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SIX DEGREES FROM LIBERATION: LEGAL NEEDS OF WOMEN IN LEGAL AND OTHER MATTERS

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SIX DEGREES FROM LIBERATION: LEGAL NEEDS OF WOMEN IN CRIMINAL AND OTHER MATTERS

Lise Addario

rr03lars-20e

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Programs Branch

Research and
Statistics Division

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Executive Summary

The Department of Justice Canada, in co-operation with the provinces and territories, is developing a new legal aid policy framework. This paper will contribute to laying the necessary knowledge base for incorporating a gender perspective in the policy renewal process. It is based on a review of the literature and a limited number of key informant interviews. Its purpose is to examine the legal aid and other legal needs of women when they are accused of criminal offences; during the times when they are serving a penitentiary sentence or on conditional release; as survivors of intimate violence who are required to give evidence against their abusive partners; as complainants and as third parties in sexual assault cases; as claimants in criminal injuries compensation proceedings; and as participants in restorative processes.

In examining the possible differences in the experiences and needs of men and women, and of various sub-groups of women – particularly Aboriginal,[1] immigrant, refugee and visible minority women – the report underscores the fact that experiences with the justice system, and the legal needs that flow from those experiences, are impacted by social position. It does not imply that men and women have totally different experiences and needs. Nor does it imply that Aboriginal, immigrant, refugee and visible minority people face totally different barriers in accessing legal services. However, it does show that factors such as gender, race, citizenship, and/or geographic location will produce additional barriers and compound disadvantages in accessing the justice system. The research findings suggest that the legal needs of women be considered more broadly.

Chapter 1 examines the relationship between the life circumstances of women in conflict with the law and their law breaking; recent government policies that have aggravated their social and economic marginalization; and their legal aid and other legal needs as accused persons in criminal courts.

Women's life circumstances and law breaking. When the stories of women in conflict with the law are examined, their history of victimization is impossible to ignore. The majority of incarcerated women, and an even greater proportion of Aboriginal women, have experienced abuse, most often perpetrated against them by men they know. Many also have substance abuse problems. However, unlike those of their male counterparts, women's addictions are frequently linked to their experiences of abuse.

[1] Given the limited time and resources available, this research emphasizes the needs of First Nations women living in urban areas and on reserve. Although previous legal aid research in each of the territories was intended to consider possible variations in the experiences and needs of men, women and youth, these were not fully explored due to time, budgetary and other constraints. More research is required in order to better understand the particular experiences and needs of northern women generally, and Nunavut and Arctic women in particular. In accordance with Article 32 of the *Nunavut Land Claims Agreement*, research must provide opportunities for direct Inuit participation in the study and, therefore, allow direct input from Nunavut women and from persons working with Inuit women impacted by the justice system.

Economic disadvantage can play a role in bringing both men and women into conflict with the law. However, the risk of living in poverty is greater for women than for men, and greatest among Aboriginal women, women of colour and immigrant women. Unlike their male counterparts, women in conflict with the law are frequently the primary or sole caregivers for their children. As a result, they have fewer opportunities to obtain an education, to establish marketable skills or to maintain employment.

Nonetheless, women are charged with far fewer and less serious offences than men. In 1999, they were most frequently charged with theft under $5,000, followed by level 1 or common assault, fraud (most frequently welfare fraud), and possession of or trafficking in cannabis – all of which accounted for 55 percent of the charges laid against women that year.

Women's law breaking is inextricably linked to their poverty and abuse. As welfare incomes have dropped further from the minimum level of subsistence established by the poverty line, women have been increasingly prosecuted and imprisoned for welfare fraud. Women's poverty is also a factor in their shoplifting items that they or their children need, their arrest for street prostitution, and their disproportionate imprisonment for fine default. While some jurisdictions have implemented fine-option programs, they rarely provide childcare, resulting in high failure rates for women with children. Charges for level 1 assault have increased significantly since 1987, in part because abused women are being counter-charged with assault when they call on the police to restrain an abusive partner.

Although women tend to be charged with less serious offences than men, the proportion of women in remand is roughly the same as for their male counterparts. Aboriginal women and women of colour are even more likely to be denied bail than White women. Like their male counterparts, women in remote and isolated communities – which include a large Aboriginal population – who are denied bail are detained in southern detention facilities because there are no such facilities in their home communities.

The role of the state in the increasing gap between the rich and poor. Recent government policies have aggravated women's economic marginalization. Such policies include a reduction in state expenditures on programs that benefit the poor, of whom women are a majority. Although the widening gap between the rich and poor – an inevitable consequence of such policies – has fuelled growth in demand for legal services, legal aid funding has decreased. Reduced funding to community-based advocacy groups has reduced the ability of disenfranchised people to influence discourse and policy. Finally, the ascendancy of the law and order agenda has led to more numerous criminal sanctions, stiffer sentences, and allocating responsibility for crime exclusively to the individual, while ignoring the correlates of crime such as illiteracy, poverty, victimization, substance abuse, and the absence of employment opportunities.

Anecdotal evidence indicates an increase in the number of unrepresented accused. The consequences of being unrepresented at trial can be severe for both men and women, especially those with mental disabilities. Unrepresented accused are more likely to plead guilty even if they do have a defence; to be convicted if they plead not guilty; and to receive a harsher sentence since they are unable to engage in charge, plea or sentence

negotiations. A criminal record can severely compromise people's ability to obtain employment or a professional licence, to advance to a more responsible position, and to become bonded or insured. However, the consequences of a guilty plea or conviction and the resulting criminal record can be particularly harsh for women and their children. Women without citizenship may lose their landed immigrant or refugee status. Those who are mothers may lose credibility in child apprehension cases and custody and access disputes. Those who are sentenced to imprisonment will be separated from their children.

Legal aid and other legal needs. Given the implications of a criminal record for women and their children, the view that incarceration is the only relevant criterion triggering entitlement to legal aid representation must be challenged.

Women need representation to assist them in court proceedings, to appeal trial decisions to higher courts, and to challenge the constitutionality of other decisions that impact on them and their children (e.g., welfare provisions). Legal counsel must be sufficiently knowledgeable about women's life circumstances in order to be able to contextualize their offences. Circumstances such as women being physically threatened by their abusive partners can form the basis of a valid legal defence. Women also need legal advice to assist them in determining whether they have a legal defence and should plead not guilty. Finally, like their male counterparts, they need information about their rights, entitlements and responsibilities under the law. Such information should be made available through a variety of media to accommodate different levels of literacy, in a variety of languages, be physically accessible and in remote locations. Target groups or communities should participate in the production and dissemination of information to increase the likelihood that it is accepted as legitimate.

Chapter 2 examines the legal aid and other legal needs of women – as prisoners, mothers and parole applicants – during the time that they are serving a sentence of two years or more in a federal penitentiary.

While the population of federally sentenced women is small, it has increased by 200 percent since 1990, with Aboriginal women, visible minority women and women with cognitive and mental disabilities – who are frequently criminalized because of their disability-induced behaviour – comprising a significant portion of the population. The relationship between women's social and economic marginalization and the correctional system is clear and particularly pronounced for Aboriginal women.

Pursuant to the *Corrections and Conditional Release Act*, the Correctional Service of Canada has the authority to take a range of decisions – including involuntary transfers, disciplinary sanctions, administrative segregation and security classification – that can generate serious consequences for prisoners and, as a result, various legal needs. The Supreme Court of Canada has held that a prisoner still has an entitlement – albeit a pared-down one – to liberty interests within the correctional setting.

Government inquiries have repeatedly described an indifference to the rule of law on the part of correctional authorities, and a lack of awareness and training on prisoners' entitlements to legal services among institutional staff. In the absence of fundamental respect for due process, prisoner complaints may not be viewed as legitimate challenges but as insubordination to be responded to with punitive measures. The use of non-litigious approaches such as mediation is also problematic because of the extreme power imbalance between prisoners and staff.

Given the above, both male and female prisoners need legal representation to ensure that deprivations of liberty are not expanded to an illegal degree. They also require legal advice about their rights to due process in disciplinary and other proceedings. Most basically, prisoners – and staff – require legal information. Such information would be most easily accepted if it were authored and distributed by prisoner, Aboriginal and mental health advocacy groups.

The circumstances of women's offending, their program needs and the risk they pose to the public are different from men's. Nonetheless, the instruments used to determine their security designation are the same as those developed and used for their male counterparts. The instruments contain a range of normative standards that put women, particularly culturally, racially, and cognitively marginalized women, at a disadvantage. The result has been a significant "over-classification" of federally sentenced women, based on classification criteria that de-contextualize their offending while ignoring systemic barriers. This is particularly true for Aboriginal women who are disproportionately classified as maximum security.

Legal advice is necessary in order to assist women to choose the appropriate avenue to challenge their security designation, as well as the individual and systemic discrimination present in the classification tools. Foremost, they need legal information to understand the implications of their security classification, and the legal avenues that are available to them to contest it.

A 1991 survey indicated that two thirds are mothers, and that 70 percent of these are single parents all or most of the time. While the Supreme Court of Canada has recognized entitlement to legal aid in child apprehension cases, the ability for incarcerated women to actually avail themselves of this constitutional protection is fragile at best. Their ability to do so is contingent on child protection workers informing them of their legal rights, on being served with notice of a hearing, on transportation to the hearing being made available to them, as well as on their ability to contact the legal aid system. Moreover, child protection workers and the judiciary focus on the individual caregiver (mother) without connecting the challenges of supporting and nurturing children to the problems of poverty, violence, the legacy of cultural marginalization and racism, and the way in which these compounding experiences of oppression affect women's lives.

Legal representation is therefore required from the point at which the children are removed, or the mother is arrested, continuously through each stage of the child apprehension case. Legal representation at child protection hearings is critical to ensure that mothers have a full and fair opportunity to be heard in court, and/or to enforce their constitutional and legal entitlements. Women also require legal advice prior to signing placement forms so that they can understand the consequences for themselves and their children. In addition, they need legal information on the implications of their incarceration for their dependent children.

Parole hearings are becoming increasingly complex, in part because of increased opportunities for victims to participate in hearings. Parole Board members are required to take into consideration the submissions of victims, the veracity of those statements and the weight to be given them, as well as the due process to be accorded to an applicant in challenging those statements. Given these complexities, legal representation is required to assist parole applicants to counterbalance the enormous visceral impact of having victims participate in the hearing.

Chapter 3 examines the legal aid and other legal needs of women – as survivors of intimate violence[2] who are required to give evidence against their abusive partners; as complainants and as third parties in sexual assault cases; as claimants in criminal injuries compensation proceedings; and as participants in restorative justice processes.

Women as survivors of violence by intimate partners. A consideration of the legal needs of survivors of intimate violence inevitably merges with their experiences with mandatory charging policies. Recent assessments of women's experiences with the policies, and the extent to which the policies met their expectations and needs, indicate that abused women are often reluctant to contact the police. They may fear state intervention in their lives from welfare, child apprehension and immigration authorities, or retaliation from their partners in the form of further abuse and counter-charging. Women who are economically dependent on their abusive partners may fear for their financial security should they be detained. Immigrant women may fear that their abusive partners will withdraw their sponsorship application. Women from closely knit cultural or rural communities may fear ostracism. Finally, Aboriginal, visible minority, immigrant and refugee women may fear a racist systemic response against their partners or themselves. Many women – almost 40 percent in one study – did not expect that their calls to the police would trigger a full criminal justice system response that would include arresting, charging and prosecuting the abuser.

Survivors of intimate violence may need independent legal representation to compel prosecution of a charge where the Crown declines to lay one or to lay a more significant charge, and to protect personal records from disclosure to the accused or the media. There is also a need for legal representation at inquests and public inquiries to examine the systemic failures that have led to women's deaths. Similarly, to the extent that current immigration law and policy discourage women from leaving dangerous family situations, women need access to legal representation to assert their constitutional entitlements to liberty and security of the person, pursuant to Section 7 of the Charter.

The practice of counter-charging gives rise to a clear need for legal advice as soon as an abusive partner utters a statement that implicates the abused woman. Bearing in mind that the most frequent defence to an assault charge against an abusive partner is that he acted in self-defence,

[2] Intimate violence refers to any and all forms of maltreatment committed in relationships of intimacy, trust, and dependence. Violence against women is defined in the United Nations' *Platform for Action* (1995) as "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. … The term embraces wife battering, battered woman syndrome, wife abuse, spousal assault … family violence, domestic abuse, domestic assault, and domestic violence." Cited by McGillvray and Comaskey in *Black Eyes All of the Time, Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999), p. xiv.

women require legal advice during any further questioning by the police, and certainly if charges are laid.

Abused women also need realistic information about the consequences of calling the police, the court process, and the protections available to them and their children. Women whose immigration status is unresolved, or who have been threatened with deportation, need basic information about their entitlements under immigration legislation and the child welfare implications of abuse within the home. They must have access to information before they call they police in order that they can assess how doing so might affect their immigration status.

Finally, abused women would benefit from legal support to assist them in weighing their options, including the risks and benefits of proceeding with a charge, to facilitate their access to different services, and to assist with different decisions throughout the criminal justice process.

Women as complainants or third parties in sexual assault cases. Legal representation may be required for sexual assault victims and sexual assault centres or therapists to defend against production of personal records in court. Women need counsel independent of the Crown, because the Crown's interest is to represent the public, not the privacy or equality interests of the record keeper. Record keepers require legal advice when policy is being formulated regarding the kinds of records they are required to keep and what may be disposed of. In addition, advice at this preliminary stage will assist the centre or therapist to explain disclosure obligations to the client. Record keepers also require advice when they are served with a subpoena.

Legal representation before criminal injuries compensation boards would permit a challenge to documented systemic bias that implies that women survivors of sexual assault are the authors of their own misfortune. Furthermore, legal representation would be necessary to participate in any appeal from such discriminatory decisionmaking.

Women as participants in restorative justice and alternative dispute resolution processes. With few exceptions, the literature promoting restorative justice and other alternative dispute resolution processes has not taken gender and diversity into account. Upon examination, concerns have surfaced regarding the use of such processes for crimes of violence against women and children. Community members share different values, based on their social position within the community. Different values can lead to different expectations of what constitutes a just result. Moreover, it cannot be assumed that community members universally condemn male violence against women. There needs to be widespread community acknowledgment, not only of the relational imbalance between a particular abusive man and an abused woman, but also of the systemic factors that allow continuing acts of male violence against women. Otherwise, a clear denunciation of the acts of an abusive man cannot be issued. The structure of community-based circles or sentencing circles over-individualizes the conflict between a particular man and woman, and has the effect of obscuring the greater systemic factors at play.

In Aboriginal communities where many people are related, family and kinship might serve to silence a victim if her abusing partner is related to a powerful family or leader. The potential for a victim to feel pressured to participate in an alternative system can be great. Additionally, the

dynamics of an abusive relationship can make the victim's willingness to participate impossible to discern.

Aboriginal women choosing the existing system may be criticized for not supporting "their own" system, and acting in ways that are not in the best interests of the community.
Many circles make no record of the comments of participants. As such, inappropriate utterances that may indicate a bias against the abused woman, or an equivocal attitude towards male violence against women in intimate relationships, cannot easily be challenged beyond the circle.

Furthermore, cautions have been raised that volunteers in restorative processes might not possess the appropriate background and training. The use of volunteers, and not paid professionals, removes the responsibility of supporting these processes from the government and moves it into the community.

Domestic violence or sexual assault survivors who participate in processes such as sentencing circles, community justice committees and victim-offender reconciliation processes require legal advice and, if necessary, legal representation to ensure that their participation is voluntary; that the process is representative of a broad diversity of interests; that their rights to privacy are protected; and that any aspect of the process or any agreement that is reached do not violate her rights to liberty, physical security and equality under the Charter.

In conclusion, it would be simplistic to suggest that identifying women's legal aid and other legal needs, or even providing for them, would be sufficient to ensure women's access to justice. The aspects of marginalization that women experience, the political choices that permit their existence, and the social conditions that aggravate them, form the backdrop for virtually all of the experiences and needs described in this paper. These are broad issues that are not part of the dialogue around the provision of legal aid and other legal services and they cannot be resolved solely by the provision of legal services, no matter how broadly defined and how generously funded. They are essentially the timeless political controversies over the cost of providing basic human entitlements in society.

Introduction to Six Degrees from Liberation: Legal Need of Women in Criminal and Other Matters[3]

The Department of Justice Canada, in co-operation with the provinces and territories, is developing a new legal aid and access to justice policy framework. This paper will contribute to laying the necessary knowledge base for incorporating a gender perspective in the policy renewal process, given the well known fact that the differences in individual experiences in the legal system are often based on gender as well as race and class. Other legal aid research projects have focussed on the unmet needs of Aboriginal peoples, immigrants, refugees and visible minorities, people living in rural and isolated locations, and accused persons and prisoners. This research will begin to identify the particular barriers and unmet needs faced by women within these subgroups.

The objectives of the research were three-fold:

a. To document the issues impacting women's need for legal aid and other forms of legal support when they come into contact with the criminal justice system as accused; when they are serving a penitentiary sentence; as survivors of intimate violence[4] who are required to give evidence against their abusive partners; as complainants and as third parties in sexual assault cases; as claimants in criminal injuries compensation proceedings; and as participants in restorative justice processes.

b. To examine the nature of actual or potential unmet needs.

c. To describe a variety of recommendations outlined in the literature to address those needs.

[3] In addition to being a play on the film title *Six Degrees of Separation*, the title of this paper relies on the sociological theory that everyone in the world is connected by a short chain of experiences or acquaintances. In other words, we are separated from everyone in this world by six short degrees or linkages. In the film, one of the characters comments on the elusiveness of this theory, observing, "You have to find the right six people to make the connection." Within the context of this paper, the theory is significant for the thread of experiences common to many women who encounter the justice system, either as accused or as witnesses in cases of intimate violence. A response from the justice system may serve an important cultural and societal function, however it also has the effect of obscuring the underlying systemic factors that lead to their contact, and often times, criminalization. This paper is intended to animate those common experiences in order to discern women's legal aid needs as well as additional needs for support.

[4] Intimate violence refers to any and all forms of maltreatment committed in relationships of intimacy, trust, and dependence. Violence against women is defined in the *Platform for Action* (1995) as any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. … The term embraces wife battering, battered woman syndrome, wife abuse, spousal assault … family violence, domestic abuse, domestic assault, and domestic violence." Cited by McGillvray and Comaskey in *Black Eyes All of the Time, Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999), p. xiv.

The report was intended to make explicit the impact of women's diversity on their experiences with the criminal justice and correctional systems, particularly the experiences of Aboriginal women,[5] and immigrant, refugee and visible minority women.

Examining the possible differences in the experiences and needs of men and women, and of various sub-groups of women, acknowledges the fact that men's and women's experiences with the justice system, and the legal needs that flow from them, are impacted by their social position. This is not meant to imply that men and women do not share many experiences and needs. Nor is it meant to imply that Aboriginal, immigrant, refugee and visible minority people do not face similar barriers in accessing legal services. However, it is to say that factors such as gender, race, citizenship, and/or geographic location will likely produce additional barriers and compound disadvantages in accessing justice.

The research tasks were:

- To review current Canadian literature concerning legal aid and other forms of legal support as they pertain to the aforementioned categories of women.

- Where no legal aid literature pertaining to these categories of women exists, to review relevant literature on the women's relevant life circumstances and justice experiences, and conduct a limited number of interviews with key stakeholders to identify possible implications for the delivery of legal services.

Assessing legal aid and other legal needs is a murky and inexact science, an area of research unto itself. Moreover, meeting those needs depends on a range of variables, including:

- The client's ability to recognize that he or she has a problem or an issue that is open to some resolution, and that the resolution has a legal component to it. Recognizing these two facts is dependant on factors such as level of education, literacy in matters of the law, age, gender, ethnicity and citizenship.[6]

- Whether meeting the need has been mandated by case law or by the Charter.

- Whether the need for services falls beyond those that are currently covered by legal aid plans.

[5] Given the limited time and resources available, this research has focussed on the needs of First Nations women living in urban areas and on reserve. Although previous legal aid research in the territories was intended to consider possible variations in the experiences and needs of men, women and youth, these were not fully explored due to time, budgetary and other constraints. More research is required in order to better understand the particular experiences and needs of northern women generally, and Nunavut and Arctic women in particular. In accordance with Article 32 of the *Nunavut Land Claims Agreement*, research must provide opportunities for direct Inuit participation in the study and, therefore, allow direct input from Nunavut women, and from persons working with Inuit women impacted by the justice system.

[6] SPS Research and Evaluation, *Legal Aid Needs of Prison Inmates Study: Report on the Proposed Study Design* (Ottawa: Department of Justice Canada, 2001), p. 8.

- Whether the issues and remedies are beyond those that are typically provided by a lawyer.[7]

Nonetheless, needs assessments in the area of legal aid may serve to remedy a glaring oversight in the delivery of subsidized legal services. The access to justice movement of the 1960s failed to differentiate clearly the compounding disadvantage experienced by low-income people when differing forms of marginalization intersect and multiply. As a consequence, people responsible for the development of legal aid programs never assessed the legal needs of low-income women, nor the fact that their experiences could necessitate a different approach to the delivery of legal aid services, as well as the eligibility and coverage criteria, in order to provide them with effective access to the justice system.[8]

As a matter of course, the legal needs of people charged with criminal offences were not assessed to any elaborate degree. Need was presumed to flow directly and exclusively from the criminal charge. Meeting a client's need according to this model has meant providing the accused person with the services of a legal aid lawyer to provide legal advice and, if necessary, representation.

