use violence and, therefore, dangerous. Crown case transcripts of drinking party homicides also indicate that defence lawyers will also exploit the portrayal of Aboriginal women's lives as characterized by violence so as to cast the accused as more pitiful than dangerous. In one case (C2), the defence reads from a pre-sentence report that describes the accused's life in the following terms:

> The accused has a two-year old child that was apprehended by CFS at the age of 3 months. The accused's mother was stabbed to death at a drinking party when the accused was 3 years old. Her father hung himself when she

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the youths as they fled the crime scene, and was shot in the face. He later died in hospital of his injuries.

> was 9 years old and a brother hung himself when she was 14 years old. The accused has stated that she has suffered a lot of abuse in her life. She was sexually abused by her uncles and raped when she was 13 years old. She attempted suicide a number of times (pills, hangings and a gun). The accused also self-mutilates. (Psychiatrist's report, C2)

The Crown may then counter this defense strategy by calling on the "victim" stereotype that casts the accused as not taking responsibility for her actions and blaming past experiences or others for her problems. As stated here by the Crown in response to the pre-sentence report:

> [S]o clearly is this an individual who prefers to be seen as a victim rather than being confronted about her inappropriate behaviour. (Memo to Senior Crown, C2)

In this case, the accused appeared at the preliminary hearing in handcuffs, until defence requested they be removed. The Crown strategy focused on portraying the accused to the judge and jury as someone who is dangerous and out of control.

Lawyering strategies also emphasize the prevalence of violence within Aboriginal communities and relationships. The aim of this strategy is to raise reasonable doubt as to the credibility of the Crown's case against the accused as it suggests to the judge and jury that several of the Crown's witnesses could have killed the deceased. For example, in one Crown case (C1) the defence counsel challenges a Crown witness about the circumstances of a homicide wherein the witness' cousin (the accused) stabbed her ex-boyfriend:

> Defence I suggest to you that you were criticizing (the deceased) at the party.

Witness:	I always criticize (the deceased) because he didn't – to me, it felt like he wasn't doing enough for me but he was a good father.
Defence:	You always criticized him?
Witness:	Yes
Defence:	Now he was criticizing you wasn't he?
Witness:	Yes he was
Defence:	He was talking about your boyfriend, threatening to beat him up
Witness:	Yes
Defence:	And you were criticizing his parenting weren't you; about not giving you any money, about drinking too much and about the fact that his kids don't know him?
Witness	Yes
Defence:	And you were giving back as good as you were getting? And he was making you mad wasn't he?
Witness:	He knew how to push my buttons
Defence	He was telling you to fuck off wasn't he and calling you a bitch
Witness:	Yes, he called me a bitch a couple of times. (Preliminary hearing transcript, C1)

This type of cross-examination strategy enables the violence to be portrayed as less serious because the relationship between the accused and the deceased was mutually combative.

In a Crown case involving an Aboriginal man and woman both accused of the beating death of the man's Aboriginal common-law wife, the defense strategy is to

suggest that the woman defendant's violence was not planned and deliberate. The defence lawyer representing the woman accused of beating the deceased states:

> My client is known as being a drunk; when she said 'I am going to kill you,' it could have been to anyone there, not just the victim. (Preliminary hearing transcript, C5)

Witness testimony is strategically used by the defence to describe the Aboriginal female accused as "wanting to fight everyone that night" (Preliminary hearing transcript, C5). What is interesting is how defence lawyers may choose to emphasize rather than minimize evidence of the accused's threatening and aggressive behaviour. This strategy frames the accused's use of violence as normal or typical, rather than as evidence of her culpability in the beating death of a woman she had earlier threatened to kill.

In contrast with the defense strategy, the strategy of the Crown Attorney in this case (C5) focused on characterizing the attack as savage and brutal. The first witness the Crown calls to testify at the preliminary hearing is the coroner to describe the cause of death. The deceased died of blunt trauma to the head and chest. She was stripped naked from the waist down and left in a parking lot in the middle of winter. The fatal injuries were described in great detail in court before the judge, focusing on the force required to result in severe bruising of her brain. The coroner also described the deceased's breasts as badly bruised and secreting breast milk during the autopsy. It was determined that she had just had a baby a few weeks earlier and was breastfeeding her infant. The images of the deceased as a new mother savagely beaten and left half-naked to die in the cold sharply contrasts with those claims of the defence lawyer that tried to minimize the intentionality of the accused's violence.

The woman accused in this case was acquitted because the Crown failed to present sufficient evidence that placed her at the scene of the murder. Her co-accused, however, was convicted of manslaughter and sentenced to five years incarceration. The outcome of this case indicates how different presuppositions about the victim, the accused and violence are used to create contrasting accounts of events to convince the judge and jury. How does the practice of law change when violence occurs in suburban communities?

Suburban Violence

To better appreciate how race, class and gender presuppositions about the victim and the accused become woven into the practice of law, it is helpful to consider a case involving a Caucasian female accused of slashing another Caucasian female with a broken beer bottle at a house party in a middle-class neighborhood (C4).

The aggravated assault of an 18-year-old Caucasian female took place at a house party that was attended by seventy young people. It is described in the police incident report as a "birthday party." The accused (also an 18-year-old Caucasian female) and her friends were asked to leave the party by the complainant after a wallet had gone missing. Once outside of the house, the accused's boyfriend showered the complainant with beer from an open bottle while yelling obscenities at her. The accused then came up behind the complainant and hit her with a broken beer bottle. The complainant (an aspiring model) received 45 stitches to her face. She testified that the accused was saying "bleed bitch bleed" after the assault as she leaned against a car, smiling. The preliminary hearing

transcripts and memos to the Senior Crown in this case reveal that gendered and class-based presuppositions are utilized to frame the strategies of defence lawyers and Crown Attorneys.

Feminist criminologists assert that cultural presuppositions frame how law makes sense of women's deviance (Gelsthorpe & Morris, 1988; Naffine, 1987; Smart, 1989). One of the most typical characteristics of women – especially those women who use violence – is that they are hormonally imbalanced and over-emotional. These gendered presuppositions are revealed in a defence strategy that describes the accused's use of violence in the following manner:

> It was an impulsive and isolated act that occurred when she was mildly intoxicated in the context of significant stress in her personal relationship [she had just undergone an abortion] and in a situation that was emotionally charged. (Sentencing Submission, C4)

The accused's recent abortion is used to typify her behaviour as normal, given the hormonal changes caused by the termination of a pregnancy. As stated by her lawyer at the preliminary hearing:

> We need to look at the medical condition that was going on and the important effect that can have on somebody's hormones to the extent that they may not be thinking as clearly as they should be. (Preliminary Hearing Transcript, C4)

Earlier, we saw how the inner-city rooming house frames the strategies of both defence and Crown lawyers. Likewise, in this case (C4), the social context of the crime (a middle-class suburban neighbourhood) also plays an important role in the strategies that are available to defence lawyers and Crown Attorneys, but they are marked by more presuppositions of gender and class than race. The defence emphasizes the respectability

of the accused while the Crown focuses on the career aspirations of the complainant. The defence describes the accused in these terms:

> She has a grade eleven education. In fact close to two years now she has been working at a meat market and that has been steady employment. She initially started out as a student in a work placement and, in fact, she impressed the people so much that they offered her full-time employment. (Preliminary hearing transcript; C4)

The Crown's strategy focuses on the credibility of the complainant. The Crown refers to the complainant as a "young lady with a brilliant modeling career ahead of her; she did nothing wrong – she was helping a friend find a stolen wallet" (Preliminary Hearing Transcript, C4). These characterizations of the complainant are striking in contrast to those examined in Crown case files involving Aboriginal women. For example, in C2 the deceased is characterized by the Crown as a "mean-spirited, vindictive and jealous woman who loved to throw her weight around." In C5, the deceased is cast by the defence as a "drunk who wanted to fight everybody."

With regard to the first mock police report, defence lawyers noted that they would emphasize the accused's level of intoxication. This strategy was necessary to convince the judge and jury that the accused believed that she was in imminent danger of bodily harm. However, the defence lawyering in the Crown case (C4) is constrained because the accused is not intoxicated. In contrast, the Crown emphasizes the lack of alcohol consumption as a way of portraying the accused as intentionally assaulting the complainant.

> The accused took the beer bottle – broke the beer bottle and gouged her eyes. Words to the effect of the complainant was "bleed bitch bleed", I submit. Which shows the intent. It is my submission also that from the

> evidence disclosed that the accused was not drunk, was not on drugs. (Preliminary Hearing Transcript, C4)

In the preliminary hearing transcripts, the defence counsel and the Crown describe the context of the assault as a "birthday party" and not a drinking party. Seventy people were in attendance and all the witnesses, the complainant and the accused had been drinking beer when the assault occurred. The characterization of the setting is enabled by assumptions that white middle-class communities – and the types of people who inhabit them – are distinct from Aboriginal communities in the inner-city area.

The sentencing submissions by the defence and the Crown also illustrate contrasting strategies that nevertheless emphasize gendered and class-based stereotypes of the accused and the complainant. The defence lawyer quotes the pre-sentence report, which characterizes the accused as being

> .... possessive of her boyfriend and an appropriately groomed woman. She is abhorred and disgusted by her own conduct. The accused is a good candidate for rehabilitation. (Psychiatrist report, C4).

The defence emphasizes that the accused is living with her boyfriend and has a close supportive relationship with her mother. The accused is described as a "quiet and soft-spoken" young woman (C4) who was not thinking clearly at the time of the assault because she had recently undergone an abortion.

By contrast, the Crown Attorney's submission to the sentencing court judge in this case described the violence as "a most serious aggravated assault" and sought a lengthy provincial sentence with anger-management counselling and supervised probation. The Crown describes the complainant as being,

> .... scarred physically and emotionally by this aggravated assault. She has dreams about the violence and has ongoing fears. As well she can no longer work as a model given the scars on her face. She is consulting a plastic surgeon as to the possibility of laser surgery to remove the scarring but does not have the finances to pay for an operation that is not covered by medicare. (Sentencing hearing transcript, C4)

The Crown's strategy shifts away from the character of the accused, as there are not issues of unemployment, substance abuse or prior criminal record to focus on. Instead, the Crown focuses on the principle of general deterrence. In his/her submission, the Crown urges that the judge impose a sentence of incarceration.

> .... so that people will know that they cannot just slash someone in the eye or maim someone and just get a slap on the wrist in court and walk out. (Sentencing hearing transcript, C4)

The sentencing judge appears to be convinced by the Crown's position, and discounts the psychiatrist's report about the accused's lack of remorse. S/he states here:

> I cannot believe how you reacted. I really can't. What you did to this girl. Everything indicates that you could go to jail for a long period of time because this kind of conduct cannot be condoned in any way. You are a young person, you have no previous record. But your actions are so callous, so cruel, so vicious in this case. (Sentencing hearing transcript, C4)

Nevertheless, the accused receives a conditional sentence plus a community service order. The strategies of defence lawyers were effective in terms of casting the accused's use of violence – although serious – as uncharacteristic and atypical. These strategies appear to rely upon the normalizing presuppositions of femininity and respectability, which are "colour-coded and class-compounded" (Daly, 1994:451). Although the judge believes the nature of the violence to be serious enough that the accused could be incarcerated, the defence lawyer is clearly enabled by the social characteristics of the

accused: a young white woman from a suburban neighbourhood who is employed and has established supports in the community.

Some criminologists have suggested that some women – primarily white middle class mothers – are treated more leniently by the courts in that they are likely to receive less punitive dispositions in comparison to men convicted of similar offences (Daly, 1987). The conditional sentencing of a young white employed woman convicted of an assault who is viewed by the judge as callous and vicious seems to support this claim. Are the strategies of lawyers in all cases involving women accused of violence shaped by expectations of chivalrous treatment?

Leniency Towards Women

Throughout all of the interviews with defence lawyers, there was an expectation of chivalrous treatment of the accused in the mock police report. Although most lawyers who were interviewed agreed that the issue of a previous criminal record is critical at the point of sentencing, so is the gender of the accused. From their perspective, women almost always receive less punitive sentences than men do. A possible explanation for the chivalrous or lenient treatment of some women by the courts could be the saliency of certain truth claims made by lawyers in their arguing of the case.

An effective means by which lawyering exploits gender stereotypes is through the "folklore or storytelling of abuse that is possible with women accused of violent crimes" (D5). One lawyer claimed that women may be portrayed as more remorseful; the judge and/or jury can sympathize with her and her violence is more easily explained away. This

lawyer points out that s/he has never received "a bad sentence for a woman client accused of violence; either I am brilliant or the system is biased" (D5). When asked if this bias is evident throughout the system, s/he claimed that the Crown still attempts to lay the most serious charge possible, regardless of the gender of the accused. For example, s/he believed the accused in the mock police report would be charged initially with second-degree murder. However, once in court, this defence lawyer explains that s/he is enabled by the gender of the accused.

> When the accused are female their lives are going to be much more dramatic and I am able to play that up. (D5)
>
> People are very sensitive to family violence and women being fearful. It is so easy to make this woman a victim of sexual abuse by her uncle blah blah, you could go on forever; it's a perfect scenario. (D5)

This lawyer's awareness of how law can be influenced by the social histories of the accused suggests that the form of law can be contested by discursive claims of victimization. Yet, the over-representation of Aboriginal women in prison – regardless of victimization rates that are more than twice that of white women (Statistics Canada, 2001b) – suggests that only certain women's lives of abuse are viewed as credible narratives.

Another perception expressed by the defence lawyers was that women are committing more serious violent crimes than in the past, but continue to receive – from their view – lenient sentences from the court. One defence lawyer attributed the chivalrous treatment of women to the less serious nature of the crimes that women-as-a-group have committed in the past. However, s/he claimed that there has been a shift in the

seriousness of the crimes that women are now committing. From his/her perspective, there is equality or symmetry in the nature of offences that men and women are being charged with.

> Instead of simply passing bad cheques or shoplifting, women now are charged with drug offences, they are often charged with more serious violent crimes so there is equality. (D10)

How, then, can we account for the perception of lawyers that symmetry exists between men and women? Lawyers' understanding of women's use of violence flows from the specific vision or angle of lawyers that comes into view through their everyday normative interactions. Defence lawyers who specialize in criminal defence work and Crown Attorneys who prosecute cases before Queen's Bench are exposed to particularly serious cases in their routine activities. From these experiences, lawyers form an understanding of who is typically violent and where violence normally occurs. In this way, lawyers come to perceive some women's use of violence as typical – such as the two Aboriginal women described in the mock police report.

When asked if Aboriginal women are also treated more leniently than men are, most of the defence lawyers claimed that there is a generalized leniency towards women irrespective of race. Yet, the review of Crown case files suggests otherwise. In one case – an intra-racial domestic assault that took place at a "hair spray party" [6] at an inner-city rooming house – an Aboriginal woman stabbed her Aboriginal common-law husband with a kitchen knife after he accused her of

6 Hair spray drinking is a form of solvent abuse. The hair spray is purchased in large quantities then diluted with water for ingesting.

having an affair, pulled her by the hair and pushed her into a closet. This case presents elements of an abusive relationship, as the accused was defending herself from the deceased. Yet, the Crown case files show that the prosecuting attorney disbelieves the accused's claim to self-defense given her statement to police. The police interview transcripts reveal the following statements:

> Accused: I grabbed the knife and stabbed him in the heart. He was fighting with me and, fuck, so I grabbed the knife and hit him in the heart, I got mad eh. ... I told him to wait and I'll be right back so I went and got my knife and came back and stabbed him.
>
> Police: Did he ever beat you up?
>
> Accused: Yeah, not very often, it's been a while. (Police incident report, C3)

The Crown expects the defense strategy to emphasize that the accused was defending herself from her abusive spouse. However, the Crown rejects this defense because there is no documented history of domestic violence.

> It is a fairly straight-forward case. I suspect the accused (Aboriginal female) will present the Burning Bed defense, [7] but I know there is no history between these two parties of domestic violence, and the accused in her answers to the police questions made only limited reference to there being trouble between the parties in the past. This line of questioning was explored to a certain extent but witnesses could not recall any instances of seeing the deceased assault the accused prior to his death. I wish to prosecute this in QB [Queen's Bench]. The defence offered a guilty plea if I agree to a conditional sentence. I declined this offer. It is one stab wound to the heart, I think a period of custody of 3-5 years is appropriate. (Memo to Senior Crown, C3)

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7 The burning bed defense is named after a Hollywood movie starring Farrah Fawcett as a diminutive yet sultry blonde who is routinely savagely beaten by her husband. In an act of desperation to save herself and her children, she sets the house ablaze after he had passed out on the bed.

> Although the deceased was physically assaulting the accused at the time of the incident, the accused's act of stabbing the deceased was unreasonable in the circumstances. (Memo to Senior Crown, C3)

The defence lawyer in this case did not use the 'burning bed defense.' Rather, he argued that the accused was so intoxicated that her statements to the police should not be entered in as evidence. The defense strategy also emphasized the lack of credible Crown witnesses because of their level of intoxication. As stated by the Crown in describing the witnesses called to testify at the preliminary hearing:

> I originally called the witness to testify on Tuesday morning. The first day of the preliminary she showed up absolutely blotto on hairspray along with another witness, that I sent her home and they promised to show up the next day and testify. (Memo to Senior Crown, C3)

This case reveals the agency of defence lawyers to choose the best strategy for their client and that they are aware of the court's perceptions of the accused, especially when she is an Aboriginal woman accused of using violence. The defence lawyer in this case appears to recognize that the 'burning bed defense' would not be successful. The accused does not conform to the stereotype of the battered woman as being powerless and afraid. Rather, her statements to police cast her as angry. In this way, the presuppositions about the typical battered woman constrain the strategies of defence lawyers, especially in cases involving Aboriginal women. As was seen in the first mock police report,

lawyering strategies were influenced by the normalization of lethal violence by an Aboriginal woman, especially in an inner-city community.[8]

The accused in this case (C3) entered a plea of not guilty and was found not guilty by a judge and jury. Given the strategies used by the defence lawyer in this case, can the outcome of the case be attributed to the chivalry of the court? Or is it a reflection of the effectiveness of lawyering strategies that are cognizant of the court's view of what kind of woman would be entitled to claim that she acted in self-defense? The lenient treatment of women by the courts is not simply judicial chivalry. Rather, this case illuminates how the practice of law is structured by racialized and class-based presuppositions as well as those of femininity.

Concluding Remarks

The aim of this chapter has been to examine the strategies of lawyers in cases involving women accused of violent crime, and how these strategies reflect a synthesis of the rule of law, professional role expectations and cultural presuppositions of gender, race and class. The practice of law expresses each of these dimensions.

The strategies of lawyers revealed in interviews and Crown case files indicate that the practice of law is a complex process that brings together the legal doctrines of self-defense and intoxication, the agency of lawyers as well as presuppositions of race, class

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8 The battered woman's syndrome defense has provoked debate within the women's movement as to whether the strategy only benefits certain women – especially white women – because of the prerequisites of passivity and helplessness that underpin the diagnosis of the syndrome (Comack, 1993). In the U.S, for example, "the ratio of Black women to white women convicted of killing their abusive husbands is nearly two to one"

and gender. Although the Official Version of Law holds that the self-defense and intoxication are applied to the facts of the case and are unmediated by social factors of the accused or victim, lawyers' accounts clearly demonstrate the influence of the accused's social history upon the outcome of the case. Defence lawyers and Crown Attorneys appear to recognize that race, class and gender presuppositions operate to influence other legal actors, such as opposing counsel, juries and the trial judge.

The legal doctrines of intoxication and self-defense do not enable defence lawyers when their clients are inner-city Aboriginal women. Rather, defence lawyers must weave together a synthesis of these legal doctrines that reflects how the profound level of drunkenness has an impact upon the accused's perceptions of imminent danger. At the same time, lawyers expect judges and juries to view inner-city communities as places of generalized violence. These normative conceptions make it possible for defence lawyers to emphasize the accused's justifiable fear of the deceased who – as an Aboriginal woman – can be typified in court as dangerous and violent. Defence lawyers are also enabled by how a judge and jury will view the murder of an inner city Aboriginal woman at a rooming-house drinking party. Defence lawyers acknowledge that the deceased is likely to be viewed as someone undeserving of the protection of the public. Therefore, her death is less likely to be viewed by a judge or jury as tragic. These expectations shape the strategies of lawyers.

Gender is marked less in cases of inner-city violence than it is when violence occurs in suburban communities. Inner-city violence is enmeshed with racialized and

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(Walker, 1989:206 cited in Comack, 1993).

class-based presuppositions about the accused, the deceased and the witnesses; 'drunken Indians' who are unsophisticated and pathetic *or* sinister and dangerous. When violence takes place in suburban communities, however, the femininity and respectability of the accused and complainant are emphasized. In this context, the Woman of legal discourse can be either cold and callous *or* emotionally unstable.

While the North End drinking party is a strategic device that differently enables defence lawyers and Crown Attorneys, suburban violence is marked by different class-based and gendered presuppositions of respectability and femininity. The action of an accused slashing a woman with a broken beer bottle while uttering "bleed bitch bleed" is presented to the court as an isolated act that can be attributed to the physiological effect of an abortion. Law as a gendering strategy clearly comes into view when lawyers rely upon physiological explanations of violence by a young woman to cast her as being powerless to control her feelings. The practice of law is structured by what truth claims the court will accept as reasonable. Law cannot make sense of an angry young white woman who intentionally uses violence.

In the present era, lawyering strategies in cases involving women accused of violence are likely to be influenced by neo-conservative claims. Aboriginal women are depicted as being pathetic, damaged, sinister and undeserving of the public's protection because they are "unwilling to refuse the bonds of civility and self-responsibility" (Rose, 2000:331). White women are cast by the defence as hard working, attractive and remorseful, or callous and cruel by the Crown. The gendering of women seems more apparent in cases involving white women. Lawyering strategies rely on the stereotypes of

femininity (irrationality, emotionalism, vulnerability) in cases involving white women, but not in cases involving Aboriginal women. In these terms, lawyering does appear to be structured action because it is constrained and channeled by social relations (marginalization) and social structures (criminal justice system) as well as neo-conservative values of self-regulation.

While the practice of law contributes to the criminalization of Aboriginal women by legitimizing their identity under law as "drunken Indians," racialized pre-suppositions in lawyering become even more apparent when we examine the second mock police report of an Aboriginal male accused of assaulting a Caucasian male. Although the crime context shifts, the "drunken Indian" stereotype persists in this second mock police report but to a different effect: the racialization and gendering of violence serves to constrain defence lawyering and enable the Crown's prosecution of the accused.

Chapter Five

Sniffer, Jocks and Bouncers: The Criminalization of Violent Men

In the previous chapter, the strategies of defence lawyers and Crown Attorneys revealed that inner-city violence committed by Aboriginal women is framed by presuppositions that emphasize the 'drunken Indian' stereotype. This stereotype brings together the dimensions of poverty and racism. In contrast, violence by young white women in a suburban community is marked by presuppositions of (hetero)femininity, desirability and respectability. In this chapter, the focus shifts to examine the strategies of defence lawyers and Crown Attorneys in cases of young men accused of aggravated assault. The second mock police report describes an assault of a young Caucasian man while working at a gas station by a young Aboriginal man police describe as a 'sniffer.'

In addition to the interviews with defence lawyers, Crown attorneys' files were examined in six Crown cases. C6 is a case involving two young men (one is described by police as Mulatto and the other as Metis) who police allege to have 'curb stomped' a young Caucasian man at a house party in the inner-city. C7 involves a Caucasian man accused of assaulting a Black man with a knife in an area of the city described in the police incident report as a place frequented by homosexual men. C8 is a case of a young Caucasian man who is accused of assaulting another young Caucasian man with a wrench over an unpaid debt outside the complainant's home in a suburban community. C9 and C11 each involve a teenaged Caucasian man accused of assaulting another teenaged Caucasian man on the street with a metal bar. The final case selected (C10) is one that

involves an Aboriginal woman accused of assaulting a bouncer at an inner- city hotel bar with a knife. This case will be used for comparative purposes (with C8 and C10). In Crown cases C7 to C11, the accused elected to be tried before a Court of Queen's Bench judge alone. The accused in the Crown case C6 elected to be heard before a judge and jury.

Analysis of the narratives of defence lawyers and the textual narratives found in Crown files suggests that the strategies of lawyers appear to focus on marking the credibility of the accused, the complainant and the witnesses. The interviews with defence lawyers reveal contrasting strategies that reflect varying perspectives on how Aboriginal men will be perceived by the police, the Crown and the judge. Both the interviews with defence lawyers and Crown file data suggest that case-building strategies are also affected by the spatial location of where the violence takes place as well as the normative conceptions of young men's violence as being victim-precipitated, mutually combative or sport-like. In contrast, an Aboriginal woman's violence against a white male bouncer at a bar is not viewed as self-defense. Rather, her violence is understood according to the stereotype of the 'drunken Indian.'

Mock Police Report 2: The 'sniffer'

The complainant (Caucasian male, age 18) was working alone at a Petro Canada gas bar. At approximately 2 a.m., the accused (Native male, age 21) entered the store and asked for the key to the washroom. The complainant's police statement outlined that the accused was holding a gasoline soaked rag and was unsteady on his feet. The complainant stated that in his opinion, the accused was a "sniffer." The complainant insisted that the accused leave the store or else he would call the police. As he

came around the counter to force the accused back out through the door, the accused grabbed a large flashlight (approximately 24 centimetres long) that was on the counter by the cash register. He swung out and smashed the complainant's hand as well as striking him about the head causing the complainant to cover his head with his hands and drop to the floor. At the moment a customer/witness entered into the gas bar and tried to pull the accused off of the complainant, while another customer/witness ran to a pay phone and called 911. The customer received minor bruising and lacerations from the accused trying to bite his hand and forearm. The complainant was taken to hospital where he was treated for 3 broken fingers. The eyewitness statements also described the accused as "high or stoned and acting like a wild man".

The accused's statement to the police outlined that he entered the store and asked the complainant for the key to the washroom. The complainant refused to give him the key and started to push him out of the store. The accused noticed that two other men were behind the cash counter and appeared not to be employees, as they did not have uniforms like the complainant. These men came over and grabbed the complainant - pushing him up against the wall while yelling at him, "dirty fuckin' Indian". The complainant and his friends then started to punch the accused in the stomach and about the head. The accused then grabbed the flashlight from the cash counter and swung out at the three men who were assaulting him. The two friends of the complainant yelled that somebody was coming and ran out the back door of the store. The accused sustained bruising and lacerations to the head and chest area. The accused maintains that he was trying to defend himself against the three attackers.

Social History of the Accused	Social History of the Complainant
Native male age 18	Caucasian male age 20
Welfare	Part time gas bar clerk
Grade 10 education	Red River College
Single	Single

Unlike the previous chapter's examination of second-degree murder, in cases of aggravated assault the legal doctrine of self-defense was not a key feature in the case-

building strategies of the lawyers interviewed, nor was it evident in the Crown files. [9] Instead, lawyering strategies in aggravated assault cases focus on the credibility of the accused and the complainant; that is, whose account is most truthful? As we will see, the issue of credibility is framed by race, class and gender presuppositions and by the marking of violence as "doing masculinity" (Newburn & Stanko, 1994).

Credibility: "Who you gonna believe?" [10]

From the outset of the interviews with defence lawyers about the second mock police report, there was a pronounced shift away from the principles of fundamental justice, specifically, that an accused is innocent until proven guilty. Instead, almost all of the defence lawyers started from the premise that the accused in the report was guilty of the charge; their role was to seek the least punitive sentence from the court. This position was rationalized by what the defence lawyers perceived as the accused's lack of credibility as an Aboriginal male 'high on sniff.' There also appeared to be a consensus amongst the defence lawyers that the charges laid by the Crown's office in this case would be assault with a weapon (the flashlight), assault causing bodily harm (the complainant's three

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9 Section 37 of the Criminal Code does provide for the use of force in order to prevent an assault against the accused or anyone under his or her protection. The Code states:

> Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or repetition of it. Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

10 Quoted from D1

broken fingers) and possibly attempted robbery. The robbery charge is based on the expectation that the Crown would argue the accused's motive for entering the gas bar was theft, not simply to use the washroom. Richard Ericson and Kevin Haggerty (1997:59) explain that the Crown's decision to prosecute is heavily influenced by police charging practices: "Police will over charge and up to the highest category possible to create a situation in which the charge reductions and charge withdrawals can be offered in exchange for a guilty plea." Paradoxically, defence lawyering is also constrained by police charging practices. Ericson and Haggerty (1997) point out that defence lawyers often begin with the presumption of guilt (contrary to the principles of fundamental justice) because, as members of the legal community, they are "bound by the need to sustain co-operative relations with the police" (Ericson & Haggerty, 1997:60).

