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RE-THINKING MANDATORY CHARGING POLICIES
IN CASES OF WIFE BATTERING:
A CRITICAL LOOK AT A (WHITE) FEMINIST
LAW REFORM STRATEGY

by

Kimberley A. Crosbie

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University

Ottawa, Ontario

April 28, 1995

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**RE-THINKING MANDATORY CHARGING POLICIES IN CASES OF WIFE
BATTERING: A CRITICAL LOOK AT A (WHITE) FEMINIST LAW REFORM
STRATEGY**

submitted by **Kimberley Crosbie, B.A. (Hons) Carleton University**
in partial fulfilment of the requirements for
the degree of Master of Arts

A handwritten signature in dark ink, appearing to read "Irene M. G.", is written over a horizontal line.

Thesis Supervisor

A handwritten signature in dark ink, appearing to read "B. Dawson", is written over a horizontal line.
Chair, Department of Law

Carleton University
May 8, 1995

ABSTRACT

More than a decade has passed since the implementation of mandatory charging policies in cases of wife battering. There are indications that police charging policies are having limited impacts. Policies are not being evenly and consistently followed across Canada and women continue to report dissatisfaction with police responses. Black women and women of colour are expressing that, as a result of racism in the criminal justice system generally, and police brutality against men of colour and black men specifically, they are reluctant to involve the police when they have been battered by their intimate male partner. The questionable impact of this law reform is in part due to the limited effectiveness of feminist engagement with the law. The limited and negative impact of this policy can also in part be explained by the omissions made by the (white) women's movement of the experiences of black women and women of colour with racism. After presenting and discussing these issues, I argue for the need to re-think mandatory charging policies.

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CHAPTER ONE INTRODUCTION

1. BACKGROUND

The last two decades of feminist struggle against male violence against women have been marked by demands for reform in areas such as incest, rape, pornography, sexual harassment and wife battering.¹ To a large extent, feminists have been successful in bringing these issues into public awareness and effecting change by engaging in strategies such as public education, consciousness raising, and organized demands for social reform. A testament to the success of this work is the opening of crisis centres for women who have experienced sexual abuse or assault and the establishment of transition houses for women in need of shelter from their abusive male partners.²

¹ In reference to early work relating to incest please refer to the work of Sandra Butler, Conspiracy of Silence: The Trauma of Incest (United States: Volcano Press, 1978); Florence Rush, The Best Kept Secret: Sexual Abuse of Children (New York: Prentice Hall, 1980); Diana Russell, Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment (Newbury Park: Sage Publications, 1984). In relation to rape, please refer to Lorenn Clark and Debra Lewis, Rape: The Price of Coercive Sexuality (Toronto: The Women's Press, 1977); Diana Russell, Rape in Marriage (Bloomington: Indiana University Press, 1990) and Susan Brownmiller, Against Our Will: Men, Women and Rape, (New York: Bantam Books, 1975). For examples of work done concerning pornography refer to Andrea Dworkin, Pornography: Men Possessing Women (New York: G.P. Putnam's, 1979); Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987); and Susan Griffin, Pornography and Silence (New York: Harper and Row, 1981). For examples of work regarding sexual harassment please refer to Constance Backhouse and Leah Cohen, The Secret Oppression: Sexual Harassment of Working Women (Toronto: MacMillan of Canada, 1978); and Catharine MacKinnon Sexual Harassment of Working Women, (New Haven and London: Yale University Press, 1979). In reference to early work on wife abuse, refer to Lenore Walker, The Battered Woman (New York: Harper and Row, 1979); and Linda MacLeod, Wife Battering in Canada: The Vicious Circle (Ottawa: Canadian Advisory Council on the Status of Women, 1980). Also refer to Connie Guberman and Margie Wolfe, No Safe Place: Violence Against Women and Children (Toronto: Women's Press, 1985).

² In 1973 the first Canadian transition house opened in Vancouver, B.C. It is estimated that there are now over 360 emergency shelters for women and their children in Canada. As