The prevailing critique of this approach has been that it does not meet the unique needs of clients living in poverty.[9] Reflecting on the inadequacy of this approach, one author wrote:

> Even if it is sometimes possible to deal with just an "isolated" legal issue, poverty imposes a bundle of disadvantages which make that issue and its resolution much more difficult than would be the case for a person of even modest means. Poverty results in a lack of formal and informal access to information and help; negative stereotyping; difficulties based on literacy and language; and additional discrimination, sometimes overt, and frequently hidden and systemic, resulting from the intersection of race or gender or disability with poverty. All of these compound in serious ways the general difficulty most people would face in confronting the legal system without legal advice or assistance.[10]

This apparent tunnel vision attitude toward providing access to justice did not take into account the uniquely stark economic reality of women that arises from their societally gendered roles as unwaged workers in the home or as poorly remunerated workers outside the home. It also did not consider the linkage between woman's experiences of poverty and their histories of physical and sexual abuse, their age, race, citizenship, sexual orientation, mental and physical health needs, or their compounding experiences of discrimination. This restrictive approach to the provision of subsidized legal services – restrictive in coverage, financial eligibility criteria, as

[7] Albert Currie, *Approaches to Determining the Needs of Legal Aid Clients* (Ottawa: Department of Justice Canada, 1998), pp. 37-42.
[8] Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998), p. 7.
[9] S. Wexler, "Practicing Law for Poor People," *Yale Law Journal* 79 (1970): pp. 1049-1067.
[10] Doug Ewart, "Hard Caps, Hard Choices: A Systemic Model for Legal Aid," in Frederick Zemans, P. Monahan and A. Thomas, *A New Legal Aid Plan for Ontario: Background Papers* (North York, Ontario: York University Centre for Public Law and Public Policy, 1997), p. 8.

well as in delivery of services – has severely hampered women's ability to resolve their problems effectively.[11]

The characterization of the criminal charge as the hub from which legal aid services and funding arrangements radiate has also had the effect of artificially isolating criminal legal aid needs from those in the civil domain. Previous studies have linked the failure of many legal aid plans to provide adequate coverage for the range of legal issues people encounter to this compartmentalization of legal problems.[12]

There are at least three reasons to consider in tandem the legal needs of women not only when they come into contact with the criminal justice system as accused persons, but also when they encounter the justice system as witnesses, complainants and third parties.

Firstly, a criminal record – inevitable when a person is convicted of a criminal offence – can give rise to a host of legal problems in the non-criminal context. A criminal record will impact on women's interests in such matters as child apprehension proceedings, custody and access disputes, and employment. As such, a criminal record will have grave and lasting implications for a woman's economic security, on her ability to nurture her children and, more generally, on her autonomy in making meaningful choices about her life.

Secondly, the division of governmental responsibility for providing legal aid services for criminal or civil matters can no longer be defended. Despite the fact that the federal government sees its role in developing policy restricted to criminal legal aid, the reality is that the federal government played a very significant role in the provision of civil legal aid services in the provinces[13] when it decided to repeal the Canada Assistance Plan (CAP) and replace it with the Canada Health and Social Transfer (CHST).[14]

The significance for women cannot be overstated. The primary clients for criminal legal aid certificates are men – approximately 80 percent of criminal legal aid certificates are issued to male applicants.[15] While federal funding for criminal legal aid has diminished and that diminution has had significant consequences for the delivery of services, the provinces remain accountable for the money they receive from the federal government. Under cost-sharing agreements, the provinces agree to provide legal services as a basis for receiving federal contributions.[16] Moreover, they are constitutionally required to provide criminal legal aid to an accused person if necessary to ensure a fair trial.[17]

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[11] Lisa Addario, *Getting a Foot in the Door*, p. 24.
[12] Law Society of British Columbia, *Where the Axe Falls: The Real Cost of Government Cutbacks to Legal Aid* (Vancouver: 2000). Women's Access to Legal Aid Coalition, *Access to Justice Denied: Women and Legal Aid in B.C.* (2000). Manitoba Association of Women and the Law, *Women's Rights to Public Legal Representation in Canada and Manitoba* (2002), accessed September 9, 2002 at www.nawl.ca/MAWLpt1.htm.
[13] In the North, civil legal aid is funded through Territorial Access to Justice Agreements. The agreements include civil legal aid in the federal funding entitlement.
[14] Addario, *Getting a Foot in the Door*, pp. 34-35.
[15] Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report* (Ontario, 1997). DPA Group, *Evaluation of Saskatchewan Legal Aid* (Saskatchewan, 1988).
[16] Office of the Deputy Minister of Justice and Attorney General, *National Review of Legal Aid* (Alberta, 1994).
[17] *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1.

By contrast, the introduction of the CHST corresponded to the loss of important national standards in respect of the provision of civil legal aid services in the provinces as well as a massive reduction in the amount of funding they received.[18] The result has been a freefall in the provision across the country of civil legal aid, of which women are by far the primary clients.[19] Consequently, it no longer makes sense to restrict inquiry about the federal government's role solely to the provision of criminal legal aid services.

Finally, from a policy perspective, there is good reason to document the manner in which, increasingly, day-to-day behaviour is being subjected to criminal sanction. It has been observed that social problems over the last century have been addressed by criminalizing the conduct, rather than by considering whether the problem could be solved or contained without recourse to criminal sanction.[20] The criminalization of welfare infractions is one example of this trend. The poorer individuals are, the more likely that they will be subjected to state scrutiny. For women, as will be discussed in greater detail, this means that their survival skills, their efforts to alleviate their poverty and the poverty of their children, will increasingly bring them into conflict with the law.

Whether as an accused person or as someone who is a witness in a criminal process:

> … any woman who fights to keep her wits, and her roof, about her as she helplessly experiences … the currents of criminal justice "knows" the true brutality of the system and the extensiveness of its destruction. If she is a racial/ethnic minority person, which she is likely to be, and/or if she is poor, which she surely is, she intuitively knows the nature of the interaction between criminal justice practices and the racist and/or classist [and/or sexist] structure of her society, as well as its impact on her life, her family, and her community.[21]

To date, the social construction of crime and the manner in which women's coping strategies are criminalized have obscured rather than illuminated the linkages between women's realities and their contact with the criminal justice system. The remainder of the research will focus on clarifying the "connections" between the diversity of women's experiences and the impact of these experiences on their needs for legal aid as well as their legal support needs when they come into contact with the justice system in criminal and other legal matters. Legal aid includes legal representation, legal advice and legal information. Legal support includes liaising with justice

[18] CAP required that assistance be provided to any person in need, regardless of the reasons of the need for assistance; that levels of provincial assistance take into account the basic requirements of recipients, in terms of food, shelter, etc., that welfare services in the province continue to be developed and extended, and that provincial residence requirements and waiting periods not be imposed. Under the CHST, only the latter standard has been maintained: M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform," *Canadian Journal of Women and the Law* 8 (1995): 372.

[19] Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Report*. DPA Group, *Evaluation of Saskatchewan Legal Aid*.

[20] A. Young, "Legal Aid and Criminal Justice in Ontario," in Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, Vol. 2 (1997): 666.

[21] N. Danner and J. Landis, "Carpe Diem (Seize the Day!): An Opportunity for Feminist Connections," in B.D. MacLean and D. Milovanovic, eds., *Racism, Empiricism and Criminal Justice* (Vancouver: Collective Press, 1990): pp. 109-112.

personnel, information gathering, and attending at court or during the restorative justice process with the accused person or witness. This is the work typically performed by community-based agencies, grassroots organizations, front-line workers and other nongovernmental organizations that provide service to people who come into contact with the justice system.

Chapter 1: Legal Aid and Other Legal Needs of Women Accused

Section 1.1 will examine the relationship between the life circumstances of women in conflict with the law and their law breaking. Section 1.2 will set forth recent government policies that have aggravated their social and economic marginalization. Section 1.3 will consider the implications for women's legal aid and other legal needs as accused in criminal courts.

1.1 Statistical Picture

It is impossible to discern all of the factors that contribute to women's law breaking. However, when the life stories of women who are charged with criminal offences are examined, the history of victimization in their lives is impossible to ignore[22] – 72 percent of provincially sentenced women, 82 percent of federally sentenced women and 90 percent of federally sentenced Aboriginal women have histories of physical and/or sexual abuse.[23] As well, 43 percent of federally sentenced women have substance abuse or addiction problems. However, unlike those of their male counterparts, women's addictions are frequently linked to their experiences of abuse.[24]

The kinds of offences in which women participate to the greatest extent – theft under $5,000, fraud, and prostitution – reflect the poverty that women in conflict with the law routinely experience. It has been observed that:

> After experience with abuse, poverty is probably the next single most unifying factor among women in conflict with the law, and it plays a major role in the crimes that women commit.[25]

Abundant documentation has highlighted the role that economic disadvantage plays in bringing both men and women into conflict with the law.[26] However, women are much more likely to be economically marginalized. Whether as single persons or as sole-support mothers, women consistently are the poorer of the poor. According to 1998 data,[27] women comprised 57 percent

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[22] Sandra Lilburn, *Taken In – When Women With Dependent Children Are Taken Into Custody: Implications for Justice and Welfare*. Paper presented at the Women in Corrections Staff and Clients Conference, Adelaide, 31 October – 1 November 2000, p. 5. Accessed at www.aic.gov.au/conferences/womencorrections/lilburn.pdf. See also Elizabeth Comack, *Women in Trouble: Connecting Women's Law Violations to their Histories of Abuse* (Halifax: Fernwood Publishing, 1996).

[23] Fact sheet, "Elizabeth Fry Week 2002," p. 6. http://www.elizabethfry.ca/eweek02/factsht.htm

[24] Ibid.

[25] Dianne Martin, "Punishing Female Offenders and Perpetuating Gender Stereotypes," in J. Roberts and D. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999).

[26] John Winterdyk and D.E. King, *Diversity and Justice in Canada* (Toronto: Canadian Scholars' Press Inc., 2000), p. 144.

[27] National Council of Welfare, *Poverty Profile, 1998* (Ottawa: Minister of Public Works and Government Services, 2000), pp. 38-94.

of all persons living in poverty. Similarly, 58 percent of all single-parent families headed by mothers were living in poverty.[28] Single-parent mothers under 65 with children under 18 had incomes, on average, more than $9,000 below the poverty line.[29] These arid statistics do not do justice to the abysmally high number of children – 546,000 – who were living in poverty across Canada at that time.[30] Moreover, the proportion of poor children living with single-parent mothers has grown substantially in recent years. In 1980 the figure was 33 percent; in 1995 the figure was 40 percent; and in 1998 the figure rose to 41 percent.

A majority of women are likely to be poor relative to men at every stage of their lives, with the exception of ages 45 to 54, when they experience poverty to the same extent.[31] The gap between men and women widens with age, with women aged 65 and older 3.5 times as likely to be living in poverty as men in the same age category.

Poverty rates are likely higher for immigrant women as well. In 1998, the poverty rate for heads of families born in Canada was close to 11.9 percent. The rate for heads of families born elsewhere was 16.7 percent. Poverty rates were lower for families who immigrated prior to 1980, and higher for those arriving in the last twenty years.[32]

The incidence of poverty among Aboriginal people is more than double the rate for other Canadians. Using Statistics Canada's Low Income Cut-offs (which exclude people living on-reserve or in the territories), the poverty rate in 1995 for Aboriginal people aged 15 and over was 42.7 percent for women and 35.1 percent for men.[33] The poverty rate for Aboriginal children under age 15 was 59 percent – compared to 25 percent for other children.[34] The poverty rates for Aboriginal people would be even higher if reserve populations were included in the calculations. According to a Statistics Canada study that mapped the conditions of these communities, nearly all had a lower standard of well-being compared to the average Canadian community.

A 1995 study found that 28.6 percent of respondents to the 1991 Aboriginal Peoples Survey reported receiving social assistance – over three times the rate of the population in general. The rates went from a high of over 40 percent for reserve populations to the low 20s for off-reserve Indians, Métis and Inuit.[35]

The data detailing the offences committed by women illustrates that, proportionately, women commit fewer crimes than men and significantly fewer violent crimes. As the Table on the following page makes clear, in 1999, women were charged with slightly more than 3 percent of all offences.

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[28] Ibid., pp. 37-38.
[29] Ibid., pp. 56-57
[30] Ibid., p. 87.
[31] Ibid., p. 39.
[32] Ibid., p. 53.
[33] National Council of Welfare, *Poverty Profile 1999* (Ottawa: Minister of Public Works and Government Services, July 2002). Accessed September 20, 2002 at www.ncwcnbes.net/htmdocument/reportpovertypro99/Introduction.html#_Toc500047813.
[34] Ibid.
[35] Ibid

Women were most frequently charged with property offences of theft under $5,000, a category that includes shoplifting. They were next most frequently charged with "level 1" or common assault. The next most common charge was fraud, which includes cheque fraud, credit card fraud, and welfare fraud. Of the three, women were most frequently charged with welfare fraud.[36] Next most frequently, they were charged with possession of or trafficking in cannabis – accounting for 3,602 (or 54 percent) of the 6,076 drug charges laid against women.[37] These four offences – theft under $5,000, level 1 assault, fraud and those related to drugs – accounted for 55 percent per cent of the offences with which women were charged in 1999, yet they amounted to less than 2 percent of all charges laid. Each of these offences, as well as incarceration for non-payment of fines, will be discussed in greater detail. Women's experiences with bail will also be reviewed.

SELECTED POLICE-REPORTED INCIDENTS, CANADA AND THE PROVINCES/TERRITORIES, 1999[38]

Offence	Reported Offences	Adults Charged		Females as Percentage
		Male	Female	
Homicide	536	351	35	6.53
Attempted Murder	685	451	69	10.07
Sexual Assault	23,872	7,361	154	0.65
Non-Sexual Assault	233,465	80,467	15,045	6.44
Abduction	726	92	61	8.40
Robbery	28,745	5,797	594	2.07
Violent Crime	291,330	95,382	15,987	5.49
Break And Enter	318,448	20,880	1,416	0.44
Theft Of Mot.Veh	161,415	7,762	598	0.37
Theft Over $5000	22,478	1,635	448	1.99
Theft Under $5000	679,095	42,100	17,712	2.60
Poss'n Stolen Prop.	28,656	13,616	2,233	7.79
Fraud	90,568	17,535	7,132	7.87
Property Crime	1,300,650	103,528	29,539	2.27
Prostitution	5,251	2,296	2,607	49.64
Drugs	79,871	36,938	6,076	7.61
Total Incidents	2,613,348	429,239	83,911	3.21

1.1.1 Theft

In 1999, more women were charged with theft under $5,000 than with any other single crime. The majority of women who are charged with this offence have shoplifted items for themselves and their children.[39] Research has confirmed that women typically shoplift such items as food, clothes and makeup – items they need or feel they need but cannot afford.[40] A study by Coverdale Courtworkers of charges laid against women between 1984 and 1988 in Halifax confirmed that the number of women charged with theft under $1,000 started to increase in

[36] Canadian Centre for Justice Statistics (CCJS) data, July 28, 1999, obtained through CCJS, June 6, 2002.
[37] Canadian Centre for Justice Statistics, *Canadian Crime Statistics, 1999* (Ottawa: Statistics Canada, 2000), pp. 15-16.
[38] Ibid., pp. 15-16.
[39] M. Chesney-Lind, "Trends in Women's Crime," in J. Winterdyk and D. King, *Diversity and Justice in Canada* (Toronto: Canadian Scholars' Press, 1999), p. 142.
[40] Ibid., p. 143.

August, when kids were preparing to return to school, and peaked in December. According to the study, December was the month with the highest number of theft charges.[41]

1.1.2 Assault

Since 1987, the number of charges laid against women for level 1 assault has almost doubled – from 7,669 in 1987 to 15,045 in 1999. The police practice of "counter-charging" or "double-charging" is partially responsible for this. In several jurisdictions in Canada, it is now common for police, when responding to women's requests to intervene in cases where they are experiencing abuse by their intimate partners, to charge both the man and the woman. This practice is triggered by the assertion that what was engaged in was less a case of the man's violence against his partner than mutual sabotage or violence.[42]

Data has confirmed that this is an effective tactic. In a study of the ways in which prosecutors and defence counsel in the United States approach their work in cases of domestic violence, 72.1 percent of attorneys indicated that the most common and most effective defence tactic in cases of domestic violence was to assert that the defendant had acted in self-defence. [43] Notwithstanding the deterrent effect this might have on women's calls for intervention, which will be discussed in greater detail later, this practice has had the effect of driving up the number of assault charges against women.

1.1.3 Welfare Fraud

As welfare incomes drop further and further from a minimum level of subsistence established by the poverty line, women's prosecution for welfare fraud has increased.[44] Despite the non-incarceral options available to respond to welfare fraud, the government of Ontario (considered a leader in its zeal to make examples of people convicted of welfare fraud) is increasingly pursuing incarceral sanctions:

	2000-01		1999-2000		1998-99		1997-98	
	# Cases	%	# Cases	%	# Cases	%	# Cases	%
Incarceration[45]	7,737	43.6	7,139	45.5	5,747	33.95	3,136	21.2

[41] National Council of Welfare, *Justice and the Poor*, (Ottawa: Minister of Public Works and Government Services, 2000), p. 65.
[42] There is some data – unconfirmed – that women who are counter-charged are not eligible to receive legal aid where they are charged on the basis of a private complaint: Zarah Walpole, *The Effect of Legal Aid Cutbacks on Women in Conflict with the Law* (Toronto: Ontario Council of Elizabeth Fry Societies, 1995).
[43] Edna Erez and Tammy King, "Patriarchal Terrorism or Common Couple Violence: Attorneys' Views of Prosecuting and Defending Woman Batterers," *International Review of Victimology* (7 (1-3), 2000), p. 214.
[44] Ministry of Community, Family and Children's Services, Government of Ontario, *Welfare Fraud Control Report 2000-01*, p. 1. Accessed June 6, 2002 at www.gov.on.ca/CSS/brochure/fraud01.html. The provincial governments of Alberta, British Columbia, Newfoundland and Québec have also embarked on initiatives to reduce the number of people receiving social assistance.
[45] Ibid.

While the majority of women who are incarcerated for welfare fraud receive sentences of less than two years, the number of women receiving federal sentences for fraud more than quadrupled between 1994-95 and 1998-99, from four to 18 – close to 5 percent of this population.[46]

A number of salient features emerge from governmental moves to vigorously prosecute cases of welfare fraud.

Firstly, welfare fraud is a strongly gendered issue. Women's deeper experience of poverty inextricably leads them to seek government support. However, in an era in which collective societal resentment toward those who receive social assistance is openly encouraged, the image of the welfare "cheat" that is increasingly cultivated is that of an irresponsible single mother who has neither a job nor a man to ensure a good home for her child.[47] As Erlee Carruthers noted in quoting Linda Gordon:

> … for all women, black and white, the need for "welfare" in industrial society arises primarily from the gap between the myth that women are supported by men and the reality that so many are not. … Increasing numbers of women … are living in poverty because of their inability to fulfil their role in the economic marriage of breadwinner-dependent, assumed to be the family norm …[48]

Moreover, it is not at all clear that the fraud is as widespread as governmental news releases suggest. For example, in 1992-93, two political science professors at the University of Montreal examined surprise visits to welfare recipients by Quebec case officers. The provincial government had claimed that as much as $30 million a year was lost to welfare fraud, but the study found that the crackdown saved the government about $3 million. In 1992-93, the excess that was identified averaged $30 a visit.[49] More people cheat on their income taxes and lie about their cross-border shopping than defraud the welfare system. Corporate crime, white collar fraud and tax evasion, in Ontario cost the public more every year than the entire cost of the social assistance system.[50] Ontario's Auditor General found that in 1992 corporate cheating on the medicare payroll tax cost the government $140 million, significantly more than the estimated $70 million to $100 million lost to fraudulent family benefits claims. In the absence of a similar crackdown on the fraudulent offences of more privileged citizens, the differential treatment of rich and poor becomes apparent.