The criminalization of the accused in the second mock police report begins far in advance of the trial process. One defence lawyer explained that when meeting with the Crown, s/he would suggest that the accused was provoked by the complainant's racist remarks. The aim of this strategy is to achieve a "watered-down" charge of minor assault from the Crown. However, s/he claimed that the Crown would likely see the original charge of assault causing bodily harm as a lesser charge than attempted robbery and, therefore, would not agree to a reduction in charges.

> You might, on a plea bargain, be able to persuade the Crown to water down the facts a little bit. But I could see the Crown saying, 'Hey look you are lucky to be getting away with assault because there is no doubt in

our minds that the intent was robbery.' (D12)[11]

This raises some serious concerns regarding the Crown's obligation to meet certain evidentiary tests in applying their discretion to prosecute, most importantly, that no charge will be laid unless there is a reasonable likelihood of conviction. There are no facts presented in the mock police report that would show the accused's intent was to rob the gas bar. Rather, the experience of the defence counsel interviewed has shown that the Crown will infer from the circumstances of the case, which is based (almost always) exclusively on police information.

All but one defence lawyer acknowledged that they would advise their client to enter a plea of guilty in exchange for a lesser sentence. When asked why pleading out to a lesser charge was likely, most defence lawyers bluntly stated that the accused lacked any credibility in his claim of self-defense because of prevailing stereotypes.

> You have a Native male who is highly intoxicated[12] who has that stereotype. You do not want to go to a jury with that because you are going to get eleven out of twelve white individuals who may very well have that stereotype. The odds of drawing a jury who is willing to give my client the benefit of the doubt are slim. (D5)

Defence lawyers also explained that a judge would be unlikely to view the accused's account as credible. The accused's lack of credibility is attributed not only to his being labelled a 'sniffer' but also to his being on welfare with little education. These

11 Recall from Chapter Three that the numbering of the respondents is altered in each of the analysis chapters to ensure anonymity. As such, D12 in this chapter is not the same D12 as in the other chapters, and so on.

12 It is important to note that nowhere in the mock police report does it state that the accused was highly intoxicated. This suggests that lawyers premise their understanding of the facts of the case on common sense presuppositions about Aboriginal peoples.

stigmas make it difficult for the defence to persuade the judge that the accused's version of events is truthful. Because of these obstacles, the defence lawyers were doubtful that they could mount a successful defense. As a consequence, they would seek a resolution agreement with the Crown.

> On a credibility issue like this, a lot of times what you do is spend most of your time trying to assess whether your client is going to be viewed as a credible witness because I am going to have to call him to the stand. I would look at his age; he has a grade 10 education. That means that he is relatively able to answer questions. But the fact that he is unemployed – on welfare – are all things that can work against him and his credibility. (D12)
>
> If I thought he was not credible, I would push the Crown into some sort of more reasonable deal. (D6)
>
> Most of my clients are pathetic witnesses. Most of them have criminal histories and cannot be subject to cross-examination. And that is the sad reality of the people that we represent is that very few of them present well in court. (D11)
>
> .... [G]enerally, your clients are not that sophisticated, and hopefully they are not drunk at the time – I mean 70 percent of them are. It is amazing how difficult it is if you are innocent to project that, to be able to say that in the face of cross examination – in the face of an allegation – to be able to be persuasive that you are innocent. It is not an easy thing to do in a court of law. (D4)
>
> I always approach a case from the standpoint of not putting my client's credibility on the line. As a criminal defence lawyer, you pretty much have to win without using your clients. (D2)

Governmentality theorists (Rose 2000; O'Malley 1998) discuss how neo-conservatives rely upon strategies of inclusion and exclusion for the purposes of social control. From the strategies of lawyers, we can deduce that lack of credibility becomes a means of excluding young Aboriginal men from due process, as credibility is defined in

terms of the accused's conformity to work ethic and self-improvement. In short, lawyers come to evaluate the credibility of the accused using the criteria of neo-conservatives: welfare dependency and the failure to take advantage of educational opportunities.

One defence lawyer disagreed with the strategy of working out a resolution agreement with the Crown in this case. S/he explained that from his/her perspective, the accused's version of events is plausible and cannot be ruled out because he may be a solvent abuser. Instead, s/he claims that the accused could have used the flashlight reflexively, not intentionally, against the complainant. This defense strategy is based on the accused's claim that three persons called him a "dirty fuckin' Indian" when he asked for the key to the washroom, then assaulted him when he did not leave. When asked about the relevance of the "dirty fuckin Indian" comment, D6 acknowledged that it is useful in explaining why the accused felt at risk. S/he dryly commented, "When anyone calls you a 'dirty fuckin' anything' it is good. I like to see that" (D6). S/he goes on to explain how s/he understands the facts of the case:

> Whether the accused is drunk or not is relevant for sentencing purposes. I would put this case down to reflex: the accused grabbed a flashlight from the counter, swung out at the three men, assaulting one of them. Looks like self-defense, which is reflex. From his perspective, you have three people coming at you and you do not have time. (D6)

The issue of the complainant's credibility is also important in that it can significantly affect the outcome of a case. As we saw in the previous chapter, the Crown's case against the accused rests on credible witness testimony. In this way, both the Crown and the defence are constrained by the issue of credibility. However, defence lawyers acknowledged that the inter-racial context of the second mock police report

would affect their ability to defend this case. Even though most defence lawyers believed that the account of events given by the accused was not all that unusual and certainly not that unbelievable, they also believed that it would be difficult to explain in court the divergence between the versions of what happened. As one lawyer noted, "what is true does not matter in court, but rather what is proven" (D2). According to the defence lawyers interviewed, it is far easier for the Crown to prove an Aboriginal male attempted to rob a gas station while high on sniff than it is for defence counsel to prove that three white males intentionally assaulted a man because he was an Aboriginal.

One possible strategy suggested by defence lawyers would be to look for contradictions between the witnesses' statements. As one defence lawyer bluntly stated, if the complainant and the witnesses are not telling the truth "you will find the devil in the details" (D12). If the accounts are not consistent, a defence lawyer can attack the credibility of the complainant's and the witnesses' accounts of what happened. As one lawyer explains:

> You try and work the credibility issue by not attacking necessarily the credibility of each individual person, but by laying before the judge three or more consistent versions of what happens, then you would have a chance. (D10)

Another defence lawyer explained that it would be important to raise any criminal history of the complainant in court to enhance the truthfulness of the accused's statement. This lawyer, however, remains skeptical of the accused's claim. His/her tone is sarcastic as s/he explains the strategy that the complainant's only motivation is racism: "It's hard to imagine that the only potential motivation here is racial; you know, 'All of these

[white] guys are just mean sons of bitches'" (D6). While racism is an angle s/he would have to "play up," s/he is not optimistic that this strategy would be deemed plausible in the eyes of the judge. Rather, it would be a reality s/he would have to create for the court in order to explain their client's actions. Again we can see the influence of neo-conservative values. The accused is simply a victim of his own loss of self-control – evidenced by his use of an intoxicant – not inequality and discrimination.

In contrast, other defence lawyers said that they would create the possibility of a racist attack at the preliminary hearing in their cross-examination of Crown witnesses. One defence lawyer (D11) explained that the cross-examination provides an opportunity to watch the witnesses and complainants answer questions as to their actions towards the accused: did they confront the accused out of racism or honest belief that something bad was about to happen (i.e. a robbery)? Another defence lawyer (D10) explained the rationale for raising the spectre of racism: when accused of being racist, people will become extremely upset and display a level of resentment or hostility. This is advantageous to the defence, as it shows the judge the complainant's potential for violence. Also, allegations of racism might cause a complainant to be more thoughtful or to re-evaluate his situation. The complainant may be more likely to apologize for his actions and back away from his position or willingness to press charges.

Regardless of the strategies that defence lawyers could use to challenge the credibility of the complainant, the credibility issues presented in the second mock police report focus primarily on the accused because of the racialized presuppositions that lawyers openly acknowledge as having a serious impact on the outcome of the case. The

labelling of the accused by the police as a 'sniffer' also constrained the strategies of defence lawyers.

Sniffing

'Sniffing' is the inhaling of solvents, such as glue, paint thinners and gasoline. These products are not controlled substances and, therefore, are relatively inexpensive and readily available. For these reasons, solvent abuse is most common amongst young people and people living in poverty. [13] In Canada, no national studies have been conducted to determine the prevalence of solvent abuse. However, a pilot study in Winnipeg found that 90 percent of inhalant users in the inner-city are Aboriginal men and women (Addictions Foundation of Manitoba, 2001a). By contrast, only 11 percent of young people attending high school in Winnipeg reported using solvents (Addictions Foundation of Manitoba, 2001b). Those who use solvents are likely to be younger, homeless Aboriginals with criminal records for assault and/or histories of physical or sexual victimization (Addictions Foundation of Manitoba, 2001a). A study by the Texas Commission on Alcohol and Drug Use (1997) found that 75 percent of deaths of solvent users were caused by self-inflicted violence or assault; and that solvent users have been found to be physically and sexually aggressive. How do these social characteristics of solvent users influence the strategies of lawyers in cases such as that described in the second mock police report?

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13 A study in the U.S. (Texas Commission of Alcohol and Drug Use, 1997) found that sniffing is most prevalent amongst indigenous youth. Hispanic and American Indian

In the second mock police report, the accused's lack of credibility is linked to how the police have characterized him in their statement as a "sniffer." The actions of the complainant and the witnesses are not viewed by the lawyers as being problematic (assaulting the accused and referring to him as a "dirty fucking Indian"). Rather, it is the accused's actions that are at issue. As explained by several lawyers:

> This guy's got trouble; he is not likely to be believed that people are just assaulting him for no good reason" (D12).
>
> This is a difficult case because often sniffers are unbelievable. So when you have a case like this, the Aboriginal-sniffer guy versus the white storekeeper,[14] you have a real upward fight. (D1)
>
> My overall impression when I look at this is to say that some Native walked into an establishment and others attacked him just because he was Native. That would be an awful lot to ask the court. (D12)
>
> I am not saying this to suggest that it does not happen in this world - but to say that there was an unprovoked attack would be really hard to advance. (D11)

As the defence lawyers explain why the accused would not have any credibility, certain typifications begin to emerge that illustrate how racialized and class-based presuppositions influence their strategies. The accused is described as an "Aboriginal-sniffer" whereas the complainant is a "white storeclerk." Although the defence lawyers claim that they are constrained by how the Crown and the court will likely view the

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youth are twice as likely to use solvents than African American youth.

14 Note how the status of the complainant in the mock police report is inflated by the lawyer, from that of part time gas jockey to storekeeper. This clearly illustrates how the common sense thinking of lawyers re-structures the facts of the case. Even though it is not in his/her client's interest to do so, the defence lawyer contributes to the accused's lack of credibility by positioning him as even more marginalized than the complainant.

accused, defence lawyers seem to hold the same perception of the accused. As a result, few lawyers would pursue a trial to show that the accused was the victim of a racist attack. Instead, the accused's behaviour is understood as an over-reaction to the situation:

> D9: It is just I would think a judge would more likely believe that this guy is high on something; that he is overreacting rather than everybody else over-reacting against him. And that could be because he is Native.
>
> GB: Is it the sniffing?
>
> D9: It really is. You have got some sniffer in the store. Who are you going to believe: the customers or a sniffer?

In contrast, only two defence lawyers claimed that the labelling of the accused as a sniffer by police is a valuable defence strategy. In their experience, sniffers are quite passive in their demeanour and are actually good witnesses when testifying on the stand. They are not argumentative or aggressive, which goes to show that they were afraid of being attacked. As well, the characterization of the accused as a sniffer can be used to challenge the capacity of the accused to understand his rights, therefore increasing the likelihood of having the charges against him dropped.

> If that person is drunk or stoned, the statement would not be admissible in court because if you are drunk or stoned you are not going to be able to appreciate your rights. (D4)

One defence lawyer explained that the Crown would counter this strategy by having a police officer testify that the accused was not heavily intoxicated when he was arrested. The police have a vested interest in minimizing the degree of intoxication. They want to reduce the likelihood of having the charges dropped on the basis of voluntariness (the accused could not give a voluntary statement, as he did not understand his rights due

to his intoxication). Strategically, it is useful for defence lawyers to put police in direct contradiction with their own testimony by questioning the police on when and where the statement was taken. Defence lawyers have come to expect that the police will testify that the accused was sober enough to appreciate his rights. This is in contrast to witness statements declaring the accused was "high or stoned and acting like wild man." Therefore, police testimony could be used by defence to argue that the complainants are wrong, mistaken or lying.

Interestingly, only one defence lawyer (D5) claimed that the characterization of the accused as a 'sniffer' is irrelevant until the time of sentencing (as a mitigating factor). S/he explained that the issue of intoxication would be ruled inadmissible at trial, as it is only considered a defense in cases of specific intent offences. Aggravated assault and assault causing bodily harm are general intent offences, therefore, the intoxication defense cannot be used. This leaves the accused's believability or credibility intact. Overall, however, defence lawyers indicated that their strategies are constrained by the accused being labelled by police and witnesses as a 'sniffer.' Consequently, almost all of the defence lawyers believe they would not be able to successfully convince the judge that the accused reacted violently as a result of being provoked by a racial slur and attack.

Racialized (and Sexualized) Spaces

Razack (2000) claims that where violence occurs contributes to how it is perceived by the police, the Crown and the judge. In the second mock police report, the accused enters a place of business as a racialized 'other.' This 'othering' of the accused – as not being

entitled to occupy certain spaces – is evident in one defence lawyer's understanding of the case. As s/he questions why the accused would want to use a public washroom, D1 frames his/her own perception of the accused using racialized and gendered stereotypes. In the process, s/he views the accused as having transgressed a racialized boundary that separates and defines the 'typical' space for an Aboriginal person.

> I am not sure why (the accused) would want to use the washroom, but when people have been sniffing a lot of times they will do things that do not necessarily have any bad intent whatsoever. But as soon as they are viewed that way, they often are treated much differently than you or I. The fact that he is Native also, in my experience, means that he is going to be viewed differently. People see him as a potential problem instead of the way a white guy the same age who walked in or a white female – you would not have the slightest concern about giving her the key to the washroom. (D1)

Razack (2000) claims that when Aboriginal peoples overstep or transgress a racialized boundary – like entering into a place of business – and engage in violence, it is the act of transgression, not the violence itself, that law seeks to punish. Razack's conceptualization can be taken to mean that the Official Version of Law enables the criminalization of the accused (such as the Aboriginal man in the mock police report). While he is not viewed as credible and trustworthy because he has overstepped the racialized boundary, the white storeclerk's account is to be believed. By legitimating the account of the white complainant rather than the claims of an Aboriginal accused, law reaffirms white spaces as being different from Aboriginal spaces.

The context of the assault constrains defence strategies because it frames or informs how defence lawyers can most sympathetically present their client's actions to other juridical actors (the Crown, the judge and the jury). In the mock police report, the

store clerk occupies a white space that is transgressed by the Indian 'other.' Lawyering strategies that legitimate the claims of the white victim reaffirm the boundaries between white space (e.g. a place of business) and 'other' spaces (e.g. the North End drinking party). Lawyering, thereby, constitutes the accused as a liar who is without entitlement to transgress white spaces.

The Crown case files reveal that the credibility of the accused and the complainant is also affected by where violence takes place. In addition to being racialized, the spatial location of criminal events can also be sexualized. The importance of the context of violence is illustrated in a case of a Caucasian homosexual male accused of assaulting a Black homosexual male (C7). The context of the assault (a public river walkway described by police as a place frequented by homosexual men) is an exploitable resource for defence lawyers as they put forward an argument that the victim precipitated the assault. The significance of the spatial context of the criminal event in terms of how it provides meaning to the quality of the violence as well as the credibility of the accused and complainant comes into view:

> Defence: You were aware that there was somebody murdered in behind that location?
>
> Complainant: Yes
>
> Defence: And this didn't concern you to the point that you maybe took a weapon with you?
>
> Complainant: No (Preliminary hearing transcript, C7)

Crown arguments during the preliminary hearing focused on police evidence of gay magazines and videos seized from the accused's apartment. Defence counsel in this case targeted the complainant's personal life and character, rather than whether he could identify the accused as his attacker.

> Defence: When you went into this area had you consumed any alcohol?
>
> Complainant: No. I had a little bit of marijuana to smoke earlier.
>
> Defence: What quantity did you smoke?
>
> Complainant: Not much, not enough to alter my brain.
>
> Defence: Isn't that the point, to alter your brain?
>
> Complainant: Not it's for relaxation. People do it for different reasons... maybe it makes them horny.
>
> Defence: Did it make you horny?
>
> [...]
>
> Defence: What education level are you at sir?
>
> Complainant: I quit school in grade 9 so I guess grade 8
>
> Defence: Any upgrading from there?
>
> Complainant: No (Preliminary hearing transcript, C7)

This line of questioning is intended to undermine the credibility of the complainant. The complainant in this case alleged that the accused began to attack him with a knife once he refused to comply with the accused's demands for sex. The complainant sustained a serious knife wound to the neck. Police later found the accused's bloodied boots in his

apartment and the complainant positively identified the accused in a photopack. In the end, however, the charges against the accused were dropped. The Crown admits that the complainant had little credibility, describing him in an internal memo as:

> .... a freethinking Rastafarian type (including dreadlocks). Unfortunately he conceded in cross-examination that he had smoked some marijuana. He is brutally honest and lacks any guile – I have no hesitation in accepting that this attack occurred precisely as he says it did. (Memo to Senior Crown, C7)

The defence strategy in this case was to argue that the complainant was attacked by a group of young men or "gay bashers" who, according to police, also frequented the river walkway. The preliminary hearing transcripts show that when the complainant was being cross-examined, he referred to the accused as "they" rather than "he." From this statement, the defence was able to claim that the attack could have involved more than one person, and that the Crown had failed to present enough evidence that the accused was the person who assaulted the complainant. In sum, the defence was successful in this case because s/he was able to convince the judge that someone else could have been responsible for the attack. However, the defence lawyer still chose to emphasize stereotypes of Black culture (uneducated drug users) and homosexuals (promiscuous) to undermine the credibility of the complainant.

Another example of how lawyers choose to emphasize racialized and gendered stereotypes is found in a Crown case file of aggravated assault involving two young men (one described by the police as Mulatto and the other as Metis) accused of assaulting a young Caucasian man at a house party. At the party, "the victim knocked one of the accused to the ground and got on top of him and was punching him in the face when he

was pulled off by numerous people" (Memo to Senior Crown, C6). Following this, a fight ensued amongst several males. The complainant was stabbed several times using a knife and a broken beer bottle. When a defence lawyer for one of the accused is cross-examining the complainant, s/he attempts to raise the racialized context of the fight:

> Defence: Do you recall making the comment when you were inside the house that 'there were too many nips and niggers here for my liking?'
>
> Complainant: No, I do not
>
> Defence: You deny making that statement?
>
> Complainant: Yes I do, I grew up in [an ethnically diverse neighbourhood].
>
> (Preliminary hearing transcript, C6)

The defense strategy is to position the complainant as the antagonist in the fight by raising the possibility that he holds racist opinions. Later, when cross-examined by the Crown as to his comments about who was in attendance at the party, the complainant states: "a lot of my friends are Filipino, black guys. I am not a racist" (Preliminary hearing transcript, C6). The Crown's counter strategy is to present the complainant as friendly towards visible minorities. What is interesting in this case – in juxtaposition with the mock police report – is the strategic value placed on inter-racial conflict. In the case illustrated in the mock police report, the claim of an Aboriginal man that he was defending himself against a racially-motivated assault was deemed to be unbelievable. Yet, in C6, the defence lawyers vigorously pursued the strategy of depicting the complainant as a racist. In these terms, perhaps racist actions on the part of the

complainants work only to the benefit of some racialized accused – those who are non-Aboriginal?

Normalizing Violence: Boys will be boys

In addition to racializing the context of the crime and the accused, lawyering also frames the accused and the complainants within the scripts of masculinity. Carol Smart (1992) claims that law is a gendering strategy that brings women and men into being as legal subjects. In these terms, law does not always work 'for' men. For example, working-class minority men are most likely to be criminalized, whereas privileged white women are the least likely. There are gendered and racialized scripts that law uses to make sense of women's and men's law breaking. In most of the narratives of defence lawyers and in the Crown's case files, men's violence is framed within scripts of masculinity. In the second mock police report, for instance, one defence lawyer (D3) acknowledged the strategic value of masculinity in relaying the view that the complainant could have attacked the accused because he is a young man.

Similarly, in two case files (C9 and C11) in which two Caucasian males are charged with assault with a weapon against other Caucasian males, Crown prosecution strategies rely on stereotypes of masculinity to show the culpability of the accused. Defence lawyers, too, relied on presuppositions of masculinity, but to assert that the assault was victim-precipitated. The stereotypes used are ones that cast young men as choosing to use violence to resolve inter-personal conflict, to establish control and to protect their honour. In one Crown case (C11), a young Caucasian male is charged with

having seriously assaulted another young Caucasian male with a knife in an alley behind a rooming house where both had attended a drinking party earlier. At the preliminary hearing, a witness testifies to overhearing the accused say "I don't have to fight fair, because [the victim] is twice as big as I am" (Preliminary hearing transcript, C11).

The defence in this case counters the Crown's strategy by cross-examining witnesses as to the aggressive character of the complainant. The following exchange raises the possibility that the accused assaulted the complainant because he was afraid of him.

> Defence: Had you seen the complainant drinking before?
>
> Witness: Oh yeah, in fact I threw him out of my apartment not too long ago because he gets very aggravating and agitating. He starts picking on you – like trying to get on your nerves – just trying to see how far he can push you. (Preliminary hearing transcript, C11)

Ken Polk (1994:68) points out that men's violence takes place in very specific social settings. These "masculine contests" are more likely to occur when an audience is present. Although intoxication plays an important role in these contests, Polk suggests that equally important is the social setting where insults are exchanged publicly and men use violence to defend their masculine honour.

In another Crown case file (C9) a young Caucasian male was assaulted by a group of five young Caucasian males over the spreading of rumors about one of the group's members (the accused). Although the accused had an extensive criminal record and the complainant's hand was crushed by blows from a metal bar, defence strategies clearly attempt to challenge the credibility of the complainant by suggesting that "he was looking

for trouble and that his injuries were not all that serious" (Preliminary hearing transcript, C9). This strategy again normalizes the violence between young men as mutually combative and victim-precipitated.

Crown case files reveal other examples of how the seriousness of violence is mediated by gendered presuppositions of masculinity. In the case discussed earlier (C6) of an aggravated assault that took place during a party between a young white male and two other young ethnic minority men, both of the accused pled not guilty, even though the complainant suffered serious injuries and was resuscitated twice due to significant blood loss. The complainant was a young university student who excelled in several sports (such as football and wrestling). He was described in Crown memos as being in top physical shape. That the violence is conceptualized as a 'fight' rather than an 'assault' is illustrated in the police incident report:

> Witnesses claim that the victim and the accused decided to engage in a mutual fight outside. Apparently the victim was winning the fight when the accused pulled a "suplex" move. (Police incident report, C6)

Indeed, witnesses to the event used a sporting analogy in describing the behaviour of the accused and their friends:

> It was an aggressive excitement that is how I would describe it; the whole groups of guys sounded just like a football team like they had just won a game. (Police incident report, C6)

The victim's statement to the police, however, portrays a different account of the violence:

> I got outside, I saw my friend standing there, so I handed him my jacket. Once I had my jacket off I started to punch this white guy. The guy fell to the ground and I was on top of him. The next thing I knew I got a beer

> bottle smashed in my face. All the people around me started to kick me all over my body. I felt a pain in my thigh and could feel blood dripping. I got off the guy but people were still grabbing and punching me. I started to run, I couldn't breath. (Police incident report, C6)

Sociologists and criminologists such as and Robert Connell (1995) and Kenneth Polk (1994) suggest that violence by men is normalized according to scripts of (hetero) masculinity. Violence by men is a means of establishing individual self-worth, protecting one's honour and reputation in response to public humiliation. Men's violence towards other men is likely to occur in public spaces where an audience is present and where there is "social friction" between ethnic groups or gangs (Polk, 1994:75). For example, in one Crown case file (C8), a young Caucasian male is accused of aggravated assault for throwing a wrench at another young Caucasian male over a repayment of a debt. The complainant had punched the accused in the face the day before and the accused had made several threatening phone calls to the complainant that day. When the complainant went outside his house to confront the accused, he was carrying a baseball bat. The accused – surrounded by a group of classmates – hurled a wrench at the complainant's head. The complainant was in a coma for nine days and suffered memory loss.

The defence strategy in this case was to portray the complainant as the instigator of the assault who angrily confronted the accused with a bat because the accused had threatened his mother. The accused is described by defence counsel during the preliminary hearing as being 6'4, weighing 200 pounds and the complainant as 6'7, also weighing 200 pounds. This strategy portrays the complainant as being someone who can 'handle himself in a fight' and suggests that there was a level playing field between the

accused and the complainant. The complainant is further described in the preliminary hearing transcript as a "semi-giant" who had earlier punched the accused in the face without provocation. The doctors who treated the complainant also characterized him as "belligerent" and "rude" (Memo to Senior Crown, C8). In this case, the defence is clearly enabled by the scripts of masculinity. This is illustrated in the preliminary hearing transcripts:

> Defence: When you picked up your bat you were in a bad mood.
>
> Complainant: I was furious
>
> Defence: I take it you didn't take the bat out there to defend yourself; you took it as a weapon.
>
> Complainant: I took it outside to defend my family
>
> (Preliminary hearing transcript, C8)

The Crown strategy was constrained by the script of masculinity played out by the defence. When conducting a direct examination of a witness, the Crown focused on the excessive nature of the violence used by the accused. The witness claimed that the accused "wound up and struck the victim first, and he went down like a log. He went on kicking the accused and his head was going around like a football" (Preliminary hearing transcript, C8).

The memos to the Senior Crown, as well as the pre-trial conference memos in C6 and C8, make no mention of self-defense. Instead, the defence strategy in C8 and C6 appeared to focus on the demeanour and character of the complainant, the lack of credible witnesses and the normative conceptions that the violence between young men is mutual combat. Despite the severity of the injuries and the number of witnesses, the

Crown in both cases was constrained by the lack of credible testimony that identified the accused as the attacker. Both accused young men in these cases were found guilty of a lesser charge; neither was sentenced to any time in custody.

The outcomes of C8 and C6 are even more striking when compared with the outcome of a Crown case involving a young Aboriginal woman charged with aggravated assault. The woman – described in the Crown files as having a "petite frame and weighing 120 pounds" – was found guilty of assaulting a bouncer at a downtown hotel bar. At the time, the accused was leaving the bar along with several others as her male friend had been evicted because of his excessive drunkenness. According to the police incident report, as the accused was being escorted out the door by a bouncer, the accused "lunged at [another] bar staff person with a knife and struck them (sic) in the right front shoulder" (Police incident report, C10). In response to the stabbing of the staff person (the complainant), the first bouncer then kicked the accused in the lower back and stepped on her hand to force her to release the knife. The complainant received a puncture wound to the shoulder, which required seven sutures to close. Under direct examination by the Crown, a witness describes the stabbing incident, referring to the accused as a "bitch" or the "Indian girl" (Preliminary hearing transcript, C10). He goes on to say that she was "strung out on heroin or something ... because she did not let go of the knife and I stepped on her hand about ten times" (Preliminary hearing transcript, C10).