Feminists have had limited success in their struggles to promote change in legal responses to men's violence against women. In the area of rape, women's groups from across Canada demanded changes to the Canadian Criminal Code arguing that the law was antiquated and sexist.³ Feminists further asserted that police officers often operated on stereotypical assumptions and biases against women and that the judiciary revictimized women when our cases did reach a courtroom.⁴ The struggles for legal reform in this area culminated in changes to the Code in 1983⁵. Although the changes can be viewed to some extent as progress, there continues to be a tremendous amount of resistance from within the legal system and the changes have not had the impact that was hoped for or

discussed in Linda MacLeod, Battered, But Not Beaten: Preventing Wife Battering in Canada (Ottawa: Canadian Advisory Council on the Status of Women, June, 1987). For a history of the battered women's movement in Canada refer to Gillian Walker, Family Violence and the Women's Movement: The Conceptual Politics of Struggle (Toronto: University of Toronto Press, 1990); and for the United States history, refer to Susan Schechter, Women and Male Violence: The Visions and Struggle of the Battered Women's Movement (Boston: South End Press, 1982). For discussion of the Canadian women's movement generally, refer to Nancy Adamson, Linda Briskin and Margaret McPhail, Feminists Organizing For Change: The Contemporary Women's Movement in Canada (Toronto: Oxford University Press, 1988). Linda Carty, And Still We Rise: Feminist Political Mobilizing in Contemporary Canada (Toronto: Women's Press, 1993), and Constance Backhouse and David H. Flaherty, Challenging Times: The Women's Movement in Canada and the United States (Montreal: McGill-Queen's University Press, 1992).

³ There was not uniform agreement among feminists as to how the law should be changed. While some women argued that the crime of rape should be re-named, other women disagreed. Refer to Maria Los, "The Struggle Over the Definition of Rape in Canada in the 1980's", Paper presented at the XIIth World Congress of Sociology in Madrid, Spain, July 1990. It seems there are some similarities between law reform in this area and reform in wife battering: while there is agreement change must occur, there is disagreement as to what the changes should be and how they should be implemented.

⁴ For a discussion of the rape laws in Canada prior to the legislative reforms, refer to Lorene Clark and Debra Lewis, supra note 1. Also refer to Christine Boyle, Sexual Assault (Toronto: Carswell Co. Ltd., 1984).

⁵ Criminal Law Amendment Act, Statutes of Canada, 1980 81-82, c. 125.

needed.⁶

The struggles of feminists and other advocates also effected change in the law's response to wife battering in 1983.⁷ One of the efforts in this area was the demand to have wife battering fully recognized as a crime. Although a man could technically be charged under the assault provisions of the Criminal Code for assaulting his female partner, in practice, wife battering was largely ignored, dismissed and treated as a private family matter. Feminists argued that the legal system was not adequately responding to men's violence against women in their homes and in effect was perpetuating men's violence by not policing this crime, by not prosecuting cases when there was a charge and through the inadequate sentencing of the few men who were convicted. In attempts to effect reform of these practices, feminists and other advocates documented and demonstrated that many police officers, when they did respond to a call for assistance from women who were battered, were abdicating their duty to uphold the law by not laying any criminal charges. It was found that many police officers preferred to "cool down" the situation, restore "familial peace" in the home and advise women to lay their own charges.⁸ In response to demands for change in police practices,⁹ directives

⁶ For a discussion of the effect and subsequent changes to the reforms, refer to Christine Boyle, Marie-Andree Bertrand, Celine Lacerte-Lamentagne and Rebecca Shamia "A Feminist Review of Criminal Law" (Ottawa: Status of Women Canada, 1986); Brettel Dawson, "Legal Structures: A Feminist Critique of Sexual Assault Reform", (1985) 14 R.F.R. 40-43; and Julian V. Roberts and Renate M. Mohr, (eds.) Confronting Sexual Assault: A Decade of Legal and Social Change (Toronto: University of Toronto Press, 1994).

⁷ Refer to the work of Linda MacLeod, supra note 1 and supra note 2, and Gillian Walker, supra note 2.

⁸ These points will be discussed in more detail in chapter three. Refer to work of Linda

for wife assault were issued to police officers and crown attorneys by the provincial offices of the Solicitor General and the Attorney General. Police officers were instructed to lay charges in all cases of wife assault¹⁰ where reasonable and probable grounds existed and crown attorneys were instructed to proceed with the assault charge regardless of the wishes of the woman who was assaulted¹¹

These changes to police practices, often referred to as mandatory charging policies, were heralded by many feminists as a vast improvement. It was hoped that these reforms would bring about changes in attitudes toward this crime, that wife battering would be regarded as a crime and not a "private" family matter, that wife battering would be considered socially unacceptable, that women would be more likely to report assaults to the police and that charging men would act as a deterrent to subsequent violence.¹² However, not all women nor all feminists¹³, applauded these changes. As with most legal reforms pursued by feminists, there

MacLeod supra note 1 and supra note 2. Peter Jaffe and Carole Anne Burris, "An Integrated Response to Wife Battering: A Community Model" 1982 (draft, paper on file with authors). Peter Jaffe, David A. Wolfe, Anne Telford, and Gary Austin, "The Impact of Police Laying Charges in Incidents of Wife Abuse" 1 Journal of Family Violence 1, 1986, 37

⁹ I am not arguing here that the changes were a direct and sincere response. I think there are many reasons why these changes were implemented. I will address this issue more fully in chapter three.