Secondly, the more onerous consequences of prosecution for welfare fraud may not be the penal response or the imposition of a fine. Rather, the imposition of a lifetime ban on receipt of social services – currently the law in Ontario – can have devastating consequences for social assistance

[46] Roger Boe, Cindy Olah and Colette Cousineau, *Federal Imprisonment Trends for Women 1994-95 to 1998-99* (Ottawa: Correctional Service of Canada, December, 2000), p. 15.
[47] Erlee Carruthers, "Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality," *Journal of Law and Social Policy* 11 (1995), p. 251.
[48] Ibid., p. 251.
[49] Lila Sarick, "Cheating less prevalent than gossip has it, studies indicate," *The Globe and Mail*, January 21, 1994, p. A8.
[50] Ontario Social Safety Network, "Welfare Reform and Welfare Fraud: The Real Issues," *Ontario Social Safety Network Backgrounder*.

recipients.[51] This ban includes the denial of subsidized medication, and, in several provinces, a ban on access to a range of social services – including access to transition houses and other shelters for abused women that receive funding from the government.[52]

1.1.4 Drug Offences

The majority of drug-related charges laid against women arise from possession of or trafficking in cannabis. However, women offenders do not typically play a substantial role in drug trafficking. Rather, their drug convictions often relate to drug use, and their roles as couriers of drugs.[53] While women in prison in the United States have reported making more illegal drug sales than men, it was due to the smallish value of the transactions: the average transaction was less than $10.[54]

1.1.5 Prostitution

The vast majority of women arrested for prostitution-related offences are arrested for "communicating" offences or "street prostitution."[55] The fact that brings this activity to the attention of the police is poverty. What some people do in the privacy of their homes, people living in poverty do in public places that are likely to attract police attention.[56] As such, their behaviour is more frequently criminalized, and the face of poverty becomes, de facto, the profile of criminality:

> It's not that people aren't guilty of crimes for which they are sentenced but there are others who are equally or more dangerous, equally or more criminal. … The criminal justice system works systematically not to punish and confine the dangerous and the criminal but the poor who are dangerous and criminal.[57]

Their involvement in street prostitution makes women who work in the sex trade more vulnerable to arrest for other crimes. For example, theft offences are often associated with prostitution-related activity. However, rather than being the results of premeditated crimes, most theft convictions for prostitutes arise from women's demands to be paid for sex acts performed.[58]

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[51] As stated by Anne Derrick in her speech to the National Association of Women and the Law Conference in March 2002, in Nova Scotia, a conviction for welfare fraud leads to a ban on the receipt of social assistance for three months.
[52] Telephone interview with Mary De Wolfe, Executive Director, Chrysalis House, May 16 and17, 2002.
[53] Kelly Hannah-Moffatt and Margaret Shaw, *Taking Risks*: *Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada* (Ottawa: Status of Women Canada, 2001), p. 16.
[54] Meda Chesney-Lind, "Trends in Women's Crime," p. 144.
[55] Helen Boritch, *Fallen Women: Female Crime and Criminal Justice in Canada* (Toronto: Nelson Publishing Company, 1996), p. 17.
[56] Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice* (Boston: Allyn and Bacon.1998), p. 107.
[57] *Ibid*., p. 134, and Martin, "Punishing Female Offenders and Perpetuating Gender Stereotypes".
[58] Kelly Hannah-Moffatt and Margaret Shaw, *Taking Risks*, p. 51.

1.1.6 Non-Payment of Fines

Fines are most commonly issued for driving while under the influence and for such morals charges as soliciting for the purposes of prostitution.[59] The vast majority of people admitted to prison because of fine default are there because they have no money to pay the fine, and a disproportionate number are Aboriginal.[60]

A 1989-90 study of women prisoners indicates that fine default played a major role in their incarceration, especially for Aboriginal women in the prairie provinces.[61] Because women are the poorer of the poor, and have less access to jobs than men, it has been suggested that their relative poverty is the reason for their disproportionate imprisonment for fine default.[62] The proportion of female inmates admitted for fine default was 47 percent in Saskatchewan, 39 percent in Alberta, 30 percent in Manitoba, 29 percent in Ontario, and 22 percent in Quebec. The complicating realities of women's lives also lead them to default on their fines:

> You need to be fairly organized to pay off a fine. For some women it's too hard – there are other things going wrong in their lives. These other difficulties tend to be the reasons they are in the (criminal justice) system in the first place.[63]

The alternatives to fine payment in some provinces are community work programs. But these rarely provide childcare for participants. As a result, women, particularly overworked mothers, have high rates of failure in these programs.[64]

1.1.7 Bail

Both judges and police exercise considerable discretion regarding the decision to grant an accused person bail. The consequences of being held in jail pending trial are very serious for both men and women. Beyond the deprivation of liberty, people detained until trial are prevented from helping in their own case.[65] They are unable to find a job, reimburse money stolen, or engage in volunteer activities – all factors that serve to mitigate a sentence if convicted, and, more generally, positively predispose a judge toward an accused person.

In a one-day snapshot of adults in all provincial and territorial prisons in 1996, the proportion of all female prisoners who were on remand after being refused bail (24 percent of all female prisoners) was similar to the proportion of all male prisoners in the same situation (25 percent).[66] Given the Statistics Canada data that women are consistently charged with less serious offences than men, and that their offences are less likely to involve violence, it should follow that a much

[59] National Council of Welfare, *Justice and the Poor*, p. 75.
[60] Ibid., p. 76.
[61] Ibid., p. 76.
[62] Martin, "Punishing Female Offenders and Perpetuating Gender Stereotypes," p. 196. National Council of Welfare, *Justice and the Poor*, p. 65
[63] Sandra Lilburn, *Taken In – When Women with Dependent Children are Taken Into Custody*.
[64] National Council of Welfare, *Justice and the Poor*, p. 86.
[65] Ibid., pp. 29-30.
[66] Ibid, p. 29.

smaller proportion of women should be detained until their trials in order to prevent danger to society.[67] The inequality of this treatment seems evident.

For people in northern and other remote communities, including Aboriginal people, the absence of local detention facilities frequently means that accused persons are separated from their home communities. This is particularly true where a person is accused of a serious offence punishable by five or more years of imprisonment. In these cases, the police have no discretion to release. As a result, many Aboriginal accused are sent to prisons in the south of Canada, separated from their children and other family members, their first language, their culture and their food while they await trial and, potentially, for the entire duration of their sentence.[68]

A study of Provincial Court cases completed for the Aboriginal Justice Inquiry of Manitoba indicated that Aboriginal women aged 18 to 34 were 2.4 times more likely to be held on remand than non-Aboriginal women in the same age category.[69] More than 90 percent of accused young Aboriginal women and 50 percent of accused young Aboriginal men were held on remand.[70] Many of these Aboriginal women were mothers – whose removal from their communities forced them to abandon their children.[71] In part, this occurs because several of the criteria that judges use to determine bail decisions have an adverse impact on Aboriginal people. The criteria include family ties, whether the accused person is employed, whether the accused has a fixed address, and the accused person's links to the community.

Aboriginal women typically migrate to urban centres to flee intimate violence.[72] When they do so, they can then be characterized as lacking a fixed address or lacking strong links to the community, despite the fact that their transience is a consequence of their vulnerability at the hands of abusive intimate partners, rather than their potential for criminality.

The Commission on Systemic Racism in the Ontario Criminal Justice System found that Black women are incarcerated at a rate that is almost seven times higher than for White women.[73] Since at least half of all prison admissions for Black people were pre-trial, it is safe to conclude that Black women are disproportionately denied bail to a corresponding degree pending trial.[74] The exact reasons for this treatment are unclear but many criminologists speculate that women who do not fit a gendered model of female passivity – those who are assertive, for example, or those who are single parents – will be treated more harshly.[75] In this regard, stereotypical societal notions about Aboriginal women, that "we as Native women should be 'unobtrusive,

[67] Ibid., p. 30.
[68] Ibid., p. 35.
[69] *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1* (Winnipeg: The Inquiry, 1991), p. 221
[70] National Council of Welfare, *Justice and the Poor*, p. 32.
[71] Ibid., p. 561.
[72] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 134.
[73] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, 1995) pp. 139-140, 143-47.
[74] Ibid., pp. 89-91.
[75] National Council of Welfare, *Justice and the Poor*, p. 64.

soft-spoken and quiet,'" have also led to confused or otherwise inappropriate judicial commentary.[76]

The risk of community-based discrimination in respect of bail decisions looms even larger in light of the 2002 Supreme Court of Canada decision in *R. v. Hall*, regarding the proper criteria to be attached to judicial decisions granting bail. In this particular case, a brutal murder had taken place. The murder caused significant public concern and a general fear that a killer was at large. The bail judge, noting a high level of concern within the community after a murder, and considering such factors as the strength of the Crown's case and the grave and horrific nature of the crime, held that it was necessary to deny bail to the accused in order to maintain public confidence in the justice system.

By a narrow majority, the Supreme Court upheld this decision. Chief Justice McLaughlin writing for the majority stated:

> … it seems to me that the facts of this case, as well as the facts in (other) cases … offer convincing proof that in some circumstances it may be necessary to the proper functioning of the bail system and, more broadly of the justice system, to deny bail even where there is no risk the accused will not attend trial or may re-offend or interfere with the administration of justice.[77]

Notwithstanding the admonition that such judicial deliberations must take account of specific factors and ought not to be used frivolously, four of the Supreme Court judges disagreed with the decision. Writing for the minority, Mr. Justice Iacobucci emphasized that to detain an accused solely on the basis that the crime is a serious one and the Crown's case is strong would serve to *undermine* rather than promote confidence in the administration of justice, given the importance of the presumption of innocence to the proper administration of justice. Going further, he voiced concern with permitting societal opinion to carry weight in such decisions, arguing that the Court's role is to guard the Charter rights of the accused even when they conflict with irrational and subjective public views, however sincerely held.

1.2 Role of the State

The statistical picture presented of women's offending is that much more modest when it is viewed against a confluence of policy choices that have disadvantaged economically marginalized people in general, and women in particular, at every turn.

Firstly, the state has retreated significantly from its obligation to alleviate the consequences of poverty. Historically, resources provided through the Canada Assistance Plan (CAP) funded services such as social assistance, worker's compensation, rent control, mental health legislation, legal aid for poverty law and other civil matters, criminal injuries compensation, human rights

[76] Emma La Rocque, quoted in McGillvray and Comaskey, *Black Eyes All of the Time*, p. 11. See also M. Crnkovich and L. Addario with L. Archibald, *From Hips to Hope: Inuit Women and the Administration of Justice* (Ottawa: Department of Justice Canada, 1999).
[77] *R. v. Hall* (2002), argued April 23, 2002, judgment released October 10, 2002, p. 22.

legislation, employment standards, and matters related to occupational health and safety legislation.[78]

In 1995, the federal government announced its intention to repeal CAP and replace it with the Canada Health and Social Transfer legislation which, unlike its predecessor, contained no national standards in respect of social assistance programs. It also did not prohibit workfare, the practice of forcing applicants to work for welfare that was understood to have been prohibited under CAP.[79] Further, the CHST also introduced a massive cut in federal transfer payments to the provinces. The consequence of this reduced contribution to social services for disadvantaged people, including women, was predicted at the time:

> Sadly, what the future holds is all too clear: far more poverty and insecurity, an explosion of hunger and homelessness, illness and family breakdown; and this will hit certain groups – single mothers, people with disabilities, visible minorities, Aboriginal peoples, young families, to name a few – much harder than others.[80]

It should be noted that this emphasis on budget balancing and deficit-reduction at the federal level – the same motivation for the introduction of the CHST – was achieved by disproportionately targeting government programs that benefited the poor, of whom women are a majority. For example, it has been estimated that while the total value of federal support for health care and post-secondary education declined by 4.4 percent by 1997/98, federal support for social assistance declined by 39 percent during the same period.[81]

Secondly, the state's withdrawal from the alleviation of disadvantage means that poverty shows no sign of abating.[82] Prior to the cuts to social assistance made in Ontario in 1995, welfare incomes of single parents in 1992, 1993 and 1994 reached 80 percent toward the poverty line, a widely used benchmark of income adequacy.[83] In the years since 1985, welfare incomes in Ontario dropped to an all-time low of 59 percent of the poverty line in 2001. In Alberta in 2001, the social assistance rate for a single parent was 49 percent of the poverty line. In Quebec, it was 57 percent in 2001. In 27 percent of welfare cases, the recipient required welfare because of a disability.[84]

[78] I. Morrisson and J. Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups," in Law Reform Commission, *Rethinking Civil Justice*, Vol. 2 (Toronto: Ministry of the Attorney General, 1996).
[79] Notably, 1995 was the year in which a Conservative majority was elected, sweeping to power on an election campaign platform in which dramatic reductions to the welfare system were promised. Ian Morrison and Gwyneth Pearce, "Under the Axe: Social Assistance in Ontario in 1995," *Journal of Law and Social Policy* 11 (1995), p. 1.
[80] Morrisson and Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups," p. 14.
[81] Morrisson and Pearce, "Under the Axe," pp. 2-3.
[82] Morrisson and Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups," p. 13.
[83] National Council of Welfare, *Welfare Incomes, 2000 and 2001* (Ottawa: Minister of Public Works and Government Services, 2002), pp. 36, 37, 79, 80.
[84] National Council of Welfare, *Poverty Profile 1998*, p. 15.

As the National Council of Welfare recently concluded:

> It is absurd to think that cutting benefits and excluding people from social assistance programs is going to result in a reduction in poverty levels. We believe it is wrong to imagine that reducing the number of welfare recipients will cause the number of workers to increase. It is more logical to believe the opposite: if more people are working, fewer people will need last-resort income. In addition, it is wrong to think that poor families all fit the same homogeneous pattern.[85]

The conclusion seems inescapable – as social assistance rates drop, the number of poor people will increase. Government-authored reports have predicted that a widening gap between the rich and poor – an inevitable consequence of policies such as these – will fuel growth in the demand for legal aid services.[86]

Thirdly, since 1993, equality-seeking organizations that advocate on issues of systemic inequality and disadvantage have either sustained major funding cuts or have been completely de-funded at the federal or provincial level.[87] This has effectively reduced the ability of disenfranchised people to collectively influence the discourse at the policy level and in advance of legislative initiatives. The unstable funding that non-governmental organizations receive has also compromised their willingness to speak out against regressive measures, based on a fear that their funding will be further cut. Even where non-governmental organizations still exist, normally, the demands on the resources of non-governmental organizations are sufficiently great that they are unable to react to the range of interventions that affect their constituencies.

Fourthly, the ascendancy of the law and order agenda has been characterized by legislation that carries more numerous criminal sanctions and stiffer sentences. The social solutions to crime that were proposed in the 1960s have been replaced, in the late 1980s and 1990s, by what British criminologist David Garland calls the "economic response." In the crime context, the economic response posits that crime is occurring because the individuals committing the crime have looked at its cost and concluded that it is not a sufficient deterrent to prevent them from committing offences.[88] The response, which forms the basis of the law and order agenda, is to make the price of crime higher and more certain. This has, in turn, meant a higher penalty structure, more police powers, and allocating responsibility for crime exclusively to the individual – while ignoring the social correlates of crime such as illiteracy, poverty, substance abuse, physical and sexual abuse, and the absence of employment opportunities.

Corresponding to this new view is the change of focus from the offender to certain kinds of victims. The political movement in the last decade has been to give voice to individual victims, making the response to crime less a societal one and more an individuated one. This has taken the form of an increased use in sentencing hearings of victim impact statements, Victims of

[85] National Council of Welfare, *Welfare Incomes, 2000 and 2001,* p. 94.
[86] Office of the Deputy Minister of Justice and Attorney General of Alberta, *National Review of Legal Aid* (Alberta, 1994), p. 168.
[87] Morrisson and Mosher, *Barriers to Access to Civil Justice for Disadvantaged Groups,"* p. 16.
[88] David Garland, interview on "Ideas" program, June 10, 2002.

Crime offices at the provincial and federal level, the introduction in many jurisdictions of a "victim's bill of rights," and, increasingly, enhanced participation for victims in the parole process.[89]

Dianne Martin has written about the role that victims play in the state's justification for one highly visible component of the law and order agenda, the war on drugs:

> As criminal justice rhetoric and punishment ethic play out in the drug war, poor neighbourhoods are actively policed, and poor and addicted women and men are put into jail for long periods of time, in the name of saving families, protecting children, preserving neighbourhoods and making the streets safe for families.[90]

A measured response to law breaking and underlying social problems has been replaced by the growth of police resources, punitive responses and the growth in the correctional population, particularly of federally sentenced women – what some have termed 'the national housing plan" in Canada.[91] The irony cannot be ignored: while get-tough law and order proponents frequently extol the virtues of smaller government, the increased criminalization of what for many is day-to-day survival behaviour has given rise to "the prison-industrial complex."

An increased use of mandatory minimum sentences means that judges are not permitted to exercise their discretion to take account of the life circumstances that contribute to the law breaking behaviour of women and members of other marginalized groups.

The law and order agenda has also responded to youth behaviours with legislation designed to crack down on homeless and squeegee kids, with zero-tolerance policies in school that remove discretion from a principal to meet the needs of individual students, and with the *Youth Criminal Justice Act*, which was developed as a response to the perceived lenient treatment of young people in the courts.

Equality-seeking women's organizations have been wise to this for years, and have denounced the anti-stalking legislation, the DNA data bank legislation, mandatory minimum sentences, dangerous offender legislation, consecutive sentences, etc., precisely because of this punitive and discriminatory response.[92] As it has been summed up by one feminist, "We are offered vengeance, not equality".[93]

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[89] Solicitor General Canada, *National Consultations with Victims of Crime: Highlights and Key Messages* (July 2001).
[90] D. Martin, "Casualties of the Criminal Justice System: Women and Justice under the War on Drugs," *Canadian Journal of Women and the Law* 6 (1993), p. 305.
[91] Interview with Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies, September 9, 2002.
[92] Department of Justice Canada, Women's violence consultations, 1995, 1996, 1997. Summary of proceedings on file with the researcher.
[93] Lee Lakeman, *Why Law and Order Cannot End Violence Against Women (and Why the Development of Women's Social, Economic, Political and Civil Rights Might End It)* (1999). Accessed May 2, 2002 at www.casac.ca/issues/whywomen.htm.

The agenda has also had a particularly devastating effect on a large number of women. In effect, it criminalizes such day-to-day behaviour as living on the street, and a range of activities – such as not declaring income when collecting social assistance, or being prostituted – that are undertaken for the sole purpose of trying to make ends meet for themselves, their children and the elderly relations for whom they are increasingly responsible.

Finally, the governmental attitude of fiscal conservatism in respect of social program spending in the 1990s has had an impact on the provision of legal aid services. Overall government contributions – both federal and provincial – reached a plateau in 1992-93 and, starting in 1995-96, began to diminish. In 1999-2000, total government contributions were $482.7 million dollars, a decrease of 6 percent from the previous year.[94] Legal aid expenditures – adjusted for inflation – have decreased by 31 percent since 1994-95.[95] As a result, provincial legal aid plans across the country have restricted both the kinds of legal matters for which legal aid is available and the financial eligibility criteria.

In most jurisdictions, coverage is available for those charged with indictable offences. Generally, in Canada, the coverage of summary conviction offences is limited to cases where there is a likelihood of imprisonment or a danger of loss of livelihood. However, in Ontario and British Columbia, both indictable and summary conviction criminal cases are covered only when there is a threat of imprisonment.[96]

Very little data has been collected to assess the extent to which the current provision of criminal legal aid meets men's or women's needs. However, the number of approved criminal applications declined between 1991-92 and 1997-98 by 38.6 percent. For the same period, the number of criminal offences cleared by charges declined by only 18.2 percent. Observations from researchers, lawyers and the judiciary point to a significant unmet need for criminal and civil (where 70 percent of clients are women) legal aid.[97]

1.3 Legal Aid and Other Legal Needs

Need for Legal Representation

Theft is the offence with which women are most frequently charged. This offence carries a maximum penalty of six months incarceration or a $2,000 fine or both. It does not typically result in a jail term for a first-time offender. As a result, legal aid lawyers are not available to provide representation to people charged with this offence, unless conviction is likely to lead to incarceration.

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[94] Canadian Centre for Justice Statistics, *Legal Aid in Canada; Resource and Caseload Statistics 1999-2000,* pp. 8-9.

[95] Ibid., pp. 10-11.

[96] Ibid., p. 5. Legal Aid Ontario, *Guide to Legal Aid Certificate Coverage* (undated), p. 2. "Risk of incarceration" is interpreted by each provincial legal aid plan. While some have generously interpreted the term "risk," today they are far more likely to restrict coverage to cases where the charge carries the "probability" of incarceration. This takes account of such criteria as sentencing practices of the judiciary, the presence of a criminal record, probation or bail, and outstanding charges.

[97] Albert Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (Ottawa: Department of Justice Canada, 2001) p. 5.

Yet it can hardly be assumed that any adversarial proceedings are sufficiently transparent that individuals – and particularly those with mental disabilities – can represent themselves. As Andrew Ashworth has noted:

> At the most basic level, words may be spoken too quickly, regular participants may assume that everyone understands certain things and there may be neither the time nor the inclination to stop and explain. Without denigrating the efforts of some magistrates' clerks to assist the unrepresented defendant, it remains true that even a fairly intelligent and self-confident citizen might fail to grasp the significance of some important steps in court procedure.[98]

There is abundant data to conclude that individuals who are unrepresented are more likely to plead guilty, even if they do have a defence, and, if unrepresented, are more likely to be convicted if they plead not guilty.[99]

Some individuals who do not have representation will plead guilty – irrespective of the existence of a defence – merely to "get it over with" or to avoid the frightening prospect of a trial. In a recent case, a woman charged with shoplifting was not on the premises at the time of the alleged incident. However, rather than face the frightening prospect of a trial unrepresented, the woman pleaded guilty and entered a diversion program.[100] A wrongful conviction is no less wrongful merely because a term of imprisonment does not issue from the conviction.