Contained within memo to the Senior Crown is a description of the complainant as "an impressive witness and although built like a proverbial brick outhouse he comes

across as quite mild mannered and very articulate." The other witness is described as follows: "this is the best friend of the other complainant; they both look like similar bookends … he has a down homey style about him that might endear him to certain justices" (Memo to Senior Crown, C10). The defence strategy in this case was to suggest that the complainants used excessive force against the accused and tried to provoke the accused.

Defence:	What is the nature of your job training to be a bouncer?
Complainant:	Well, you have to stop fights and you have to keep control of people. People that are too drunk, you have to ask them to leave. Sometimes people get violent and that is why bouncers are usually larger people, so we can intimidate them in a way.
Defence:	Why did you push the accused?
Complainant:	It wasn't a push. I put a little bit of pressure and gently nudged her out the door.

(Preliminary hearing transcript, C10)

[….]

Defence:	So you moved behind her as she was being distracted by the other bouncer; then what happened?
Witness:	I kicked her in the back
Defence:	Now is this in the midback or lower back?
Witness:	Right dead center
Defence:	And you indicated that at the time you were wearing steel toed boots?
Witness:	Yes
Defence:	Can you describe the kick?

Witness:	I've kicked people before and I have knocked them out cold with one kick. I know the strength of my legs. There is no way that she should have been able to withstand the kick that I gave.
Defence:	So you put a lot of force into it?
Witness:	Yes I did. (Preliminary hearing transcript, C10)

Despite the petite stature of the accused, the defence in this case was not successful in convincing the Crown or the judge that the accused had reacted out of fear of the complainant. The Crown successfully claimed that the accused was dangerous because she was not subdued by the witness kicking her in the back or stomping on her hand. The Crown remarked in the sentencing submission: "the extent of her rage is seen by degree of force required to disarm and restrain her, obvious from the witnesses she intended to harm not only the victim but anyone who stood in her way" (Sentencing hearing transcript, C10). The accused pled guilty to aggravated assault and was sentenced to twenty months incarceration and one year supervised probation with orders to undergo anger management counselling.

How can we make sense of the sentencing disparities between these three cases (C6, C8 and C10)? Sentencing outcomes are most affected by the accused's prior criminal record, especially for violent offences (Roberts & Cole, 1999). The woman accused of aggravated assault in C10 had a criminal record of previous charges for assault with a weapon and aggravated assault. The one young man accused of aggravated assault in C6 also had previous records for assault and assault causing bodily harm, yet was found guilty of common assault and was fined. The accused in C8 had no prior

criminal record and was convicted of a lesser charge of assault and was fined. The sentencing outcomes in the Crown cases C10 and C6 – regardless of similar criminal records – remain vastly different. To better understand this disparity, it is important to consider how typifications of the accused, the complainant and the witnesses may have resulted in a more punitive sentence for an Aboriginal woman than young white men.

The sentencing outcome in the C10 reflects a myriad of issues, including the woman's previous criminal record, the strategies of lawyers that emphasize the stereotypes of Aboriginal women and inner-city violence, as well as her class position. As an Aboriginal woman, the accused in C10 lacked socio-economic resources that could have enabled an alternative, non-custodial sentence. Borrowing from Rose (2000: 336), it is possible that incarceration of an inner-city Aboriginal woman (and not the young white men in cases C6 and C8) is used to manage those individuals who are perceived as impervious to the new morality of self-control. Yet, gendering strategies also come into view. The Aboriginal woman in this case received the most severe disposition across all of the cases of assault described in this chapter. Yet, the extent of the victim's injuries was the least severe. Kline (1994:458) claims that in law, ideological representations of Aboriginal peoples continue to be "constructed, reproduced and reinforced," suggesting that the Aboriginal woman's violence in this case is made sense of under law according to her "Indianness"; her strength and ability to withstand pain makes her appear to be uncivilized and savage. At the same time, however, she is described in court by the witness and complainant as "a bitch" – an intentionally gendered language that assigns a

devalued status and normalizes the violence against her by the complainant and the witness.

Concluding Remarks

Earlier in Chapter Four, the racialized and class-based stereotype of the "drunken Indian" was found to influence the strategies of lawyers in cases involving Aboriginal women accused of lethal violence. This chapter has examined the strategies of defence and Crown lawyers in cases of aggravated assault involving young white and Aboriginal men and one Aboriginal woman. From the oral and textual narratives presented, the "drunken Indian" remains a pervasive typification of Aboriginal men and women accused of violence. In cases involving non-Aboriginal men, scripts of (hetero)masculinity are relied upon to normalize male violence as sport-like, mutually combative or victim-precipitated.

The second mock police report described an Aboriginal man – labelled by the police as a 'sniffer' – who is charged with assaulting a white male gas-bar attendant. Although the accused claims to have been defending himself from being attacked by two white males who called him a 'dirty fuckin' Indian,' interviews with defence lawyers revealed that the accused would likely be convicted because the judge would not accept his story of a racial attack as credible. All but one of the twelve defence lawyers interviewed stated that they could not successfully argue self-defense in this case – despite the accused's account – because he is stigmatized as a 'sniffer' and an Aboriginal man.

Lawyering strategies in this case appear to be more structured by the common-sense thinking of defence lawyers than by the principles of fundamental justice. The credibility of the accused is determined according to racialized presuppositions that link Aboriginal young men with sniffing and violence, and white young men with respectability and self-control. Defence lawyers appear to recognize cases that the Crown would likely prosecute, such as an assault of a white store clerk by an Aboriginal man. In this case, the likely conviction of the accused is linked to an Aboriginal man's lack of credibility, not necessarily his criminality.

In contrast with the mock police report wherein the accused had little credibility, in a case involving a Black homosexual male seriously assaulted on a river walkway by a white homosexual male, the Crown dropped the charges against the accused, in part, because of the lack of credible testimony by the complainant. The complainant was portrayed as a "free thinking Rastafarian type – including dreadlocks – who had smoked marijuana" (C7). Despite physical evidence that suggested the accused had seriously assaulted the complainant, the defence was successful in discrediting the credibility of the complainant by focusing on his lack of education and unemployment. In these terms, we see how law does not always work for men. Rather, law works to the benefit of white, heterosexual and employed men and women.

In contrast, the Crown is successful in its prosecution of a petite Aboriginal woman who is charged with aggravated assault after she cut the arm of a bouncer at a bar with a knife. She is described in court by witnesses as a "bitch" and an "Indian high on heroin" who can withstand brutal kicks to her back. Despite the overpowering strength of

two large men trained to physically confront unruly bar patrons, the Crown is able to convince the judge that the accused is "an intensely angry person who is a danger to not only those who she knows, but also to complete strangers" (Memo to Senior Crown, C10). The accused in this case received the most punitive sentence of all of the cases examined, further demonstrating that Aboriginal women's violence – when it is directed towards white men – is viewed as being more deviant than violence between men. The sentencing outcome in this case (20 months incarceration) also expresses the influence of economic marginalization in terms of the accused being unable to rely upon community supports or employment to serve her sentence in the community.

The Crown cases also suggest that lawyering is framed by scripts of masculinity that mark intra-gendered violence as a typical expression of male aggression. Male violence is viewed by the court as a "normal crime" (Sudnow, 1965) in that young men must defend their reputation and honour. In both cases involving two young men accused of aggravated assault where serious life threatening injuries resulted (C6 and C8), the Crown agreed to a resolution agreement in exchange for a guilty plea to a much lesser charge of common assault. The defence strategies in these cases emphasized the size and demeanour of the complainant so as to suggest that the violence was victim-precipitated. In C6, the complainant was a football player described as being in top physical shape, whereas in C8 the complainant is described as a "mini-giant." This case suggests, as Polk (1994) and other criminologists have found, that male aggression is a "masculinity contest" that is more likely to escalate in public settings. Lawyering strategies and lenient

sentencing outcomes in this case suggest that the Official Version of Law accepts such explanations of male violence as reasonable.

The next chapter examines the strategies of Crown Attorneys and defence lawyers in a case involving a teenaged woman who accuses her mother's boyfriend of sexual assault. Over the last two decades, Canada's sexual assault legislation has undergone important changes that have had a significant impact on the practice of law. These reforms have been intended to constrain the strategies of the defence so as to protect women's equality rights. The aim of the next chapter is to assess whether these reforms have indeed had an impact upon the conduct of lawyers in sexual assault cases.

Chapter Six

The Practice of Law in Sexual Assault Cases: Whacking the Complainant ... Still?

In 1988, at a seminar for criminal defence lawyers, an Ottawa lawyer laid out his strategy for winning a sexual violence case:

> 'Whack the complainant hard' at the preliminary hearing, he advised. 'Generally, if you destroy the complainant in a prosecution,' he said, 'you destroy the head. You cut off the head of the Crown's case and the case is dead.'You've got to attack the complainant hard with all you've got so that he or she will say: 'I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge.'(Schmitz, 1988:22)

This now infamous quote has in many ways come to define the practice of law in sexual violence cases. In sexual assault trials, 'whacking the complainant' refers to an array of strategies used by defence lawyers to undermine the character and credibility of the complainant so that she is unwilling to testify against the accused.

As David Brereton (1997) points out, the adversarial structures and processes of any criminal trial require that lawyers use tactics aimed at undermining a complainant's credibility when conducting a cross-examination. Nevertheless, while the credibility of the complainant is a key issue in most criminal cases, it is especially so in those involving charges of sexual assault. One reason has to do with the context in which sexual violence is most likely to occur. Because sexual assaults are more likely than other offences to take place in private (and therefore without the corroborating or confirmatory evidence of witnesses or bystanders) the complainant is the Crown's key witness to the charge. Another reason has to do with the sexual nature of the violence that is the defining feature of the charge. It is here where cultural presuppositions – especially those concerning

women's (and men's) sexuality and character – have historically informed the practice of law.

Feminists have long argued that the laws concerning rape and sexual assault have been framed by mythologies that normalize women as liars and sexual temptresses (Busby 1999; 1997; Lees 1997; Gelsthorpe & Morris 1987; Smart 1989). Drawn from a wider patriarchal culture, these rape myths have played a significant role in Canadian jurisprudence. Elizabeth Comack (2000; 139-142) provides an overview of rape myths and their cultural meanings:

i. *Rape is impossible*: Anatomically women cannot be forced into sex, just like "you cannot thread a moving needle."

ii. *Women want to be raped*: Women ask to be raped by the way they dress or their behaviour (hitchhiking or going to bars).

iii. *Rape is a sexual act*: Rape is the outcome of a man's natural impulses once a woman has turned him on.

iv. *No means yes*: When women flirt or act precociously they really want to have sex, whether or not they say no. Women will tease men into thinking that sex is okay.

v. *If yes to one then yes to all*: Unless women are virgins, married or celibate before they were raped, they consented to sex.

vi. *Women cannot be trusted*: Women make false accusations and blackmail past lovers.

vii. *Rape doesn't really hurt anyone*: Unless a woman has been physically assaulted and injuries are visible, the rape was not that serious.

The influence of these stereotypes upon the legal process has historically been apparent in both legal doctrine and strategies utilized by lawyers in court. For instance, reflecting the myth that 'women cannot be trusted,' prior to 1983 in Canada the legal

doctrine of recent complaint was founded on the notion that the sooner a woman reported an assault, the more likely her claim was true. As well, defence lawyers regularly questioned complainants as to their sexual history. Playing on myths like 'no means yes' and 'if yes to one, then yes to all,' this strategy was aimed at raising a reasonable doubt about a woman's character and her claim of non-consent to sex.

Since the 1980s, Canadian feminists have endeavoured to realize reforms to the rape laws that would constrain the influence of rape myths on the practice of law. Largely as a result of this pressure for reform, the last two decades have witnessed a series of amendments to the sexual assault laws. In 1983, Bill C-127 was introduced. The rape laws were repealed and three new sections were added to the offence of assault: sexual assault; sexual assault with a weapon, threats to a third party and bodily harm; and aggravated sexual assault. Under this new legislation, both men and women could now be charged with sexual assault, husbands could be charged with sexually assaulting their wives and vaginal penetration was no longer a necessary element. The doctrine of recent complaint was dropped and the corroboration requirement was removed. Limitations were placed on the ability of defence lawyers to ask questions about the sexual history of the complainant and the public disclosure of the identity of the complainant was restricted. These reforms were designed to acknowledge rape as a violent crime. By "shielding" women from the humiliating experience of being asked questions as to their sexual history, the aim was to reduce the trauma experienced by the victim during the

trial. As well, it was hoped that the reforms would increase the reporting rates of sexual assaults.[1]

Further amendments were made to the sexual assault legislation in 1985. These changes were passed to enable greater protection of child complainants in sexual assault cases. The amendments attempted to address the power imbalances between adults and children in terms of age, dependency and trust that would prohibit a young person from resisting unwanted sexual contact. In short, a young person under the age of 12 cannot consent to sexual intercourse, nor can a young person between the ages of 12 and 14 consent unless the accused is between the ages of 12 to 16, is less than 2 years older than the complainant and is neither in a position of trust or authority toward the complainant. As well, a young person between the ages of 14 and 17 cannot give consent if an accused is in a position of trust or authority. Under these amendments, an accused cannot claim that s/he mistakenly believed the complainant was over the age of fourteen.[2]

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1 Roberts (1994) shows that reporting of sexual assaults increased an average 12 percent a year between 1984-1988. However, in 1994 the National Survey on Violence Against Women showed that only 6 percent of all sexual assaults were reported to the police.

2 Regardless of these changes to protect child complainants, research indicates that sexual assault cases involving children continued to be marked by issues of the child's credibility. For example, Rita Gunn and Rick Linden (1994) studied the processing of child sexual abuse cases in the City of Winnipeg between 1985 and 1988. The authors noted that police files of child sexual abuse allegations contained references such as "not virgin/chaste," "prostitute," "previous sex with offender" and "ulterior motive." Other data collected as to the nature of the sexual assaults against children indicated that assaults involving penetration and/or medical treatment were more likely to result in charges being laid. In addition, interviews with Crown Attorneys identified the credibility of the child as well as the lack of corroborating evidence as the key obstacles to successful convictions (Gunn & Linden, 1994).

The 1983 and 1985 amendments to the Criminal Code were met with staunch criticism by the Canadian Bar Association. The professional association of lawyers argued that by removing the corroborating evidence rule and constraining the use of the complainant's sexual history to challenge her credibility, the 1983 law was a violation of the rights of the accused protected under the *Charter of Rights and Freedoms*. [3] The crux of the Canadian Bar Association's critique of Bill C-127 was that its 'rape shield' provisions contravened sections 7 and 11 of the *Charter*, which guarantee an accused's right to a fair trial and to present a full defence and answer to a charge.

Ultimately, on appeal from lower court rulings that convicted two men of sexual assault, a constitutional challenge to the 1983 rape shield provision was launched. These two cases were heard together by the Supreme Court in 1991. In *R* v. *Seaboyer and Gayme* (1991), defence counsel argued that the two accused men had made the honest mistake of assuming the consent of the complainants because of what was known of the young women's lifestyles. Defence lawyers claimed that the accused should be able to enter in as evidence records demonstrating the complainants' sexual proclivities, as this evidence was the basis of the accuseds' mistaken belief that the complainants had consented. This evidence was ruled inadmissible by the lower court trial judge and both of the accused were found guilty of sexual assault. The decisions were eventually

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3 These sentiments were echoed in a study by Scott Clark and Dorothy Hepworth (1994:126-127) examining the effect of the 1983 amendments upon sentencing in sexual assault cases. The authors found that across Canada, defence lawyers viewed the Crown's position as greatly enhanced because of the inadmissibility of sexual history of the complainant and the relaxation of the corroboration requirement. However, sentencing data showed conviction rates to be *lower* on average after the reforms were implemented.

appealed to the Supreme Court of Canada where the convictions were overturned on the basis that section 276 (inadmissibility of the complainant's sexual history with the accused and others) of the Criminal Code denied the accused the right to present all evidence necessary to put forward a complete defense. The Court ruled that, indeed, section 276 of the Criminal Code did contravene the *Charter*. As a result, the rape shield provision was struck down. Common law was refashioned, leaving it up to lower court trial judges to determine the admissibility of evidence pertaining to the complainant's sexual history.

The heated debate and public pressure which followed on the Supreme Court's decision led the federal Department of Justice to introduce Bill C49 in 1992. The new provisions were intended to accomplish two main goals. First, section 273 outlined the conditions under which consent for sex can be obtained. Second, section 276 aimed to minimize the viability of the mistaken belief defense in sexual assault cases that rested upon the rape myths that a complainant is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience. At the same time, the proposed revisions were to allow trial court judges to assess the relevance of evidence other than that which was intended to mislead the court with discriminatory stereotypes or rape myths.

Since 1992, the rape shield provision of Bill C-49 has been challenged as unconstitutional on the ground that it continues to violate sections 7 and 11 of the *Charter* (for example, *R* v. *Darrach* and *R* v. *Ewanchuk*). The basis of such challenges is that the accused in a sexual assault case is not entitled to the same rights as are persons

accused of other crimes because of the unique evidentiary tests that are imposed by section 276. In response to Bill C-49, defence lawyers turned their attention in earnest to the use of the complainant's confidential records, such as third party evidence (e.g. confidential records from therapists) and confidential records (e.g. the complainant's personal diaries). The use of confidential documents and third party records in sexual assault trials is a strategy intent on undermining the credibility of the complainant and thus the Crown's case against the accused. Although the practice of introducing the complainant's private records was initiated by defence lawyers as early as 1988, it became more common in sexual assault trials after the passing of Bill C-46 in 1992 (which placed constraints on the questioning of complainants as to their sexual history). [4] In 1995, the Supreme Court of Canada ruled in *R.* v. *O'Connor* that the entering of private records as evidence was an acceptable practice in sexual assault trials. Moreover, the Crown had a duty to ensure that such evidence was disclosed to the defence. The majority of the Court ruled that section 7 and 11(d) of the *Charter* (the right to a fair trial and to present a full defence) required that the Crown obtain all documents, including privileged communication records (such as psychiatric reports) of the complainant. These documents were to be made available to the defence for the purposes of discovery.

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4 This strategy was enabled by the decision in *R.* v. *Stinchcombe* (1995), in which the Supreme Court reinforced the Crown's obligation to disclose. The Court ruled that the Crown had to release private records to the defence and not withhold it for the purposes of tactical advantage. In reference to the production of private records in the possession of third parties (other than the Crown), the Court held that "the onus should be on the accused to satisfy a judge that the information is likely to be relevant"; that is, the release of such documents must be of likely relevance and cannot be a "fishing expedition."

Critics of the *O'Connor* decision have pointed out that the practice of seeking private records is most common in sexual assault cases and most often at the request of defence lawyers (for the purposes of undermining the complainant's credibility and character and her motive in alleging the accused sexually assaulted her). Thus, private records have not been used to establish the competence of the complainant (that is, to assess her cognitive ability to understand and participate the proceedings). The seeking of private records is aimed at undermining *women's* credibility, specifically. In these terms, the *O'Connor* decision discriminates against women's equality rights (Busby, 1997:152). Such uses of third party private records include establishing inconsistencies in a complainant's statement to police and her testimony in court. As well, counselling records indicating a complainant's self-blame following the attack, having second thoughts about laying charges and stating that she did not strenuously resist the attack, can be used effectively in the courtroom to suggest that the complainant is being prompted by her therapist to claim that she was sexual assaulted or that she did consent to sex with the accused. Other uses of third party records in sexual assault cases have been to introduce evidence that the complainant has been sexually abused in the past or, more importantly, she has made allegations of sexual abuse about other people. This type of evidence enables the defence to suggest that the complainant is not credible as she likely "has a disordered sexual perception" or "comes from a dysfunctional family and therefore would have a tendency to lie" (*R.* v. *Darby*). [5] In short, confidential records have emerged as a potent defence strategy in sexual assault cases for 'whacking the complainant.'

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5 Again, as Busby (1997) points out, given the prevalence of sexual abuse in the lives of

As discussed in Chapter Two, the emphasis on the rights of the accused characterizes the adversarial nature of law. In this way, the lawyering strategy of 'whacking the complainant' is a necessary part of determining the truth as is required under the rule of law (McBarnet, 1981). Moreover, it is contrary to the principles of fundamental justice for defence counsel to *not* challenge the credibility of the complainant, as this contravenes the accused's right to a fair trial. By contrast, the Crown is prohibited from undermining the credibility of the accused, but rather must function as a minister of justice, presenting all of the evidence to the court and having no vested interest in obtaining a conviction, only the administration of justice (Smith, 1989; Proloux & Layton, 2001). The Crown also faces constraints as to how the court assesses the reliability and competency of the complainant to tell the truth in court. This has particular bearing on the Crown's case against the accused in a sexual assault case because often the only evidence against the accused is the complainant's account. Despite the formal changes in law that have occurred over the past twenty years, women's credibility continues to be sexualized – unlike any other criminal case. The question remains, then, as to whether rape myths continue to shape the case-building strategies of defence lawyers and the extent to which Crown attorneys are constrained in their prosecution of sexual assault cases.

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women, the use of third party records by the defence to undermine the complainant's credibility discriminates against women-as-a-group. Moreover, it doubly disadvantages Aboriginal women and institutionalized women who are vulnerable to sexual exploitation. These women are also more likely to have many official records kept about them and thus, far more material to be used against them.

The aim of this chapter is to determine whether reforms in the area of sexual assault legislation have had the intended effect of constraining the influence of rape myths upon how a young person's credibility is determined in sexual assault cases. Do defence lawyers continue to 'whack the complainant' using rape myths to undermine the credibility of the complainant? Are Crown Attorneys still constrained by the mythologies that frame a young person's credibility when s/he claims to have been raped? To address such questions, interviews with defence lawyers were guided by a mock police report outlining a complaint of sexual assault by a young Caucasian woman against her mother's Caucasian boyfriend. The aim was to unravel how defence lawyers work within legal doctrines to undermine the credibility of teenaged and child complainants. In addition to the twelve oral narratives of defence lawyers, nine Crown case files were selected on the basis of similar case facts as those reported in the mock police report. Case files C12, C13, C14 and C15 each involve a child complainant sexually assaulted by a male relative; C16, C17, C18 and C19 involve women accused of sexually assaulting male and female children; and C20 is a case of a Caucasian man accused of sexually assaulting several teenaged Aboriginal female and male prostitutes.

The findings of interviews with defence lawyers suggest that defence lawyers are aware of the stigma attached to cases involving young complainants. However, while defence lawyers appear to possess agency in terms of their cross-examination strategies so that the complainant does not have to be re-traumatized by the trial process, most defence lawyers subscribe to the adversarial process of 'whacking the complainant.' Defence lawyers frame the motives of complainants in sexual assault cases with

presuppositions of young women as 'vengeful' and 'attention seeking.' As well, mothers of teenaged sexual assault complainants are cast as 'blameworthy' and false accusations are attributed to 'bad therapy.' Crown counsel case files also indicate that rape myths are used by defence lawyers to 'whack the complainant' in sexual assault cases involving children, especially teenagers.

Mock Police Report 3: Sexual assault

The complainant (Caucasian girl, age 16) disclosed to her school physical education teacher that she had been physically and sexually assaulted at home by her mother's boyfriend (Caucasian male, age 45). The police were contacted by the teacher after the young girl stated to her that she was having problems with her mother's fiancé who had just moved into the home. The complainant stated that the accused was always coming into her room at night and she could not go to sleep because she was afraid of what would happen to her if she did.

After taking the complainant's statement of two incidents that involved her breasts being fondled and being forced to perform fellatio on the accused, the police attended the restaurant owned by the accused. He was escorted to the Public Safety building and formally charged with sexual assault. The accused denied any charges of sexually assaulting the girl, stating "the little whore has been nothing but trouble for me and her mother ever since I moved in, always looking for some way to get her mother angry at me; she's the one who is always coming on to me." When asked by the police if the accused had sexual contact with the complainant, the accused stated that she had offered to give him a blowjob (which he accepted) but he had never slept with her. "Anyway, it was all her idea in the first place."

A doctor's examination of the girl indicated that she had been sexually active. Police forensic investigators searched the home of the accused and the complainant and took samples of the bed sheets from the complainant's bedroom. There was evidence of semen and blood, although they were watermarked as the sheets had been washed. Police interviews with the mother reveal that the mother believes the fiancé and wants her daughter charged with public mischief.

Social History of the Accused	Social History of Complainant
Age 45	Age 16
Caucasian	Caucasian female
Restaurant owner	grade 10 student

"The Smell of the Case"

All the defence lawyers interviewed stated that this case would be difficult to defend because of the "unseemliness or smell of the case" (D1). Defence lawyers expressed the difficulty of trying such a case because of the stigma of the charges.

> The bottom-line is he is getting blown by his fiancé's daughter. It's a lost cause to argue consent. It is still repugnant. (D1)

> No one likes to believe that 16 year-old girls are going to lie and no one is going to believe this 45 year-old man who gets on the stand and makes these comments. (D2)

> I can't stand these cases. I am reluctant to fight them these days. (D10)

One defence lawyer did comment that s/he is troubled by some of the strategies that his/her colleagues use when cross-examining sexual assault complainants. S/he realizes that some of his/her colleagues continue to 'whack' complainants and that s/he can understand why some complainants would give up rather than face the experience of testifying in court.

> There was a time – and still are times – when defence lawyers would stand up and berate the complainant, especially if they were Aboriginal or disinclined to be very communicative, and would say to them over and over again, 'You are lying, this never happened.' If they did it long enough the complainant will say, 'I lied' just to get out of that situation because it is just so horrible. (D11)

This respondent went on to talk about how difficult sexual assault cases are for him/her personally. Yet, as a defence lawyer, s/he is expected to act in the best interests of his/her

client. As a way of reconciling his/her own moral position with what is expected of him/her professionally, s/he would attempt to defend the accused in a manner that is least difficult for the complainant. As s/he explains here:

> So maybe I should continue doing it that way ... I just couldn't bring myself to do it. I would ask the judge if I could remain seated when cross-examining. You have got to live with yourself, too. I would try to do my job in a more respectful way and try to be more creative and crafty about the cross-examination, as opposed to being belligerent and intimidating. There are probably greater percentages in going about it the more aggressive way than trying to be more respectful. (D11)

Defence lawyers do possess agency in their practice of the law; they can choose to reduce the potential for humiliation of the complainant in a sexual assault trial during cross-examination. However, this individual sense of ethical responsibility seems to contradict wider professional ethics that defence lawyers must "fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which they think will help their client's case" (Canadian Bar Association, Code of Professional Conduct cited in Delisle & Stuart, 1991). The principles of fundamental justice also constrain the agency of lawyers in that the rights of the accused to a full defence and proper legal counsel are ostensibly paramount in the practice of law. As D11 explains, s/he tries to keep in mind that the accused is entitled to proper legal counsel and that the principles of fundamental justice inform the practice of law.

> You do have to say and do a lot of things that you wish you didn't have to, but you try to remind yourself of the principles of the presumption of innocence; that the accused is entitled to a full and complete defence and that he has chosen you because he expects you to say and do everything that he would do for himself if he had the level of expertise required. *So I am constantly trying to hang onto the principles that are far larger than my own.* (D11; emphasis added)

Throughout the interviews, defence lawyers recognized that they tend to be publicly stigmatized by the types of clients they represent, especially in sexual assault cases. As one lawyer stated, "defence lawyers have always been condemned as being uncaring and as being a scourge on humanity – you would just get that from representing the bad guy" (D2). More simply stated by another respondent, "I am not my client" (D1). Another defence lawyer commented that, as a parent of young girls, s/he finds these types of cases particularly repugnant but, nevertheless, would not refuse to represent the accused. Most of the lawyers interviewed appeared to acknowledge that despite their personal feelings towards cases involving sexual violence, their role as defence counsel is to ensure that the accused receives a fair trial in accordance with the principles of fundamental justice.