¹⁰ I use the term "assault" at this point to reflect the legal terminology

¹¹ The practices of crown attorneys will be briefly discussed in chapter four

¹² Refer to Carole Anne Burris and Peter Jaffe, "Wife Abuse as a Crime: The Impact of Police Laying Charges" 25 Canadian Journal of Criminology 1983, 309; and again, the work of Linda MacLeod, supra note 1 and supra note 2

¹³ In a personal interview with Linda MacLeod, she explained that after many of the public speeches she delivered on wife battering, many women from the audience would approach her expressing their concerns and fears about the policies. Personal interview, July 7, 1994.

were concerns that the policies would effectively take control away from women, that given a racist and sexist legal system they would not effect real change, that the changes would have disproportionate effects relating to race and class, and that they would serve to legitimate the state.¹⁴

2. STATEMENT OF THESIS (EXPLORATION)

It has been over ten years since the implementation of mandatory charging directives and it appears that many of the fears and concerns of some feminists and some women who have been battered have been actualized. There are indications that police officers are not consistently or evenly laying charges of assault, even when there is ample "evidence" to do so.¹⁵ In addition, some women who have been battered and who have had police officers come into their homes are expressing that they are being confronted with racist and sexist attitudes from police officers.¹⁶ It is also being brought to the attention of

¹⁴ Personal interview with Linda MacLeod, July 7, 1994. Also refer to Jane Ursel, "The Legal Implications and Public Response to the New Wife Abuse Directive in Manitoba", 28 Canadian Journal of Criminology 2, 1986; and N. Zoe Hilton, "One in Ten: The Struggle and Disempowerment of the Battered Women's Movement" 7 Canadian Journal of Family Law 1989, 313; and Susan Schechter, supra note 2.

¹⁵ Refer to the London Family Court Clinic Inc., "Wife Assault as a Crime: The Perspectives of Victims and Police Officers on a Charging Policy in London, Ontario From 1980-1990" (London: April 1991). The reluctance of officers to follow the policies is evidenced by the fact that a number of subsequent directives have been issued by the Solicitor General since the original directives in 1983. For instance, refer to April 6, 1989, Memorandum to All Chiefs of Police, RE Spousal Assault, from Acting Assistant Deputy Minister, Ministry of the Solicitor General.

¹⁶ This will be discussed in chapter four. There is also evidence that crown attorneys are not always proceeding with cases of wife assault. For a local example of this finding, refer to Debra MacLeod "An Examination of Ottawa-Carleton Court Response to 175 Domestic Related Offenses" (Ottawa: Ottawa Police, December 1993).

women's advocates, by women's organizations such as the National Organization of Immigrant and Visible Minority Women of Canada,¹⁷ and public attention through the media,¹⁸ that mandatory charging policies are negatively impacting on women of colour and black women. Women of colour and black women are hesitant to call upon a racist legal system that discriminates against persons of colour and that is insensitive to cultural issues.¹⁹ Overall, it seems that there is a growing level of discontent among feminists and other advocates concerning the policy of mandatory police charging.²⁰

These criticisms of mandatory charging policies by organizations for women

¹⁷ The National Organization of Immigrant and Visible Minority Women of Canada has produced three reports on wife battering. "Impact of Wife Assault as a Crime Strategy: A Provincial Forum for Organizing and Networking", (Ottawa: January 1993) (herein referred to as "Impact"); "Racial Oppression and Police Violence Against Immigrant and Visible Minority Communities: How they Impact on the Policy of Wife Assault as a Crime Strategy", (Ottawa: March, 1993) (herein referred to as "Racial Oppression"); and "Violence Against Immigrant and Racial Minority Women: Speaking with Our Own Voice, Organizing From Our Own Experience", (Ottawa: February 1992), researched by Maria Shin and Michele Kerisit