Moreover, unrepresented defendants are unable to engage in charge, plea or sentence negotiations. The result may be sentences that are more severe than for those defendants who are able, through their lawyers, to negotiate a charge or sentence bargain. The criminal justice system has evolved into a state where plea bargaining is the norm, at least for serious offences. Because police may anticipate charge reduction by laying a larger number of, and more severe charges than are warranted, those unable to enter into negotiations may, by default, be convicted of these inflated charges.

The consequences of a criminal record can be devastating and far-reaching for both men's and women's ability to obtain employment, obtain a professional licence, advance to a more responsible position, and/or become bonded or insured. Men and women who are not Canadian citizens may face a deportation hearing and loss of their immigrant or refugee status. However, the consequences of a criminal record can be particularly severe for women. It will further compromise their ability to attain economic autonomy and/or support their children. It will also adversely affect their credibility in child apprehension cases and in disputed custody and access matters.

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[98] Andrew Ashworth, "Legal Aid, Human Rights and Criminal Justice," in Richard Young and David Wall, eds., *Access to Criminal Justice: Legal Aid Lawyers and the Defence of Liberty* (London: Blackstone Press, 1996), p. 56.
[99] K.E. Renner and A.H. Warner, "The Standard of Social Justice Applied to an Evaluation of Criminal Cases Appearing Before the Halifax Courts," *Windsor Yearbook of Access to Justice* 1 (1981). National Council of Welfare, *Justice and the Poor.* p. 57. Law Society of British Columbia, *Where the Axe Falls*, p. 121. *Report of the Aboriginal Justice Inquiry of Manitoba*. Volume 1, p. 501.
[100] Telephone interview with Laurie Ehler, Coordinator, Nova Scotia Elizabeth Fry Society, May 24, 2002.

Given the potential stakes for women and their children of a criminal record, the view that incarceration is the only relevant criterion triggering entitlement to legal aid representation must be challenged. Legal representation is required in cases where the accused person has a defence precisely because a criminal record will result from conviction. This should be considered a necessity in view of the adverse impact of a criminal record on a woman's ability to maintain economic autonomy and to nurture her children.

Legal representation is also required to assist litigants to appeal trial decisions to higher courts. Madam Justice Louise Arbour of the Supreme Court of Canada recently expressed concern about the effect of not appealing decisions:

> It leaves some bad law – or bad precedents – on the books … It undermines the confidence that the public has in the correctness of a decision if it appears – or is alleged – to be wrong, yet there is no access to review. In a society that relies on very complex law to regulate social order, you cannot at the same time deprive people of legal assistance. Even if an unrepresented litigant manages to conduct an appeal single-handedly, he or she is far less likely than a trained lawyer to scrutinize the trial record properly and state the legal principles that ought to be appealed. To have a theoretical right of review you cannot exercise is very harmful, not only to the person who should have had some redress, but very damaging for the system generally.[101]

Of all of the offences with which women are commonly charged, welfare fraud trials are typically the most complex, and require many hours of preparation on the part of a lawyer to go through the paperwork. Legal aid coverage must be sufficiently generous to cover this time. Women must also have access to lawyers who are able to contextualize the offence and have sufficient time to prepare a comprehensive defence. Circumstances such as women being physically threatened by their abusive partners if they report their actual, true living situation to welfare authorities can form the basis of a valid legal defence. The point is that only a lawyer who understands the woman's experience of living with an abusive partner will be able to successfully convey that.[102]

Legal representation is also required to challenge the provisions of various provincial social assistance regimes that may be constitutionally invalid, such as banning recipients who have been convicted of welfare fraud from receipt of welfare for life; banning them from using the services of battered women's shelters; cutting off their subsidized drug benefits; going after other family members for overpayments; plans to test welfare recipients for alcohol and drug use; and the scrutiny which accompanied the new initiative to disqualify social assistance for single

[101] Kirk Makin, "Crisis in legal aid dire, Arbour warns," *The Globe and Mail*, March 2, 2002, pp. A1, A4.
[102] The defence of BWS has been successfully used in this kind of case: *R. v Lalonde* (1995), 22 Ontario Reports (3d) 275 (Ont. Gen. Div.).

persons living in shared accommodation if they are considered to have a relationship of financial interdependence and mutual support.[103]

Need for Legal Advice

Most jurisdictions have a duty counsel system. Duty counsel lawyers provide legal advice to detained persons and persons appearing in courts without a lawyer. They may guide them in obtaining legal services and give on-the-spot representation, providing immediate advice at arrest and detention. In several jurisdictions, duty counsel services have been expanded to also include full representation up to and including the determination of guilt or non-guilt (in criminal cases), and representation at sentencing.[104] Expanded duty counsel services are but one in a series of service-delivery models, including assisted self-representation and early intervention strategies that seek to provide clients with services that are less expensive than full legal representation.[105]

The role of duty counsel can be particularly valuable, as duty counsel can discern whether an individual has a defence, represent people who plead guilty, and help to explain the consequences of obtaining a criminal record. However, as the Canadian Bar Association noted, duty counsel can be overworked, sometimes seeing 30-40 people in a day.[106] The Commission on Systemic Racism in the Ontario Criminal Justice System noted that duty counsel have no control over the rate at which prisoners are transported to courts. Consequently, if large numbers of unrepresented prisoners arrive at the same time, duty counsel may be unable even to interview them properly.[107] This is of even greater concern if it means that duty counsel is unable to provide adequate representation to an accused person at a bail hearing, particularly since judges are now permitted to take the subjective concerns of the public into account.[108] The Commission also expressed concern with many part-time duty counsel's qualifications:

> … per diem duty counsel receive no systematic training and may work without any assistance or supervision from senior counsel. … over-reliance on such lawyers is unfair to them and unjust for accused persons.[109]

The concern that duty counsel may not be able to adequately represent their clients' interests resonates for women who are seeking divorce from abusive husbands. If the woman is cross-charged following a violent episode, then she is faced with the challenge of obtaining legal counsel experienced with criminal law for the domestic violence matter, and with family law for

[103] This rule, known as the "spouse in the house," was struck down by the Ontario Court of Appeal on May 13, 2002. On May 27, 2002, the Ontario Government announced its intention to appeal this decision of the appellate court to the Supreme Court of Canada.
[104] Canadian Centre for Justice Statistics, *Legal Aid in Canada: Resource and Caseload Statistics 2000/01*, p. 7.
[105] Accessed September 18, 2002 at www.cba.org/cba/advocacy/legalaidadvocacyresourcekit/Optionsforthedeliveryoflegalaid .
[106] www.cba.org
[107] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, p. 154.
[108] *R. v. Hall.*
[109] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, p. 174.

the divorce and child custody matters. Duty counsel may not have the range of competence or the flexibility of time to meet this range of needs.[110]

Legal advice is also needed to provide women with information regarding the implications of a criminal record or a guilty plea. Since diversion carries no risk of incarceration, many people plead guilty to avoid the daunting prospect of representing themselves at trial, and enter a diversion program even if they have a defence because of the potential consequences of going to jail. However, those working with women, particularly young women in conflict with the law, have challenged the veracity of stated policy that individuals who complete a diversion program do not have a record. Anecdotal evidence suggests that the court is oft-times provided with information regarding an individual's participation in a diversion program, contrary to the stated policy.[111]

As previously stated, the consequences of obtaining a criminal record are sufficiently damaging that, irrespective of the penal consequences, legal advice is necessary to assist individuals to determine whether they have a legal defence.

Need for Legal Information

The inter-relationships between poverty, low levels of education, literacy challenges, cultural alienation and contact with the justice system have implications for providing both men and women with information about their rights, entitlements and responsibilities under the law. Of Aboriginal women accused of criminal offences, the Aboriginal Justice Inquiry of Manitoba found:

> A number of women commented that they did not understand the court procedures. Some said they could not understand the language that was being used. Some knew nothing other than they were told to plead guilty, so they did.[112]

Information must be provided to those people who are unaware of the presence of law regulating particular conduct or of the existence of some legal avenue, and to those who have been frustrated in their efforts to access it.[113]

Information must be made available through a variety of media to accommodate different levels of literacy. Providers of legal information also must overcome such accessibility barriers as geographic isolation and language.

Whether a community has participated in the production and dissemination of information will help to influence the extent to which its members accept the information as legitimate. There are

[110] Manitoba Association of Women and the Law, *Women's Rights to Public Legal Representation in Canada and Manitoba,* part 2, p. 1.
[111] Interview with Laurie Ehler, Co-ordinator, Nova Scotia Elizabeth Fry Society, May 24, 2002. Interview with Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies, September 9, 2002.
[112] *Report of the Aboriginal Justice Inquiry of Manitoba.* Volume 1, p. 501.
[113] Ian Morrisson and J. Mosher, "Barriers to Access to Civil Justice For Disadvantaged Groups,, p. 24.

at least two reasons for this. Firstly, communities that have experienced systemic discrimination in Canada and/or have a history of repression from their countries of origin will be more inclined to accept information from a non-governmental source. Secondly, such communities are able to bridge the gaps that frequently prevent their culturally and linguistically marginalized members from accessing information.[114]

The Native Court Worker program is an example of such a community-based service. Funded by the federal government and most of the provincial or territorial governments, it has assisted Aboriginal people who are charged with criminal offences by providing them with legal information. The courtworkers also educate the judiciary and Crown prosecutors about the marginalized circumstances of Aboriginal people who are charged with criminal offences.[115]

It is worth noting that in southern jurisdictions, courtworkers were meant to complement legal counsel. Now, however, some community service agencies report that they have, essentially, replaced legal counsel, due to reduced legal aid coverage and a lack of lawyers prepared to work for legal aid rates – a devolution of their role that some feel is unacceptable.[116]

Pilot projects that provided legal information to accused while alerting accused people to the nature of their situations, the options available to them, the nature and consequences of the charges against them, the nature of the criminal process, and possible sources of assistance were found to be effective.[117]

While women need information about all kinds of offences, current legal information is particularly important in respect of criminal offences such as welfare fraud, the treatment of which has changed in the last several years. It is important for women receiving social assistance to understand, for example, that there is a broad continuum of what is perceived as constituting fraud, ranging from systematic and flagrant abuses of the system, to failure to report babysitting money or gifts from friends.[118]

Need for Legal Support

The need for legal support arises from the stress and culture shock accused persons and others experience when they are implicated in the criminal justice process. People who can act as legal supports for women include Native courtworkers, court-based advocates, front-line shelter workers, staff from organizations serving people in conflict with the law, and community service agencies. These individuals are not lawyers. They typically provide practical and emotional support for women accused. They interpret the court process for them. They also intervene with justice personnel where women accused are too frightened, or incapable.

[114] Ibid., p. 30.
[115] Currie, *Riding the Third Wave*, p. 10.
[116] Interview with Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies, September 9, 2002. A recent study of legal services in Nunavut found that courtworkers are expected to provide legal advice and representation in Justice of the Peace Court. The study noted the significant challenges they face, including but not limited to heavy workloads, the emotional demands of the job, the pressure they experience to take on more duties, and the need for more training, mentoring and support from both lawyers and other courtworkers.
[117] Currie, *Riding the Third Wave*, pp. 10-11.
[118] Carruthers, "Prosecuting Women for Welfare Fraud in Ontario," p. 242.

The service these non-legal advocates provide – often as volunteers – is admirable and essential but, increasingly, it is insufficient. So is legal advice and representation in some cases. This is best illustrated by the horrific circumstances of Kimberly Roger's life and death. As outlined in the application by the Canadian Association of Elizabeth Fry Societies to Legal Aid Ontario for test case funding, the facts are as follows.

Kimberly Rogers applied for and received social assistance from the Ontario government from 1996 to 1999. During that time, she was a student attending the social work program at Cambrian College in Sudbury, and received an OSAP loan in the amount of $49,000. As a result, she was ineligible for social assistance.[119] Kimberly was charged with fraud under section 380(1) of the *Criminal Code* and pleaded guilty on April 24, 2001. At that time, she was 40 years old, alone and pregnant with a child due in August. Kimberly had no prior criminal record.

The Crown and the defence counsel – paid for through legal aid – made the following joint submission on sentence: Kimberly would be given a six-month conditional sentence, to be served under house arrest, followed by an eighteen-month probation period. The joint submission also included a restitution order.[120] Kimberly's house arrest was subject to her ability to shop for the necessities of life on Wednesdays only, between the hours of 9:00 a.m. and noon.

As a result of the criminal conviction, Kimberly's welfare payments were automatically suspended for three months. During the sentencing proceedings, it was made clear to the judge, the Crown and defence counsel that Kimberly would be without income for three months.

A constitutional challenge to the automatic three-month suspension was brought by Kimberly in May 2001 and was successful. Kimberly's benefits of $520 per month were re-instated by Justice Epstein on May 31, 2001. Her monthly entitlement was reduced by $52 as part of the restitution order, leaving her with $468 per month. Of that amount, $450 went to rent. Kimberley was therefore left with $18 per month, $0.60 per day, to cover all of her monthly expenses including food, transportation and telephone.

Kimberley was found dead in her apartment on August 11, 2001, during a heat wave in Sudbury. For the six days preceding her death, temperatures were above 30 degrees C. Her unborn child did not survive and the cause of Kimberly's death remains unknown.

An inquest is scheduled into the circumstances of Kimberly's death. This tragedy raises the issue of the feminization and criminalization of poverty.[121] It also raises the broader problem of the systemic manner in which criminalization obscured the consequences to humanity of the state's failure to alleviate hardship and, in this case, inflict that hardship. Finally, it raises the harder systemic questions of responsibility for the consequences of a sentence that left Kimberly Rogers unable to buy food. The results of the inquest should be carefully examined.

[119] Canadian Association of Elizabeth Fry Societies, Application for Test Case Funding to Legal Aid Ontario, May 6, 2002, p. 2.
[120] Ibid., p. 2.
[121] Ibid., pp. 6-7.

1.4 Summary

This chapter examined the relationship between the life circumstances of women in conflict with the law and their law breaking; recent government policies that have aggravated their social and economic marginalization; and their legal aid and other legal needs as accused persons in criminal courts.

Women's life circumstances and law breaking. When the stories of women in conflict with the law are examined, their history of victimization is impossible to ignore. The vast majority of incarcerated women, and an even greater proportion of Aboriginal women, have experienced abuse, most often perpetrated against them by men they know. Many also have substance abuse problems. However, unlike those of their male counterparts, women's addictions are frequently linked to their experiences of abuse.

Economic disadvantage can play a role in bringing both men and women into conflict with the law. However, the risk of living in poverty is greater for women than for men, and greatest among Aboriginal women, women of colour and immigrant women. Unlike their male counterparts, women in conflict with the law are frequently the primary or sole caregivers for their children. As a result, they have fewer opportunities to obtain an education, to establish marketable skills or to maintain employment.

Nonetheless, women are charged with far fewer and less serious offences than men. In 1999, they were most frequently charged with theft under $5,000, followed by level 1 or common assault, fraud (most frequently welfare fraud), and possession or trafficking in cannabis – all of which accounted for 55 percent of the charges laid against women that year.

Women's law breaking is inextricably linked to their poverty and abuse. As welfare incomes have dropped further from the minimum level of subsistence established by the poverty line, women have been increasingly prosecuted and imprisoned for welfare fraud. Women's poverty is also a factor in their shoplifting items that they or their children need, their arrest for street prostitution, and their disproportionate imprisonment for fine default. While some jurisdictions have implemented fine-option programs, they rarely provide childcare, resulting in high failure rates for women with children. Charges for level 1 assault have increased significantly since 1987, in part because abused women are being counter-charged with assault when they call on the police to restrain an abusive partner.

Although women tend to be charged with less serious offences than men, the proportion of women in remand is roughly the same as for their male counterparts. Aboriginal women and women of colour are even more likely to be denied bail than White women. Like their male counterparts, women in remote and isolated communities – which include a large Aboriginal population – who are denied bail are detained in southern detention facilities because there are no such facilities in their home communities.

The role of the state in the increasing gap between the rich and poor. Recent government policies have aggravated women's economic marginalization. These include a reduction in state expenditures on programs that benefit the poor, of whom women are a majority. Although the

widening gap between the rich and poor – an inevitable consequence of policies such as these – has fuelled growth in demand for legal services, legal aid funding has decreased. Reduced funding to community-based advocacy groups has reduced the ability of disenfranchised people to influence discourse and policy. Finally, the ascendancy of the law and order agenda has led to more numerous criminal sanctions, stiffer sentences, and allocating responsibility for crime exclusively to the individual, while ignoring the correlates of crime such as illiteracy, poverty, victimization, substance abuse, and the absence of employment opportunities.

Anecdotal evidence indicates an increase in the number of unrepresented accused. The consequences of being unrepresented at trial can be severe for both men and women, especially those with mental disabilities. Unrepresented accused are more likely to plead guilty even if they do have a defence; to be convicted if they plead not guilty; and to receive a harsher sentence since they are unable to engage in charge, plea or sentence negotiations. A criminal record can severely compromise men's and women's ability to obtain employment or a professional licence, to advance to a more responsible position, and to become bonded or insured. However, the consequences of a guilty plea or conviction and the resulting criminal record can be particularly harsh for women and their children. Women without citizenship may lose their landed immigrant or refugee status. Those who are mothers may lose credibility in child apprehension cases and custody and access disputes. Those who are sentenced to imprisonment will be separated from their children.

Legal aid and other legal needs. Given the implications of a criminal record for women and their children, the view that incarceration is the only relevant criterion triggering entitlement to legal aid representation must be challenged.

Women need representation to assist them in court proceedings, to appeal trial decisions to higher courts, and to challenge the constitutionality of other decisions that impact on them and their children (e.g., welfare provisions). Legal counsel must be sufficiently knowledgeable about women's life circumstances in order to be able to contextualize their offences. Circumstances such as women being physically threatened by their abusive partners can form the basis of a valid legal defence. Women also need legal advice to assist them in determining whether they have a legal defence and may plead not guilty. Finally, like their male counterparts, they need information about their rights, entitlements and responsibilities under the law. Such information should be made available through a variety of media to accommodate different levels of literacy, in a variety of languages, be accessible and available in remote locations. Target groups or communities should participate in the production and dissemination of information to increase the likelihood that it is accepted as legitimate.

Chapter 2: Federally Sentenced Women

> Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.[122]

Nowhere is access to the justice system to assert one's rights more tenuous, and nowhere is the need for vigilance to ensure compliance with the Rule of Law more compelling than in correctional settings that largely function away from scrutiny. As Commissioners Hamilton and Sinclair wrote in the 1991 report of the Aboriginal Justice Inquiry of Manitoba, "Legislators pass laws and judges hand down sentences in awe-inspiring surroundings, but it is in prisons and jails that freedom finally is restrained."[123]

2.1 Defining the Population

The population of federally sentenced women – serving sentences of two years or more – is small. Women comprise only 2 percent of the total federal population: 350 incarcerated women compared to 12,600 men. Additionally, 500 federally sentenced women are on conditional release in the community.

However, the correctional population of federally sentenced women, particularly young women of colour, is the fastest-growing segment of the prison population. It has increased by 200 percent since the report of the Task Force on Federally Sentenced Women was written in 1990.[124]

Aboriginal women are disproportionately incarcerated, at 18 percent of the population of federally sentenced women although they represent only 2.8 percent of the population of Canada.[125] They account for the increased numbers of federally sentenced women in the Prairies. An increasing number of Black women - and women with cognitive and mental disabilities - are among the increased population of federally sentenced women in the East.

A 1991 Survey of Federally Sentenced Women indicates that two thirds of federally sentenced women are mothers, and 70 percent of these are single parents all or part of the time. Less than one third have any job qualifications beyond basic education, and two thirds have never had

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[122] House of Commons Sub-Committee on the Penitentiary System in Canada (Chairman: Mark MacGuigan), *Report to Parliament* (Ottawa: Minister of Supply and Services, 1977), p. 87.
[123] *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1, p. 431.
[124] K. Pate, Keynote Address to the Women in Corrections Conference, Australia, October 30 - November 1, 2000, p. 2.
[125] Correctional Services Canada, *Aboriginal Offender Statistics*. Accessed at www.csc-scc.gc.ca/text/prgrm/correctional/abissues/know/4_e.shtml

steady employment.[126] As already noted, histories of physical and sexual abuse are commonplace among incarcerated women.