The role of ethics in defence lawyering also underpinned the discussion of plea-bargaining in sexual assault cases. As outlined in Chapter Two, plea negotiations between the Crown and the defence are a necessary means by which criminal cases are resolved as they limit the number of cases that go to trial and hence lessen the heavy workload of the court. When asked about the role of plea bargaining in sexual assault cases, one defence lawyer explained that s/he is responsible to the courts, the community and to his/her profession, as well as ultimately being the last line of defence for his/her client (D11). Plea-bargaining is a means of reconciling all the expectations of the profession, the courts and the accused. These expectations also give rise to a certain degree of role strain as defence counsel must reconcile what the accused is alleged to have done with his or her right to a full defence as well as the strained resources of the court.

Given the 'smell' of a sexual assault case, it would seem likely that defence lawyers would advise their client to plead guilty rather than go to trial. It was surprising that only one defence lawyer (D1) said that s/he would advise the accused in the mock police report to plead guilty. In contrast, most defence lawyers explained that they would not advise the accused to plead guilty to a sexual assault charge like the one described in the mock police report because of the likelihood that the charges would be dismissed at the preliminary hearing. This sentiment was echoed across most of the interviews with defence lawyers, who had a "wait and see what happens in court" (D2) approach to sexual assault cases. Most lawyers stated they would not advise a client to plead guilty because, from their perspective, the Crown would not be able to make a *prima facie* case against the accused. Defence lawyers stated that in such a case, they could easily undermine the credibility of the complainant. In this way, the likelihood of conviction is affected by the agency of lawyers in terms of their strategies at the preliminary hearing to undermine the trustworthiness of the complainant.

One lawyer bluntly stated that this case should not go to trial because of the lack of evidence. However, since there is – in his/her experience – low corroboration of evidence required for sexual assault cases, the case would probably go to trial.

> I do not think he should be charged in the first place. I would expect an acquittal or maybe a summary conviction for fondling her breasts. It depends on how forceful he was. I have seen fellatio charges on summary convictions, depending on the circumstances and details of events. There is a fine line between indictment and summary conviction. (D2)

Another lawyer claimed that s/he has "done well over a thousand cases of sexual assault and I have fought hundreds of them" (D1) because s/he perceives the level of

corroboration required to secure a conviction in sexual assault cases to be unjustifiably lower than other criminal cases. S/he views the rape shield provision that restricts the use of the complainant's sexual history – as well as the limitations placed on the use of private records as evidence of the complainant's motive or reliability – as seriously eroding the accused's right to a fair trial. [6] As a result, s/he will choose to take on sexual assault cases so that s/he can challenge the rules of evidence in sexual assault trials. This defence lawyer's position reveals the agency of lawyers to resist legislative reforms intended to constrain the influence of rape myths and balance the rights of the accused to a fair trial with the complainant's right to privacy and equality.

One defence lawyer talked about the recent changes to sexual assault legislation and Supreme Court decisions as being a pendulum that is driven by political pressure. For example, D2 noted that the pendulum in the courts has started to swing towards re-establishing the importance of evidentiary tests that have been suspended in the past. From his/her perspective, the rape shield provision – as well as the recent Supreme Court decisions (like *R.* v. *Mills*) – are politically motivated.

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6 The respondent is referring specifically to the Supreme Court decision in *R* v *Mills*. In August of 1995, an Alberta man was charged with sexual assault and unlawfully sexually touching a thirteen-year-old girl. Defence counsel for Mills brought an application for a new preliminary inquiry seeking full disclosure of all therapeutic records and notes relating the complainant that were in the possession of a counselling organization. The Alberta provincial court judge dismissed the application for a new preliminary hearing, but held that the trial could not proceed until the third party records were produced in accordance with *O'Connor*. During this time, Bill C-46 came into force amending section 278, thereby changing the process of disclosure and determination of relevancy. The defence counsel argued that section 278 in Bill C-46 was unconstitutional as it infringes on the defendant's right to a fair trial. In 1999, the Supreme Court of Canada ruled in *R* v *Mills* that section 278 of the Criminal Code does not violate the accused's constitutional rights.

> The pendulum in the courts swings all the time. Because now you have the *Mills* decision and now the pendulum swings another way overnight because that was an evidentiary decision. Suddenly, you are being barred from getting records that you thought you could get before, so now the pendulum is over there. (D2)

This same lawyer goes on to explain that limiting defence counsel's access to evidence will increase the likelihood of appeals and, ultimately, the number of acquittals in sexual assault cases because they are being allowed to go ahead without proper and sufficient evidence. From his/her perspective, restricting the type of evidence that can be entered by the defence (such as private records) will only increase the number of appeals and stays of proceedings in sexual assault cases.

> A lot of historical sexual assault cases were caused by this pendulum swing away from important evidentiary rules. I think the pendulum cannot swing any farther. I think we are going to start seeing it swinging back the other way because there are a lot of acquittals on these cases *because there has just not been enough evidence despite the political pressure for these things to be prosecuted. These cases are being prosecuted not on the basis of ethics that the Crown is supposed to follow, which is the likelihood of a conviction.* (D2; emphasis added)

Interviews with defence lawyers suggest that, for some, their strategies in sexual assault cases are based on a purposeful defiance of legislative reforms that have limited the admissibility of evidence as to the complainant's sexual history or private records. Defence lawyers view their strategies in court as rooted in principles of justice rather than pandering to political interests. These sentiments are similar to those found by Rick Linden and Rita Gunn (1994) when interviewing defence lawyers following the 1983 amendments introducing the rape shield provision. Defence lawyers then, as now, view their role as guided by professional ethics, not partisan interests. Moreover, political interests – such as those that shaped the reforms to the sexual assault legislation – are

believed to have *diminished* rather than enhanced the likelihood of conviction in sexual assault trials because of the low level of corroboration that is required. The low number of convictions in sexual assault cases is understood as stemming from 'bad law' that allows weak cases to go to trial resulting in an acquittal, not from defence lawyers' tactics of 'whacking the complainant' and thus discouraging her from going forward with the charges. However, as we shall see, it is the strategies of defence lawyers and the form of law itself that play important roles in the outcome of a sexual assault trial.

Plea Bargaining

Although the accused in the mock police report conceded to police that he had sexual contact with his fiancé's teenaged daughter, most of the defence lawyers interviewed would not advise their client to accept a plea bargain from the Crown. Defence lawyers appeared to agree that the credibility of the complainant could be undermined during cross-examination at the preliminary hearing. Defence lawyers also recognized that their clients in sexual assault cases oftentimes will not agree to a plea bargain before the trial begins. Most defence lawyers explained that in their experience, persons accused of sexual assault will not agree to plead guilty and will "go to the wall" (D2) on these charges because of the implications of being found guilty of any sexual offence. However, defence lawyers acknowledged that not accepting a plea bargain from the Crown is a risky strategy because if an accused is later convicted, the 'smell' of sexual assault cases often influence the sentencing judge's decision. From the perspective of defence lawyers, if the accused were to be found guilty, the court would likely impose a

lengthy sentence of incarceration.[7]

One defence lawyer explained that in sexual assault cases, the accused often would not accept a plea until the first day of the preliminary hearing when he is exposed to the process. From this lawyer's experience, men who sexually exploit children do not believe that their complainants will testify against them. However, when faced with the trial process, they turn out to be "terrible cowards" (D2) and this is when they become anxious to plead. It is important to consider, too, how defence counsel may encourage an accused's belief that a young person will not testify against her attacker and that there is little likelihood of conviction. By 'whacking the complainant' at the preliminary hearing – undermining her credibility and trustworthiness – defence lawyers can dissuade a young girl from going to trial, resulting in a stay of proceedings against the accused. Therefore, the accused's belief that a young person would be unwilling to testify against him may also be buttressed by the defence counsel's strategy at the preliminary hearing.

Another defence lawyer echoed the sentiment that men accused of sexual assault are likely to claim that the child complainant consented to sex. From D10's perspective, comments like those expressed by the accused in the mock police report ("she's the one who is always coming onto me") are typical. S/he explained that a man accused of sexually assaulting children will often claim the sex was consensual because "it's not his fault he is so attractive; it's not his fault that the girl keeps following him around all the time; and it's not his fault that she comes into his room when he is getting undressed"

7 In contrast to this perception, Canadian Centre for Justice Statistics reports that approximately 57 percent of sexual assault cases result in conviction, and the median sentence length is 9 months (Statistics Canada, 1998).

(D10). S/he points out that these types of justifications are not accepted by the courts in sexual assault trials. However, Crown case files seem to indicate otherwise.

In a case involving a Metis girl who was repeatedly sexually assaulted over an eight-year period by her grandmother's Metis common law husband, the accused made the following statement to police:

> She was always after me; she'd take advantage of me when I was drunk. She wanted me to do those things, like suck her pussy. She wants me to lie on her too. She just lies there with no clothes on. (Police incident report, C14)

Even though the accused had admitted to sexually assaulting the girl, the defence in this case did not enter into plea negotiations with the Crown prior to the preliminary hearing. Instead, the defence cross-examined the police on the statement made by the accused. During the cross-examination, the police officer was asked to characterize the accused's demeanour so as to rationalize the manner in which the accused spoke of the complainant.

> Defence: Officer, you mentioned something about the accused's communication. Is it fair to say Officer that the accused is not a sophisticated individual?
>
> Police: That is correct.
>
> Defence: As a matter of fact, in giving us some of the comments that the accused was making in response to some of your comments or questions, it's fair to say that some of them didn't actually address the question that you had just said to him, is that correct?
>
> Police: I would agree that at some point, the replies weren't what I expected or I thought were inappropriate.
>
> Defence: It's fair to say that for intents and purposes – and I don't think I am going to offend my client by phrasing it this way

– to some degree we could characterize him as being slow witted.

Police: I would say he was slightly below average intelligence. (Preliminary hearing transcript, C14)

By characterizing the Metis accused in this way, the defence deflects attention away from the content of the police statement wherein the accused clearly blames the complainant. The accused's statement to police is deeply enmeshed in mythologies of the rape victim as being a sexual temptress and 'asking for it,' yet these myths are obscured by the portrayal of the accused is slow-witted and unsophisticated, and therefore not as blameworthy. This strategy also normalizes the accused's behaviour according to a script of masculinity that he was powerless to stop himself because of her provocative and flirtatious behaviour. In this way, Smart's (1989) analysis of law as a disqualifier of the victim's experiences of sexual assault and the rape trial as a celebration of phallocentrism comes into view. As Jennifer Temkin (2000:232) points out in her study of rape trials in England, "barristers play to the phallocentric instincts and understandings of jurors and deflect attention away from the behaviour of the defendant himself." This strategy also rests upon the court's racialized view of the accused in that his lack of sophistication is normalized in terms of his "Indianness" (Kline, 1994). The Crown in this case does not challenge this characterization of the accused, further entrenching the racialized presupposition. In these terms, rape myths operate to discredit the complainant while racialized presuppositions work to 'make normal' (Sudnow, 1965) sexual abuse by a Metis man.

Overall, defence lawyers interviewed claim that the likelihood of conviction in

sexual assault cases is often determined at the preliminary hearing. It is not until after the preliminary hearing that defence lawyers will consider entering into plea negotiations with the Crown. The preliminary hearing is recognized by defence lawyers as critical to their client in that it is here where the credibility of the complainant can be challenged to produce a stay of proceedings.

Preliminary Hearing: 'Whacking the Complainant'

The preliminary hearing in a sexual assault case is very important for defence lawyers. Although the preliminary hearing is officially intended for the Crown to present its case for the court to decide if there is a likelihood of conviction at trial, defence lawyers acknowledged that they use the preliminary hearing as an opportunity to assess and undermine the credibility of the complainant. As expressed by one defence lawyer, the outcome of the trial hinges on the complainant, especially in terms of her demeanour in court and on the stand.

> I would expect there would be lots of problems with the girl herself. Reasons why she wouldn't want to come to court; reasons why she would be likely to blow up; reasons why she would decide that she didn't want to communicate and that could involve just sitting and crying in court. (D10)

This quote illustrates how the strategies of defence lawyers are enmeshed with rape myths for attacking the credibility of the complainant; in this case, presuppositions that teenaged girls are emotionally unstable. Such presuppositions influence how the defence counsel will undermine the credibility of the complainant during the preliminary hearing. Indeed, while defence strategies used in other criminal cases often focus on undermining the credibility of complainants (for example, by revealing inconsistent

statements or establishing ulterior motives on the part of the complainant), 'whacking the complainant' in sexual assault cases rests upon the saliency of rape myths.

Defence strategies in sexual assault cases are linked to certain presuppositions about the appropriate age for a complainant in order for him/her to be considered credible. According to respondents, the age of the complainant in the police report prevents the Crown from arguing the seriousness of the offence in terms of "innocence lost" (D2). Her age also makes it difficult for the Crown to build a case against the accused, as the impact of the assault upon a teenager is perceived as less devastating, especially if the complainant has been sexually active in the past. Cross-examinations of a teenaged complainant would also be more aggressive than if the complainant was very young, because a teenager is seen as being able to "handle it" (D1). Defence lawyers bluntly stated that if the complainant in the mock police report had been eight years old, a conviction would be likely.

> If an 8 year old said you did it, then you are in big trouble. But if she is16 and there is no corroboration involved, it makes it a little easier to test the credibility of the complainant. (D1)

Alternatively, defence lawyers perceive sexual assault cases involving child complainants as being easier to prosecute than to defend. This is because defence strategies are constrained by the perception of the court that the defence is re-victimizing the child. Crown files of sexual assault cases, however, tell a different story. Throughout all of the case files that were examined, Crown Attorneys clearly identify the young age of the child victim as the most critical barrier to a successful prosecution as children are oftentimes not permitted to testify. The Canadian Evidence Act requires that the witness

understands the nature of the oath to tell the truth and that the witness be able to communicate in court. These conditions raise serious limits upon the testimony of Aboriginal children from isolated communities. For example, in one Crown file, the complainant was an Aboriginal boy (5 years old) who had been sexually assaulted by a male babysitter (Aboriginal male, 48 years old). The preliminary hearing transcript shows that the child spoke very little English and was confused by many of the questions he was asked. The court ruled that the complainant failed to meet the criteria of the Canadian Evidence Act in that he did not recollect the events clearly, nor did he have the capacity to communicate.

> My observation of the complainant is that he does not understand the difference between telling the truth and telling a lie and, therefore, I hold that he doesn't have the capacity to testify with respect to that. I will not allow him to testify. (Preliminary hearing transcript, C15)

Another example of how the age of the child complainant influences the outcome of a case is found in sentencing submissions. In the case discussed above (C15), defence counsel claims in his/her submission that because of his young age, the impact of the sexual assault on the child complainant will be minimized:

> Defence: I accept the fact that he no doubt will have some trauma, and it will probably last with him perhaps the rest of his life, and if, if there is anything that can be said, it may be that he was so young and that may help to minimize it because perhaps his memory might not be quite so long. *Had he been an older child, it might have had a more terrible effect on him.* (Sentencing hearing transcript, C15; emphasis added)

Ironically, this same lawyer evokes the long-lasting and damaging consequences of sexual victimization on a child to justify his/her client's need for treatment rather than incarceration:

> You see from the pre-sentence report that he, himself, was raped when he was in a boarding school, that this left him with a traumatic emotional scar and he has never sought help for that, and it has obviously affected his life. He himself was sexually assaulted as a child, and now he finds himself before the courts having been convicted of the very same crime. (Sentencing hearing transcript, C:15)

Other Crown case files reveal similar strategies that focus on the age of the complainants as a mitigating factor. For example, in one case, a teenaged male complainant accuses his father of sodomizing him for several years when he was a young boy. The defence suggests during the cross-examination of the complainant that he suffered no long-term effects of the assault as he has been able to maintain a relationship with the accused.

> Defence: And you still visit your father?
>
> Complainant: Once in a while.
>
> Defence: And the two of you don't have any trouble getting along, do you?
>
> Complainant: No.
>
> Defence: I have no further questions.
>
> (Preliminary hearing transcripts, C21)

When interviewed, defence lawyers commented that under cross-examination at the preliminary hearing, complainants often disclose new information about the sexual assault that they had not reported to the police. The complainant is then seen as unbelievable and untrustworthy, therefore the charges may be stayed. One lawyer (D1) did acknowledge that there are legitimate reasons why complainants do not fully disclose what happened to the police in the initial investigation (such as being too embarrassed or having forgotten certain details or not appreciating their relevance). However, s/he

explains that new disclosures at the preliminary hearing leave the court with the impression that the original accusations were not serious enough so the complainant decided to exaggerate or make something up.

> You will often find that the child will say, 'I only told the teacher' except to find out that she has also told a group of friends. The child will say to the teacher, 'this is what happened', then say to the police something slightly different, say to friends something worse happened and a lot of times over the course of time in these things you find that the complaint actually gets worse. It starts off with fondling, and I have had many trials where during the course of the trial the witness reveals for the first time that there was an act of sexual intercourse. The more I press them in terms of whom they told and what was said to each person, the more different versions I get. (D1)

This defence strategy appears to be one of discrediting the complainant by 'mining' her various statements for inconsistencies. Statements given to police and teachers and at the preliminary hearing are compared and contrasted with one another to cast doubt on her credibility and truthfulness. One defence lawyer explained that the preliminary hearing is often where the complainant has to tell her story for the third time (first to police, second to the Crown) and there is a strong likelihood that she would not be able to repeat her story three times without any inconsistencies. Temkin (2000) found similar strategies of "trapping" the complainant by pointing out the inconsistencies in her statements.

A Crown case file indicates another example of how inconsistent statements are viewed by the courts as evidence of the complainant's lack of credibility rather than an outcome of a traumatic experience. In a case file involving three Caucasian children (two girls, ages 8 and 10 and one boy, age 3) who had been sexually assaulted by their Caucasian grandfather, one of the complainants had claimed during the preliminary

hearing that she had been drugged by the accused during the assaults, yet this was not recorded in her statement to police. In a memo to the Senior Crown, the Crown Attorney responsible for the case noted that this disclosure of drugging was a "new wrinkle that poses a very serious problem, and that may very well likely result in a stay of proceedings" (C12). In this way, the rule of law does enable the successful defence of men accused of sexual violence by naming young girls stories 'omissions' and 'inconsistencies,' rather than ways of remembering traumatic experiences. It is important to consider whether such a strategy flows from the adversarial structure and process of the rule of law. In sexual assault trials, it appears that the adversarial process of 'whacking the complainant' is enabled by rape mythologies about young girls as liars who cannot keep their story straight. Although defence strategies of 'whacking the complainant' are expected under the principles of fundamental justice, they are nonetheless gendering strategies that take advantage of rape myths.

Another way rape myths influence the practice of law in rape trials is to suggest that young people have ulterior motives when alleging they have been sexually assaulted. Defence lawyers will endeavour to use out-of-court statements made by the complainant (as well as private records) to establish the complainant's motive for alleging that she had been sexually assaulted. This defence strategy is both rooted in certain cultural presuppositions about young girls *and* enabled by the adversarial structure of the preliminary hearing. For example, defence lawyers suggested in the interviews that young girls claim they were sexually assaulted as they are looking for attention – especially if they are having trouble in school. As well, the lawyers held that a teenaged

girl like the one described in the mock police report is likely to be manipulative or jealous of her mother's boyfriend and looking to undermine that relationship. As explained here:

> There may also be problems at school with incomplete schoolwork or failing grades. These can motivate the complainant to blame her poor performance on the impact of the abuse. (D2)
>
> When disclosure occurs at school we try to analyze what was going on at the time and there are things that commonly occur. There are problems at school, problems in a relationship, problems with friends. Often we find that the complaint corresponds to the complainant being told to get this project done or get this homework done or else you are in big trouble. The explanation then becomes 'I cannot do it because of things at home - I am so upset about being abused.' As soon as that statement is made, the dynamics of the situation at school change completely. (D2)
>
> You will find that the child will tell all of her friends that this has happened and there is a tremendous outpouring of sympathy. So I would want to know what changed for the complainant once the allegation was made. (D1)

Interviews with defence lawyers indicated that in their view, teenaged girls are likely to be troublemakers who lie about being sexually assaulted so as to sabotage their mothers' personal relationships. This conceptualization of the complainant as blameworthy is expressed here as a defence lawyer understands the accused's use of profanity when describing the complainant ("that little whore has been nothing but trouble for me ever since I moved in") as evidence that points to the complainant's character as a troublemaker.

> Leaving aside his choice of words, it points to evidence of a problem between the two of them and his suggestion that she is the one who is always coming onto [him]. (D2)

The complainant's motive to accuse her mother's fiancé of sexual assault was also explained by defence lawyers as being an act of retaliation, not sexual promiscuity; the

complainant might be particularly angry because the accused refused to let her have the car, was disciplining her, etc.

> This is a fairly understandable situation and it's easily understandable. You can imagine if you are sixteen and suddenly somebody moves into the house, maybe your mother has a relationship with the person but you don't. You can understand how that might be viewed as a significant intrusion. (D10)

Crown counsel case files also reflect the rape myths that girls are motivated to claim they were raped because they are looking for attention. In a Crown file of a young Caucasian girl who had been repeatedly assaulted by her Caucasian grandfather, the defence tries to portray her as attention-seeking in his cross-examination.

Defence:	Do you think you have gotten a fair bit of attention by telling the police about what happened with your Grandpa?
Complainant:	No, we get the same amount of attention that we normally do.
Defence:	Did you find that after you talked about these things with adults, the people in your foster home and the police, did you find that they seemed concerned about you, more concerned than usual?
Complainant:	I couldn't really answer that. They are always concerned. (Preliminary hearing transcript, C12)

Several rape myths come into view in the transcripts of this case. First, the defence counsel is attempting to suggest that the complainant has ulterior motives because of the length of time between when the attacks occurred and when they were reported – that is, if anything really did happen she would have called the police sooner. By relying on the notion of recent complaint, defence counsel is able to suggest that nothing happened and the complainant is lying to receive special treatment. Second,

under cross-examination, defence counsel suggests that the complainant is blameworthy for not resisting her grandfather:

> Defence: Did you ever try to make enough noise so that your Grandmother would come in the room and see what was going on?
>
> Complainant: I don't know, I just cried lots. I wasn't trying to get her to come in the room.
>
> Defence: Why weren't you trying to get her to come into the room?
>
> Complainant: Because I was too scared. I didn't know what to do. (Preliminary hearing transcripts; C12)

Although the requirement of corroborating evidence and recent complaint were removed in 1983, the defence lawyering in this case seems to suggest that the courts continue to be influenced by the lack of corroborating evidence (such as crying out or other signs of resistance by the complainant) as well as the timeliness of the complaint. In other words, defence lawyers continue to exploit the mythology of 'real' rape victims. Another lawyering strategy that relies upon rape myths about the irrationality of those who claim to have been raped is to request the disclosure of confidential records.

Section 276 of the Criminal Code limits the use of confidential records of the complainant's personal life. [8] However, regardless of juridical measures, lawyering strategies continue to seek out such information as a means of discrediting the

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8 These records have included "counselling, therapy and psychiatric records, as well as records from abortion and birth control clinics, child welfare agencies, residential and public schools, drug and alcohol recovery centers, other doctors, employers, the military, psychiatric hospitals, the Crown on unrelated charges against the complainant, and personal diaries, reporters' notes, and criminal and Young Offender records" (Busby, 1997:149).

complainant. In discussing the mock police report, several defence lawyers acknowledged that they would make an application to have any therapeutic counselling notes disclosed to establish any irregularity or inconsistency in the complainant's story. Therapeutic records could be justified for the purposes of discovering any inconsistencies in the complainant's testimony (D2).[9] These inconsistencies are key to showing that the complainant is a liar. As illustrated here:

> I would want to do some looking into whether or not she had had any counselling. It says here that she went to the teacher and said things. I would want the teacher's notes. The reason why I make these applications is to see if she has said anything inconsistent with what she said to police. For example, if she said, 'he fondled my breasts' to the teacher and then said 'he fondled my breasts and forced me to perform fellatio on him' to the police, that is something that looks like she is adding to her story to make it sound better. (D2)

Given the role of rape myths and cultural presuppositions of youth and childhood in cases involving men accused of sexually assaulting children and teenagers, it is important to inquire if these same strategies are used in cases involving women accused of sexual assault.

Women Accused of Sexual Assault

In a Crown case file (C16) of a twenty-year old Caucasian woman charged with sexually assaulting her boyfriend's sister (age 12), defence lawyers claimed that the complainant was fantasizing about having a sexual relationship with her brother's girlfriend. Although the Crown asserts (in a memo to the Senior Crown) that the witness is extremely credible,

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9 Only one lawyer (D1) commented that most judges and Crown Attorneys would object to this application because of the recent *R.* v. *Mills* decision that limits counsel's access to

the Crown expects the defence to argue that the complainant has "false memories of those events caused by parents, police and social workers." The Crown also points out in this memo that the complainant has been in counselling since the disclosure to the police. Despite the credibility of the complainant, the accused is acquitted on all charges.

The defence strategy in this case was to portray the complainant as a "daydreamer" who has false memories of being kissed and masturbated by the accused because of suggestions made by social workers and her parents. The complainant in this case was presented to the preliminary hearing judge as someone who was easily manipulated by parents and therapists to believe that she had been sexually assaulted by the accused. Legal scholars have noted that there has been a growing public and judicial interest in 'false memory syndrome' (Busby, 1997). False memory syndrome refutes the possibility that traumatic events such as a sexual assault can be repressed and then 'remembered' several years later. In this view, recalled memories of sexual assault are in fact false memories that are produced as a result of 'bad therapy,' typically feminist therapy. In cases of historical sexual assaults – that is, where the incidents are alleged to have occurred several years earlier – defence lawyers will argue that the complainant was not sexually assaulted, but rather the memories were suggested or 'planted' by her therapist.

Another defence strategy in this case was to claim that the complainant fantasized about wanting to have a lesbian relationship and that sexual contact between the complainant and accused was consensual. To accomplish this, the defence requested that

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the complainant's private records.

the complainant's diary be read in as evidence as to her feelings towards the accused. For example, the complainant wrote: "I miss [the accused] very much. I hope [accused] never goes away. I love her so much" (Preliminary hearing transcript, C16). Of particular significance at the preliminary hearing was the pages of the diary that had been ripped out by the complainant. The defence argued that this act indicated that the complainant had made up the allegations, whereas the Crown claimed that she was "troubled" by what had happened to her.

The mining of the complainant's diary for evidence of lesbian fantasies also signifies an important shift in how defence strategies utilize dominant heterosexual norms to frame sexual contact between two young women as erotic *or* an indication of the complainant's mental health problems. For example, in the transcripts of the police interviews, the accused was asked repeatedly if she considered herself a lesbian. The police insisted that she take a polygraph as to her sexual orientation. This type of questioning was not found in other police transcripts of interviews with men accused of sexually assaulting young boys. Furthermore, in other sexual assault cases involving adult men accused of abusing younger males, defence counsel did not suggest that the complainant was not credible because he had been receiving counselling.

In two other Crown cases involving Caucasian women charged with sexually assaulting children, the Crown commented in both cases (in a memo to the Senior Crown) that the credibility of the children was the critical barrier to achieving a conviction. In both cases, the children's testimony was challenged by the defence under cross-examination. For example, in one case (C17) involving a woman who was accused

of sexually assaulting two young girls (Caucasian, ages 4 and 7), the complainants testified that the accused had asked them to bathe with her and sponge her breasts. The trial took place two years after the alleged incidents had happened and the complainants had difficulty recalling in court what they had said in their statements to the police. The Crown had offered a plea bargain of 4 to 6 months incarceration in exchange for a guilty plea to the charge of sexual interference. However, the accused was acquitted on all charges because the children's testimony was deemed to be not credible.