¹⁸ During the winter of 1994, the Globe and Mail published a few articles relating to research conducted by the National Organization of Immigrant and Visible Minority Women of Canada on wife battering. For the first in this series of articles, refer to Sean Finn, Globe and Mail January 27, 1994. The media coverage of this research was not entirely accurate. The reporter suggested that this Organization was demanding the abolition of police charging policies when in fact the Organization was arguing for a review of the policies. For the response of women's organizations to this coverage, refer to National Organization of Immigrant and Visible Minority Women of Canada, National Association of Women and the Law, and Canadian Association of Elizabeth Fry Societies, Memorandum to Women's Groups, re: Mandatory Charging Policies, February 2, 1994, (on file with organizations)

¹⁹ Refer to Linda MacLeod and Maria Shin, "Like a Wingless Bird: A Tribute to the Survival and Courage of Women Who Are Abused and Who Speak Neither English Nor French", (Ottawa: National Clearinghouse on Family Violence, 1994) (herein referred to as "Like a Wingless Bird"); and Linda MacLeod and Maria Shin, "Isolated, Afraid and Forgotten: The Service Delivery Needs and Realities of Immigrant Women Who Are Battered", (Ottawa: National Clearinghouse on Family Violence, 1990) (herein referred to as "Isolated")

²⁰ Linda MacLeod has also made this point. "Preventing Wife Battering: Towards A New Understanding", (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 2

of colour and black women and other feminists working in this area have raised a number of questions and concerns that I find particularly troubling and important. On one level, the limited, and often negative, impact of this policy has led me to the larger question of the effectiveness and appropriateness of legal reforms to address male violence against women. This debate certainly is not a new one within feminist communities and there is a considerable amount of feminist scholarship on this subject. It is this work, in conjunction with the work of organizations for women of colour and black women that has led me to the second level of my exploration. Feminist strategies for law reform in the area of wife battering, as with much other work by (white) feminist scholars and activists, did not consider how mandatory charging policies would affect black women and women of colour.²¹

I think there are similarities between the limitations of the work of many (white) feminist legal scholars and how the legal system often responds to women. Like the legal system which often negates women's experiences and distorts our realities in the attempt to turn them into legally acceptable forms of "evidence", many (white) feminists have ignored the multiple levels of oppression women experience and have "excluded" the concerns of women of colour and black women from our analyses of male violence against women.

²¹ Nor does there appear to have been much consideration about how these policies would effect women with disabilities, lesbians, Aboriginal women and poor women. In this paper I am focusing on how the lack of race analysis has effected women's experiences of mandatory charging policies. My focus on this dimension of oppression will be explained later in this chapter.

Reform strategies that do not take into account the various levels of women's oppression will inevitably be ineffective in promoting change for women. In many ways, I think it is the combination of these omissions made by (white) feminists and the limited effectiveness of law reform itself, particularly given the racism in the criminal justice system, that have led to the difficulties with mandatory charging policies. It is this question that I explore in this thesis: what have been the effects of designing a policy that "excluded" many women's realities and how does this relate to other limits of law reform? It is not my intention to find the answers, if there are any to be found, on what to do with mandatory charging policies. In fact, I now have more questions about this policy than I did when I began my research. My purpose here is to explore the issues and to ask those questions.

3. ORGANIZATION OF THESIS

Chapter two begins with an examination of the overall responses of many (white) feminists to black feminist legal scholars and to feminist scholars of colour. Because my focus in this thesis is on the issue of law reform and how law reform initiatives in wife battering have "excluded" the experiences of black women and women of colour, debates concerning the (in)effectiveness of law reform as a strategy for social change are explored. In chapter three, I examine traditional police responses to wife battering and the impetus behind the struggles for law reform in this area. In this chapter, I also explore the ways in which many feminists and other advocates embraced mandatory charging policies without considerable

or thorough analysis of their potential impacts. It is in this chapter that I present and explain mandatory charging policies. In chapter four, I explore how some of the fears and concerns that some advocates had in regard to these policies have been actualized. In order to better conceptualize the impact of mandatory charging policies on women of colour and black women, chapter five explores some of the realities of black women and women of colour, how these realities affect how they experience being battered and how they experience the legal system. In chapter five, I also briefly explore racism in the criminal justice system. In chapter six, I discuss some of the questions that are raised in this paper about mandatory charging policies and explore future directions for feminist engagement with these policies.

Before I proceed with my examination of mandatory charging policies, I have a number of preliminary methodological and language matters that I want to explain.

4. (NOT) USING STATISTICS

In the beginning sections of many papers on wife battering, the myriad of statistics on wife battering are quoted. For a number of reasons, I am choosing not to do this. I think that too often feminist scholars are expected to "prove" that the issue being addressed is worthy of investigation. While there is much to be learned about wife battering, the prevalence of men's violence against their intimate female partners has been sufficiently "proven".