New federal women's facilities have recently been established or built in the regions. Some have speculated that the increase in the number of federally sentenced women is attributable to a greater willingness on the part of judges to impose a federal sentence because a woman serving such a sentence is now more likely to be able to remain in her own region.[127] It may also be that judges have responded to pressure from such provincial governments as Ontario's to give out tougher sentences.[128] Judges may also give federal sentences because they believe that women serving such sentences are more likely to receive the treatment they need.[129] Whatever the reason, the significant increase in women's convictions, from 1,450 in 1994-95 to 2,150 in 1998-99, and the corresponding increase in more federal sentences, from 31 to 96 cases for the same period, suggests that judges are adopting a "tougher" approach toward the sentencing of adult women.[130]

The kinds of offences for which women are most likely to receive a federal sentence are homicide, attempted murder, robbery, major assault, and drug trafficking/importation.[131] These offences accounted for two thirds of all cases that received a sentence of two years or more in 1998-99. However, women's offending differs significantly from men's. For example, the evidence suggests that women's violent offences tend to be reactive in nature.[132] As a result, violent crimes are more often committed against intimates, not strangers, and many of these women – some report the majority – experienced abuse at the hands of their partners before committing a violent offence. In 1998, the majority of the 68 women serving a life sentence for murdering their intimate partners had been abused by their partners prior to the offence.[133]

Madame Justice Arbour noted in the report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, that although the relationship of women's social and economic marginalization to the criminal justice system has been well documented, Aboriginal women are particularly affected by this inequality. They come to prison at a younger age than non-Aboriginal women. They generally have lower levels of education and employment. Alcohol and drug abuse is a greater problem for them, and is reported to have played a greater role in their offending. They also have a greater incidence of past physical and sexual abuse.

[126] Margaret Shaw, *Survey of Federally Sentenced Women: Report to the Task Force on Federally Sentenced Women.* (Ottawa: Correctional Services Canada, 1990).
[127] Boe, Olah and Cousineau, *Federal Imprisonment Trends for Women 1994-95 to 1998-99,* p. 20. See also Anne Derrick, Speech to the National Association of Women and the Law Conference, March 7, 2002.
[128] Richard Mackie, "Ontario slammed for 'attack' on judges," *The Globe and Mail,* April 20, 2000.
[129] Kim Pate, Keynote Address to the Women in Corrections Conference, p. 5.
[130] Boe, Olah and Cousineau, *Federal Imprisonment Trends for Women 1994-95 to 1998-99,* p. 23
[131] Ibid., pp. 11-15.
[132] Hannah-Moffatt and Shaw, *Taking Risks,* p. 15.
[133] Canadian Association of Elizabeth Fry Societies, *Alternatives to Incarceration.* Accessed April 10, 2002 at www.efry.ca.

Moreover, they are incarcerated within a penal environment that is particularly alienating to many Aboriginal cultures.[134] This cultural alienation reverberates within the correctional setting. As a consequence, many have observed that it is an impossible setting in which to heal:

> In ways that are different from the world outside, but are nevertheless continuous with it, prisons offer more white authority that is sexist, racist and violent. Prisons are then one more focus for the pain and rage we carry. For us, prison rules have the same illegitimacy as the oppressive rules under which we grew up … Physicians, psychiatrists, and psychologists are white and male. How can we be healed by those who symbolize the worst experiences of our past?[135]

Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, has noted that the penal environment has also had uniquely harsh consequences for women with mental and cognitive disabilities. Women with mental health needs are frequently criminalized because of their disability-induced behaviour in institutions or in the community.[136] Correctional practice has been to respond to these mental health needs with a higher and more restrictive security designation. Pate points out that the inability of the correctional system to address cognitive challenges and mental health needs should not be a justification to classify prisoners as high security risks and subject them to harsher treatment and greater deprivations of their liberty. To do so is to engage in stereotyping of the sort prohibited by the equality provisions in Section 15 of the Charter.[137]

2.2 Restrictions on Liberty in Federal Institutions

The governing legislation for the management of confinement and treatment of prisoners in federal penitentiaries is the *Corrections and Conditional Release Act*, 1992. Pursuant to this Act, the Correctional Service of Canada has authority to take a range of administrative decisions. These kinds of decisions can have significant implications for a prisoner's liberty. They can generate a range of needs for legal advice and, depending on the seriousness of the consequences for the prisoner, for legal representation. These decisions include involuntary transfers, disciplinary hearings, administrative segregation, and classification issues.

The legal basis for challenging these decisions rests either on a breach of one or more provisions of the *Corrections and Conditional Release Act* or on a violation of the Charter. In this latter regard, the Supreme Court of Canada has held that a prisoner still has entitlement – albeit a pared-down one – to liberty interests within the correctional setting.[138] Decisions affecting discipline, segregation and transfer must not violate constitutional entitlements to liberty and

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[134] *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, p. 220.
[135] F. Sugar and L Fox, *Survey of Federally Sentenced Aboriginal Women in the Community* (Ottawa: Native Women's Association of Canada, 1990), p. 10.
[136] Kim Pate, Keynote Address to the Women in Corrections Conference, p. 4. Telephone interview with Wanda Gorician, Prison Liaison Co-ordinator, Edmonton Institute for Women, June 5, 2002.
[137] Kim Pate, Keynote Address to the Women in Corrections Conference, p. 4. See also Hannah-Moffatt and Shaw, *Taking Risks*, p. 47.
[138] *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160

security of the person, under Section 7, and must also be made in accordance with principles of fundamental justice.[139]

In the report of the Commission of Inquiry into Certain Events at the Prison for Women, Madame Justice Arbour documented the events triggered by a physical confrontation that took place between six prisoners and correctional staff in April 1994. In the days following the confrontation, the prisoners in question were placed in segregation, were subjected to a strip search and, later, a body cavity search. The six women remained in segregation for many months and were not ultimately released until between December 1994 and January 1995.[140]

The mistreatment of these prisoners violated the fundamental principles contained in international human rights covenants, the Charter and correctional law.[141] Madame Justice Arbour wrote:

> … the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service. … the deficiencies that the facts have revealed were serious and detrimental to prisoners in every respect, including in undermining their rehabilitative prospects. *There is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control*.[142] [emphasis added]

Madame Justice Arbour also observed that, during the time that the inmates were in segregation, inmates were neither advised of their right to counsel nor given access to counsel. Inmates' specific and repeated requests for lawyers were denied.[143] She concluded that correctional staff were not familiar with these entitlements, and failed to recognize the purpose of the entitlement or the need to comply with it. It is worth noting that even before the Commission of Inquiry into Certain Events at the Prison for Women, the Commissioners of the 1991 Aboriginal Justice Inquiry of Manitoba also reported that rules entitling an inmate to assistance from another person of the inmate's choice were being interpreted by prison staff to exclude lawyers.[144] It has been pointed out that part of the corporate disregard for law can be traced to staff ignorance about prisoner's entitlements and staff responsibility.

The Rule of Law establishes rights and interests under law, and protects these rights and interests against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process.[145] Madame Justice Arbour concluded that the absence of the Rule of Law that she documented in her report was apparent both within the prison and at the highest level of management. In her view, the correctional culture was unlikely to significantly revise its inert attitude toward respect for due process. She wrote:

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[139] Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas and McIntyre, 2002), p. 60.
[140] *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa, 1996): pp. 27-29.
[141] Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons,* p. 353-4.
[142] *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, p. 198.
[143] Ibid., p. 41
[144] *Report of the Aboriginal Justice Inquiry of Manitoba,* Volume 1, pp. 453-4
[145] House of Commons Sub-Committee on the Penitentiary System in Canada, *Report to Parliament*, 1977), p. 86.

> The Rule of Law has to be imported and integrated … from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously.[146]

A conviction for a disciplinary offence can result in an involuntary transfer to a higher security classification, and can undermine prospects for parole or other forms of conditional release. As such, the disciplinary process grants significant powers to correctional staff, which they are required to exercise with due regard for the Rule of Law and the constitutional entitlements of prisoners. Yet, correctional staff receive little or no training relating to the disciplinary process, and receive no education with respect to legal and factual elements required to prove particular offences.[147]

2.2.1 Legal Aid and Other Legal Needs

Need for Legal Representation

In light of the Correctional Service's corporate indifference to the Rule of Law, so thoroughly documented in the reports of the Commission of Inquiry into Certain Events at the Prison for Women, the Aboriginal Justice Inquiry of Manitoba and the House of Commons Sub-Committee on the Penitentiary System in Canada, and in light of the possible consequences for women deprived of liberty, the only question is what form of advocacy for federally sentenced women is optimal.

In his book, *Justice Behind the Walls: Human Rights in Canadian Prisons*, Michael Jackson wrote with caution about promoting the formal adversarial process within prisons, given prisoners' limited access to legal aid:

> One of the other problems with excessive reliance on a due process model, ultimately superintended by the courts through judicial review, is that it is subject to the vagaries of litigation and the limited access prisoners have to legal aid. This results in few cases reaching the courts and, for those that do, a heightened adversariness between the parties. For all these reasons, the development of alternatives to litigation, emphasizing non-adversarial and more informal dispute-resolution processes, has been identified as a necessary part of an effective system of prison justice.[148]

Jackson went on to explore the scope and limitations of such non-litigious mechanisms as the prisoner grievance process and the role of the Office of the Correctional Investigator (O.C.I.). The grievance process is intended to resolve individual complaints; the O.C.I. is intended to raise the profile of individual as well as widespread allegations of abuse within institutions.

The recurring critiques of these mechanisms are that the Correctional Investigator does not report to Parliament but to the Solicitor General – thus missing an opportunity to elevate the profile of violations of prisoners' entitlements – that the grievance process does not subject the grievance

[146] *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, pp. 180-181.
[147] Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons*, p. 269.
[148] Ibid., p. 68.

to a review by an authority independent of the present system, and that prisoners do not have a voice in the process.[149] Aboriginal inmates confirmed this latter criticism in 1991, in that 69 percent reported that, when they did make their complaints known, their concerns were ignored.[150] Additionally, the grievance process is compromised by the sheer delay that frequently vitiates any satisfactory resolution to a grievance.[151]

The greater issue with the O.C.I., the grievance process, and with more non-litigious forms of dispute resolution, is that they are tainted by the well-documented indifference to the Rule of Law in correctional settings. In the absence of fundamental respect for due process, prisoner complaints may not be viewed as legitimate challenges but as insubordination to be responded to with punitive retaliation. In the experienced voice of one prisoner in administrative segregation:

> You want to complain about the rags you get for clothes but you know the cleaners will spit in your food or urinate in your coffee if you do. You want to complain about the guard who miscounted your phone calls for the month, only giving you one or two, but you know next month you won't get any if you do. You want to complain about not being transferred but you know that this will piss somebody off and you will never get out.[152]

The 1991 Aboriginal Justice Inquiry of Manitoba concluded that no satisfactory, culturally appropriate process is in place to enable Aboriginal prisoners to challenge or appeal disciplinary treatment. In its survey, the Inquiry found that 64 percent of Aboriginal prisoners had not made any complaints during their time in prisons, compared with 40 percent of non-Aboriginal prisoners. Thirty percent of Aboriginal prisoners felt there was no one they could go to with complaints about the way that they were treated. This suggests that culturally appropriate outreach is necessary in order to make the grievance process more accessible.

However, the reality is that when the prisoner is totally dependent for the tiniest increments of liberty on the goodwill of a large bureaucracy that can retaliate viciously if it feels provoked, the supplicant will be reluctant to complain.[153]

Mediation has recently been used to deal with prisoner complaints. Within the context of two parties whose power is imbalanced to an absurd degree, the most likely result of this non-litigious approach will be a further winnowing away of prisoners' entitlements set forth in the *Corrections and Conditional Release Act*, the Charter and human rights legislation.[154]

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[149] Ibid., pp. 69-73.
[150] *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume1, p. 454.
[151] Telephone interview with Wanda Gorician, Prison Liaison Coordinator, Edmonton Institute for Women, June 5, 2002.
[152] Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons*, p. 384.
[153] Morrisson and Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups," p. 36. Telephone interview with Dawn McBride, Past President, Canadian Association of Elizabeth Fry Societies, June 6, 2002. Telephone interview with Pam Rubin, Researcher, May 20, 2002.
[154] Interview with Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies, September 9, 2002.

It is easy to predict – based on the conclusions that Madame Justice Arbour drew in her report – that the Rule of Law will be routinely ignored and flouted without vigilance to compel adherence to it. The need for protection of these
entitlements cannot be overstated. Nothing less than full legal representation in the correctional setting will ensure that deprivations of liberty are not expanded to an illegal degree.

Need for Legal Advice

The Commissioners of the Aboriginal Justice Inquiry of Manitoba also concluded that rules for disciplinary board hearings, requiring inmates to know the case they were to meet, were ignored.[155] Given this repeated observation that disciplinary charges against prisoners routinely lack the specificity and clarity necessary for prisoners to know the case they have to meet, at a minimum, prisoners require legal advice about their rights to due process in disciplinary proceedings.[156]

In addition to legal problems arising from their incarceration, prisoners routinely face a host of legal problems that arise from family law matters – custody issues, divorce proceedings, child apprehension matters – that also require legal advice.

Need for Legal Information

Most basically, prisoners require legal information in order to assist them to frame a problem as one with a legal dimension to it. Given the cultural alienation most federally sentenced women experience, legal information would be most easily accepted if it were authored and distributed by such community-based prisoner advocacy organizations as Elizabeth Fry Societies. Other organizations – that could bridge the cultural divide with Aboriginal women or offer information in an accessible format to women with mental health challenges – would be able to assist women to identify their legal issues as well as the recourses available to them.

2.3 Security Classification

The security classification level that federally sentenced men and women receive has significance beyond the obvious consequence of security placement. It affects their conditions of confinement, entitlement to goods, work placement, unescorted temporary absences, access to supervision level services, and likelihood and timing of release.[157]

The population of federally sentenced women comprising Aboriginal women, women of colour, and an increasing number of women with mental health needs, is a diverse population. These

[155] *Report of the Aboriginal Justice Inquiry of Manitoba,* pp. 453-454.
[156] Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons,* pp. 269-70.
[157] Hannah-Moffatt and Shaw, *Taking Risks,* p. 21.

women's experiences and needs are different from men's. On this point, Madame Justice Louise Arbour wrote:

> … [women's] crimes are different, their criminogenic factors are different, and their correctional needs for programs and services are different. Most importantly, the risks they pose to the public, as a group, are minimal and considerably different from the security risk posed by men.[158]

When they are closely examined, it becomes apparent that the assessment tools used to classify federally sentenced women have been developed for and statistically validated on a male population. Not surprisingly, the need for gender-neutral, class-neutral and race-neutral criteria to classify women has been highlighted repeatedly in the literature. Simply put, the classification instrument is riddled with a range of normative standards that put women, particularly culturally, racially, and cognitively marginalized women, at a disadvantage. The result has been a significant "over-classification" of federally sentenced women, based on classification criteria that de-contextualize their offending and ignore systemic factors.[159]

This is particularly true for Aboriginal women, who are disproportionately classified as maximum security. In her essay, "Aboriginal Women and Correctional Practice: Reflecting on the Task Force on Federally Sentenced Women," Professor Patricia Monture-Angus commented on a dimension of this systemic discrimination for federally sentenced Aboriginal women. She wrote:

> Both dislocation and disconnection are the result of colonial experiences such as child welfare apprehensions, residential schools and registration systems established under the *Indian Act*. Dislocation and disconnection remain predominant experiences of those who live within correctional institutions in Canada. The refusal of Aboriginal women to trust the "helping" services of the prison becomes one more strike against them. They are then seen as unco-operative. They are kept at a high security classification and denied parole.[160]

Several of the risk-management and risk-prediction criteria, such as employment status, a history of substance abuse, and community functioning, reveal a middle-class bias that presumes that employment is available for those who are motivated to work within their communities. However, as Monture-Angus points out, Aboriginal people do not typically belong to communities that are functional and healthy, but are in a state of dysfunction for which colonialism must take a large measure of responsibility.[161] Using a normative social construct in

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[158] *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, p. 228.
[159] Canadian Association of Elizabeth Fry Societies, *Submissions of the Canadian Association of Elizabeth Fry Societies: Five-Year Review of the Corrections and Conditional Release Act* (2000). Report of the Task Force on Federally Sentenced Women, p. 26. Hannah-Moffatt and Shaw, *Taking Risks*, p. 18.
[160] Patricia Monture-Angus, "Aboriginal Women and Correctional Practice: Reflections on the Task Force on Federally Sentenced Women," in Kelly Hannah-Moffatt and Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (Halifax, 2000), p. 56.
[161] Ibid., p. 57.

this way also obscures rather than acknowledges the impact of colonialism on the ability of a community to be supportive and nurture its members.

In their report, *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women,* Kelly Hannah-Moffatt and Margaret Shaw concluded, "Given that Aboriginal women represent less than one percent of Canada's population, the racism of the assessment and classification tools is clear."[162] They wrote:

> Many criteria in the Needs Identification Analysis target the disadvantage experienced by women prisoners as factors which increase their security classification with the result that the most disadvantaged federally sentenced women are the most likely to be subject to the more restrictive conditions of confinement. Restrictions based on disadvantage without proof that the proposed restrictions are necessary, contravene the equality provisions of the Charter.[163]

Hannah-Moffatt and Shaw also found that many correctional staff who are responsible for administering the classification process have described its application to women as a subjective process, and have raised concerns that "cultural differences in attitudes, reactions, dialect and verbal exchange could all be used in discriminatory ways. For example, some Black women might be seen as manipulative or misunderstood, some Asian women as too submissive."[164] Staff also noted that the financial problems that led women to participate in drug trafficking were not accounted for in the risk assessment.[165]

2.3.1 Legal Aid and Other Legal Needs

The classification process reveals a range of systemic discriminations that can be challenged through the grievance process, as a breach of the *Corrections and Conditional Release Act,* through the process of habeas corpus, as a violation of human rights legislation, and as a violation of the Charter. It seems clear that legal advice is necessary in order to assist women to choose the appropriate avenue and, most importantly, legal representation is essential to challenge the individual as well as the systemic discrimination present in the classification designation.

Any woman who objects to her classification designation will require legal representation in order to challenge the decision. Typically, this decisionmaking procedure is challenged in court by way of an application for a writ of habeas corpus, a technical and legally complicated procedure.[166]

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[162] Hannah-Moffatt and Shaw, *Taking Risks*, p. 51.
[163] Ibid., p. 46. See also Patricia Monture-Angus, "Aboriginal Women and Correctional Practice: Reflections of the Task Force on Federally Sentenced Women," p. 58.
[164] Hannah-Moffatt and Shaw, *Taking Risks*, p. 37.
[165] Ibid., p. 35.
[166] Telephone interview with Megan Arundale, Paralegal, Prisoner Legal Services, May 15, 2002.

Federally sentenced women – particularly vulnerable women, such as those with mental health needs – also need legal information in order to understand the implications of a security classification, and the legal avenues that are available to them, including litigation, a constitutional challenge and a human rights complaint.

2.4 Child Apprehension Matters

While entitlement to legal aid for child apprehension cases has been constitutionally recognized by the Supreme Court of Canada in the *G.(J)* decision,[167] the ability for incarcerated women to actually avail themselves of this constitutional protection is fragile at best. Their ability to do so is contingent on child protection workers informing them of their legal rights, on being served with notice of a child protection hearing, on transportation to the hearing being made available to them, on their ability to contact legal aid, and on finding a lawyer who will agree to travel considerable distances to represent them.

At the time of her arrest, a woman is required to negotiate two complicated separate social systems – the criminal justice system and the child apprehension system – whose processes have, to date, not been co-ordinated nor made comprehensible to her. Concern about care arrangements can be an overwhelming distraction that can seriously hamper a woman's ability to negotiate criminal legal processes.[168]

Focus groups were recently held with Aboriginal women in British Columbia whose children had been in state care.[169] While the participants were not incarcerated, their experiences are illustrative of the range of challenges women confront when dealing with the child welfare system.

Their comments underscore women's need for legal information. Many mothers had not heard of, or were not familiar with the child apprehension process, their rights or their responsibilities:

> *She (social worker) didn't let me know my legal rights, if I should go for legal aid or, didn't offer very much at all.*
>
> *I felt like I didn't have any rights … I didn't know my rights.*

Focus group participants spoke of feeling discriminated against and intimidated by government social workers and others working in the child welfare system. Their observations correlate with

[167] *New Brunswick (Minister of Health and Community Services) v. G.(J),* [1999] 3 S.C.R. 46.
[168] Sandra Lilburn, *Taken In – When Women with Dependent Children Are Taken Into Custody,* p. 2
[169] Kelly MacDonald, *Missing Voices: Aboriginal Women Who Have Been at Risk of or Who Have Had Their Children Removed From Their Care: Phase 2. Research Report* (National Action Committee on the Status of Women – BC Region, 2002).

broader Aboriginal experiences of racism in contemporary Canadian society. The participants provided many stories that were expressed with anger, hurt, outrage, and sadness:

> *I get so angry when I talk about the ministry. I feel that now I am labelled, I think because of who I am and what I am – Native. We should have the same rights as anyone else. Every nationality should be treated the same way. Just cause we are Native does not mean we are evil, bad and nothing but drunks.*

> *I guess what I'm trying to say is they treat Aboriginal women with a lot of discrimination, or something like that, discrimination … they like to intimidate you and they don't let you know you have rights.*

A number of participants noted that they were advised to just be agreeable in order to speed up the return of their children, pointing to a broader systemic flaw in the justice process that encourages agreement rather than resistance:

> *… they more or less told me that the sooner I get it over with the least time it would be for me to have my children back. If I fought it and said you know this is totally unfair it's wrong information you have, it would have taken over a year, or two years maybe.*[170]

The experiences of Aboriginal women with the child welfare system must be understood within the broader historical context of colonization. The initial incarnation of child-apprehending institutions was the notorious residential school. The schools have been viewed as "a conscious, deliberate and often brutal attempt to force Aboriginal peoples to assimilate into mainstream society, mostly by forcing children away from their language, culture and societies.[171] Indian residential schools denied over 100,000 children the experiences of culture, parenting and the development of child-rearing skills and norms, and subjected them to physical, psychological and sexual abuse."[172]

Professor Marlee Kline noted that child protection workers and the judiciary tend to focus on the individual caregiver (mother) without connecting the challenges of supporting and nurturing children to the problems of poverty, violence and the legacy of cultural marginalization and

[170] Kelly MacDonald, *Missing Voices.*
[171] *Report of the Aboriginal Justice Inquiry of Manitoba,* p. 514.
[172] McGillvray and Comaskey, *Black Eyes All of the Time,* p. 13, and the sources cited within.

racism, and the way in which these compounding experiences of oppression affect women's lives.[173] Kline went further in her analysis:

> The focus on individual "bad mothers" as the source of difficulties in First Nations child welfare cases effectively blames First Nations women for the effects of social ills that are largely the consequence of this history and present. Vivid illustrations of this individualized mother-blaming focus can be found in child protection cases, involving First Nations women who are dependant on drugs or alcohol, or involved in a relationship with a violent man.[174]

The number of Aboriginal children in care is disturbingly high. Equally disturbing is the fact that according to the Children's Commission's *1998 Annual Report*, contrary to the law of British Columbia, only 2.5 percent of Aboriginal children are placed in Aboriginal homes. Further, only 30 percent of the plans of care for Aboriginal children include, as required by Ministry policy and provincial legislation, plans to address, honour and respect their cultural needs.[175]

It is easy to imagine how much more anxiety-producing this experience of having her children apprehended would be where the woman was also charged with a criminal offence.