In the other case (C18), a Caucasian woman (age 31) is charged with sexually assaulting her biological son. The complainant (age 9) is described by a Crown Attorney in a memo to the Senior Crown as a "problem" given the findings of a psychiatric assessment:

> The victim interacted in a silly, immature manner a good deal of the time. He tended to giggle, talk fast, make exaggerated faces and rely heavily on regressive talk in his language. He was cooperative and accommodating during the games in order to prolong play. Despite his superficial playfulness and cooperativeness, he was actually fairly difficult to engage in conversation or interactive play. (Psychological assessment quoted in Memo to Senior Crown, C18)

To compensate for the complainant's lack of credibility in this case, a memo to the Senior Crown shows that the Crown intended to introduce a report of a Child and Family Services worker that described the accused's behaviour "as inappropriate during her visits with the complainant after his apprehension (i.e. wearing low cut see through blouses, kissing on the mouth, etc.)." The Crown's strategy of sexualizing the accused's behaviour was not found in any of the five cases involving men accused of sexual assault. For example, in the Crown case (C14) described earlier (an older Metis man accused of

sexually assaulting his granddaughter), the defence strategy was to suggest that the accused was slowwitted and unsophisticated and, as a result, was less blameworthy. The accused in that case, however, pled guilty and was sentenced to 30 months incarceration. The woman accused of sexually abusing her son entered a plea of guilty to a charge of sexual interference; charges for sexual assault and invitation to sexual touching were stayed for a lack of evidence. She received a two-year suspended sentence. Although sentencing decisions were not available for review and reasons for sentencing are diverse and complex, the disparity in sentences in these two cases suggest some important differences in terms of how the court perceives women and men convicted of sexual assault.

The gendering of women in sexual assault trials also encompasses their roles as mothers of sexual assault complainants. Women as mothers are considered blameworthy for not protecting their children from sexual abuse, as well as for having dysfunctional relationships with their daughters that would lead to false allegations of sexual assault.

Women as Mothers of Sexual Assault Complainants

'Mother blaming' appears as an important subtext of the lawyering strategies discussed in the interviews. The complainant's mother can be a way of deflecting responsibility away from the accused. Indeed, defence lawyers seem to target the mother's lack of intervention as more problematic or blameworthy than the accused's behaviour. As well, Crown case files indicate that the prosecution of the accused is constrained if the mother of the complainant does not support her daughter's claim that she was sexually assaulted.

Case-building strategies of defence lawyers discussed in the interviews were marked by their experiences of routinely seeing bitter relationships between mothers and teenaged daughters. Most defence lawyers indicated that they have found these types of circumstances amongst family members – wherein the mother will often believe the stepfather, even if he acknowledges having sexual contact with her daughter – to be commonplace.

> I would look at whether or not I could show that the relationship between the mother and the daughter was in fact so full of acrimony or whatever else there was to make the position that she is coming onto him a credible one. (D1)
>
> Did the mother ever confront her daughter and do something? (D2)

The mother's testimony that her daughter is lying is also crucial to the plea-bargaining process with the Crown as it challenges the credibility of the complainant. Because the mother of the complainant disbelieves her daughter and claims that she is lying about what happened, the mother would be called as a defence witness to testify against the complainant (for example, as to her possible psychiatric history.) The mother's story is crucial to the defence because it sets up the possibility that the daughter is prone to making up stories or causing problems in the home.

> The mother would be the whole case. You would want to find out if there is bad blood between them and where it comes from. Are there discipline problems, have there been previous problems between them, is there a reason for the girl to make up these stories, is she prone to always tell the truth or is she prone to lie and if she lies does she lie to get herself out of trouble, or does she lie to get other people out of trouble? (D10)

Crown files of cases involving child complainants also indicate that mothers often do not believe their children when they disclose being sexually assaulted. In one case

(C11), [10] two young sisters claim to police that they told their mother that her boyfriend was fondling their little brother whenever they slept over on the weekends. In the memo to the Senior Crown, it is noted that the mother denied that her children ever told her about the assaults. The Crown Attorney assigned to the case commented that this raises a problem for the prosecution in that it diminishes the credibility of the children's testimony and he anticipates that the mother's testimony will be the defence's strategy.

> The children report that they had attempted to tell the mother what was happening; this is denied by the mother. This remains a problem for the Crown in the prosecution of this matter. (Memo to Senior Crown, C11)

In terms of the mock police report, one defence lawyer explained that the mother's claims that her daughter is a liar would not be relevant because the judge could decide that it is hearsay and is inadmissible in court. Another defence lawyer agreed that the testimony of the mother should not be used because it actually generates sympathy for the complainant, not the accused. S/he explained that juries do not like to see mothers abandoning their children. "A lesser experienced lawyer would probably jump at the chance to introduce the mother's testimony, but I would not" (D1). However, other defence lawyers disagreed, claiming the complainant's mother can be used by the defence to prove or disprove the claims the complainant made about incidents in the home that involve the accused. The complainant will be asked in court to describe incidents that occurred with the accused, and the mother can be used to make the complainant out to be a liar.

What will happen is there will be a number of incidents that the girl will

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10 There is no information recorded in the Crown file on this case that identifies the race of the accused or the victims.

> describe in court. The mother will obviously not know any of these because she won't have witnessed any or presumably all hell would have broken loose. (D2)
>
> The girl will say that certain things happened and the mother will be in a position to either corroborate surrounding circumstances like 'Well, we were both home that night' or 'I went out for a while.' (D1)

There appears to be little consensus amongst the defence lawyers who were interviewed as to the mother's role in their case-building strategies. On one hand, the mother's testimony could be used to cast the complainant as an attention-seeking, troubled young girl. On the other hand, the mother's testimony against her daughter may evoke sympathy for the complainant.

The Relationship Between the Accused and the Complainant

The nature of the relationship between the accused and the complainant becomes another focus of lawyering strategies in sexual assault cases, but only in terms of undermining the complainant's credibility and the seriousness of harm suffered as a result of the attack. Although Canadian law criminalizes the abuse of trust and dependency for the purposes of gaining consent, these formal provisions were of little consequence to defence lawyers and were rarely considered by the Crown in the case files analysed.

Under the Criminal Code [section 273.1 (c)], a person cannot consent to sexual intercourse if there is a relationship of trust or dependency. With regard to the mock police report, there was a range of opinions as to whether the relationship between the accused and the complainant was one of dependency and trust. However, all defence lawyers claimed that it could be easily argued in court that there was not a relationship of

trust or dependency between the accused and the complainant, therefore the sexual intercourse was consensual. For example, one defence lawyer explains that from his/her perspective, it is not a breach of trust as the accused had just moved into the house:

> I don't think there is enough of a relationship between the two of them to charge exploitation. I don't know how long mom and the fiancé were together, let's just say he just moved in. It suggests to me that he be not in a position of trust. That is the only avenue to go at. (D2)

Although the legislation formally defines the conditions under which consent cannot be given, defence lawyers reveal how the clarity of the law can be strategically blurred by questioning the definition of 'position of trust.' As illustrated here:

> She is old enough to consent by law so you can *create* a consensual relationship between the two of them or possibly an honest belief that she gave consent on the basis of her behaviour. (D1; emphasis added)

One lawyer claimed that determining if the accused in the mock police report was in a position of trust over the complainant is "such a grey issue" – despite legal reforms such as section 273 of the rape shield provision, which clearly state that consent to sex cannot be given in a relationship of trust and dependency. Instead, lawyers take advantage of specific details of the relationship between the accused and the complainant.

> ....[D]id the accused pay the bills? Does the complainant have a relationship with her biological father, therefore lessening the parental role of the accused? (D1)

And,

> Q: So you would see that as a relationship of trust, or would you fight it?
>
> D11: Oh, I would definitely fight it
>
> Q: Because of the newness of the relationship?
>
> D11: Yeah, exactly

Two defence lawyers, however, did believe that the accused in the police report was in a position of trust as a step parent and that there was no defense to the charge. Surprisingly, however, these lawyers stated that they would not work out a deal with the Crown immediately because it is possible to argue that the accused did not acknowledge his relationship with the complainant as parental. As lawyers walk through the description of the relationship between the accused and the complainant, they rationalize away the position of power held by the accused over the complainant as her mother's fiancé:

> Clearly, this is not a trust situation, number one. Number two, she is sixteen so she can consent to sexual intercourse. It is clear that she is capable of consent and that is what happened. (D2)

The interviews with defence lawyers indicate that much sexual assault legislation is still left to interpretation by the courts and, as a result, unless there is a flagrant violation of trust (such as a case involving a very young child), the Crown must prove that any consent construed by the accused is vitiated by the nature of the relationship between the accused and the complainant. This task becomes more difficult for the Crown if the complainant is a teenager, as the power imbalance within her relationship with the accused is presumably less acute. In this way, the age of the complainant again emerges as an important strategic consideration for both defence lawyers and Crown Attorneys.

The review of case files shows that the Crown is more likely to be successful in cases involving young child complainants because the abuse of trust is more blatant and because consent to sex is not a defense when the complainant is under the age of

fourteen. However, the young age of a child complainant also constrains the Crown's strategies, as children are seen as liars or easily influenced or confused. Teenaged complainants, especially those living on the street or in care, bring to light a different set of presuppositions that have an impact upon the court's assessment of the seriousness of harm.

Street Kids and Foster Kids

The status of the complainant as a teenaged prostitute or being apprehended by Child and Family Services frames the strategies defence lawyers use to discredit the testimony of the complainant. The lawyering strategies discussed in the interviews and presented in Crown case files are framed by presuppositions that prostitutes cannot be raped and that young people in-care are troubled and blameworthy. Specifically, young people living on the street or in-care are viewed by the courts as being motivated to fabricate accusations of sexual assault so as to gain the sympathy of social workers or to deflect attention away from their involvement in prostitution.

One Crown case file involved a Caucasian man in his fifties who was charged with 28 counts of sexual assault and prostitution-related offences involving Caucasian and Aboriginal street kids between the ages of 14 and 16 years. In the following exchange between a teenaged girl who works as a prostitute and a defence lawyer, the sexual assault is portrayed as less serious than working the streets.

Defence: Now originally you had admitted to the police, in your mother's presence, certainly that you were doing tricks, is that correct?

Complainant: Yes

Defence: And by doing tricks, I am assuming that you were having sex with men with your clothes off.

Complainant: Yes

Defence: Or at least some of them

Complainant: Yes

Defence: And your breasts, or your vagina would be touched by men, underneath your clothes is that correct?

Complainant: Yes

Defence: Yet the reason you give his Honour that you never mentioned these other sexual assaults is because it was too shameful; is that correct?

Complainant: Yes

Defence: But in comparison, these were sexual assaults and certainly beyond your control is that correct

Complainant: Do you want to repeat that?

Defence: These were, these were touching over clothes; is that right?

Complainant: Yes

Defence: Which is in my – I suggest to you – less shameful than being touched under your clothes. (Preliminary hearing transcript, C20)

This lawyer attempts to normalize the accused's sexually-aggressive behaviour given that the complainant had worked as a prostitute. Her status frames the accused as less blameworthy. In this same Crown case (C20), the defence focuses on why one of the complainants did not resist the attack. This strategy diminishes the credibility of the complainant's claim that he did not give consent.

Defence: You went to sleep with your pyjamas and your underwear on?

Complainant: Yes

Defence: And you say that at some point during the night you woke up and found that the accused was inserting his fingers into your anus, is that right?

Complainant: Yes

Defence: And what you did then is open your eyes and rolled over and fell asleep again, is that right?

Complainant: Yes

Defence: You didn't scream, tell him to fuck off or stop or anything like that did you?

Complainant: No

Defence: You didn't get up and storm out of house and tell the police did you?

Complainant: No

Defence: You rolled over and went to sleep, despite the fact that somebody was sexually assaulting you by inserting their fingers in your anus?

Complainant: Yes

Defence: Then you went out and worked for him for a couple of weeks

Complainant: Yes

Defence: I am suggesting to you that you told your social worker that you were sexually assaulted because it made her have sympathy for you as opposed to being a prostitute.

(Preliminary hearing transcripts, C20)

The case-building strategies of this defence lawyer reveal several tactics. First, the

questions asked are aimed at portraying the complainant as indifferent to the accused's behaviour and suggesting that he consented to anal sex. This strategy is enabled by section 273 of the Criminal Code in that the Crown must prove that the complainant did not consent to sex with the accused. Because the complainant testifies to trying to sleep during the assault, the defence counsel is able to raise reasonable doubt as to the Crown's claim that he did not consent to sex. In other words, the defence strategy here is framed by the assumption that a complainant who claims that he did not consent must demonstrate active resistance out of fear of the accused. Second, the defence suggests that the complainant lied to people in authority (social workers) about his working as a prostitute. By casting the complainant as a liar, he loses credibility in his claim that he did not consent to sex with the accused. Third, by not admitting to being a prostitute and instead claiming he was sexually assaulted by the accused, the complainant is seeking attention.

Defence lawyers also noted during the interviews that the involvement of Child and Family Services (CFS) in the lives of the complainants is "typical" in the types of cases like the one presented in the mock police report. If a young person has been apprehended or placed in-care as a result of problems at home, defence lawyers will use this information to undermine his/her credibility. An earlier study by criminologist Pat Carlen (1988) of incarcerated women in Britain found that young women living in-care from an early age tend to receive more punitive dispositions as offenders or to be disbelieved as complainants. Young women who have been in foster care are perceived by the courts as lacking the necessary self-control nurtured in familial relationships. In

the context of the mock police report, defence lawyers when interviewed seemed to recognize the strategic value of the complainant having been in foster care. One lawyer believed it was important to determine

> ....whether or not the child sabotaged relationships in the past, vying for attention. Had the kid made up complaints in the past, had the kid ever been apprehended, ended up in care? (D2)

The defence lawyers indicated that in a situation like the one outlined in the mock police report, it is likely that Child and Family Services would be involved and is threatening to remove the daughter from the home. In this event, the mother will oftentimes start "remembering that she saw it happen"(D2) as she must appear to CFS to be defending her daughter against sexual abuse. Therefore, from a defence standpoint, the involvement of CFS is critical because it can affect the willingness of the mother to corroborate the accused's version of events. This remembering of events can result in an acquittal for the accused because the truthfulness of the mother is questionable if her accounts coincide with CFS threats to remove the child. This leads to inconsistent testimony against the accused that can be dismissed by the court.

> When a mother is forced to choose between her spouse and her child, I have seen cases where people start to remember seeing things that never happened and result in an acquittal because to remember seeing this is preposterous. (D2)

In sum, the strategies of defence lawyers appear to be influenced by the status of the complainant, especially for teenaged boys and girls who are living on the street or in foster care. The sexual aggression of the Man of legal discourse is uncontested. Instead, it is the demeanour, attire and lifestyle of the complainant that becomes the focus of the lawyering strategies – regardless of law reforms to constrain against such tactics.

Concluding Remarks

The aim of this chapter has been to determine whether rape myths continue to enable the case-building strategies of defence lawyers and constrain Crown Attorneys in sexual assault cases, despite reforms to sexual assault legislation. Interviews with defence lawyers and Crown case files indicate that courtroom strategies continue to rely upon rape myths.

Over the last thirty years in Canada, there have been several important reforms to sexual assault legislation to address the influence of rape myths in sexual assault cases. These reforms have removed barriers, such as the necessity of corroborating evidence and recent complaint. Reforms have also put in place formal mechanisms that protect the complainant from having to testify in open court as to her sexual history and limit the disclosure of private records as evidence of her character. Sexual assault cases remain, however, a contested terrain over the rights of the accused to due process versus the complainant's right to privacy and equality. In fact, most defence lawyers interviewed indicated that recent evidentiary restrictions in sexual assault cases reflect political interests, not the rule of law. It becomes clear that regardless of the rules of evidence operating to constrain prosecution in sexual assault cases, defence lawyers have continued to argue that sexual assault legislation – in particular section 273 and section 276 – constitutes an unfair restriction on the legal process. Section 276 of the Criminal Code puts forth that the complainant's sexual history is only admissible under certain circumstances and cannot be used to support the claim that the complainant consented to sex with the accused or is less worthy of belief. Defence lawyers have claimed that this

restriction contravenes the rights of the accused to present a complete defence. Section 273 outlines the conditions under which consent can be given so that the accused could not simply claim that he was honestly mistaken in his belief that the complainant had consented to sex. Of particular importance in the cases involving young people, consent cannot be given if a relationship of trust exists between the accused and the complainant.

The strategies of defence lawyers discussed in the interviews, as well as those presented in Crown case files, indicate that – despite progressive legislative reforms – the credibility of women and children continues to be invaded by rape myths. Rape myths are patriarchal presuppositions of femininity, masculinity, heterosexuality and childhood that set out several powerful stereotypes. As shown in this chapter, rape myths also frame young children's accounts of sexual exploitation. When young children claim to have been sexually assaulted, oftentimes they are not believed because of their lack of sophistication and moral development. Young children, it is held, cannot be trusted to tell the truth and are apt to fabricate events, especially when encouraged by adults (therapists, social workers and mothers). For teenaged girls and boys, especially those living in care or on the street, their credibility is even more enmeshed with the typification of teenagers as 'rebellious,' 'untrustworthy,' 'irresponsible' and 'sexually promiscuous.'

Rape myths should have little influence upon the practice of law in a sexual assault trial. However, from the discussions with defence lawyers, it would seem, ultimately, that defence lawyering in sexual assault cases continues to be enabled by these mythologies. One way we can see how rape myths invade the case-building strategies of lawyers is in the 'whacking' of the complainant at the preliminary hearing.

At the preliminary hearing, defence lawyers will aggressively cross-examine the complainant as to the consistency of her statements disclosing the attack. This strategy – enabled by rape myths that frame young girls as liars – is aimed at portraying the complainant as having made up the allegation for attention from teachers and/or parents. Similarly, defence lawyers continue to target the nature of the relationship between the accused and the complainant to create the possibility that the sex act was consensual because of the complainant's sexualized or flirtatious behaviour towards the accused. In cases involving teenaged girls, defence lawyers target the acrimonious mother-daughter relationship. Mothers are held accountable for their daughters' behaviour or are used to testify against their daughters.

Crown case files also indicate that defence lawyers choose to aggressively cross-examine women and children in sexual assault cases in spite of the formal protections afforded to sexual assault complainants. Defence lawyers appear to be unconstrained in their cross-examination of child complainants, especially those children living in-care or on the street. Indeed, it is the Crown that is constrained by the complainant's perceived lack of credibility in such cases. Crown files illustrate that defence lawyers minimize the seriousness of the assault because of the complainant's status as a runaway or teenaged prostitute. The lifestyles of teenaged boys and girls working in the sex trade or living on welfare are used to frame the character and blameworthiness of the complainants.

Crown files reveal that the credibility of child complainants in cases involving women accused of sexual assault is also problematic. For example, a young teenaged girl is undermined by defence lawyers as being a 'daydreamer' who has lesbian fantasies.

Crown lawyering is also constrained by psychiatric assessments of children who have been sexually exploited by their mothers. These assessments are used by the defence to argue that the child cannot be called to testify against the accused. To combat these constraints, it was found that Crown Attorneys would raise the character of the accused and cast her as a sexually promiscuous woman who dresses inappropriately. This was a strategy not found in any cases of men accused of sexually assaulting young children. In this way, law works as a gendering strategy in that it enables sexualized representations of women accused of sexual assault. In cases of those men who admit to sexually exploiting children, the accused are cast as blameless because of their lack of sophistication or their own sexual victimization as children.

It would appear that case-building strategies discussed by defence lawyers and those found in Crown files seem to affirm the resiliency of rape myths. I would agree with McBarnet (1983) and Brereton (1997) that the rule of law and its adversarial processes and structures explain – at least in part – the strategies of 'whacking the complainant.' As stated here by McBarnet (1983:294):

> The source of the victim's experience in court is not located just in the specific social prejudices underlying rape cases, but more generally in the structure and function of the criminal trial itself.

Nevertheless, this study suggests that the role of defence counsel in a sexual assault trial is enabled both by rape mythologies and by the structure of the adversarial process; the adversarial process is enmeshed with rape mythologies. In this way, the rape trial remains distinct from other criminal trials because lawyering strategies operate as gendering devices that constitute Smart's (1993) Woman of legal discourse while at the same time

normalizing young women as being sexually provocative, vengeful liars. By relying on rape mythologies – despite legal reforms to the contrary – the practice of law enables a certain mode of governance. By this I mean to say that complainants' – even children and especially teenaged boys and girls – are made responsible for their experience. Yet, interestingly, contrary to governmentality notions of responsibilization, men accused of sexual assault are not viewed as personally responsible for their behaviour, especially in cases involving Aboriginal men. In these cases, sexually aggressive behaviour is normalized as a part of their "Indianness" (Kline, 1994), in particular, their lack of sophistication or their own sexual abuse as a child. In these terms, the agency of lawyers in the litigation of sexual assault cases comes into view. Legal reforms have not translated into the weakening role of sexual stereotypes and rape myths in the administration of justice. Rather, these reforms have been met with contestation and resistance – evoking new strategies in the practice of law that rely upon rape mythologies in the 'whacking of the complainant.'

Other important legal reforms have taken place in the last decade, specifically those that address domestic violence. The criminal justice response to domestic violence cases has sparked a debate as to the "law and order" tone of these initiatives. There are concerns that mandatory charging and vigorous prosecution policies have contributed to the over-criminalization of Aboriginal and working class men, as well as the double-charging of the women such policies were intended to protect. The following chapter shifts the focus to an examination of the practice of law in cases of domestic violence. Interviews with defence lawyers and the Crown cases that are examined raise some

disturbing practices that indicate a pervasive resentment towards and sabotage of zero-tolerance policies.

Chapter 7

Lawyering Under Zero-tolerance

The focus of this chapter is on the criminal justice response to domestic violence, specifically the effect of zero-tolerance policies upon the case-building strategies of lawyers. "Zero-tolerance" is a term which first became part of the public discourse during the U.S. War on Drugs in the 1980s. It was a slogan for the Regan administration's increasingly punitive policies towards certain forms of drug use (in particular, crack-cocaine). In the Canadian context, "zero-tolerance" came to be associated in the 1990s with an array of criminal justice policies aimed at enabling the arrest and prosecution of persons charged with domestic violence offences. In February of 1990, for instance, the Manitoba government announced a "zero-tolerance policy on domestic violence" which reiterated a 1983 directive that the police must lay an appropriate charge if there is evidence of violence in a domestic relationship (N.D.P Caucus Task Force, 1995). The subsequent establishment of the Family Violence Court in Winnipeg in September of 1990 and the formation of a specialized prosecution policy has resulted in significant changes to the practice of law with respect to domestic violence cases.

This chapter aims to accomplish three things. The first is to briefly describe Manitoba's Department of Justice zero-tolerance policies and to discuss their impact on the criminal justice processing of domestic violence cases. The second is to examine the strategies of defence and Crown lawyers to assess if the practice of law is structured differently in domestic violence cases than in comparison to other crime categories looked at so far. Finally, this chapter will examine the position that zero-tolerance has

introduced a "new paradigm of justice" (Ursel, 1999) which has improved the quality of lawyering in domestic violence cases.

Manitoba's Criminal Justice Response to Domestic Violence

Zero-tolerance for domestic violence was first introduced in 1982 when the federal Solicitor General encouraged police departments across Canada to implement a 'no drop' or mandatory charging policy for cases of domestic violence. In 1983, the Attorney General of Manitoba directed police officers to lay charges in all cases of domestic assault and the Crown to prosecute all cases vigorously (McGillivary & Comskey, 1999). This directive was in large measure a response to demands from women's groups that violence in the home be treated as a serious matter. Previously, because police had been reluctant to intervene in domestic matters, women were left to take on the onus of laying criminal charges against their abusers. There were also concerns that Crown attorneys were not pursuing the charges. As a result of the 1983 directive, the number of spousal assault cases where charges were laid increased from 629 in 1983 to 1137 in 1989 (Ursel, 1994).

Despite mandatory charging by police, women's groups continued to stress that domestic violence is profoundly different from other crimes of assault because of the emotional and financial relationship that exists between the accused and the complainant (Ursel, 1992). It is the complexity of the relationship that may explain the reluctance of many women to testify against the accused, thereby resulting in a large number of stays of proceedings in domestic violence cases. In response to these concerns, in 1986 a Women's Advocacy Program was instituted to help women whose family members had

been charged with domestic violence. Women received short-term counselling, victim-witness support and referrals to other programs (McGillivary & Comaskey, 1999).

In 1990, a review of Manitoba's criminal justice response to domestic violence (the Pedlar Report) identified several shortcomings that continued to limit the effectiveness of mandatory charging. Shelter workers and feminists argued that police continued to act insensitively towards victims, testifying in court was a traumatic experience for women, sentences were too lenient and restraining orders were ineffective in protecting women (Pedlar, 1991). Following the recommendation of the Pedlar Report, the Family Violence Court was established in September of 1990.

Winnipeg was the first city in Canada to implement a separate division of a court to handle cases involving spousal, child and elder abuse. It is the nature of the relationship between the offender and the victim that determines if a case falls within the purview of the Family Violence Court (Schulman, 1997). The Family Violence Court is composed of an Intake Court wherein Crown counsel determines if there is a *prima facie* case against the accused. If the facts of the case are uncomplicated and the accused has no previous record of domestic violence, a guilty plea may be entered in Intake Court (Schulman, 1997). If a *prima facie* case can be made against the accused and a guilty plea is not entered, the case is remanded into a screening court, wherein the Crown assesses the merits of a case, determines whether a further investigation is required and attempts to resolve the case with defence counsel (Schulman, 1997). Finally, the case will either be scheduled for sentencing (as a result of the outcome of a negotiated arrangement with the defence) or the case will be set down for trial. Following the implementation of the

Family Violence Court, Winnipeg had the highest arrest rate in Canada for domestic violence offences (Ursel, 2001).

While the Attorney General had requested in 1983 that police follow a mandatory charging policy when responding to cases of domestic violence, it was in 1993 that the Winnipeg Police Department implemented a formal Family Violence Policy and Procedure manual. The domestic violence policy – which came to be known as the zero-tolerance policy – read as follows:

> A. It is a police duty and responsibility to lay a charge where there are reasonable grounds to believe that a domestic assault or some other offence has occurred. Charges shall be laid *whether or not the victim wishes to proceed with the matter, and even in circumstances where there are no visible injuries or independent witnesses.*
>
> B. Once a charge(s) involving domestic violence has been laid, *all decisions relating to prosecution/disposition are made at the sole discretion of the FAMILY VIOLENCE UNIT CROWN ATTORNEYS* (Public Prosecutions Division, Department of Justice, Manitoba). (Winnipeg Police Department, 1993; emphasis added)

This police protocol led to further increases in the number of charges laid for domestic assault in the city of Winnipeg. For instance, while there were 1444 charges laid in the twelve month period following the implementation of the Family Violence court in 1990, there were 3743 charges laid in the twelve month period (1993/94) following the implementation of the police zero-tolerance policy (Ursel, 2001).

Linda Wood's (2001) study of the impact of the police policy on the processing of domestic violence cases found a significant increase in the number of stays of proceedings. Whereas 58 percent of the cases where charges were laid prior to the implementation of the policy in 1993 resulted in a stay of proceedings, 73 percent of cases resulted in a stay after the policy was put in place. In addition to higher rates of

case attrition, Wood found that a larger percentage of women were being counter-charged by their partner (34% post 1993 versus 27 % pre 1993).

Concerns over counter-charging led women's groups to assert that women were being re-victimized by the mandatory charging process and were reticent to contact the police out of fear of being charged themselves (N.D.P Manitoba, 1995). In the effort to address this unintended consequence of zero-tolerance, the Department of Justice issued a directive to all police agencies in Manitoba in January of 1994, stating:

> ...[T]he Crown should be contacted before proceeding with charges against any victim who has retaliated or is alleged to have precipitated (counter-accusations) against the abuser for the purposes of defence and self-protection. Due consideration will be given to the safety measures deemed necessary and taken by the alleged crimes and will not automatically result in additional charges which include the abused party. (Manitoba Department of Justice, 1994)

In 1994, Manitoba's New Democratic Party Caucus formed a Task Force on Violence Against Women. The mandate of the Task Force was to collect the perspectives of citizens as to how the provincial government could effectively address the issue of violence against women. An important finding of the N.D.P Task Force was that zero-tolerance protocols are "all but nonexistent on Manitoba reserves" (N.D.P Manitoba, 1995). It was found that Aboriginal women in northern communities were particularly vulnerable to domestic violence. The police often failed to adhere to zero-tolerance policies of prioritizing domestic violence calls, they did not provide victims with transportation to safety and charge(s) were seldom laid on the basis of the victim's account alone. In light of their experiences, most Aboriginal women who appeared before the N.D.P Caucus Task Force on Violence Against Women demanded that the police in their communities follow zero-tolerance policies more strictly.