2.4.1 Legal Aid and Other Legal Needs

Justice for women entering the correctional system is contingent on a number of factors, including access to legal information and advice about the implications of their incarceration for their dependant children.[176] The imprisonment of a female single parent can frequently result in instability for the children, characterized by frequent moves, too many caregivers, and the possibility of permanent separation from a parent.[177] It is hard to imagine a more stressful set of circumstances under which women are forced to make care decisions about their children than upon arrest.

Need for Legal Representation

Representation is required continuously from the point at which the mother is arrested through each stage of the child apprehension case. A lawyer working within the correctional institution

[173] M. Kline, "Ideology of Motherhood: Child Welfare Law and First Nations Women," *Queen's Law Journal* 18 (1993), p. 320.
[174] M. Kline, "Ideology of Motherhood," p. 306.
[175] In the year 2000, the number of Aboriginal children in care in B.C. was 3,172. Approximately 40 percent of the total number of children in continuing custody (permanent care of the Ministry of Child and Family Development) are Aboriginal and, in some cases, up to 64 percent (up North) are Aboriginal. More recent statistics suggest that the number as of March 2001 was 4,098 Aboriginal children in care, an alarming increase of 19 percent from March 1999: Kelly MacDonald, *Missing Voices.* British Columbia Children's Commission (Commissioner: Cynthia Morton), *1998 Annual Report* (Victoria: Queens Printer, 1999).
[176] Sandra Lilburn, *Taken In – When Women With Dependent Children are Taken Into Custody*.
[177] Martha Raimon, "Barriers to Achieving Justice for Incarcerated Parents," *Fordham Law Review* 70 (2001), p. 424.

would be well positioned to provide legal advice to incarcerated mothers, to take account of the best interests of the child and the restricted mobility of an incarcerated mother.

Legal representation at judicial hearings is critical to ensure that mothers have a full and fair opportunity to be heard in court. In particular, representation is needed to respond to the view that incarceration is often used as an indicator of parental fitness.[178] Judges may view the absence of the incarcerated mother at a hearing – despite her best efforts to attend – as a sign of default or indifference to the proceedings, and may proceed without her, often leading to tragic consequences for her and her children.[179]

Notwithstanding the constitutional entitlement to legal aid in child apprehension matters, women are frequently not able to attend protection hearings and assert their rights. The reasons for their non-attendance are varied, but their unawareness of their entitlements, their inability to access legal aid, and the correctional institutions' non-facilitation of their participation are partly responsible. This suggests women will need legal representation to apply for court orders to enforce their constitutional entitlements as well as their rights under child protection legislation.

Need for Legal Advice

Women require legal advice prior to signing a voluntary consent form so that they can understand their rights and responsibilities, and the consequences for their children of voluntarily signing them into care.

Need for Legal Support

Persons providing legal support could assist with advising women of the child apprehension process as well as their rights and responsibilities when their children are in care. Paralegal workers could also communicate with child apprehending agencies to assist with visitation plans, attend case conferences and help access services available in jail.[180]

2.5 Parole Hearings, Conditional Release, and Implications for Legal Aid and Other Legal Needs

Prisoners who make an application before the National Parole Board face a hearing that is inquisitorial in nature. Some offenders have the support of an assistant, who may be a friend or family member or, in relatively few cases, a lawyer.[181] At the hearing Board members ask questions relating to the prisoner's offence, understanding of factors contributing to the offending behaviour, institutional history and progress toward rehabilitation and re-integration.

Hearings are becoming increasingly complex, in part because of the increased opportunities for victims to participate in the hearings (and additional recent plans would enhance their participation). Parole Board members are required to take into consideration the submissions of

[178] Sarah Gauch. "When Mothers Go to Prison," *Human Rights* 16,2 (1989), pp. 33-35.
[179] Martha Raimon, "Barriers to Achieving Justice for Incarcerated Parents," p. 424.
[180] Ibid., Raimon, p. 425
[181] Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons*, p. 541.

victims, the veracity of those statements and the weight to be given to them, as well as the due process to be accorded to an applicant in challenging those statements.

Data in the United States shows a direct inverse relationship between the parole grant rate and the participation of victims in the parole process: the greater the participation of victims, the less likely the applicant will be granted parole.[182] Legal representation is more necessary than ever, if only to assist applicants to counterbalance the enormous visceral impact of having victims participate in the parole hearing.

The majority of prisoners are released prior to the expiration of their custodial sentence, subject to conditional release. The process of re-integration does not, on the face of it, raise legal issues for which legal representation is required. It does, however, require tremendous resources in the community for organizations that provide services for people who have been in conflict with the law. This kind of an investment should be seen as a preventive measure to help reduce the occurrence of re-offending.

2.6 Summary

This chapter examined the legal aid and other legal needs of women during the time that they are serving a sentence of two years or more in a federal penitentiary, as prisoners, mothers and parole applicants.

While the population of federally sentenced women is small, it has increased by 200 percent since 1990, with Aboriginal women, visible minority women and women with cognitive and mental disabilities – who are frequently criminalized because of their disability-induced behaviour – comprising a significant portion of the population. The relationship between women's social and economic marginalization and the correctional system is clear, and particularly pronounced for Aboriginal women.

Pursuant to the *Corrections and Conditional Release Act*, the Correctional Service of Canada has the authority to take a range of decisions – including involuntary transfers, disciplinary sanctions, administrative segregation and security classification – that can generate serious consequences for prisoners and, as a result, various legal needs. The Supreme Court of Canada has held that a prisoner still has an entitlement – albeit a pared-down one – to liberty interests within the correctional setting.

Government inquiries have repeatedly described an indifference to the Rule of Law on the part of correctional authorities, and a lack of awareness and training on prisoners' entitlements to legal services among institutional staff. In the absence of fundamental respect for due process, prisoner complaints may not be viewed as legitimate challenges, but as insubordination to be responded to with punitive measures. The use of non-litigious approaches such as mediation is also problematic because of the extreme power imbalance between prisoners and staff.

[182] B. Smith, E. Watkins and K. Morgan, "The Effect of Victim Participation on Parole Decisions: Results from a South Eastern State," *Canadian Journal of Policy Research* 8,1 (1997), p. 57. W. Parsonage, F. Barnet and J. Helfgott, "Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study," *Canadian Journal of Policy Research* 6,3 (1992), p. 87.

Given the above, both male and female prisoners need legal representation to ensure that deprivations of liberty are not expanded to an illegal degree. They also require legal advice about their rights to due process in disciplinary and other proceedings. Most basically, prisoners – and staff – require legal information. Such information would be most easily accepted if it were authored and distributed by prisoner, Aboriginal and mental health advocacy groups.

The circumstances of women's offending, their program needs and the risk they pose to the public are different from men's. Nonetheless, the instruments used to determine their security designation are the same as those developed and used for their male counterparts. The instruments contain a range of normative standards that put women, particularly culturally, racially, and cognitively marginalized women, at a disadvantage. The result has been a significant "over-classification" of federally sentenced women, based on classification criteria that de-contextualize their offending while ignoring systemic barriers. This is particularly true for Aboriginal women, who are disproportionately classified as maximum security.

Legal advice is necessary in order to assist women to choose the appropriate avenue to challenge their security designation, as well as any possible individual and systemic discrimination present in the classification tools. Foremost, they need legal information to understand the implications of their security classification, and the legal avenues that are available to them to contest it. A 1991 survey indicated that two thirds of incarcerated women were mothers, and that 70 percent of these were single parents all or most of the time. While the Supreme Court of Canada has recognized entitlement to legal aid for child apprehension, the ability for incarcerated women to actually avail themselves of this constitutional protection is fragile at best. Their ability to do so is contingent on child protection workers informing them of their legal rights, on being served with notice of a hearing, on transportation to the hearing being made available to them, and on their ability to contact legal aid. Moreover, child protection workers and the judiciary focus on the individual caregiver (mother) – without connecting the challenges of supporting and nurturing children to the problems of poverty, violence, the legacy of cultural marginalization and racism, and the way in which these compounding experiences of oppression affect women's lives.

Legal representation is therefore required from the point at which the children are removed or the mother is arrested, continuously through each stage of the child apprehension case. Legal representation at child protection hearings is critical to ensure that mothers have a full and fair opportunity to be heard in court, and/or to enforce their constitutional and legal entitlements. Women also require legal advice prior to signing placement forms so that they can understand the consequences for themselves and their children. In addition, they need legal information on the implications of their incarceration for their dependent children.

Parole hearings are becoming increasingly complex, in part because of increased opportunities for victims to participate in hearings. Parole Board members are required to take into consideration the submissions of victims, the veracity of those statements and the weight to be given them, as well as the due process to be accorded to an applicant in challenging those statements. Given these complexities, legal representation is required to assist parole applicants to counterbalance the enormous visceral impact of having victims participate in the hearing.

Chapter 3: Women as Witnesses, Complainants and Third Parties in Cases of Intimate Violence and Sexual Assault

Criminal charges represent offences against the state. The violence or trespass to a victim is meant to be owned by the community, and is represented within the criminal process as "an attack on us."[183] As such, the interests of the woman who has experienced intimate violence or sexual assault are considered to be allied with those of the Crown. Within the classical structure of a prosecution, the only independent role that the victim is accorded is as the complainant, or, in the words of Nils Christie, the "trigger" of the criminal justice process.

3.1 Women's Experience with Mandatory Charging

A consideration of the needs of survivors of intimate violence for legal aid and other legal services inevitably merges with women's experience with the mandatory charging policy that has been in place for the last two decades in Canada.[184] The policy, which the Solicitor General of Canada introduced in 1982, was a response to the expectations of equality-seeking women's organizations for a broad-based strategy that would take seriously the harms women experience at the hands of their intimate partners. While physical assault theoretically included assault inflicted against wives or other intimate partners:

> … in practice this use of violence was treated as paradigmatically private and thus, of little interest to the criminal justice system. The characteristic police response (if they responded at all) to wife assault in the post-war years was to attempt to reconcile the parties, usually by briefly separating them or by attempting informal mediation. Charges were rarely laid, and if laid, rarely prosecuted through to sentencing.[185]

Mandatory charging represented the first prong of a tripartite strategy to address the contemporary characterization of male violence against women in intimate relationships as a matter of public concern and a serious one, at that. The three elements of the approach included: a direction that the police would lay charges in all incidents of "wife assault" when there were reasonable grounds to do so;[186] a corresponding direction to prosecuting Crowns that charges

[183] S.E. Marshal and R.A. Duff, "Criminalization and Sharing Wrong," *Canadian Journal of Law and Jurisprudence* 11,1 (1998), p. 7.
[184] The findings in this section should not be presumed to fully apply to Nunavut and Arctic women. Further research is required to understand the history and implementation of the mandatory charging policy, as well as the mandatory charging related experiences of women living there.
[185] D. Martin and Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse," *Canadian Journal of Women and the Law* 8,3 (1995), p. 14.
[186] Ministry of the Solicitor General and Correctional Services, *The Policing Standards Manual* (Ontario, 1994), guideline 0217.01.

should only be withdrawn by the Crown under "exceptional circumstances," noting that reluctance by the victim did not give rise to such exceptions;[187] and, finally, an expectation that a judicial sentence would reflect the gravity of the offence and resound with the appropriate ring of community denunciation. A policy of appeal by the Crown was intended to challenge those cases where it did not.

This approach was meant to transform a societal belief system that had indulged the premise that violence against women was most properly characterized as a private matter into which the state ought not to stray, a practice of mutual sabotage between husbands and wives properly relegated to the privacy of the family and the home.[188]

It is controversial to assert that this policy has resulted in a reduction in male violence against their intimate female partners.[189] More to the point however, there has been a sustained reluctance – and in many cases, resistance – on the part of many abused women to co-operate with the prosecution of their partners.[190] This raises significant questions about whether the needs of women who have experienced conjugal violence – both their needs within and beyond the criminal justice system – are being met by the current policy.[191]

A number of qualitative assessments reveal what women say about the current criminal justice response and how they define their needs.[192] These assessments report that women's experiences with the mandatory charging policy, and the extent to which it met their expectations and needs, are shaped by experiences that go beyond that of gender. Race, class, maternal status and citizenship predominate and intersect as variables that both inform a woman's decision to call police, as well as her experience of the state's response.

Mothers who experienced abuse were unequivocal in prioritizing the needs of their children, either in securing their safety or in keeping the abuse hidden from them. Mothers adopted their children's needs for safety and protection as their own, and factored them into their decision either to make efforts to leave the abuser or to keep the family intact.[193]

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[187] The Ministry of the Attorney General, Government of Ontario, *Crown Policy Manual, Province of Ontario*. "Spousal/Partner Assault," SP-1, January 15, 1994.
[188] Erez and King, "Patriarchal Terrorism or Common Couple Violence," p. 207.
[189] Martin and Mosher, *Unkept Promises*, p. 18. See also Tammy Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against the Prosecution," *Domestic Violence: Global Responses* (Great Britain: AB Academic Publishers, 2000), p. 7.
[190] Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada," p. 8.
[191] As Laureen Snider wrote in "Feminism, Punishment and the Potential for Empowerment," (M. Valverde, L. MacLeod and K. Johnson, eds., *Wife Assault and the Canadian Criminal Justice System* [Toronto: Centre of Criminology, 1996], p. 244): "… in this area, the effect on the women the legislation is aimed at empowering – the battered or assaulted women – must be the prime, if not the only, criterion for evaluating the success or failure of law reform."
[192] Martin and Mosher, *Unkept Promises.* Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada," and J. Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs," *Canadian Journal of Women and the Law* 13 (2001), p. 74. See also McGillvray and Comaskey, *Black Eyes All of the Time*, pp. 84-113.
[193] Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs," pp. 86-87.

The spectre of state intervention was also a preoccupation for many women who feared the degree to which calling the police would bring unwelcome scrutiny into their lives. They feared child apprehension authorities, welfare workers and deportation authorities. Fear of having their children taken by child protection authorities was cited by some Aboriginal survivors of intimate violence as a deterrent to calling the police.[194]

Consequences for their economic security weighed heavily in women's consideration of possible actions to put an end to their abuse. For women who are economically dependant on their abusers, charging and prosecuting has the potential consequence – if a period of incarceration is imposed – of compromising their own and their children's economic position. For women with limited employment experience, limited knowledge of English and few marketable skills, the prospect is of almost-certain poverty.

Abused immigrant women who contemplated police intervention sometimes faced threats from their abusive partners to alter their immigration status. Additionally, many women in close-knit cultural communities identified fear of ostracism within their community if they reported the abuse. Finally, many women were also forced to reconcile their need for reprieve from the abuse with a previous experience of state or police brutality in their country of origin.[195]

Immigrant women were not alone in grappling with this legacy of state oppression, and the consequences of police intervention for their own safety, the safety of their abusive partners, and the implications for their community. Aboriginal women have repeatedly raised concerns about the ways in which the state has oppressed First Nations people culturally, physically and economically.[196] The literature confirms that the fear of a racist response against their partners or themselves is well founded.[197]

On a practical level, women in rural and isolated communities who need assistance in order to escape abusive partners may have only the police to call. For these women, the consequences of calling for police intervention against abusive partners have included shaming, banishment, and the abandonment of their culture, community, and even their children.[198] Access to help for

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[194] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 136. Even more disturbing was the disclosure that Aboriginal women, seeing themselves from the police officers' perspective – as responsible for the violence because of their inadequacies – accepted this low opinion as corroborating the opinions of their abusive partners (p. 139).

[195] A. Côté, M. Kéresit and M. L. Côté, *Sponsorship … For Better or for Worse: The Impact of Sponsorship on the Equality Rights of Immigrant Women* (Ottawa: Status of Women Canada, 2001), p. 1. Dr. B. Miedema and Dr. S. Wachholz, *A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick* (Ottawa: Status of Women Canada, 1998), p. 21. Interview with Chantal Tie, Executive Director, South Ottawa Community Legal Services, April 19, 2002. Martin and Mosher, *Unkept Promises*, p. 20. Minaker, *Evaluating Criminal Justice Responses through the Lens of Women's Needs*, p. 81.

[196] McGillvray and Comaskey, *Black Eyes All of the Time*. *Report of the Aboriginal Justice Inquiry of Manitoba*. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Ministry of Supply and Services Canada, 1996). Emma Laroque, "Re-examining Culturally Appropriate Models of Criminal Justice Applications," in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997). MacDonald, *Missing Voices.*

[197] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide. Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. McGillvray and Comaskey, *Black Eyes All of the Time*, p.139.

[198] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 134.

women and children living on reserves may be further compromised by band politics.[199] Abusers have used delays in police response either to increase the violence or to pressure the victim to forgive and forget.[200]

Overall, the data from these studies indicates that the mandatory charging policy falls short of meeting women's expectations. Clearly, all of the women interviewed needed the police to answer their calls[201] and needed their reports of abuse to be taken seriously.[202] They expected the police to express to the abuser that his actions were wrong,[203] and hoped that the abuse would stop if the police did so.[204] All women who were interviewed identified a need for physical safety. In fact, women most frequently had hoped that the police would remove the abusive partner from the house.[205]

However, many women did not expect that their calls to the police would trigger a full criminal justice system response that would include removing, arresting, charging and prosecuting the abuser. Indeed, there is some indication that many women who call the police have no understanding of mandatory charging policies and how it will affect them or their partners.[206] In one study, almost 40 percent of women who had called the police to report an incident of abuse did not know that the police were required to lay charges, even if the complainant was against it.[207]

However, in about 9.75 percent of cases women wanted the partner charged.[208] When a charge and prosecution are clearly what an abused woman wants, the results have significance far beyond the outcome of the individual case. As Joanne Belknap pointed out, the subsequent charge, prosecution and unequivocal judicial denunciation of abuse can lead to an improvement in women's perceptions of the justice response:

> The prosecution and adjudication stages are consequential for perpetrators – deciding their guilt or innocence, creating a criminal record and imposing a penalty. But they are even more important for battered women and their determination to access the legal system. By convicting batterers, the law reaffirms victims' versions of abusive behaviour, and rejects abusers' presentation of the event and the legal defences that they put forward. … The symbolic message the law sends through the approbation of women's complaints is critical for their willingness to mobilize the law to resist intimate violence.[209]

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[199] Ibid., p. 11. See also Abt Associates of Canada. *Comprehensive Review and Evaluation of the Certificate Component of the Ontario Legal Aid Plan* (Toronto: Attorney General of Ontario, 1991).
[200] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 80.
[201] Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs," p. 84.
[202] Ibid.
[203] Martin and Mosher, *Unkept Promises*, p. 23.
[204] "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada," p. 15.
[205] Ibid., p. 15.
[206] Ibid., p. 14.
[207] Ibid., p. 14.
[208] In Martin and Mosher's study, one in 11 women supported the mandatory charging policy. In Landau's study, 15 percent indicated that they wanted their partners charged.
[209] Erez and King, "Patriarchal Terrorism or Common Couple Violence," p. 209.

If and when women speak more positively about their experiences, more women may be encouraged to turn to the justice system for a response to intimate violence.[210]

3.1.1 Legal Aid and Other Legal Needs

In view of the harms that potentially flow from full criminal justice intervention – threats to immigration status, intervention from child welfare agencies, risk of retaliation from the abuser, ostracism from the community – women's frequent dismay at the chain of events triggered by the call for intervention is understandable.

Need for Legal Representation

There are several reasons why an abused woman may need independent legal representation or legal advice. They include compelling prosecution where the Crown declines to lay a charge; laying a more significant charge than that laid by the Crown; and protecting personal records from disclosure to the accused or the media.[211]

To the extent that current immigration law and policy discourage women from leaving dangerous family situations, women need access to legal representation in order to assert their constitutional entitlements to liberty and security of the person, pursuant to Section 7 of the Charter.[212] In fact, where a woman's immigration status is in flux or is linked to the status of other family members, a range of legal issues may surface – including how the breakdown of the family unit will affect the immigration process, and how a criminal conviction of an immigrant women's husband will affect the immigration status of his dependants, including the woman.[213] If immigration policy is not to have the effect of heightening women's vulnerability to intimate violence, women must not be forced to choose between living with danger in their home or putting their immigration status in jeopardy.[214] Women whose sponsorship has broken down require legal representation in order to ensure that their application to remain in Canada on humanitarian and compassionate grounds is correctly completed and supported by as much corroborating evidence as is necessary.[215]

Between 1978 and 1990, six of the ten Canadian provinces passed statutes characterizing childhood exposure to domestic violence as giving rise to a need to protect the child.[216] While not widely used, there is some indication from women's shelter advocates that various provinces have applied these provisions to remove children from their abused mothers and place them in

[210] Sexual Assault Centre of Essex County, *Proposal to Status of Women Canada for Independent Lawyers in Cases of Sexual Assault* (undated). On file with the researcher
[211] Jennie Abell and Elizabeth Sheehy, *Criminal Law and Procedure: Proof, Defences, and Beyond* (North York, Ontario: Captus Press, 1998), p. 401. Martin and Mosher, *Unkept Promises*, p. 42.
[212] Colleen Sheppard, "Women as Wives: Immigration Law and Domestic Violence," *Queen's University Law Journal* 26 (2000), p. 28.
[213] Ibid., p. 2.
[214] Ibid., p. 7.
[215] Interview with Chantal Tie, Executive Director, South Ottawa Community Legal Services, April 19, 2002.
[216] See, for example, *Child Welfare Act*, R.S.A. ch c-8, subsection (3)(a) (1984) (Alberta), *Child and Family Services Act*, ch. C-7.2, subsection 11(a)(vi) (1989) (Saskatchewan), and *Child and Family Services Act*, R.S.N.S. ch. 5, subsection 22(2)(I) (1990).

temporary wardship.[217] Successful legal representation of a mother's interests in this kind of case requires substantial knowledge of the dynamics of domestic violence, not typically part of lawyers' training. Suffice to say that women who face these applications require knowledgeable legal counsel who can contextualize the nature of the women's position to the court, and challenge the assertion that removing a child from the mother is the most effective way to make the child safe.[218] Even without widespread implementation, the discretion available to child protection workers to remove children is real, and women require legal information about the potential consequences of alerting the state to their experience of violence.[219]

Need for Legal Advice

The practice of counter-charging gives rise to a clear need for legal advice as soon as an abusive partner utters a statement that implicates the abused woman. Bearing in mind that the most frequent defence to an assault charge is that the abusive partner acted in self-defence, women require legal advice if any further questioning by the police is to take place, and certainly if charges are laid.

Recent inquests into murders of women killed by their partners highlight the need for survivors of intimate violence to receive legal advice before the bail hearing, so that they can realistically make decisions regarding their safety and the safety of their children[220] – as well as during criminal proceedings on issues of disclosure, Charter rights and privacy rights.[221] Since women who are survivors of intimate violence frequently have an ongoing relationship with the abuser, it is imperative that they have a strong voice in the proceedings before the courts.

Need for Legal Information

The overarching critique of the mandatory charging policy is that it takes the decision out of the hands of women. At best, this disempowers them; at worst, it puts them at real risk of harm.[222]

[217] Interview with Mary DeWolfe, Executive Director, Chrysalis House, May 16 and 17, 2002.
[218] Interview with Janet Mosher, Academic Director, Parkdale Community Legal Services, Toronto, May 14, 2002.
[219] Equally worrisome is an American trend to prosecute women for the murderous acts of their abusive partners towards their children. In one case, a mother who was asleep while her partner killed her three-year-old daughter, has been convicted of murder and is currently serving a sentence of 36 years with no chance of parole. The issue is even more complicated when a battered woman is prosecuted for the offence, as very few American states permit the legal defence that to intervene in the abuse would have further endangered their own lives or made it worse for the children: Erin Anderssen, *The Globe and Mail*, Saturday, May 11, 2002, p. F7. The trend of prosecuting women – "she knew or should have known" – overlooks the intimidation, the abuse and the violence that characterizes many marriages: Claire Renzetti, in Susan Miller, *Crime Control and Women: Feminist Implications of Criminal Justice Policy* (California: Sage Publications, 1998), p. 185.
[220] Jury's verdict and recommendations from the Inquest into the deaths of Arlene May and Randy Iles, p. 15.
[221] Ibid., p. 23.
[222] Martin and Mosher, *Unkept Promises,* p. 41.

Martin and Mosher noted the importance to women of having realistic information about the scope and limitations of the criminal justice process. As they noted:

> Women are assured again and again that the criminal justice system provides an effective response; that it is the woman's best source of immediate protection and the greatest deterrent of future violence by her husband against her. It (the literature giving advice to battered women) doesn't tell women that most women who are killed by their partners are killed when they attempt to take action to stop the abuse. Women are told that the police will respond and will protect them. It doesn't tell them that the police may listen to her husband and tell her she is to blame. … Women need to know that once the criminal process is initiated they have no ability to stop it; they need to know what to expect in cross-examination; … they need to know in the context of counselling that information given may fall into the hands of a defence lawyer and be used in a court proceeding; the list goes on. As noted earlier, frequently women are not given full and accurate information but rather an optimistic and reassuring spin.[223]

Women need clear and accessible information confirming that they are separate legal entities from their husbands, and that intimate violence is illegal in Canada. Women whose immigration status is unresolved, or who have been threatened with deportation, need basic information about their entitlements under the law, and about the child welfare implications of abuse within the home. They must have access to information – before they call they police – in order that they can assess how calling the police or filing criminal charges on their own might affect their immigration status. They also require legal advice, once criminal charges have been laid, regarding the range of legal issues that may surface – including possible implications regarding the custody of their children, their immigration status, and their eligibility for social assistance.

A study of immigrant Latina women's help-seeking behaviours has revealed that few of the women interviewed ever sought services from programs or professionals specifically designed to assist them – lawyers, police, battered women's programs or crisis hotlines. Instead, most of them first discussed the abuse with women in their communities. This study suggests that information about the illegality of intimate violence, about peace bonds, restraining orders, and shelter services must be widely available in the community.[224] In addition, professionals from whom women seek other services – such as immigration lawyers and health care workers – should receive training to detect the signs of abuse, and education about the legal rights of and support services available to immigrant women, and should help distribute this information to all immigrant women whom they encounter.[225]

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[223] Ibid., p. 42.

[224] Miedema and Wachholz, *A Complex Web*, p. 21. See also Joanne Godin, *More than a Crime: A Report on the Lack of Public Legal Information Materials for Immigrant Women Who are Subject to Wife Assault* (Ottawa: Department of Justice Canada, 1994), pp. 3-6. Janet Currie, *Ethnocultural Minority Women: Spousal Assault Barriers to Access and Using the Justice System* (Ottawa: Department of Justice Canada, 1995), p. 11.

[225] Mary Anne Dutton, "Characteristics of Help-Seeking Behaviours, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications," *Georgetown Journal on Poverty Law and Policy* 7 (2000), p. 245.

While a national assessment of such professionals' awareness has not been done, immigrant-serving agencies in Alberta did not have basic knowledge of the laws affecting immigrant women in cases of intimate violence, and so were not in a position to provide basic legal information on the topic.[226]

Need for Legal Support

Martin and Mosher identified the need for someone to provide legal support to assist abused women in navigating the process of police intervention and prosecution in an informed manner. This person would also assist women in weighing their options, including the risks and benefits of proceeding with a charge; would facilitate the women's access to different services; and would be available to assist at the various stages of decisionmaking throughout their engagement with the criminal justice system.[227]

Being an immigrant woman accentuates the isolation and fear that abused women typically experience and, hence, the need for legal support. Social isolation – increased by the lack of social contacts, limited mastery of English or French, and cultural alienation – enhances the risk of family violence because it interferes with detection and accountability, and promotes increased marital dependence.[228]

Regardless of their immigration status, women whose first language is neither English nor French require full translation and interpretation services so that they can fully interact with police, Crowns and the courts. Such services can assist in reducing the extent to which the legal process is an alienating one for them.

While, in provinces such as Ontario, respite from the onerous requirements of workfare are available to women who have left abusive relationships, the initial three-month deferral and any subsequent extensions are at the discretion of the caseworker. This exemption in not necessarily well understood. Women require legal support to enable them to make their case to the worker. Similarly, immigrant women who are applying for social assistance due to sponsorship breakdown may make application for an exemption from the $100 monthly deduction that is otherwise automatic. Immigrant women fleeing abusive partners whose first language is not English or French would not be aware of such details, and would also be helped by community support when making their claim.[229]

Notwithstanding the above, Martin and Mosher assert that an effective answer to the problem of meeting the needs of abused women requires a "de-centring" of the criminal justice system response as *the definitive response* to what abused women need.[230]

[226] Miedema and Wachholz., *A Complex Web*, p. 5.
[227] See also Lee Lakeman, *Ninety-nine Steps to End Violence Against Women* (Ontario, 1993), Recommendation number 23.
[228] Dutton, "Characteristics of Help-Seeking Behaviours," pp. 245-306.
[229] Interview with John Frazer, Researcher, Income Security Clinic, Toronto, June 3, 2002.
[230] Martin and Mosher, *Unkept Promises*, p. 40

Certainly the data confirms that many of the needs that women identified are outside the realm of the criminal justice system, and points to social service and community-based supports.[231] Women spoke of their needs for medical attention, a need for healing and emotional security for themselves and their children, and a need for information about their eligibility for social assistance and subsidized housing. Many women indicated that what made the biggest difference to them was access to a shelter. [232]

Aboriginal women in Manitoba who had experienced intimate violence spoke positively about the agencies they contacted for help – including shelters, counselling services, treatment centres for substance abuse, healing centres, and crisis telephone lines.[233]

3.2 Sexual Assault Proceedings and Implications for Legal Aid and Other Legal Needs

Need for Legal Representation

There is already precedent for granting enhanced legal representation to victims, a trend that would well serve the needs of sexual assault complainants. A number of European jurisdictions grant victims the right to have a lawyer represent their interests in criminal proceedings. In Norway, this right is extended in cases of rape and other violent crimes to the provision of legal aid to the victim. The victim's lawyer has several responsibilities:

- protecting the victim during questioning by police and in court;
- preparing the victim for the court process;
- contacting local care agencies;
- updating the victim on developments in the case;
- appealing against decisions to drop the case;
- ensuring that compensation claims presented in conjunction with the criminal case are complete; and
- ensuring that questioning during the case is conducted properly and is not irrelevant to the case [234]

Legal representation may be required to defend against production of sexual assault survivors' personal records in court. Counsel independent of the Crown are necessary for women wishing to prevent disclosure, because the Crown's interest is to represent the public, not to represent the privacy or equality interests of the record keeper.[235]

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[231] Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs," p. 106.
[232] Ibid., pp. 84-90. Martin and Mosher, *Unkept Promises,* p. 23.
[233] McGillvray and Comaskey, *Black Eyes All of the Time,* p. 81.
[234] The Norwegian government has established victim support schemes in many areas. There are support centres for victims of incest, and crisis centres for battered women and victims of rape. Also, 25 medical emergency centres in the country provide specialized medical care for crime victims. Accessed at www.restorativejustice.org/rj3/feature/Dec01/Norway.htm.
[235] Interview with Karen Busby, Professor, Faculty of Law, University of Manitoba, June 11, 2002.

This has been confirmed by the Supreme Court of Canada in *A.(L.L.) v. B.(A.)*, which recognized the right of the record keeper to be so sufficiently separate and compelling that it provided for a direct appeal to the Supreme Court of Canada in cases where third parties wish to challenge a court order to produce records, including those kept by a women's shelter or a rape crisis centre.[236]
Where the record keeper is a rape crisis centre or a therapist, it is preferable that the complainant and the record keeper have independent legal representation for the range of issues arising from the subpoena of a complainant's personal records, since their privacy interests are different and may diverge.[237]

Counsel of choice is very important in these kinds of cases. In recognition of this, Legal Aid Ontario has developed a training program and implemented a specialized panel of lawyers designated to accept legal aid certificates in legal proceedings in which the opposing side is seeking access to a victim's or witness's medical or therapeutic records.[238]

Need for Legal Advice

For the sexual assault centres and therapists who counsel women who have been raped, and who have increasingly been subpoenaed for the production of records they have kept about a complainant, the need for legal advice frequently arises. In view of recent jurisprudence on the issue, record keepers will require legal advice regarding the kinds of records they are required to keep and what may be disposed of. [239] Advice at this preliminary stage will also assist the centre or therapist to explain to the client what disclosure obligations exist.[240] In addition, legal advice is required when the record keeper is served with a subpoena, firstly in respect of the obligation to produce records, and, secondly, to defend against the frequently served but incorrect general subpoena.[241] Finally, in one instance legal advice has been required for a sexual assault centre during a Law Society investigation into a defence counsel's widespread dissemination of a complainant's personal records.[242]

It should be noted that the jury in the May-Iles Inquest, recognizing the irreplaceable role that front-line workers play in assisting women survivors of intimate violence, urged the government to consider enacting legislation to protect the confidentiality of communications between women's advocates and their clients.[243]

[236] *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 at 556.
[237] Interview with Karen Busby, Professor, Faculty of Law, University of Manitoba, June 11, 2002.
[238] Saadia Dirie, *Legal Aid Ontario. O'Connor/Mills Survey Report: Draft Client Satisfaction Evaluation* (Legal Aid Ontario, April 29, 2002), p. 5.
[239] *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.) Also interview with Lydia Fiorini, Executive Director, Sexual Assault Crisis Centre, Windsor, Ontario, May 21, 2002.
[240] Interview with Karen Busby, Professor, Faculty of Law, University of Manitoba, June 11, 2002.
[241] Ibid.
[242] Interview with Lydia Fiorini, Executive Director, Sexual Assault Crisis Centre, Windsor, Ontario, May 21, 2002.
[243] Jury's verdict and recommendations from the Inquest into the deaths of Arlene May and Randy Iles, pp. 22-23.

3.3 Criminal Injuries Compensation Proceedings and Implications for Legal Aid and Other Legal Needs

Criminal injuries compensation schemes are available to provide damages to victims of crimes. The presence of this form of compensation recognizes that a state sanction against an accused does not address the needs of victims.

Compensation is frequently awarded as a matter of course to victims of offences in which the offender was a stranger, as in the case of robbery, for example. Less successful before such boards have been women who do not fit the typical stereotype of an innocent bystander who is seen to be deserving of compensation.[244] Thus, in a Nova Scotia case, a sex trade worker who was assaulted with a hammer, and kidnapped for two days during which she was sexually assaulted, was initially denied compensation because such dangers were seen to be consequences of her work rather than criminal acts deserving of compensation.[245]

Even where women experience violence at the hands of their abusive partners, and their partners have been convicted, compensation boards have been judgmental and dismissive of their claims where their behaviour does not fit within the board members' expectations of the "deserving" victim. Thus, for example, in the case of *L.(A.)*, the Saskatchewan Crimes Compensation Board initially denied and then, later, provided reduced compensation to a woman whose husband was convicted of assaulting her, on the grounds that remaining with her husband and throwing his clothes into a suitcase during an argument amounted to sufficiently provocative behaviour that she should not be entitled to full compensation.[246]

Virtually every legislative scheme that creates the victim's entitlement to compensation in criminal cases also permits an award of compensation to be reduced or denied, based on the victim's conduct. Suffice to say that legal representation to an applicant in these situations would permit a challenge to the kind of systemic bias that views women survivors of sexual and intimate violence as the authors of their own misfortune. Furthermore, legal representation would be necessary to participate in any appeal from such discriminatory decisionmaking. In some cases, multiple appeals have been necessary in order to correct the injustice that results from this kind of systemic bias.[247]

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[244] Hughes, *How Many Times a Victim? L.(A.) v. Saskatchewan (Crimes Compensation Board)*, and *Pigeau v. Crowell, P.C.J.* (1993), 6 Canadian Journal of Women and the Law 502.
[245] *Poholko v. Criminal Injuries Compensation Board* (1983), 58 N.S.R. (2d) 15 (C.A.).
[246] Hughes, *How Many Times a Victim?*
[247] *L.(A.) v. Saskatchewan Criminal Injuries Compensation Board.* Saskatchewan Criminal Injuries Compensation Board (2 June 1998) award no. 190/98. Saskatchewan Criminal Injuries Compensation Board (15 March 1990) award no. 2511/90. *R v. Crimes Compensation Board of Saskatchewan* (1986), 2 W.W R. 696 (Sask. C.A.), *Dalton V. Criminal Injuries Compensation Board* (1982), 36 O.R. (2d) 394 (H.C.J.), *Poholko*, at 1. Compensation or restitution is also an important part of the Norwegian system. When the police first question a victim, they must ask if he or she would like to file a compensation claim to be considered concurrently with the prosecution. This claim is decided at sentencing.

3.4 Restorative Justice Proceedings

It is no exaggeration to say that restorative justice represents the single largest innovation to the criminal justice system in the last century. It has been characterized as the latest "wave" of reform in the movement to broaden access to justice, covering "a full panoply of institutions, devices, personnel and procedures … in order to encourage experimentation with a wide range of reforms."[248] In contrast to the justice system's traditional fixation with the offending behaviour as a crime against the state:

> Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships – that is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. As it is concerned with social equality, restorative justice inherently demands one attends to the nature of relationships between individuals, groups and communities."[249]

Restorative justice is marked by a number of inclusive characteristics: an emphasis on the harm done to community relationships; an acknowledgement of the greater role for victims in the process; and a desire to hold the offender accountable, but also to attend to underlying needs of the offender that are seen to be linked to the offending behaviour.

Another feature of the restorative justice process is its re-centring of the conflict resolution process – both literally and philosophically. Hence restorative justice processes typically unfold not in the unfamiliar and majestic surroundings of a courtroom, but in a more familiar setting within the community. Restorative justice is seen to return responsibility for dealing with the crime back to the community, and, by doing this, to give the crime a chance to be seen within a broader communal context.[250]

The impact of colonization on Aboriginal people and the mistreatment of Aboriginal men and women within the Canadian justice system have resulted in a disproportionate incarceration of Aboriginal men and women in federal and provincial penal institutions. Many have spoken out

[248] Mauro Cappelletti and Bryan Garth, *Access to Justice - A World Survey*, Volume 1 (Milan: Sijthoff and Noordhoff – Alphenaandenrij, 1978), quoted by Mary Jane Mossman and Patricia Hughes, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses* (Ottawa, Department of Justice Canada, March 2001).
[249] Jennifer Llewellyn and Robert Howse, *Restorative Justice – A Conceptual Framework* (Law Commission of Canada, 1998).
[250] Susan Aglukark, Speaking notes for the Canadian Criminal Justice Association Congress, Ottawa, September 1998. Mossman and Hughes, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses*, p. 21.

against incarceration as an effective response to social disorder and crime. In this way, restorative justice is attractive for its goal of:

> … facilitat[ing] reconciliation and peace rather than retribution and deterrence … The pursuit is for social rather than for strictly legal justice; the focus is on empowerment of those marginalized by the mainstream legal systems; the objective is to contextualize justice; the goal is to return the conflict to its rightful owners.[251]

Moreover, the Canadian justice system has been widely seen as failing the challenge of reflecting important cultural dimensions within its own system. As Robert Fulford has written:

> Law expresses culture. A society slowly develops an idea of itself through culture and eventually writes it down as law. If society's authority reaches across many cultures, it brings all of them under the same legal net. … Ten years ago, complaints (from rights-seeking groups) were usually discussed on their separate merits, but now it's obvious they are part of a broad pattern.[252]

Four major types of programs are identified with the restorative justice movement: victim-offender reconciliation programs (VORP); community, neighbourhood or youth justice panels; sentencing circles; and family group conferencing or community accountability conferencing.

To date, the literature promoting restorative justice initiatives has not taken gender and diversity into account. As has been pointed out:

> Restorative justice is not discussed in the literature within a contextual analysis that recognizes the systemic violence and abuse that women and children live with in this society; nor is there any analysis of the particular dynamics of violence and abuse in relations to other minority and marginalized members of society.[253]

Nor has the evaluation of restorative justice initiatives taken place from a perspective that takes account of women's entitlements to life, liberty and security expressed in Section 7 of the Charter or of their equality entitlements guaranteed in Section 15.