The state's response to domestic violence came under scrutiny again in 1995 because of a murder/suicide of an estranged couple in Gimli, Manitoba. Rhonda and Roy Lavoie were well known to social services and the Family Violence Court. Rhonda had testified as to the severity of the physical and sexual assaults she had suffered, yet Roy was released on bail (at Rhonda's request) and repeatedly violated bail conditions to have no contact or communication with Rhonda. While on bail for charges related to his abuse of Rhonda, Roy kidnapped and murdered his wife and then killed himself. That same year, a public inquiry into the deaths of Rhonda and Roy Lavoie was called to examine the criminal justice and social services response to cases of domestic violence. The report, released in 1997, called for significant changes to the structuring of police, the courts, the corrections system, social service agencies, the legal profession and governments (Schulman 1997). Some of the recommended changes were intended to empower the Crown Prosecutor's office. For example, the Crown could oppose the pre-trial release of an accused if his criminal record included stays of proceedings in cases of domestic violence involving the same victim.

In 1999, the Manitoba Department of Justice issued another policy directive to Crown Attorneys in regards to domestic violence prosecutions. The intention of the directive was to outline the conditions under which a Crown is to proceed to trial and what to do when a complainant refuses to testify against the accused. The directive states that the Crown is to proceed to trial "unless it becomes clear at some stage of the proceedings that there is no longer a *prima facie* case for which there is a reasonable expectation of conviction" (Manitoba Department of Justice, 1999: 3). The Crown is to make every effort to encourage witnesses who are victims of domestic violence to testify.

In those cases where the victim refuses to testify, the Crown must review the circumstances of the cases – particularly the seriousness of the assault – to determine if the victim should be compelled to testify. Criteria for assessing the strength of a case and determining whether to proceed with a prosecution include a review of the victim's statement to police and the events following that time to account for any changes to the victim's willingness to go forward (such as being pressured by the accused). The Crown is also to consider sufficient independent evidence to prosecute and if the accused has previous convictions for violence offences involving the same complainant. When the complainant is unwilling to testify, the Crown should consider if counselling from a support agency would assist her in deciding to testify. Further, the Crown is directed to consider whether such a prosecution is in the interests of the victim and not contrary to the interests of the community, especially when proceeding with a prosecution that could place the victim at a higher level of risk. Finally, the Crown is directed to consider the impact of not proceeding with a prosecution upon future cases of a similar nature. In sum, the 1999 directive outlines a consistent approach to the prosecution of domestic violence cases that is in accordance with recent case law, the principles of fundamental justice and the role of the Crown in the administration of justice.

Debating the Zero-Tolerance Response to Domestic Violence

The Family Violence Court and mandatory charging practices have remained contentious issues amongst those who want the criminal justice system to protect the victims of partner abuse and those who are skeptical of broadening the state's powers of arrest and prosecution. Proponents of the Family Violence Court model claim that the large increase

in the number of charges laid in spousal abuse cases suggests that the state is responding to the demands that women's experiences of domestic violence are to be taken seriously. More men are being charged and, of those who are criminalized, more are receiving sentences of treatment, supervised probation and/or incarceration (Ursel, 1994, 2000, 2001).

Yet, most of those charged with domestic violence in Winnipeg are Aboriginal men from the inner city. The Aboriginal Justice Inquiry Implementation Committee (AJIIC, 2001) reports that 66 percent of Aboriginal men charged with domestic violence were on social assistance, whereas 53 percent of non-Aboriginal men were employed (Whitecloud & Chartrand, 2001). Wood (2001) found that prior to 1993, Caucasian men were more likely than Aboriginal men to be charged with domestic violence. After the implementation of the police protocol in 1993, Aboriginal men were more likely to be charged with domestic violence (Wood, 2001:131). A study conducted for the Aboriginal Justice Implementation Committee (Ursel, 2001) found that of all men convicted of spousal abuse, only 8 percent of Aboriginal men received a conditional discharge, whereas 21 percent of non-Aboriginal men received a conditional discharge. In addition, 30 percent of Aboriginal men convicted of spouse abuse received custodial sentences, whereas only 17 percent of non-Aboriginal men received custodial sentences (Ursel, 2001). Whitecloud and Chartrand (2001) point out that Aboriginal people were more likely to receive incarceration than were non-Aboriginal people, even after controlling for weapons-related and seriousness of offence variables.

Ursel (2001) accounts for this sentencing disparity as stemming from the greater likelihood that Aboriginal men have prior histories of incarceration than non-Aboriginal

men (and thus are more likely to receive harsher sentences). Ursel (2001) also points out that the sentencing disparities between Aboriginal and non-Aboriginal men are reduced when taking into consideration the race of the victim. When an Aboriginal woman is the victim of a domestic assault, Aboriginal (31 percent) and non-Aboriginal men (29 percent) are likely to receive the same sentence. Supporters of zero-tolerance take this to mean that the courts treat the victimization of Aboriginal women seriously. It could be argued, however, that the greater use of incarceration in cases involving Aboriginal victims is a result of the more serious injuries (and therefore physical evidence) Aboriginal women sustain at the hands of their abusers, not greater sensitivity to Aboriginal women as a group. It may also be that non-Aboriginal women are more successful in receiving police protection earlier in the relationship when their injuries are less serious.

A persistent problem with zero-tolerance protocols has been 'counter-charges' or 'double-charging' of women who have turned to the criminal justice system for protection from an abusive partner. Double charging occurs when police must charge both parties because each has reported the other for partner abuse. One study suggests that "over a five year period (1992/1993 to 1996/1997) dual arrests have occurred in 7 percent of the households in which arrests were made" (Ursel, 2001:19). Another study (Comack, Chopyk & Wood, 2000) found that in one-third of the cases involving a woman accused of partner abuse, she was the one who had contacted the police for assistance (versus only 5% of men accused).

The double-charging of women seeking protection from the police highlights how zero- tolerance policies that take away the discretion of the police and the Crown can

have a negative impact on some women. However, women have reported other problems when turning to the police and courts for protection. McGillivary and Comaskey's (1999) research with Aboriginal women in Manitoba found that most women believed the criminal justice system should protect them from violence and administer punishment. Yet, most of the women also believed that the justice system was unfair and favoured the rights of the accused over those of the victim. The failure of the criminal justice system to protect Aboriginal women living in reserve communities was attributed to the disregard for Aboriginal women shown by police, as well as the power of chiefs and band councils to force women to recant their testimony. Moreover, many of these women were themselves charged by the police for domestic violence when attempting to defend themselves against their abuser. These findings suggest that the Family Violence Court process of mandatory charging and specialized prosecution does not benefit Aboriginal women living in isolated communities. Yet, these women overwhelmingly support incarceration, mandatory treatment and intensive supervision in the community upon release from jail (McGillivary & Comaskey, 1999). [1]

Another study (Lloyd, 2000) was conducted with 26 women from various communities around the city of Winnipeg. All of these women had contacted the Winnipeg Police Service as a result of partner abuse. This group of women expressed strong opinions about zero-tolerance. Although most of the women had positive

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1 To remedy the problems facing Aboriginal women living in isolated Northern communities who have been abused, a Women's Advocacy program has since been established in The Pas and Thompson, Manitoba. The Department of Justice has stated that the Family Violence Court has been so successful in Winnipeg that it is expected to be expanded to other major judicial centers, as well as special procedures for circuit court sittings in more isolated communities (Manitoba Women's Directorate, 1999:4).

experiences with the Women's Advocacy Program, they held more negative views of police officers, Crown Attorneys and sentencing judges.

> A common element in the stories told by the women was how they felt about what happened to them once the police and the Family Violence Court System entered their lives. They reported feeling disempowered because they had no choices about what would happen with their (ex)partners' cases or, often, their relationships. Many of the women also described not having full understanding of the zero-tolerance policy. (Lloyd, 2000:iv)

In spite of the concerns of race and class bias, the increased rate of case attrition and double-charging, proponents of Winnipeg's Family Violence Court suggest that this model represents a "new paradigm of justice" which aims to balance the needs of the victim with the prosecution of the accused. According to Ursel (2001:25), under the traditional adversarial model, the Crown could not use his/her discretion to achieve "meaningful resolutions for women-at-risk." In contrast, the Winnipeg Family Violence Court attempts to "bridge the gap between prosecutors and victims through a pursuit of a new paradigm of justice intervention. …The paradigm takes as a starting point that the victims' needs and concerns should guide the course of justice intervention" (Ursel, 2001:26). Women often have more practical needs (such as child support and recovery of personal property) and are more interested in economic survival than they are interested in the punishment of their partner. In these terms, conviction of the accused is not the ultimate goal. Ursel (2001) claims that Crown Attorneys – in attempts to resolve the case in a manner that meets the needs of the victim – engage in strategies like "testimony bargaining." This strategy is used when a victim is unwilling to testify against her abuser, as she does not wish him to go to jail but rather to receive treatment in the community. The Crown will agree to recommend probation in exchange for her testimony.

According to Ursel (2001), this new paradigm has also restructured the "work culture" of the Crown Attorneys' office such that the indicators of success are not conviction rates, but assistance to victims of domestic violence. Specialized prosecution policies have enhanced the role of the Crown Attorneys selected to oversee the prosecutions in the Family Violence Court. The aim of appointing Senior Crown Attorneys to domestic violence cases is to improve the likelihood of conviction, but also to change lawyers' attitudes towards domestic violence cases. Traditionally, domestics have been viewed by Crown Attorneys as cases that would not enhance their career. Under the new 'work culture' in the Family Violence Court, domestic violence cases are now viewed as cases requiring a sophisticated level of expertise and experience. Nevertheless, Ursel's position of a new 'work culture' does not attend to defence lawyers, who are also an important component of the Family Violence Court response to domestic violence. Little is known of the role of defence lawyers in domestic violence litigation and the impact of zero-tolerance upon their strategies in the courtroom.

What is the role of defence lawyers in this new "paradigm of justice"? As a way of understanding how zero-tolerance structures the practice of law, findings from interviews with defence lawyers will be presented. The aim here is to examine the impact of the zero-tolerance policy on the work culture of lawyers. Defence lawyers were asked to present their case-building strategies in response to a mock police report that described an incident of domestic violence wherein a Caucasian woman is accused of assaulting her Native ex-common law husband over his visitation with their daughter. Interview data will be compared with Crown attorneys' case files on three cases of domestic violence. These data can inform us as to what other gendered, racialized and class-based

presuppositions might frame the practice of law in domestic violence cases and if there has been a shift toward a new paradigm of justice, one that views domestic violence as a serious crime and the needs of victims as more important than winning in court.

In the discussion which follows, the findings will be presented in two parts. Part One will focus on the defence lawyering strategies that emerged from the interviews. These will be juxtaposed with the strategies made evident in the Crown case files. Part Two will take a closer look at the work culture of defence lawyers under the zero-tolerance policy.

Mock Police Report 4: Domestic Violence

> The complainant in this case (Native male, age 23) alleges that the accused (Caucasian female, age 21; his former common-law spouse) stabbed him. The assault took place outside of the accused's apartment (she was living there with their 3 year-old daughter). The complainant claimed that he went to her apartment because she did not drop off their daughter at the exchange centre as per their custody order. It was later determined by the police, upon contact with Child and Family Services, that the complainant has unsupervised access with his daughter twice a week at the Children's Access Agency. The complainant stated that he was concerned that something had happened to his daughter. When he arrived at her apartment, he tried contacting her through the security intercom but she refused to let him in. Instead, she came down alone and told him that their daughter was not feeling well, and that she had left a message at the exchange centre for him informing him of this. The complainant then called the accused a liar and demanded to see his daughter. The accused refused to allow him up to the apartment. The complainant stated that "all of a sudden he was bleeding from the side of his head." When asked by police if he had said anything that threatened the accused, he denied having said anything to her other than he wanted to take his daughter to a surprise party for his girlfriend. He also stated, "the bitch has done this to me a thousand times, always keeping my little girl from me." When asked if he had been drinking that day, the complainant stated he had a couple of drinks. The complainant sustained a laceration next to his left eye near the temple area that required four stitches. He also sustained a mild concussion with blurred vision for several days following

the incident. The emergency room physician's report stated that the complainant had a blood alcohol level of .01 at the time of admitting.

The accused's statement indicated that she had left a message for the complainant about his daughter's illness and that when she confronted him outside of the apartment she believed that he had been drinking. The staff at the exchange centre stated that they had received no such message from the accused, and that there had been problems with the accused keeping to the visitation order set out by the courts. The accused claimed that the complainant was verbally abusive, calling her a whore and pushing her up against the apartment building entrance. At one point, he placed his hand on her throat. It was at this moment that the accused stated that she couldn't clearly remember what happened, only that she struck the accused on the left on the side head with her keys. When asked if she purposely placed the keys in a position so as to stab the complainant (for example, placing a key between her index and middle fingers), the accused stated that she couldn't remember as everything happened so fast. She claimed that she was afraid of him because he had been drinking and he had his hand around her throat.

Social History of the accused	Social history of the complainant
Caucasian female	Native male
Age 21	Age 23
High school graduate	Grade 10
Receptionist	Unskilled labourer

The Agency of Lawyers: The "chick defense"

The Official Version of Law holds that law is impartial and unaffected by social, moral and political forces. Each person accused of a crime is judged according to the evidence presented and the facts of the case. In short, extra-legal (non-juridical) claims cannot be seen to influence the administration of justice. Smart (1992) and Razack (1999), among others, have argued that law sees men and women as gendered and racialized subjects. In the previous chapter, sexual assault cases were found to be structured by rape myths about the complainant as troubled or vengeful. Rape myths are used to normalize male sexual aggression. The Man of legal discourse does come alive in the strategies of

lawyers, as does the Woman of legal discourse. She is in the foreground, cast as the troubled or promiscuous teenager, whereas his sexual aggressiveness remains in the background. In the context of domestic violence, interviews with defence lawyers and an analysis of Crown case files show that women's actions continue to be structured by various gendered presuppositions. However, in these cases, the Man of legal discourse comes to the foreground and is more visible. It is through the strategic use of gender for the purposes of winning their cases that the agency of lawyers comes into view. Defence lawyers make strategic choices based on the interests of their client. Women can be brought into view as victims of male violence *or* as mutually combative bitches. Men can be cast as being out of control, jealous and drunk *or* as breadwinners doing the best they can to support their families. Each of these characterizations of masculinity and femininity has its basis in particular constructs that hold purchase not only in the wider society, but in law as well.

During the interviews, it became evident that defence lawyers thought of their strategies in terms of how they would expect the court to look upon a woman charged with assaulting her ex-common law partner. It is the court's view of women accused of violence that shapes their strategies, as defence lawyers must concern themselves with the net result of preventing their client from going to trial or to jail. As D9 explains, defending people accused of domestic violence involves working within the court's preconceptions of domestic violence. S/he stated that s/he has to be aware of the attitudes towards domestic violence that s/he will be confronting in the course of defending his/her client. Because of these preconceptions of domestic violence, when defending a woman charged with domestic violence, defence lawyers rely on what one lawyer (D6) referred

to as the "chick defense."

All of the defence lawyers interviewed agreed that cases of domestic violence where a woman is charged are relatively easy to defend. In their experience, "most of them do not get out the door" because it is almost exclusively "his word against hers" (D6). Yet, as was demonstrated in the previous chapter, a woman is not always viewed as credible. Rather, her credibility is linked to the nature of the violence and her relationship with the accused. In the context of domestic violence, a woman's credibility is framed by presuppositions that normalize her as a victim of male violence.[2] Therefore, the context of the violence (sexual versus domestic) shapes the strategies of lawyers.

The "chick defense" is a lawyering strategy that conforms to how law sees women in relation to men in the context of domestic violence. The domestic violence context is so powerful in how it shapes the practice of law because it ascribes the identities of men and women. The Woman of legal discourse in domestic violence cases comes into view as not being the Man of legal discourse who, in the context of the mock police report, is steeped in presuppositions of race, as well as masculinity. Regardless of his claims, he is viewed by the defence counsel as an Aboriginal who is drunk and out of control and, therefore, not to be believed. What is important here is the role that racialized and gendered presuppositions of Aboriginal men play in structuring the strategies of lawyers. The following will examine the various ways that gendered and

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2 The intent here is not to be dismissive of the fact that the vast majority of people charged with domestic violence are men and, of the women charged, the majority are the result of double-charging practices (Statistics Canada, 2000b). Domestic violence is a problem of male violence. However, what is troubling is the manner in which presuppositions of femininity and chivalry have not been de-centred in the practice of law under zero-tolerance.

racialized assumptions frame the strategies of the lawyers. These findings will be later juxtaposed with the lawyering strategies found in the Crown case files.

Credibility: "Women are believed over men"

Most of the defence lawyers interviewed claimed that the complainant in the mock police report would have little or no credibility with the court. The complainant's lack of credibility is inferred from the typification of men as aggressors and women as victims of male violence.

> Unless she comes off badly, she is the mother of the child, she has got custody, and she has got unsupervised access through an agency. She is just going to be believed. *Women are believed over men.* (D5; emphasis added)

One defence lawyer interviewed reflected on the other mock police reports to explain the various responses to women's credibility. S/he remarks that in the first mock police report (Chapter 4), the accused is less likely to receive any form of leniency or chivalrous treatment by the courts because the deceased was a female, but also because she herself was Aboriginal. By contrast, the woman accused of domestic assault against her ex-spouse is likely to be viewed by the courts as being entitled to leniency because of the inter-gendered context of domestic violence that is normatively understood by the courts to be men's violence against women. S/he explains:

> The way that things have developed you have a zero-tolerance policy that really operates against men. So, in this police report I think that there are certain stereotypes that are all within our consciousness that you can use to your advantage. There are stereotypes in the other police reports too that would be used against a man. In the drinking party case you have North End Aboriginal people that are out there drinking and self-destroying

> themselves and getting into one of these scrums over a boyfriend and somebody loses their life. You use these to your advantage when you have the opportunity. As a lawyer, it is your job to understand the psyche of the judge and try to manipulate that as best you can. (D7)

This defence lawyer admits, however, that the strategy of manipulating stereotypes is constrained by judges who will decide the case based on the facts presented.

> At the end of the day, a judge who hears the case also has enough experience to look at the facts of the case and judge a case based on facts rather than stereotypes. No matter how hard we try to spin things a certain way, it's one thing to say, it's another thing to convince. (D7)

Another defence lawyer candidly states that the accused will be acquitted simply because the complainant is a man and the accused is a woman. This defence lawyer supports his/her assertion that the woman accused in the mock police report will be acquitted as the complainant has little credibility because he is calling her a 'bitch' and not dealing with his difficulties with her through proper channels. Instead, "he is taking the law into his own hands" (D8). This is compounded by the fact that he has been drinking and is verbally abusive towards the accused.

> A lot of this has got to do with the fact that she is a woman and he is a man, he is on a restraining order, and he is at her house. That is going to scar his credibility completely. Even if what he says is true, he is not going to be believed. It is the man/woman thing. (D8)

It is important to note that nowhere in the police report does it state that a restraining order against the complainant was ordered. This assumption (made by all of the defence lawyers during the interviews) demonstrates how truth claims are structured by the lawyers' own perceptions of men.

Oftentimes, defence strategies must rely on the effectiveness of such stereotypes as it is in the best interest of their client to do so. For example, when speaking of the mock police report during the interview, one defence lawyer believed that the accused's not being able to recall what happened is typical because "women who are battered tend to black-out a lot" (D6). However, another defence lawyer did state that in his/her experience, the accused's inability to remember the incident clearly would be a disadvantage in court. From D1's perspective, when an accused claims that she cannot remember what happened, the court will view her as trying to be deceptive. To overcome this obstacle, D1 would look for evidence to corroborate what she said to police, such as witnesses or any signs of personal injury.

Another assumption that was held by the defence lawyers was that the accused and the complainant had joint custody of their daughter (although this was not stated in the mock police report). As one defence lawyer explains, because the accused did not have sole custody of the child and visitation had to be facilitated through the Children's Access Agency, the courts could view this as an indication of the accused's lack of credibility because she does not appear to be a good mother. S/he explains:

D9: It seem to me that two sane people should not have to go through a Children's Access Agency to see their kids, so at least one of them is nuts.

GB: So that's a red flag for you?

D9: That's a big flag for me. One of them hates the other more than they love the kids.

Another defence lawyer also raised the visitation arrangement. However, s/he claimed that the arrangements could be used to suggest to the court that the accused was afraid of

the complainant.

> I'm assuming there has been CFS involvement in the past and this has obviously been an acrimonious split, that at one time or another somebody's filed a report against somebody. If you have a split up and you have to have a neutral place for the transfer of access to take place, generally speaking that is going to be done because there is concerns about these two people being alone together. Somebody probably has an order of some sort against the other. (D10)

One defence lawyer did acknowledge that attacking the credibility of the complainant would be more difficult because the complainant had court-ordered visitation with his child; "he is different from a lot of guys, he does have access instead of simply getting loaded and going over there and saying 'give me the kids'" (D1). Another lawyer assumed that the complainant in this case is involved with his child, therefore the typical characterization of the "deadbeat dad" cannot be used to attack his credibility (D12).

The stereotypes of men as 'deadbeats' and women as 'bad mothers' are recognized by defence lawyers as effective strategies in domestic violence cases. Relying on these stereotypes allows defence lawyers to structure their strategies in the best interests of their client – even though these stereotypes have little to do with the complainant's propensity to use violence. As well, none of the defence lawyers recognized that in cases of partner abuse, custody and visitation of children are often used by abusers to retain contact with their partner (McGillivary & Comaskey, 1999). Rather, from the lawyers' perspective, the complainant is a good father.

Although the complainant's parental role limits the degree to which he could be presented as an abusive ex-husband, another lawyer stated, "I would find out how I could go after him" (D5). To his/her mind, this would mean focusing on the age difference

between the complainant and the accused (as this could be used to argue a power imbalance between the two), as well as any physical evidence of injuries that the accused sustained (to argue that her actions were defensive not offensive in nature). D9 explained that s/he would have to counter the court's perception of the accused as a bad mother. To do so, s/he would shift the focus of his/her strategy onto the credibility of the complainant to "present this guy as unsympathetically as possible."

Up to this point, we have seen how normative presuppositions of femininity, parenting and domestic violence appear to have an impact upon the strategies of defence lawyers. Case-building strategies, however, do not only reflect the scripts of femininity. Undermining the credibility of male complainants in domestic violence cases rests upon the presuppositions of masculinity. Men are normatively violent, blameworthy and out of control. For example, one defence lawyer explains:

> His [the complainant's] comment, 'the bitch has done this to me a thousand times,' he is the one who is angry. He goes over there, he is probably stewed, he has been boozing, he has lost control of the situation. [S]o you might imagine that she is the one who is going 'No you are not taking the child' and he gets angrier and angrier. 'I wanna see the child and make sure she is okay.' She says, 'No.' You can see this thing escalating to the point where he cannot exercise any control over what he wants so he attempts to take control by grabbing her. (D9)

Challenging the credibility of a man who claims to have been assaulted by his former wife is enabled by the typification of the accused as a frightened victim. In this respect, exploiting the chivalry of the court in domestic violence cases could be achieved by raising the history of the complainant's relationship with the accused. One lawyer (D7) explains that from his/her perspective, the complainant's statement, "the bitch has done this to me a thousand times," seems to express a potential for aggressive behaviour.

In his/her opinion, it would be likely that the complainant has been charged by the accused in the past. Most defence lawyers agreed that they would interview the complainant's current girlfriend to establish if there is any abuse in that relationship, and would also speak with Child and Family Services for an assessment of the complainant's relationship with his child.

Another strategy identified by the defence lawyers was the complainant's admission that he had only a couple of drinks prior to the assault. The issue of intoxication is important. On the one hand, it could be used to present the complainant as minimizing the amount he had to drink and, in effect, lying to police. This would create the possibility that the complainant also minimized his level of involvement in the assault.

> Whatever he says, though, I am probably going to be able to establish that when he says he had a couple of drinks, he really meant he had seven. (D3)

On the other hand, the complainant's intoxication can be used to suggest that the accused reasonably believed that she was in danger and, therefore, she was acting in self-defense.

> He shows up. He has been drinking. She undoubtedly knows his history and knows that he (pause) you know, definitely with his drinking problem. The fact that he only had .01 (pause) he could have been stoned, too. (D3)

Another defence lawyer expressed a similar analysis. S/he explained that it is not the amount of alcohol consumed by the complainant but the accused's perception of the complainant as drunk that is relevant (D3). Because of the smell of alcohol, it was the accused's honest belief that she was in danger and needed to protect herself from him.

Whether he's at .01 or .2, if he's got his hands around her throat, she can

> smell alcohol. If he's had 90 drinks or he had one drink, she can smell alcohol and that can impact on how she may react to the situation, particularly if there is a history of alcohol and abuse mixed together. (D10)

Amongst the various non-juridical claims that defence lawyers would use to frame their strategies – mothering, femininity and masculinity – one lawyer assessed the strategic value of the complainant being an Aboriginal male.

> Because this is a domestic, because she is a woman, he is an Aboriginal, because he was drinking, she is a mother ... because he calls her a bitch; he's got problems. (D12)

Similarly, one defence lawyer acknowledged that the accused was a white woman and that this would work to her advantage in court.

> In terms of background, my client is going to play it a lot better than the complainant just by virtue of the fact that she is a white woman. (D10)

When one defence lawyer was asked about the influence of the complainant's race on his/her case building strategies, D12 stated that s/he had actually never considered the role of race. From his/her perspective, the credibility of the accused and/or the complainant is assessed on an individual basis. S/he would not anticipate that the complainant would be considered less credible just because he was an Aboriginal man, as it is the demeanour of the accused and/or complainant in court that determines their credibility. S/he explains:

> It's demeanour, it's how well they answer questions. If it takes them from A to D to get to B when all is needed is for them to go directly to B, it makes them look evasive. So you want somebody who is very direct in their answers, one who isn't argumentative, one who can control their temper. (D12)

While D2 claims it is the demeanour – not the race – of the accused that is important at trial, s/he also notes that s/he would shop around for a judge that would be less biased

towards Aboriginals or Blacks. This strategy would suggest that demeanour of the accused or the complainant is assessed by the courts according to racialized and gender stereotypes.

> My concern is the judge, who the judge is going to be that particular day, because I think some are more sympathetic than other judges to Natives and Blacks. (D12)

Although defence lawyers seemed to be of mixed views as to the influence of race upon the outcome of this case, most lawyers who were interviewed claimed that – if the case went to trial at all – the accused would be acquitted because the 'chick defense' would enable defence lawyers to portray her as a frightened victim. An acquittal or stay of proceedings is also likely because a man who claims that he was assaulted by a woman has little credibility before the courts. The strategies of defence lawyers illustrate that law is a gendering strategy in the way it relies upon certain presuppositions about women and men.

As stated earlier, the Family Violence Court in Winnipeg has been heralded as promoting a new paradigm of justice that enables the Crown to balance the interests of the victim with public denunciation of domestic violence. The Crown is able to proceed with a prosecution under conditions that would not be allowed in other criminal matters. For example, according to the 1999 directive, the Crown is instructed to consider the accused's previous criminal record for domestic assaults involving the same victim and to proceed to trial without the testimony of the victim (Manitoba Department of Justice, 1999:4). Implicit in this enabling of the Crown to vigorously prosecute domestic violence cases is the constraining of the strategies of the defence counsel. Defence lawyers claim to have little opportunity to raise procedural matters (such as the admissibility of the

victim's statement to the police) as they would in other criminal matters. As such, defence lawyers resort to strategies that rely upon gendered, racialized and class-based presuppositions in order to undermine the Crown's case against the accused. Crown case files illustrate further how lawyers' strategies rely on social constructions of masculinity and femininity.

Crown Case Files

A review of Crown case files of domestic violence that appeared before the Court of Queen's Bench reveals that the scripts of femininity, masculinity and race clearly frame lawyering strategies. One of these case files outlines a similar incident to the one described in the mock police report, wherein a woman is charged with aggravated assault after stabbing her ex-spouse with a knife. The accused (Native female) is described in an R.C.M.P notation in the file as "violent, mentally unstable and has suicidal tendencies." [3] The memo to the Senior Crown describes the complainant (Native male) as "fragile at best and a very reluctant witness" (Memo to the Senior Crown, C21). At the preliminary hearing, the complainant refuses to repeat in court the account he gave to police about the stabbing. Under direct examination, the complainant continually states that he cannot remember anything and that he cut himself with a piece of broken glass, not by a knife. The Crown Attorney asks the trial judge that he be able to treat the complainant as a hostile witness because of his resistance to testify. The complainant admits that a knife

3 It is interesting to note how this characterization of the accused is similar to that used to describe the Aboriginal women in the first mock police report (Chapter Four). These patterns of typification suggest that Aboriginal women are viewed as violent and dangerous, regardless of the context of the crime.

cut him and the preliminary hearing judge orders the accused to stand trial. In the end, a stay of proceedings was entered because the complainant did not appear to testify.

The prosecution policy directive issued by Manitoba's Department of Justice does not prevent the Crown from requesting that the judge compel the complainant to answer the Crown's questions. Rather, the guidelines regarding the prosecution of domestic violence cases address the charging of reluctant complainants with contempt of court. Instead of charging, the Crown is to refer the victim to the Women's Advocacy Centre to be advised as to safety planning once the accused is released from custody. The complainant in this case could obviously not be referred to the advocacy office for assistance. Nevertheless, the seriousness of the assault, as well as the R.C.M.P. memo that described the accused as mentally unstable and violent, prompted the Crown to request that the complainant be treated as a hostile witness in the effort to obtain a conviction.

Crown case files reveal that where women are the complainants in domestic violence cases, defence lawyers re-frame their strategies with images of women as 'bad mothers' or 'nagging bitches.' In these terms, lawyers possess agency in how they choose to work under the constraints of zero-tolerance. For example, in a Crown case of a man charged with assaulting two children and his common law partner, the woman is cross-examined by the defence as to her behaviour and how she may have precipitated the violence:

Defence: You were present when these incidents happened?

Complainant Yes

Defence: After he hit your daughter with the belt did you phone the

police?

Complainant No

Defence: When he taped her mouth shut with duct tape did you phone the police or Child and Family Services?

Complainant No I did not

Defence: Why wouldn't you phone 911?

Complainant: Because I did not want to stay home and for him to come and the cops are home and if nothing would have been done then who knows what he would have to the kids or me. (Preliminary hearing transcripts, C22)

This complainant took her children to a shelter and from there she called the police. The police interview transcripts describe the complainant and the children as "credible" in their telling of what happened. However, the preliminary hearing transcripts reveal that the complainant is cast by the defence as anything but credible and is, in fact, responsible for the violence that occurred because she did not seek help.

The defence lawyering in this case (C22) is framed by "whacking the credibility" of the complainant, similar to what was found in sexual assault cases discussed in Chapter Six. However, the defence lawyering in C22 focuses on normative assumptions of mothering and attempts to cast the complainant as a mother who failed to protect her children. Crown files in this case also revealed that defence strategies attempt to frame the complainant as mutually combative and not a passive victim of abuse. The following is a submission by the defence in application for the accused's pre-trial release.

> The accused and the complainant have been together for quite some time and were quite happy together. The accused has advised me that in the last two months they have had to go on welfare, that money's been tight, that there are large debts owing on his truck and other debts and that *this has affected the complainant in a negative way, that she now loses it where*

> *she didn't before.* He tells me that he has concerns that she – in fact he tells me that she was the one who on July the 1st yelled at the child because she was eating too much and causing a disturbance. The accused is attempting to get enough employment so that they have a steady income and that money problems don't cause this kind of tension between the two of them. He also informs me that the complainant has in the past couple months had difficulties dealing with the other children. That he has talked to her about this but he says that he figures *it's money problems that is at the root of her tension and her stress in this relationship and he is doing his best to alleviate that.* (Bail Court transcript, C22; emphasis added)

Despite the defence lawyer's attempts to discredit the testimony of the mother and to present her as blameworthy, as well as to cast the accused as a breadwinner struggling to provide for his family, the accused is found guilty and sentenced to 6 months incarceration and 3 years probation. The Crown's success can be attributed to the way in which this case fits within the 'typical' definition of domestic violence. For example, the accused has a prior record of domestic violence as well as having a serious drinking problem. The complainant and the children both sustained physical injuries, such as bruising and black eyes. As well, the complainant fled to a shelter for battered women and children.

The socio-political context also frames the prosecution of this case in that it appeared before the courts shortly after the case described earlier of Rhonda and Roy Lavoie. In the transcripts of the bail hearing for the accused, the bail court judge makes the following statement:

> The problem it would seem to me is this is an individual who is very, very close to being out of control and has been for a couple of years. No surety is going to be able to deal with this kind of situation and no job will deal with it. This isn't a onetime thing. This is something with a history and a past. No there is far more here than simply not having a job. I would be frightened to release this particular accused. I would be frightened that he would go looking the victim who has taken her child *and then we would have another dead mother or another dead child, another dead somebody*

> *who was trying to leave an abusive relationship* and under these circumstances, no, the application is denied. (Bail Court transcript, C22; emphasis added)

The point here is not that the bail court judge was mistaken in his/her decision to deny bail, but rather that judicial decision-making is influenced by greater public awareness of domestic violence issues. Given the heightened awareness of domestic violence cases following the deaths of Rhonda and Roy Lavoie, judges' decisions are structured by the socio-political context of public demands that domestic violence be taken seriously.

Like the other mock police reports discussed in earlier chapters, lawyers are cognizant of the effectiveness of using gendered stereotypes of femininity and masculinity to cast their client as not guilty. The Crown strategies, by contrast, appear to be less enmeshed with gendered stereotypes, but rather focus on the seriousness of the violence and the need for general and specific deterrence. These strategies are in keeping with the policy directive outlining the role of the Crown in domestic violence cases: Crown Attorneys are to vigorously prosecute for the purposes of public denunciation. In these terms, the Crown does not have to rely on non-legal strategies. While this prosecution policy enables the Crown to argue the seriousness of the offence and the need for deterrence, the defence is left to rely on non-legal strategies that undermine the credibility of the complainant.

As discussed earlier, proponents of the Family Violence Court claim that specialized prosecutions have introduced a new paradigm of justice and work culture that values meeting the needs of victims, rather than winning convictions. The second section of this chapter will examine how defence lawyers view various policies and directives that govern the practice of law in domestic violence cases, and what kind of work culture

has emerged.

Attitudes Towards Zero-Tolerance: "It's tantamount to fanaticism" [4]

From the perspective of defence lawyers, the vigorous prosecution policy is contrary to the prescribed role of the Crown to proceed only with those cases where there is a likelihood of conviction. For example, one defence lawyers explains:

> I think a good chunk of cases are set down for trial and the defense will be that the complainant will not testify. That is the reality but there is nothing you can do about it because there is a zero-tolerance policy in place. Anybody who makes the slightest complaint is going to be charged and you are going to fill the dockets. I am not going to plead guilty when I know damn well that if it is set down for trial, nothing is going to happen. (D11)

This view is striking in that the guidelines regarding the prosecution of domestic violence cases clearly state that a stay of proceedings must be entered if there is insufficient evidence. In pursuing a prosecution in cases where the complainant's testimony is the only source of evidence against the accused, zero-tolerance directives instruct Crowns to apply recent case law outlining the use of complainant statements to police as evidence at trial in the event that the complainant refuses to testify in court (Manitoba Department of Justice, September 1999). In other words, the Crown is to vigorously prosecute only those cases where sufficient evidence does exist.

Despite these guidelines, many defence lawyers interviewed claimed that current zero-tolerance protocols which limit the Crown's discretion in the decision to prosecute are tantamount to "putting the blinders on" (D3).

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4 Quote from D4

> We are not going into a social court of law, we are going into a criminal court of law and criminal law still applies. If you want to change the criminal standard by way of legislation, fine, then you can change your discretionary powers. (D3)

Another defence lawyer claimed that s/he is concerned about a net-widening effect when the discretionary power of the courts comes under political pressure.

> Why should there be a different test for certain crimes and not all? I am really concerned about the spread of the lack of discretion beyond domestic assaults. (D4)

Zero-tolerance prosecution policies have also resulted in an increasingly adversarial relationship between defence lawyers and the Crown Attorneys' office. As one defence lawyer states:

> You walk into the Crown Attorneys' office and there is a plaque on the wall that says that they don't care about winning or losing a case. The Crown never loses. The Crown will not put in a case unless there is a reasonable likelihood of conviction. So then you have political involvement from the Minister to what should be a neutral problem of Public Prosecutions. The Crown continues to prosecute when they swear an oath that they are not going to put in a case unless there is a reasonable likelihood of conviction. So that makes it frustrating for me as a defence lawyer. I have a third more cases that I probably should have and they are all going to get stayed. (D5)

Most defence lawyers expressed frustration at what they perceive to be an abuse of prosecutorial powers; they resent the increase in cases that has resulted from the Crown's vigorous prosecution policy. Defence lawyers appear particularly frustrated by the large number of cases that are stayed because of insufficient evidence presented by the Crown. While the animosity between defence lawyers and the Crown cannot be accounted for solely in terms of zero-tolerance (given the adversarial nature of the system), it is evident that the new protocol has exacerbated the situation.

Ursel (2001) claims that the Crown Attorneys now view domestic violence cases

as important to their professional reputation because of the seriousness of the crime. Interviews with defence lawyers, however, reveal that they continue to define the nature of their practice of law in terms of the types of cases they defend. Occupational groupings of those who take cases involving "real violence rather than domestic violence" (D8) have emerged. For example, one defence lawyer explains that his/her practice does not involve the "some guy slapped his wife" kinds of cases (D4). S/he clearly distances his/her law practice from domestic violence. "The cases that would be referred to me would be quite a bit more serious, usually sexual in nature or more violence." Another defence lawyer explains, "these types of cases eat up court time where it would be valuable time that I could be spending doing other cases with more important legal issues" (D5). In these terms, defence lawyers appear to categorize domestic violence cases as of little value to them for establishing a lucrative practice. Although status hierarchies within the legal community are common (such as those between legal aid lawyers and private bar), occupational status also seems to be determined by the 'types' of cases that lawyers take on. In short, zero-tolerance policies have resulted in a work culture wherein defence lawyers differentiate between 'real' violence and domestic violence.

The work culture in the Family Violence Court described by defence lawyers appears to undermine the claim that specialized prosecutions have improved the quality of lawyering in domestic violence cases. The level of frustration and resentment is troubling and has resulted in the use of tactics by some lawyers to subvert the trial process in domestic violence cases.

Subverting Zero-tolerance

It was within the context of the mock police report that defence lawyers openly discussed tactics used to subvert – what they perceive to be – a politically-motivated and biased use of the court system. One tactic that most defence lawyers identified was judge-shopping. While judge shopping is generally viewed as a necessary part of their job in protecting the interests of their clients, it has taken on increased significance under zero-tolerance.

Judge-shopping was explained as a strategy wherein lawyers will try to avoid having their client appear before a trial judge who they believe to be more likely to convict certain types of individuals or sentence them to periods of incarceration rather than probation. There was only one defence lawyer (D6) who denied ever shopping around for a trial judge, claiming "you cannot, you don't know who is on the bench until the day of the trial" (D6). Another defence lawyer was more cautious when discussing the practice of judge shopping. D5 explains that judge-shopping is a part of being a good criminal defence lawyer, and s/he will go so far as to inform the Crown that s/he is not willing to deal with a particular judge.

D11 was more open about his/her attitudes towards judge-shopping. S/he sees judge-shopping as more a part of his/her role as a defence lawyer and even goes so far as to say it is what s/he gets paid to do as a private bar lawyer to get the best outcome for the client.

> [Judge-shopping] can make a whole difference to your client. You cannot shop on a trial date unless there is an adjournment. But when it comes to guilty pleas, if you do not judge shop – I think you are negligent. (D11)

D11 clearly identifies him/herself as a better lawyer than legal aid staff lawyers because s/he does judge shop. Implicit in this statement is the demarcation of occupational groupings of private bar defence counsel and legal aid staff defence counsel.

> I judge shop a lot – it is what I am paid for. If [my clients] do not want to judge shop, they can get a legal aid staff lawyer. I am appalled at people who do not judge shop – I think if you are a defence counsel and do not judge shop you should be disbarred. (D11)

One of the reasons D11 gives for judge-shopping is that s/he has been "burnt" in the past by having the wrong judge, specifically in the Court of Queen's Bench. D11 assumes that most defence lawyers prefer court of Queen's Bench for trials, but in his/her experience the Provincial Court judges are more in touch with what is going on as they see it everyday in the lives of accused persons and victims. In contrast, QB judges are "a bunch of old guys" (D11) who are more likely to believe a police officer's statement than any evidence the defence can raise to refute the validity of a police officer's testimony. For example, D11 explains that in Provincial Court, s/he can rely on the facts of the case as a strategy, rather than case law.

> I think that some defence counsel like to bad mouth Provincial Court judges because they can – they are too familiar. I know there are some loony judges in Provincial Court, but there are loony judges in QB. I mean, there are some Provincial Court judges that you wouldn't try arguing case law and, yeah, I guess you can do that more [argue case law] in Queen's Bench, but on the other hand, if you are trying to win on facts, I think you have a got a lot better chance in Provincial Court on things like self-defense. I have been burned too many times in Queen's Bench where I got the wrong judge. (D11)

It is clear from this statement that D11 deflects his/her losses as a defence counsel onto the unpredictability or "looniness" of the trial judge.

In addition to judge shopping as a strategy for subverting the Crown's vigorous prosecution of domestic violence cases, one lawyer admitted to a more troubling strategy of contacting complainants in domestic violence cases to dissuade them from testifying. D11 explained that s/he approaches the complainant in a domestic violence case to discuss the likelihood of her testifying against the accused. The aim of this strategy is to undermine the complainant's intention to testify. For example, D11 will ask the complainant if she had been drinking that night or if she could remember exactly what happened. If the defence lawyer surmises that the complainant is not going to testify, s/he will contact the Crown who is handling the case against the accused and inform him/her that the complainant is not going to testify. Although D11 did acknowledge that this practice is tantamount to pressuring the witness, s/he prefers to see it as "working it out."

> A lot of people charged with domestic violence end up in jail because a lot of them have legal aid duty counsel. Duty counsel will not talk to the complainants. They won't talk to the women. Whereas, if I know the woman from previous assaults then I will call her and say 'Hi it is me, has he been bad again?' If the complainant says to me on the phone that she is not going to proceed or that she was drunk and cannot remember what happened, then I need to know that so I can make a deal with the Crown. (D11)

The deal with the Crown mentioned here is that the defence lawyer will plead the client guilty if the complainant is going to appear to testify. If the complainant will not testify, the Crown will move the trial date up so that the charges can be dismissed or stayed. The Crown's office knows that D11 will not go ahead with a trial unless the complainant is going to testify. It is interesting to note that none of the defence lawyers indicated that the Crown relies on testimony bargaining with the complainant in cases

when she is unlikely to testify. Rather, the charges are dismissed or stayed. This contrasts with Ursel's position that the Crown will use testimony bargaining in efforts to meet the interests of the complainant as well as vigorously pursue a prosecution.

D11 goes on to explain that s/he sees the role of a defence lawyer as keeping the client out of jail. S/he reaches this end by advising clients that s/he will "work out a deal with the Crown rather than go to court." In turn, the Crown's office rewards D11 for not using the trial process for every accused.

> When I need to put a matter into screening court fairly quickly and the screening courts are full, certain Crown's will do it for me. When I need a custody trial date and they are full for four or five months – largely in domestics – I can usually work it out that most of the Family Violence Crown's give me a date one month from now. (D11)

In the end, D11 claims that his/her clients are out more quickly than most other men charged with domestic violence.

> I make sure my clients know the deal, that I won't put them through a trial just for the hell of it. I'll decide ahead of time if I am going to win or I am going to lose. I get my clients out a lot faster than a lot of people's clients. (D11)

This strategy would appear to be unethical, as the defence lawyer is attempting to direct the complainant not to testify against the accused. As well, the Crown's conduct in this strategy also contradicts the prosecution guidelines laid out in the Attorney General's directive. The directive states that if the complainant in a domestic violence case is unwilling to testify, the Crown is to refer the case to the Director of Prosecutions to assess whether the complainant's statement to police can be read in as evidence or if she can be compelled to testify. The practice of law in this case illustrates the agency of the Crown and the defence to subvert zero-tolerance guidelines. The Crown is directed to

vigorously prosecute those cases where the possibility of conviction exists with or without the testimony of the complainant. Insight as to why the Crown and defence may engage in conduct that appears to contravene the prosecution guidelines set out in a directive from the Department of Justice can be gleaned from the findings of an earlier study with Crown Attorneys in Ontario. In that study (MacLeod, 1995), Crown Attorneys expressed that such policies are disrespectful of the function of the Crown as professionals in that they remove their discretion, causing a large number of minor assault cases that overwhelm the system and drain the lawyering resources.

Other defence lawyers raised limitations of zero-tolerance other than those linked to heavy caseloads. These lawyers explained that – in their view – zero-tolerance does not provide women with what they require to end the abusive relationship. D1 explains that domestic violence cases "take on a life of their own which nobody ever intended." Complainants do not understand the implications of calling the police claiming, "he pushed me." Because the police must arrest and remove the accused from the home, oftentimes women are left without any means of support. As explained here:

> What the complainant does not appreciate is that making a call to the police and saying 'he pushed me' is going to be suddenly, 'he is gone' – which means she is now responsible for the children without any assistance. She is now responsible for the money and groceries in the next day. (D1)

The defence lawyers explained that in their experience, there is a dissonance between what women want and what they receive under zero-tolerance. From their perspective, zero-tolerance empowers police and prosecutors, but not women because it does not provide for immediate financial and social supports, such as childcare, food and/or income assistance.

> What typically happens is that you have the complainant and the accused that the next day wishes the whole thing had not happened. (D10)
>
> Often I get the complainant on the phone the next day saying 'I just want him home, I just want him to leave me alone, and now he's promised not to drink.' So they want the bail order changed because they want him to be able to come home or have some contact. (D10)

Examination of a Crown case file (C23) indicates that women do face difficulty when deciding to testify against the accused. These difficulties are oftentimes linked to women's lack of social and economic resources to cope. For example, in a memo to the Crown from the Women's Advisory Program, the complainant (an Aboriginal woman) expresses that she wishes the accused (an Aboriginal man) not be incarcerated, as she requires his support at home for childcare.

> The complainant stated that she does not want the accused to go to jail. She is requesting that as part of any sentence, the Courts will place the accused on probation and order him to attend, participate and complete counselling on Domestic Violence, as well as an Alcohol Treatment Program. The complainant believes that the accused should be punished for what he has done to her but she is requesting that he does not go to jail for the following reason: the complainant needs the accused's help to take over the parental role and responsibilities for their two oldest children. Due to her health problems, and the behavioural problems of her children, she disclosed that she has been under a lot of stress and she finds it very difficult to cope with her situation. In addition to her health concerns, she is concerned for the well being of her children. She believes that her children need their father and that is why jail is not the answer at this point in time. (Memo to Crown from the Women's Advisory Program, C23)

What is particularly striking in this case is that the accused has been convicted several times in the past for sexually and physically assaulting the complainant. She fled to her parents' home in Northern Manitoba, but the accused followed her and her family offered no support or protection. She eventually returned to Winnipeg to end the relationship. In her testimony at the preliminary hearing, the complainant explains that the accused uses

his relationship with their children to control her. This tragic account of poverty and isolation tells that oftentimes, Aboriginal women have few alternatives for protection other than the criminal justice system. Yet, this type of response does not meet the material and structural needs that women require to end the cycle of violence (such as appropriate and affordable childcare and community support).

Other defence lawyers' accounts of their experiences echo the frustrations women face because of poverty and lack of structural supports. Lawyers explained that for some women, their continued contact with the accused – regardless of non-communication and contact orders that may be in place – is linked to immediate day-to-day needs of childcare. Defence lawyers have heard complainants say, "What I really want is to let him come here at 7:30 in the morning, pick up the kids, take care of them while I have a shower and make their lunch then he can take them to school" (D10). But, in most cases, contact between the complainant and her partner cannot happen once the charge has been laid.

Another defence lawyer (D3) explains that because of the backlog in cases and the complainant's need to maintain a relationship with the accused, a woman will often breach non-communication and contact (NCC) orders, and/or testify in court that she was too drunk to remember what happened or that she fell down the stairs. This leaves the complainant in a precarious position the next time she is assaulted. She is ashamed to call the police and is reluctant to repeat the same stressful process again. The complainant is also unlikely to be believed in the future when she does claim to have been seriously assaulted.

Ursel (2001) argues that under the new paradigm of justice in the Family Violence Court, the Crown does not abandon women who fail to testify against their abusers or violate restraining orders. Rather, this pattern of behaviour is now understood as typical for women in abusive relationships. However, what is unaccounted for is how defence lawyers will utilize the past behaviours of women as a means of undermining their credibility in court.

> You end up with complainants who in many cases have legitimately been assaulted but end up lying, saying things like 'I was drunk and I have no idea what happened,' because they want to see the accused acquitted. So when it happens again, you have a history of a complainant lying to the court. So, eventually you are going through this for the fifth time and it gets impossible to convict the guy because she has perjured herself so many times in the past. (D2)

Another consequence of zero-tolerance protocol is the frequency of court orders such as NCC orders. D8 explains that there is no way to differentiate between the accused who is a serious threat to his spouse and the situation where a woman is merely upset at her ex-spouse.

> The other problem is that the frequency of orders is leading to a problem because they have become so cheap. Nobody knows if an NCC is granted because it is a terrible situation and this guy really should keep as far away from her, or whether it is a situation where she is upset about something and got an order. (D8)

D1 claims that police are forced to manage a large volume of NCC orders and this has an impact on how they respond to calls. All 911 calls that report a violation of a NCC order are to be treated as a priority-one calls in the dispatching of police resources. From D1's perspective, police resources are ill-equipped to deal with the number of NCC orders

issued by Family Violence court judges. [5]

In addition to these concerns about zero-tolerance, interviews with defence lawyers also revealed that zero-tolerance approaches are an inappropriate and ineffective solution to domestic violence. From their perspective and based on their experience, domestic violence is a "relationship problem" (D7) that involves both men and women. Yet, zero-tolerance unfairly targets only men's behaviour.

"It's a relationship problem"

Throughout the interviews, defence lawyers appeared to frame domestic violence as "a normal pattern of living for the accused and the complainant" (D1) that should be dealt with through mediation and counselling, not criminalization. Most of the interviews with defence lawyers indicated that psychological supports and mediation are more necessary than is a strict legal response to combat family violence. The majority of domestic violence is understood as stemming from troubled personal relationships – not dangerous men – and, in some instances, is victim-precipitated. On one hand, this perspective of domestic violence can be viewed as a potentially progressive approach in that lawyers are advocating for supports and resources for women and children. On the other hand, it is to the strategic advantage of defence lawyers to present domestic violence as a relationship problem and to advocate for a non-punitive response, as it is in their client's best interest.

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5 D1 is referring to the case in Winnipeg where two Aboriginal women were killed by an ex-spouse of one of the women. The man was under a restraining order at the time of the murders. The women had called for police assistance 5 times from 3 different addresses before the police responded. A coroner's inquest called to investigate if the women's deaths could have been prevented heard that improperly trained staff operated the 911 call centre and the Winnipeg Police Service ineffectively maintained NCC orders.

It is important to also note that this seemingly progressive outlook contrasts sharply with the strategies used by defence lawyers in sexual assault cases. In Chapter Six, the strategies of lawyers were rooted in stereotypical views of teenaged girls and boys as being untrustworthy and attention-seeking, rather than in need of therapeutic intervention and support. These findings suggest that the viewpoints of lawyers may be more a reflection of the most effective strategies for defending men accused of harming women and children than a commitment to a progressive politics.

Because domestic violence is understood to be a relationship problem, defence lawyers perceive zero-tolerance policies as unjustly penalizing men. One common example given to illustrate this lack of equity is the mutual breaching of non-communication and contact orders (NCCs) by the complainant and the accused. One defence lawyer (D11) explains that most breaches of NCC orders are consensual because most of the complainants in domestic violence cases want to continue their relationships.

> When a woman wants the guy back – and 90 percent do – I would say most of my clients are back with that woman within the next month, whether there is an order or not. It's because she wants him back and they think they can reconcile. And, yes, he may assault her again. (D11)

D11 goes on to explain that in his/her opinion, NCC orders deny women any power or agency to decide how to resolve the problems in their relationship. S/he states that because of this lack of choice or control over the process, women will not call the police when they are assaulted or threatened.

> It bugs me, quite frankly … that they are saying women are stupid. Like they are assuming that because there has been so much domestic violence in society, no woman knows her own mind. Therefore, they have to protect her from her own stupidity. (D11)

In sum, interviews with defence lawyers suggest that the new paradigm of justice

envisioned by proponents of zero-tolerance for domestic violence is seriously undermined by the agency of defence lawyers. Although considerable attention has been paid to the work culture of Crown Attorneys (such as the introduction of specialized prosecutions), defence lawyers continue to resist these reforms, claiming that zero-tolerance violates the principles of fundamental justice and is the result of fanatacism that unfairly targets men, and at the same time fails to meet the needs of women living with violence.

Concluding Remarks

In recent years, a number of criminal justice policies have been implemented in Manitoba to address the problem of domestic violence. These policies – broadly referred to as zero-tolerance – have affected the mandate of police agencies and prosecutors in how they respond to domestic violence cases, leading some proponents to suggest that a 'new paradigm of justice' now prevails. The purpose of this chapter has been to consider whether, in fact, the practice of law is structured differently in domestic violence cases compared to other crime categories we have examined, and whether this 'new paradigm of justice' extends to the work culture of defence lawyers.

Like other crime categories we have considered, the practice of law in domestic violence cases rests on typifications of accused and complainants. Interviews with defence lawyers reveal that when women are charged with domestic assault, stereotypes of femininity (or what is referred to as the 'chick defense') are used extensively throughout the trial process. By contrast, the complainant in the mock police report also comes into view as an Aboriginal man who likely has a drinking problem and a past

record of violence against the accused. In these terms, law works as a gendering and racializing strategy in that the Woman of legal discourse appears as a 'typical battered woman' and the Man of legal discourse as a 'drunken Indian.' Defence lawyering clearly relies on normative assumptions of women who use violence as 'victims' and Aboriginal men as being 'out of control.' Crown files on three cases of domestic violence show that the strategies of defence lawyers continue to be framed by the way law sees women and men. However, in those cases where the accused is a man, the defence strategy shifts to cast the woman complainant as 'mutually combative' or as a 'liar.'

Interview data also point to some troubling findings as to the work culture amongst defence lawyers under zero tolerance. Defence lawyers who were interviewed claimed that vigorous prosecution policies are a flagrant violation of the principles of fundamental justice and are 'tantamount to fanaticism.' Moreover, from their perspective, vigorous prosecution policies (as they currently exist) do not work in the interests of women living with violence. Defence lawyers interviewed also claimed that occupational groupings have emerged that differentiate between those lawyers who do 'real violence' and those who capitalize on the high volume of domestic violence cases that are being processed. As a result of this generalized resentment by defence lawyers, strategies have been adapted to undermine zero tolerance, such as judge shopping and talking to complainants to persuade them not to testify.

Zero-tolerance policies for addressing the problem of domestic violence have had a significant impact upon the practice of law. Under zero tolerance, the state appears to be committed to devising a strategy that balances the importance of prosecuting domestic violence cases with the prescribed role of the Crown to pursue a conviction only when

there is a likelihood of conviction. However, specialized prosecution also appears to have antagonized the legal community so that lawyers have begun to subvert the Family Violence Court protocol. These findings suggest that realizing the goal of a 'new paradigm of justice' that prioritizes the needs of victims over the interests of winning has been less than certain. Zero-tolerance policies such as specialized prosecutions have resulted in disparate rates of criminalization for Aboriginal men and have under-estimated the agency of lawyers. This study suggests that problems such as high rates of stays of proceedings in domestic violence cases can be attributed, at least, in part, to the strategies of defence lawyers who are willing to subvert the principles behind zero tolerance. That defence lawyers are resorting to such subversive strategies adds weight to feminist concerns over the viability of relying upon the criminal justice system to respond to the needs of women in violent relationships.