Within the context of male violence against women in intimate relationships, the success of restorative justice processes must be closely examined. For instance, restorative solutions may fall short of a satisfying resolution for Aboriginal women. It cannot be assumed, for example,

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[251] Carol La Prairie, "Altering Course: New Directions in Criminal Justice Sentencing Circles and Family Group Conferencing," *Australian and New Zealand Journal of Criminology*. Special Issue on Public Policy, December 1995.
[252] Robert Fulford, "Considering public perceptions of justice," *The Globe and Mail*, October 18, 1995, p. R1.
[253] Sandra Goundry, *Restorative Justice and Criminal Justice Reform in British Columbia: Identifying Some Preliminary Questions and Concerns.* A report prepared for the B.C. Association of Specialized Victim Assistance and Counselling Programs (April 1998). See also, Canadian Panel on Violence Against Women, *Final Report* (Ottawa: The Panel, 1993).

that experiences of culture, colonization and violence are homogeneous, just as it cannot be assumed that Aboriginal women who are survivors of intimate violence will define culturally appropriate solutions in the same manner as Aboriginal men or their political leaders.[254]

A number of concerns have surfaced regarding the use of restorative justice initiatives for crimes of violence against women and children.[255] Among them, three stand out as having significant implications for women's needs for legal information: advice, representation, and non-legal support.[256]

3.4.1 Definition of Community

When restorative justice initiatives refer to community, there is an implicit suggestion that there is one big community where people are able and willing to participate in restorative justice processes; that geographic proximity determines the community;[257] and that the smaller the community the more cohesive it will be, and the greater the likelihood it will be able to take on the responsibility for the resolution process.[258]

Upon closer examination, however, it becomes less than clear who the community is. Regardless of their size, communities are far from homogeneous. Community members have different values and patterns of behaviour that are bound up with their social position. The point is that an individual's experiences, based on religion, race, sex and class, contribute to a particular set of values, and can lead to different expectations of what constitutes a just result.[259]

It cannot be assumed that any community universally condemns male violence against women. Indeed, there is abundant evidence that, in some communities, in ways that are implicit as well as explicit, it is condoned.[260] Without a community acknowledgment – not only of the relational

[254] McGillvray and Comaskey, *Black Eyes All of the Time,* p. 18.

[255]See, for example, Mary Crnkovich, *The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities, (*Banff, Alberta: Canadian Institute for the Administration of Justice Conference, 1995). Stephanie Coward, *Restorative Justice in Domestic and Sexual Violence: Healing Justice*? (2001). Accessed May 23, 2002 at www.hotpeachpages.org/paths/rj_domestic_violence.html. Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women," in S. Boyd, ed., *Challenging the Public/Private Divide; Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997). Laroque, "Re-examining Culturally Appropriate Models of Criminal Justice Applications." Provincial Association of Transition Houses of Saskatchewan (PATHS), *Restorative Justice: Is it Justice for Battered Women?* Conference Proceedings, Saskatoon, April 14 – 15. Accessed May 23, 2002 at *www.hotpeachpages.org/pathsrj.html.*

[256] Although many of the findings in this section may apply to Nunavut and Arctic women, further research is required to fully understand the history and workings of restorative justice proceedings there, as well as the experiences of women participating in such proceedings. See Crnkovich and Addario, *From Hips to Hope,* for an overview of justice issues of concern to Inuit women and children.

[257] It is true that Judge Barry Stuart has often asserted that "community is not a place, it is people." See B. Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice Canada, 1997). The fact is, however, that restorative justice initiatives are located within a geographic framework, and community representation is defined to mean representation of the physical community. In the author's experience, efforts to include members of a broader community interest are rejected.

[258] Susan Aglukark, Speaking notes for the Canadian Criminal Justice Association Congress.

[259] Ibid.

[260] Canadian Panel on Violence Against Women, *Final Report.* Linked to this concern, is the observation that violence against women has been characterized within community-based justice initiatives as a shared marital

imbalance between a particular abusive man and an abused woman, but also of the systemic factors that permit the continuing acts of male violence against women – a clear expression of denunciation of the abuse of women will not issue from a community-based justice initiative. The structure of restorative processes over-individualizes the conflict between a particular man and woman, and has the effect of obscuring the greater systemic factors at play.

Moreover, it has been observed, for example, that in Aboriginal communities many people are related. Family and kinship impact in a significant way upon a victim if her abusing partner is related to a powerful family or leader. Women and children may, therefore, be silenced, or not be believed when they speak about their abuse. If they do speak out, they are often blamed.[261] As it has been pointed out:

> Diverting those who have violated intimate relations of trust raises a number of problems. A wrongful act committed by one in a situation of trust invites greater, not a lesser, penalty than a similar act committed against a stranger. The voice of the victim may be more obscure than it is in the existing system, as there is not a prosecutor to represent her interests, however inadequately.[262]

3.4.2 Voluntariness of Participation

While there is no legal requirement to participate in a restorative justice process, the potential for a victim to feel pressured to participate can be great.[263] In fact, the dynamics of an abusive relationship can make the victim's willingness to participate impossible to discern:

> … The power imbalances and dynamics of control, which characterize many domestic violence relationships, suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with their abusers.[264]

It has also been noted that when communities – particularly those communities that have been so badly served by the Canadian justice system – are given the choice between the existing system and "their own," the pressure to choose the latter will be hard to resist.[265] Those choosing the existing system may be criticized for not supporting "their own," and acting in ways that are not in the best interests of the community.

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problem, echoing the previously discussed defence counsel tactic of extending responsibility for the male abuser's actions to the abused woman.

[261] Crnkovich and Addario, with Archibald, *From Hips to Hope.*

[262] McGillvray and Comaskey, *Black Eyes All of the Time,* p. 117.

[263] Pauktuutit, *Inuit Women and the Administration of Justice, Phase 1 Progress Report, Number 1* (Ottawa:1994). C. Griffiths et al. *Crime, Law, and Justice Among Inuit in the Baffin, NWT, Canada* (Burnaby, B.C.: Criminology Research Centre, Simon Fraser University, 1995).

[264] R. Busch and S. Hooper, "Domestic Violence and Restorative Justice Initiatives: The Risks of a New Panacea." *Waikato Law Review 4* (1996) 101.

[265] Crnkovich and Addario, with Archibald, *From Hips to Hope,* p. 33.

In most reserve communities, no steps are taken to protect against the possibility that an offender with influence in the community will manipulate the process.[266]

3.4.3 Privacy of the Process

It is not without irony that the proliferation of restorative justice initiatives in the country coincides with increasing efforts on the part of equality-seeking women's organizations to hold judicial decisionmakers accountable for their discriminatory views. In 1990, Madame Justice Bertha Wilson stated:

> The studies show overwhelming evidence that gender-based myths, biases, and stereotypes are deeply embedded in the attitude of many male judges, as well as in the law itself.[267]

The documented cases of gender bias evidenced by the judiciary are too numerous to review within this report.[268] The point is that only the presence of a record has made it possible to hold members of the legal system accountable for expressing inappropriate and discriminatory attitudes towards women. Despite the use of a recording device in some "court" circles, there is no requirement to do so in every case.[269] Many circles make no record of the comments of participants. As such, inappropriate utterances that may indicate a bias against an abused woman, or an equivocal attitude in respect of male violence against women in intimate relationships, cannot easily be challenged beyond the circle. In fact, in some sentencing circles, members are required to sign a confidentiality agreement at the outset of the process, and are therefore precluded from bringing troubling commentaries to the wider community.

It should be noted that none of these critiques is unique to restorative processes. Research into the impact of mediation processes on abused women in Nova Scotia concluded that abused women in mediation and conciliation frequently felt intimidated by their abusive ex-partners.[270] Women reported that their interests were compromised during the process by mediators who demonstrated an inability to detect or handle abuse issues, and by a lack of legal representation. In this latter regard, women reported that mediators sometimes presented confusing or incorrect information to the parties about the law and their legal rights.[271] Notwithstanding that the mediation process was meant to be voluntary, women experienced coercive pressure to participate.[272] In particular, women agreed to mediation because they were told that not to do so would make them appear unco-operative to the judge who would ultimately decide the matter in question.[273] Because of language obstacles and because of a lack of knowledge of Canadian law

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[266] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 116.
[267] Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" The Fourth Annual Barbara Betcherman Memorial Lecture, *Osgoode Hall Law Journal* 28 (February 1990), p. 507.
[268] A summary can be found in the background paper report, "Gender Bias in the Courts," of the Federal/Provincial/Territorial Working Group of Attorneys General, *Gender Equality in the Canadian Justice System* (April 1992), pp. 11-13. See also Crnkovitch and Addario, footnote 1 at p. 1.
[269] Stuart, *Building Community Justice Partnerships*, p. 27.
[270] Transition House Association of Nova Scotia (THANS), *Abused Women in Family Mediation: A Nova Scotia Snapshot* (January 2000), p. 3.
[271] Ibid., p. 16.
[272] Ibid., p. 3.
[273] Ibid,, p. 18.

and rights, immigrant women perceived that they were at a great disadvantage trying to negotiate in the context of conciliation and mediation. As a result, the Nova Scotia researchers recommended that women have access to legal advice before and during any court-connected ADR process, and that culturally appropriate support should be available to all women.[274]

3.4.4 Legal Aid and Other Legal Needs

The federal move to promote restorative justice is motivated, in part, by a desire to curb the growth of the correctional population. An equality analysis of the impact on women and children has not, to date, formed part of the analysis.[275]

This motivation to save money through less incarceration will not lead to effective restorative justice initiatives. Money diverted from the prison system should be transferred into the community in order to provide sufficient program support for restorative initiatives. Diversion from the criminal justice system must guard against manipulation by the offender, reflect the seriousness of the offence, hold offenders accountable, keep victims safe, offer and enforce treatment, and monitor compliance.[276]

The informality of the restorative justice process, the lack of a record, the absence of clear representation in the decisionmaking process for those who can speak to systemic issues, the lack of cohesion within the community and the questionable voluntariness for the victim – all these have continually surfaced as concerns in the literature. These concerns challenge expectations that women who are victims of domestic violence or sexual assault are fully accorded the liberty and equality entitlements that are their due under the Charter; that the decisionmakers clearly denounce the behaviour of the abuser and hold him accountable for his behaviour; and that women's physical security is assured.

For these reasons, there has been sustained resistance to the use of restorative justice measures in cases of male violence against women, including domestic violence as well as sexual assault.[277]

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[274] Ibid,, p. 27.
[275] Solicitor General Canada, *Corrections Population Growth: Second Progress Report for the Federal/Provincial/Territorial Ministers Responsible for Justice* (Ottawa: Solicitor General Canada, 1998).
[276] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 143.
[277] Coward, *Restorative Justice and Domestic and Sexual Violence*, p. 13. Provincial Association Against Family Violence, *Making It Safe: Women, Restorative Justice and Alternate Dispute Resolution* (July 2000), formal Response of the Avalon Sexual Assault Centre to the Nova Scotia Department of Justice, September 1999. Accessed May 23, 2002 at www.hotpeachpages.org/paths/rjIrene.html.

As researchers interviewing Aboriginal women about the use of alternative processes in cases of intimate violence concluded:

> Jail means punishment, and punishment means the possibility that the offender – and the community – will recognize the wrongfulness of the act. The symbolic function of jail as punishment or *payback*, as public denunciation of the conduct and as a lesson taught to the offender was important to the respondents. … But incarceration means more than punishment. It also provides a period of absolute safety for victims and gives them "time out" to heal.[278]

In a sense, these critiques can be viewed as consequence of the "de-centring" of the criminal justice system without the attendant protections and safeguards recommended by Martin and Mosher. The absence of these safeguards is not surprising.

Need for Legal Representation and Legal Advice

However, restorative justice initiatives continue to proliferate in hundreds of communities across the country. Women who are survivors of abuse and who participate in such processes – sentencing circles, community justice committees, and victim-offender reconciliation processes – require legal advice and, if necessary, legal representation within the circle. This is needed to ensure the victim's participation is voluntary; to ensure the circle is representative of a broad diversity of interests; to protect her rights to privacy; and to ensure that the terms and conditions of any aspect of the process or an agreement that is reached do not violate her rights to liberty, physical security and equality under the Charter.[279] On a basic level, the interests of the victim cannot be assumed to be the same as anyone else sitting within the circle, and her right to independent legal advice must be assured.

Need for Legal Support

Additionally, a range of social and legal supports is required to assist women who have experienced violence. Notably, it is the absence of these supports that has caused even the most ardent supporters of restorative justice to hesitate about recommending its use in cases of intimate violence.[280] These requisite resources and services include:

> ... the development and operation of adequate public legal education on alternatives; paid administration to operate the alternative approach; support and advocacy workers for women and children who are victims of violence; male batterer counselling programs; in addition to the social worker and addictions counsellors that may already be located in the communities.[281]

[278] McGillvray and Comaskey, *Black Eyes All of the Time*, p. 119-120.
[279] *R. vs. O'Connor* (1995) 4 S.C.R. 411.
[280] PATHS, *Restorative Justice* National Organization of Immigrant and Visible Minority Women, Unpublished conference proceedings (Ottawa, 2001).
[281] Crnkovich, *The Role of the Victim in the Criminal Justice System*, p. 24.

It has been noted that one must define or accept a definition of oneself as "battered" or "beaten" or "abused" before one can initiate or effectively participate in a healing or restorative process.[282] Finally, cautions have been raised that volunteers might not possess the appropriate background and training to facilitate these processes. The use of volunteers, and not paid professionals, removes the responsibility of supporting these processes from the government and moves it into the community.[283]

3.5 Summary

This chapter examined the legal aid and other legal needs of women as survivors of intimate violence[284] who are required to give evidence against their abusive partners; as complainants and as third parties in sexual assault cases; as claimants in criminal injuries compensation proceedings; and as participants in restorative justice processes.

Women as survivors of violence by intimate partners: A consideration of the legal needs of survivors of intimate violence inevitably merges with their experiences with mandatory charging policies. Recent assessments of women's experiences with the policies, and the extent to which the policies met their expectations and needs, indicate that abused women are often reluctant to contact the police. They may fear state intervention in their lives from welfare, child apprehension and immigration authorities, or retaliation from their partners in the form of further abuse and counter-charging. Women who are economically dependent on their abusive partners may fear for their financial security should they be detained. Immigrant women may fear that their abusive partners will withdraw their sponsorship application. Women from closely knit cultural or rural communities may fear ostracism. Finally, Aboriginal, visible minority, immigrant and refugee women may fear a racist systemic response against their partners or themselves. Many women – almost 40 percent in one study – did not expect that their calls to the police would trigger a full criminal justice system response that would include arresting, charging and prosecuting the abuser.

Survivors of intimate violence may need independent legal representation to compel prosecution of a charge where the Crown declines to lay one, to lay a more significant charge, and to protect personal records from disclosure to the accused or the media. There is also a need for legal representation at inquests and public inquiries to probe systemic failures that have led to women's deaths. Similarly, to the extent that current immigration law and policy discourage women from leaving dangerous family situations, women need access to legal representation to assert their constitutional entitlements to liberty and security of the person, pursuant to Section 7 of the Charter.

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[282] McGillvray and Comaskey, *Black Eyes All of the Time,* p. 11.

[283] PATHS, *Restorative Justice.*

[284] Intimate violence refers to any and all forms of maltreatment committed in relationships of intimacy, trust, and dependence. Violence against women is defined in the United Nations' *Platform for Action* as "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. … The term embraces wife battering, battered woman syndrome, wife abuse, spousal assault … family violence, domestic abuse, domestic assault, and domestic violence." Cited by McGillvray and Comaskey in *Black Eyes All of the Time,* p. xiv.

The practice of counter-charging gives rise to a clear need for legal advice as soon as an abusive partner utters a statement that implicates the abused woman. Bearing in mind that the most frequent defence to an assault charge against an abusive partner is that he acted in self-defence, women require legal advice during any further questioning by the police, and certainly if charges are laid.

Abused women also need realistic information about the consequences of calling the police, the court process, and the protections available to them and their children. Women whose immigration status is unresolved, or who have been threatened with deportation, need basic information about their entitlements under immigration legislation, and about the child welfare implications of abuse within the home. They must have access to information before they call the police in order that they can assess how it might affect their immigration status.

Finally, abused women would benefit from legal support to assist them in weighing their options, including the risks and benefits of proceeding with a charge, to facilitate their access to different services, and to assist with various decisions throughout the criminal justice process.

Women as complainants or third parties in sexual assault cases: Legal representation may be required for sexual assault victims and sexual assault centres or therapists to defend against production of personal records in court. Women need counsel independent of the Crown, because the Crown's interest is to represent the public, not the privacy or equality interests of the record keeper. Record keepers require legal advice when policy is being formulated regarding the kinds of records they are required to keep and what may be disposed of. In addition, advice at this preliminary stage will assist the centre or therapist to explain disclosure obligations to the client. Record keepers also require advice when they are served with a subpoena.

Legal representation before criminal injuries compensation boards would permit a challenge to documented systemic bias that implies that women survivors of sexual assault are the authors of their own misfortune. Furthermore, legal representation would be necessary to participate in any appeal from such discriminatory decisionmaking.

Women as participants in restorative justice and alternative dispute resolution processes: With few exceptions to date, the literature promoting restorative justice and other alternative dispute resolution processes has not taken gender and diversity into account. Upon examination, concerns have surfaced regarding the use of restorative justice initiatives for crimes of violence against women and children. Community members share different values, based on their social position within the community. Different values can lead to different expectations of what constitutes a just result. Moreover, it cannot be assumed that community members universally condemn male violence against women. There needs to be widespread community acknowledgment, not only of the relational imbalance between a particular abusive man and an abused woman, but also of the systemic factors that allow continuing acts of male violence against women. Otherwise, a clear denunciation of the acts of an abusive man cannot be issued. The structure of community-based circles or sentencing circles over-individualizes the conflict between a particular man and woman, and has the effect of obscuring the greater systemic factors at play.

In Aboriginal communities where many people are related, family and kinship might serve to silence a victim if her abusing partner is related to a powerful family or leader. The potential for a victim to feel pressured to participate in an alternative system can be great. Additionally, the dynamics of an abusive relationship can make the victim's willingness to participate impossible to discern.
Aboriginal women choosing the existing system may be criticized for not supporting "their own" system, and acting in ways that are not in the best interests of the community.

Many circles make no record of the comments of participants. As such, inappropriate utterances that may indicate a bias against the abused woman, or an equivocal attitude towards male violence against women in intimate relationships, cannot easily be challenged beyond the circle.

Furthermore, cautions have been raised that volunteers in restorative processes might not possess the appropriate background and training. The use of volunteers, and not paid professionals, removes the responsibility of supporting these processes from the government and moves it into the community.

Domestic violence or sexual assault survivors who participate in processes such as sentencing circles, community justice committees and victim-offender reconciliation processes require legal advice and, if necessary, legal representation to ensure that their participation is voluntary; that the process is representative of a broad diversity of interests; that their rights to privacy are protected; and that any aspect of the process or any agreement that is reached do not violate her rights to liberty, physical security and equality under the Charter.

Conclusion

It would be simplistic to suggest that identifying women's legal aid and other legal needs, or even providing for them, would be sufficient to ensure access to justice for them. The dimensions of marginalization that women experience, the political choices that permit their continued existence, and the social conditions that aggravate them form the backdrop for virtually all of the experiences and needs described in this paper.

This marginalization is shaped by political decisions to criminalize women for their efforts to survive and nurture themselves, their children and their elderly dependents; by correctional environments that countenance disregard for the Rule of Law; by a criminal justice response to a call for intervention that forces women to choose between enduring intimate violence and triggering state scrutiny, thereby risking losing their children, immigration status or liberty; and by societal tolerance of the continuing epidemic of male violence against women.

These are broad issues that are not part of the dialogue around the provision of legal aid and other legal services and they cannot be resolved solely by the provision of legal services, no matter how broadly defined and how generously funded. They are essentially the timeless political controversies over the cost of providing basic human entitlements in society.[285]

[285] Michael Ignatieff, *The Needs of Strangers* (New York: Viking Penguin, 1984), p. 11.

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Appendix 1: Interview Respondents

Brenda S.: Abused woman who was criminally charged of assaulting her abusive partner. May 23, 2002.

Chantal Tie: Executive Director, South-Ottawa Community Legal Services. April 19, 2002.

Dawn McBride: Past President, Canadian Association of Elizabeth Fry Societies. June 6, 2002.

George Biggar: Vice President Legal Services, with Rob Buchanan, Aneurin Thomas, Michelle Sherwood, and May Maroni of Legal Aid Ontario. May 14, 2002.

Janet Mosher: Academic Director, Parkdale Community Legal Services, Toronto. May 14, 2002.

John Frazer: Researcher, Income Security Clinic, Toronto. June 3, 2002.

Karen Busby: Professor, Faculty of Law, University of Manitoba. June 11, 2002.

Kim Pate: Executive Director, Canadian Association of Elizabeth Fry Societies. September 9, 2002.

Laurie Ehler: Co-ordinator, Nova Scotia Elizabeth Fry Society. May 24, 2002.

Lydia Fiorini: Executive Director, Sexual Assault Crisis Centre, Windsor, Ontario. May 21, 2002.

Martha Arbuthnot: Lawyer, Ontario Council of Elizabeth Fry Societies. May 10, 2002.

Mary De Wolfe: Executive Director, Chrysalis House. May 16 and 17, 2002.

Megan Arundale: Paralegal, Prisoner Legal Services, B.C. May 15, 2002.

Pam Rubin: Researcher. May 20, 2002.

Wanda Gorician: Prison Liaison Co-ordinator, Edmonton Institute for Women. June 5, 2002.