Conclusion

In both form and method, law is held to be impartial, neutral and objective. A criminal trial is idealized as an adversarial process in which the practice of law is structured according to principles of fundamental justice, as well as codes of professional conduct that protect the rights of the accused. The principles of fundamental justice proclaim that every accused who appears before the court is entitled to a full and complete defence to the charge, that the accused is innocent until proven guilty and that the Crown must prove its case against the accused beyond a reasonable doubt. The principles of fundamental justice insist that the Crown's decision to prosecute must be based on a reasonable likelihood of conviction, that prosecution is in the best interest of the public and that the power of prosecution is not unlimited. Yet, despite the principles of fundamental justice and professional codes of conduct, economically-marginalized racial minority men and women continue to be over-represented in criminal courts, remand centers, jails and prisons across Canada. The purpose of this study has been to uncover some of the possible reasons why a paradox exists between the form of law and conditions of inequality.

The intellectual histories of post World War II criminology and the sociology of law suggest that the over-representation of marginalized social groups (particularly inner-city young men of colour) has been only partially theorized. Theoretical explanations have narrowly focused upon either micro processes (such as labelling or routine activities) or macro structures (such as patriarchy, colonialism or capitalism). This split between micro and macro explanations has confounded how to make sense of the

paradox between inequality and the principles of fundamental justice. More recent theoretical excursions of post-structuralism have tended to remain at the level of discourse by claiming, for example, that law is a gendering or racializing strategy. What remains unclear, however, is how these strategies work in the everyday world. In response to the perceived shortcomings of existing theoretical frameworks, I have proposed an integrative approach that focuses on the practice of law as social action that is structured by the form of law, discourses of race, class and gender, the current socio-political context of neo-conservativism and the agency of lawyers.

Sentencing studies have, for the most part, been a key data source for criminologists and sociologists of law interested in understanding the influence of social characteristics of the accused on the criminal justice response. These studies suggest that race, class and gender somehow influence the administration of justice. Yet, sentencing studies have not provided a clear picture of how the race, class and gender of the accused affect the outcome of the criminal justice process. I have argued that sentencing studies emphasize *outcomes* of the criminalization process, but little can be gleaned as to the *process* that organizes the various legal and non-legal aspects of the case. In these terms, I have suggested that a methodological shift towards a qualitative examination of the criminalization process can contribute to our understanding of the complex relationship between the form of law and patterns of inequality.

How can we explain the paradox between the principles of fundamental justice and disparate rates of criminalization for those most entitled to the protection of the rule of law – especially those from marginalized groups accused of serious crimes? Official crime statistics in Canada report that Aboriginal men and women are generally more

likely to be convicted of violent crimes than other racialized groups, especially in the prairie regions. The city of Winnipeg, Manitoba has one of the highest concentrations of urban Aboriginal peoples, as well as a severe concentration of urban poverty and one of the highest violent crime rates in Canada. Men and women accused of violent crimes in Winnipeg are likely to be economically-marginalized Aboriginal peoples from the inner-city. The focus of this dissertation has been on the strategies of lawyers in cases of violent crime (such as, manslaughter, aggravated assault, sexual assault and domestic violence). To this end, I have suggested that lawyers are key players in the criminalization process in terms of their status, prescribed roles and agency. Said differently, the strategies of lawyers can inform us as to how the principles of fundamental justice are influenced by presuppositions of violence and the race, class and gender of the accused, victim(s) and witness(es).

This dissertation has sought to answer four questions:

- How do racialized, gendered and class-based presuppositions affect the case-building strategies of lawyers?
- How is violence normalized? How and where is it made typical?
- What influence does the current conservative socio-political context have on the practice of law?
- How does the agency of lawyers play out in the practice of law?

To answer these questions, a qualitative methodology was designed to incorporate interviews with twelve defence lawyers and the contents of twenty-three Crown case files. These data have revealed that lawyers are able to weave presuppositions about the accused, the victim and the context of the violence into the form of law.

Law as a Gendering, Class-based and Racializing Strategy

In a criminal trial, a defence lawyer must strive to undermine the credibility of the Crown's case against the accused. Defence lawyers engage in zealous cross-examinations using strategies referred to as 'whacking the complainant,' which are intended to dissuade the complainant from testifying as well as undermining his/her credibility. Although 'whacking the complainant' is an element of the adversarial system, my data suggest that defence lawyers rely upon gendered and racialized strategies – such as rape myths and racialized images of the 'drunken Indian' and the 'North End drinking party' – in their case-building strategies. As presented in Chapter Six, sexual assault trials involving young children and teenaged boys and girls are particularly rich in the use of discursive claims about childhood and adolescence (C12, C13, C21). Teenaged girls are cast as promiscuous and manipulative and their mothers are blameworthy for failing to protect them (C16, C17, C18). As well, women's sexual aggression is eroticized as a lesbian fantasy (C19). To a lesser extent, white men accused of sexual assault are also gendered, albeit in a different form. Men's sexual aggression is unmarked and seemingly normalized (C20). In cases involving Aboriginal men accused of sexual assault, lawyering strategies rely upon racialized presuppositions that Aboriginal men lack sophistication and are slow-witted (C14, C15).

In cases involving Aboriginal peoples accused of, victimized by or witnesses to violence, it was difficult to distinguish between racialized presuppositions and those that were linked to class. In Chapter Four and Chapter Five, defence lawyers appear to be enabled by common-sense assumptions that Aboriginal peoples are undisciplined and lazy, as shown by their substance abuse, welfare dependency and limited education (C1,

C2, C3, C5). Race, class and gender presuppositions become enmeshed when examining cases of Aboriginal women charged with a violent crime. Crown Attorneys are enabled by racialized presuppositions that normalize violence by Aboriginal peoples, especially Aboriginal women. Crown strategies reflect the assumption that Aboriginal women are dangerous and a risk to others, regardless of the context of the violence. For example, an Aboriginal woman's violence is rarely cast as self defense, even when evidence suggests that she was the victim of male violence (C3). Defence lawyers are constrained by this view of Aboriginal women and recognize that the courts will not accept a self-defense argument. Instead, their strategies focus on procedural issues, such as the inadmissibility of the accused's statement because of her intoxication. Similarly, when an Aboriginal woman is accused of assaulting a white man (C10), the Crown is able to claim that she is dangerous and a risk to others because witnesses (white men) describe her as a 'bitch' or 'high on heroin.'

The strategies of defence lawyers and Crown Attorneys further entrench class cleavages and truth claims of racial inferiority. For example, lawyers disbelieve the claim of an Aboriginal male who, when wanting to use the washroom at a gas station, is assaulted by three white males who call him a 'dirty fuckin' Indian.' Instead, defence lawyers would encourage the accused to plead guilty and not go to trial as he has little credibility before the court. Similar patterns are found in Crown case files of inter-racial assaults. A Black homosexual male who is seriously injured by a white male lacks any credibility because of his 'Rastafarian dreadlocks,' lack of education and marijuana use (C7). In contrast, violence between young white men is framed as a "masculine contest" where men use violence to defend their honour (C6, C9, C11). In these terms white male

violence is normalized or made reasonable as a means of protecting one's reputation and status. This view of young men's violence is enabled by cultural presuppositions of masculinity, but is also supported by the form of law. Under law, violence is deemed to be reasonable (therefore, less criminal) when two (white) men engage in mutual combat to protect their personal property or reputation. In this way, violence by men is influenced by race, class-based as well as gendered presuppositions that are embedded in the form of law itself.

Overall, these findings suggest that the influence of inequality upon the criminal justice system cannot be isolated into discrete variables of race, class and gender. Rather, what is important is how each is woven together. The discursive claims of 'Indianness,'whiteness, economic-marginalization and gender appear enmeshed in the strategies of lawyers, suggesting that the over-representation of Aboriginal men and women in the criminal justice system is a product of a complex interplay of various stereotypes.

The Influence of the Neo-conservative Socio-political Context

The resiliency of racialized, gendered and class-based presuppositions in the practice of law suggests that they are effective because they hold purchase in the larger society. For example, rooming houses in the inner city are inhabited by violent 'drunken Indians' and 'welfare bums.' In contrast, drinking parties in middle-class neighbourhoods are characterized as 'birthday parties.' Violence between young white women is psychologized and labelled an isolated incident or the result of a hormonal imbalance caused by a recent abortion. While these are gendering strategies that mark white middle-

class women's violence as atypical, lawyers also rely upon class-biases by drawing attention to the white woman's work ethic, conformity to feminine role expectations and close relationship with her mother. In these terms, defence lawyers are enabled by strategies that draw upon images of respectability and femininity.

It is important to recognize that these lawyering strategies are expressions of a form of governance that is aimed at the responsibilization of the individual. Governmentality theorists suggest that the criminalization process is intended to manage those individuals who have been dependent upon the welfare state and have an adjudged lack of competence or capacity for self-discipline. In these terms, the role of the criminalization process is the management of those who are unwilling or incapable of self-governance, such as individuals who are economically-marginalized. Thus, the over-representation of inner-city Aboriginal men and women in the criminal justice system – despite the principles of fundamental justice – can be explained as a function of how the neo-conservative state governs according to the class interests of the liberal elites.

Domestic violence has been a key focus in this study of how the neo-conservative context influences the practice of law. The strategies of lawyers in domestic violence cases reveal how the practice of law is structured by a neo-conservative socio-political context that advocates for a rigid law-and-order approach to crime control, or what Snider (1998) calls "compulsory criminalization." Yet, public denunciation and vigourous prosecutions do not appear to influence the practice of law in all crime categories. In cases where young Aboriginal men and women are victims of violence, there is little sense of public denunciation and need for vigorous prosecution. Rather, the Crown is constrained by the victim's lack of credibility because of his/her "Indianness": substance

abuse, unemployment and transciency. In cases of Aboriginal peoples accused of serious crimes, defence lawyers are inclined to negotiate plea bargains with the Crown, suggesting that the principles of fundamental justice are limited by the race, class and gender of the accused. The exclusion of disenfranchised and racialized groups from due process also fails to recognize their experiences of victimization. Rather, economically-disadvantaged Aboriginal men and women are cast as dangerous or ungovernable populations.

The Agency of Lawyers in the Practice of Law

Across all of the crime categories examined in this study, defence lawyers appear as agents of criminalization driven by the desire to win at trial, but also by their personal views of men and women accused of or victimized by violence. The form of law (such as 'rape shield' provisions or vigourous prosecution policies) does not constrain the agency of lawyers who do not accept the intention of the law. For example, in sexual assault trials, defence lawyers continue to rely on confidential records to undermine the credibility of the complainant – regardless of case law that constrains the use of such evidence at trial. Defence lawyers are also likely to advise their clients (such as men accused of sexually assaulting children and teenagers) not to plead guilty on the basis of their own personal view of young girls and boys who claim to have been sexually assaulted, particularly street youth and children in foster care. The strategies of defence lawyers are enabled by cultural presuppositions that teenaged boys and girls are manipulative troublemakers and liars. Given their wide currency, law is likely to accept

these rape myths as truth claims, constraining the Crown's ability to claim that the complainant did not consent to sex with the accused.

The agency of lawyers also comes into view when examining the practice of law in domestic violence cases. Although proponents of Winnipeg's Family Violence Court claim that specialized prosecutions are intended to improve the quality of lawyering in domestic violence cases, interviews with lawyers suggest otherwise. Defence lawyers appear to engage in various strategies to undermine the prosecution (such as judge shopping and contacting the complainant to dissuade her from testifying). Although these tactics are not exclusively used in domestic violence cases, defence lawyers revealed a sense of outrage and resentment over what they perceive as a violation of the principles of fundamental justice, political meddling in administration of justice and a misuse of court resources. As such, defence lawyers were more likely to engage in strategies that undermine the intention of the Family Violence Court.

As well, within the legal community, domestic violence cases are not considered 'real' violence and prestige is attached to more serious crimes. In their view, domestic violence is a problem better addressed through counselling and mediation, not criminalization. This viewpoint, however, reflects the strategic advantage of defence lawyers who have a stake in minimizing the potential for criminalization. While defence lawyers are apt to rely on strategies that undermine the Family Violence Court's specialized prosecution policy, the strategies of Crown Attorneys in the Family Violence Court appear to emphasize public denunciation and are supported by the wider political context that is 'tough on crime.'

Concluding Remarks

This study represents an initial exploration of the criminalization process. Futher research is necessary to build upon the theoretical framework of lawyering as structured action. In particular, the strategies of lawyers in cases of men and women accused of armed robbery must be examined. As well, a larger sample size is required to establish consistent patterns in the strategies of lawyers. Nonetheless, what implications do the findings of this study hold for those working towards social change within the confines of law?

How the state should respond to violent crime is a contentious issue. This study suggests that strategies to protect against disparate rates of criminalization for marginalized social groups must be cognizant of the role of lawyers in the administration of justice. The principles of fundamental justice do not constrain the use of racialized, gendered and class-based presuppositions. Indeed, the strategies used by lawyers in the courtroom reveal that the form of law accommodates normative conceptions of violence, masculinity, femininity, sexuality, race and poverty. Those presuppositions that resonate with wider socio-political interests are the ones most likely to structure the practice of law.

These findings raise serious doubts as to the viability of using the form of law to protect the rights of marginalized men and women, even those accused of serious crimes. The principles of fundamental justice do not prohibit the agency of lawyers to sabotage or undermine the intention of law reforms. When using law as a resource for social change (such as the protection of women and children from domestic violence), careful attention must be paid to the capacity for personal agency as well as the professional work culture of defence lawyers and Crown Attorneys to sabotage or undermine the effectiveness of

legislative reforms. By narrowly focusing on the changes necessary to improve the quality of Crown lawyering, feminist reforms do not attend to the role of defence lawyers in the process of criminalization.

Law is an important dimension of social change, however, law comes to life in a socio-political context. Feminist reforms to the criminal justice response to domestic and sexual violence have converged with neo-conservative interests of compulsory criminalization and the dismantling of the welfare state. In doing so, feminists have unwittingly enabled the 'compulsory criminalization' of economically-marginalized Aboriginal men and reified the power of the state as the solution to women's inequality, despite law's capacity to exclude marginalized women's accounts and accept men's explanations for their violence as reasonable. This study shows that law continues to protect the interests of the liberal elites who demand protection from dangerous populations – those disenfranchised by the shrinking welfare state. White men continue to benefit under law as their violence remains normalized and a part of their (hetero)masculinity. By contrast, women's violence remains eroticized and pathologized, whereas their victimization is adjudged according to the rape myths and scripts of (hetereo)femininity. As this study indicates, the form of law is not the only context that constrains and enables the strategies of lawyers. The practice of law is also influenced by the wider socio-political context, the presuppositions of race, class and gender, as well as the agency of the lawyers themselves. Any future strategies for legal reform to address the paradox between inequality and the principles of fundamental justice should be wary of the complexity of the criminalization process.

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Appendix A

Mock Police Reports

Mock Police Report 1: The North End drinking party

The accused (Native female, age 31) and the victim (Native female, age 39) were attending a drinking party in a North End rooming house with several acquaintances. Previous to this, they had been at the Occidental Hotel on Main Street in downtown Winnipeg. The accused claimed in her statement to the police that the victim (a friend of the accused) was accusing her of flirting with her boyfriend throughout the evening, which the accused denies doing. The accused also stated that the victim repeatedly told her she would "make her good and ugly" the next time she saw her near her boyfriend. The police incident report states that the accused had been drinking excessively as her speech was slurred and she had difficulty recalling where she had been earlier in the day. Police interviews with the boyfriend of the victim were of little help as he claimed he did not remember anything about that night. When the accused left the Occidental at closing, she was to meet her sister along with several of her friends at a house party. The accused claims that the victim followed her up Main Street, threatening and yelling to her that she was going to tell everybody what a slut she was.

Upon arriving at the rooming house, the accused went into the shared bathroom down the hall from the party, closing the door behind her. The victim pushed her way through the door and grabbed the accused by the back of the hair, pushing her face into the wall. The accused smashed the beer bottle she was holding and slashed the victim across the face. The victim threw her to the floor on her back and lunged at her, placing her hands around her neck. The accused then slashed the victim's throat. The victim fell off of her, grabbing her neck. The accused got up and ran out into the hallway screaming for someone to call 911. However, by the time the police and ambulance arrived, the accused had climbed out a window and fled down the street.

It was later determined that the accused had outstanding charges for prostitution and theft-related charges. When she was later apprehended at the Savoy Hotel, she claimed that she did not attend a party at the rooming house, and that she had been at the Occidental and Savoy Hotels all night. Eye-witness accounts of friends in attendance at the party stated that the accused had arrived at the party "really loaded" and very upset (crying, etc) about being hassled at the bar by the victim. She was yelling that she wanted to "make her shut up." None of the eyewitnesses could recall overhearing the victim threaten the accused because of the noise of the party and the location of the bathroom. Witness accounts also stated that they had often seen the accused with a knife to protect her. The victim later died of her injuries in hospital.

Social characteristics of the accused	Social characteristics of the complainant
Aboriginal female (age 31)	Aboriginal female (age 39)
Single	Single
Mother of 2 children	Mother of 2 children
Welfare	Welfare
Grade 8 education	Grade 10 education

Mock Police Report 2: The 'sniffer'

The complainant (Caucasian male, age 18) was working alone at a Petro Canada gas bar. At approximately 2 a.m., the accused (Native male, age 21) entered the store and asked for the key to the washroom. The complainant's police statement outlined that the accused was holding a gasoline soaked rag and was unsteady on his feet. The complainant stated that in his opinion, the accused was a "sniffer." The complainant insisted that the accused leave the store or else he would call the police. As he came around the counter to force the accused back out through the door, the accused grabbed a large flashlight (approximately 24 centimetres long) that was on the counter by the cash register. He swung out and smashed the complainant's hand as well as striking him about the head causing the complainant to cover his head with his hands and drop to the floor. At the moment a customer/witness entered into the gas bar and tried to pull the accused off of the complainant, while another customer/witness ran to a pay phone and called 911. The customer received minor bruising and lacerations from the accused trying to bite his hand and forearm. The complainant was taken to hospital where he was treated for 3 broken fingers. The eyewitness statements also described the accused as "high or stoned and acting like a wild man."

The accused's statement to the police outlined that he entered the store and asked the complainant for the key to the washroom. The complainant refused to give him the key and started to push him out of the store. The accused noticed that two other men were behind the cash counter and appeared not to be employees, as they did not have uniforms like the complainant. These men came over and grabbed the complainant - pushing him up against the wall while yelling at him, "dirty fuckin' Indian." The complainant and his friends then started to punch the accused in the stomach and about the head. The accused then grabbed the flashlight from the cash counter and swung out at the three men who were assaulting him. The two friends of the complainant yelled that somebody was coming and ran out the back door of the store. The accused sustained bruising and lacerations to the head and chest area. The accused maintains that he was trying to defend himself against the three attackers.

<u>Social History of the Accused</u>
Native male age 18
Welfare
Grade 10 education
Single

<u>Social History of the Complainant</u>
Caucasian male age 20
Part time gas bar clerk
Red River College
Single

Mock Police Report 3: Sexual Assault

The complainant (Caucasian girl, age 16) disclosed to her school physical education teacher that she had been physically and sexually assaulted at home by her mother's boyfriend (Caucasian male, age 45). The police were contacted by the teacher after the young girl stated to her that she was having problems with her mother's fiancé who had just moved into the home. The complainant stated that the accused was always coming into her room at night and she could not go to sleep because she was afraid of what would happen to her if she did.

After taking the complainant's statement of two incidents that involved her breasts being fondled and being forced to perform fellatio on the accused, the police attended the restaurant owned by the accused. He was escorted to the Public Safety building and formally charged with sexual assault. The accused denied any charges of sexually assaulting the girl, stating "the little whore has been nothing but trouble for me and her mother ever since I moved in, always looking for some way to get her mother angry at me; she's the one who is always coming on to me." When asked by the police if the accused had sexual contact with the complainant, the accused stated that she had offered to give him a blowjob (which he accepted) but he had never slept with her. "Anyway, it was all her idea in the first place."

A doctor's examination of the girl indicated that she had been sexually active. Police forensic investigators searched the home of the accused and the complainant and took samples of the bed sheets from the complainant's bedroom. There was evidence of semen and blood, although they were watermarked as the sheets had been washed. Police interviews with the mother reveal that the mother believes the fiancé and wants her daughter charged with public mischief.

Social History of the Accused	Social History of the Complainant
Age 45	Age 16
Caucasian	Caucasian female
Restaurant owner	grade 10 student

Mock Police Report 4: Domestic Violence

The complainant in this case (Native male, age 23) alleges that the accused (Caucasian female, age 21; his former common-law spouse) stabbed him. The assault took place outside of the accused's apartment (she was living there with their 3 year-old daughter). The complainant claimed that he went to her apartment because she did not drop off their daughter at the exchange centre as per their custody order. It was later determined by the police, upon contact with Child and Family Services, that the complainant has unsupervised access with his daughter twice a week at the Children's Access Agency. The complainant stated that he was concerned that something had happened to his daughter. When he arrived at her apartment, he tried contacting her through the security intercom but she refused to let him in. Instead, she came down alone and told him that their daughter was not feeling well, and that she had left a message at the exchange centre for him informing him of this. The complainant then called the accused a liar and demanded to see his daughter. The accused refused to allow him up to the apartment. The complainant stated that "all of a sudden he was bleeding from the side of his head." When asked by police if he had said anything that threatened the accused, he denied having said anything to her other than he wanted to take his daughter to a surprise party for his girlfriend. He also stated, "the bitch has done this to me a thousand times, always keeping my little girl from me." When asked if he had been drinking that day, the complainant stated he had a couple of drinks. The complainant sustained a laceration next to his left eye near the temple area that required four stitches. He also sustained a mild concussion with blurred vision for several days following the incident. The emergency room physician's report stated that the complainant had a blood alcohol level of .01 at the time of admitting.

The accused's statement indicated that she had left a message for the complainant about his daughter's illness and that when she confronted him outside of the apartment she believed that he had been drinking. The staff at the exchange centre stated that they had received no such message from the accused, and that there had been problems with the accused keeping to the visitation order set out by the courts. The accused claimed that the complainant was verbally abusive, calling her a whore and pushing her up against the apartment building entrance. At one point, he placed his hand on her throat. It was at this moment that the accused stated that she couldn't clearly remember what happened, only that she struck the accused on the left on the side head with her keys. When asked if she purposely placed the keys in a position so as to stab the complainant (for example, placing a key between her index and middle fingers), the accused stated that she couldn't remember as everything happened so fast. She claimed that she was afraid of him because he had been drinking and he had his hand around her throat.

Social History of the Accused	Social history of the Complainant
Caucasian female	Native male
Age 21	Age 23
High school graduate	Grade 10
Receptionist	Unskilled labourer

Appendix B

Invitation to Participate

March 1, 2000

Dear ______;

A research project is under way by the University of Manitoba's Department of Sociology entitled, "Men, Women an Violence: The Criminal Justice Response." The purpose of the research is to explore a number of issues pertaining to men's and women's involvement in criminal acts of violence.

My purpose in writing to you is to request an interview to discuss your insights and experiences in defending cases involving violent crimes. The interview will be focused on a series of vignettes involving violent crimes that have been constructed from the analysis of Crown files. This strategy will be used so that you can avoid speaking about specific cases. As well, I wish to explore working relationships with other key players in the criminal justice system, such as police officers and Crown attorneys. I anticipate the interview will take about one and a half hours. The interviews will be tape recorded and later transcribed. Be assured that the research process will adhere to the ethical guidelines required for projects of this nature - including confidentiality and anonymity.

Please contact me at either of the numbers listed below. I look forward to working with you.

Yours truly,

Gillian Balfour
Ph.D. candidate
Department of Sociology
University of Manitoba

Appendix C

Consent Form

The Role of Defence and Crown Attorneys in the Administration of Justice

I understand that Gillian Balfour is undertaking a study of the defence and prosecution of persons accused of violent offenses. I understand that my participation in this project is voluntary, and will involve a recorded interview of approximately one hour in duration. I understand that at any time during the interview I may refuse to answer a question, request that the tape recorder be turned off, or choose to withdraw from the study altogether.

I understand that the information I provide during the tape-recorded interview will be held in strict confidence. **Only the researcher (Gillian Balfour) and the research assistant who transcribes the interview will have access to the tapes, and the tapes will be destroyed once the research is complete**. Confidentiality and anonymity will also be maintained in the reporting of the findings. For example, while my words may be cited verbatim in the final report, my identity - and the identity of any person named during the interview - will remain confidential, but with one exception: information related to the abuse and/or violence against children must be reported to the proper authorities.

I understand the purpose of the research and what my participation will involve. I am willing to participate in this study and to discuss my experiences as a practicing lawyer. I give my permission to Gillian Balfour to use the content of our interview for research purposes. A copy of the final report will be made available to me upon request

____________________ Signature of Participant	____________________ Date
____________________ Signature of Gillian Balfour Department of Sociology University of Manitoba	____________________ Date

This study has been approved by the Department of Sociology Ethics Review Committee. Any complaint regarding the procedure may be reported to the dissertation supervisor, Dr. Elizabeth Comack

Appendix D

Interview Schedule

Introduction

I would like to organize our interview according to different themes. Part One will be a short discussion of your professional profile. Part Two will focus on the vignettes that you reviewed earlier. It is here that I wish to focus on your strategy or approach to defending the accused. Part Three will focus upon lawyering as a profession in a bureaucracy. Please feel free to refer to any notes you may have drawn up prior to our meeting.

Part One

1. What is your current position?

2. Can you describe a brief overview of your career path?

3. How long have you been practicing?

4. Where did you go to law school?

Social History

- age
- gender
- ethnicity

Part Two

I'd like you to look at these four vignettes that I have designed based on my preliminary analysis of Crown counsel files for cases that have appeared before the QB between 1996-1998.

I would like discuss several aspects of these vignettes:

1. What aspects of the case do you consider in determining your defence strategy and the reasons for this strategy?

2. The likelihood of this approach resulting in a plea bargain resolution?

3. What kind of argument would you make in terms of the disposition?

4. What other information would you want to have about the event and the actors involved?

Additional questions

1. How do you go about determining the credibility of the witnesses' and/or victims testimony?

2. Can you explain the varying experiences between provincial court and Queens Bench when presenting a case? Which do you prefer?

3. How is your approach to a case affected by whether the accused proceeds by judge alone or judge and jury?

4. Is your approach to a case affected by current anti-gang and zero tolerance domestic violence initiatives?

5. How much of an impact does forensic evidence such as DNA testing have on your case-building strategy?

6. Given that relatively few women are charged with violent offences, are there certain differences in terms of your case-building strategy when the accused is a woman?

7. Are women treated more leniently in the courts?

   A. If yes, are all women treated leniently or some groups of women?

   B. Is leniency evident in the finding of guilt or in the passing of sentence?

8. Can you explain in your own words the reasons for the sentencing disparities that seem to exist between Aboriginal and Caucasian people? Does this awareness affect your work with someone accused of a violent crime?

9. Can you comment on the impact (if any) of Bill C-41: conditional sentencing and special consideration of Aboriginal offenders *as it pertains to the persons accused and found guilty of violent crimes.*

Part Three

1. What is the nature of your relationship with the investigating police officers of a case?

2. Comment on your working relationship with Crown attorneys. Other defence lawyers?

3. What is the rationale for the nature of these working relationships?

4. What proportion of your criminal bar experience has been working with legal aid clients? How does this impact on the nature of your work?

5. Can you explain to me – as you understand it - the process of assigning cases to specific counsel?

6. Have you attended a pre-trial conference? If so, what is the purpose of this conference? Have you attended a resolution hearing? Again, what is the purpose of this meeting, from your perspective?

7. How political is your job?

8. Have you ever been surprised by the outcome of a case?