I also think that excessively invoking statistics about men's violence against women can take attention away from the women who are being battered. Women are already being depersonalized and de-focused by terminology that situates the entire woman into one experience (battered women) and adds to the decontextualization of men's violence against women (domestic violence, conjugal violence, spouse battering). This tendency does not need to be further supported by discussing men's violence against women in terms of statistics.²² Furthermore, focusing on the number of incidents of wife battering promotes a simplification of the problem instead of encouraging an understanding of its complexities.²³ On a practical note, I presume that the people who may be reading this paper are in no need of further "evidence"

However, after expressing all this, there are times when it is important to invoke statistics. I think using statistics can dramatically highlight inefficiencies in practices or perspectives and can provide some insight for future direction and research. When I do refer to statistics, they will usually be mentioned in footnotes

5. MY USES OF LANGUAGE

When I was working on this section I thought that, like many writers, I would delegate this piece to footnotes. However, as you will have noticed, this is a

²² I am reminded of the phrase "becoming a statistic". One woman to whom I have spoken regarding her experiences of being battered mentioned that she was worried she would be killed by her ex-partner and "become a statistic"

²³ Linda MacLeod has made this point. supra note 2. at 6.

section, not a footnote. I think the issues of language - how it is used, its limits and its impacts - are far too critical to relegate them to a footnote. It is essential, for me, to have this discussion in the main text. Also, since footnotes are more readily passed over, I think that my discussion of language is too significant to leave it to chance that it will be read.

I have chosen to use the term "wife battering" as opposed to the often used "wife assault", "female partner abuse", "domestic violence", "spouse abuse", "woman abuse" and "conjugal violence". I have chosen the term "wife" as it, unlike the term "woman", denotes the intimacy or connection between the men who are battering and the women who are being battered.²⁴ The terms "spouse", "domestic" and "conjugal", although alluding to the personal relationship, conceal that it is overwhelmingly women who are being battered by men.²⁵ The term "wife" is not completely appropriate either as it is typically used to describe a relationship formally sanctioned by the state and the church. Although I am uncomfortable with this, there are no other alternative terms that I find more appropriate at this time. I use this term to include all women who are (were) in a relationship with the man who is doing the battering, not just women who are legally married

²⁴ I am discussing men battering women in intimate relationships and not lesbian battering. This exclusion will be explained later in this chapter.

²⁵ It has been amply illustrated that the majority of women who assault men do so in self-defense. Refer to Diana Russell, Rape in Marriage, *supra* note 1; Daniel G. Saunders, "Wife Abuse, Husband Abuse, or Mutual Combat: A Feminist Perspective on the Empirical Findings" in Kersti Yllo and Michele Bograd, (eds.) Feminists Perspectives on Wife Abuse (Newbury Park: Sage, 1988), at 90; Linda MacLeod, *supra* note 2, at 17-18; and Felicite Stairs and Lori Pope, "No Place Like Home": Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds" 6 Journal of Law and Social Policy 1990, 148, at 153.

Compared to "abuse" or "assault", I find the term "battering" a more graphic and powerful description of men's violence against women. For me, battering encompasses the full gamete of physical, sexual, emotional and economic violence that so many women experience from their male partners. However, I do use the term "wife assault" when specifically referring to the legal definition or response to men's violence against their female partners. I also prefer to use the phrase "women who are battered" as opposed to "battered woman". I think that the latter term presents women solely in terms of their experience of being battered by identifying women as second to their experiences. It has also been argued that the term invokes the stereotypical image of "the battered woman".²⁶

Although I use the term partner when referring to persons who are intimately connected, I do so with great hesitation. I have difficulty characterizing a battering man as a "partner". At the same time, I also have difficulty using terms like husband or boyfriend. The term husband is too closely linked with the legal sanctioning of relationships and reminds me of the property orientation of marriage.²⁷ As such, I have chosen, at this point, to use the term partner. It is

²⁶ One of the areas of concern over the image of "the battered woman" that has surfaced is in relation to the "battered woman syndrome". For a discussion of the "battered woman's syndrome" and surrounding issues, refer to Christine Boyle, "A Feminist Approach to Criminal Defences" in Richard F. Devlin (ed), Canadian Perspectives in Legal Theory (Toronto: Emond Montgomery, 1991), 273; Christine A. Littleton, "Women's Experiences and the Problem of Transition: Perspectives on Male Battering of Women" University of Chicago Legal Forum: Feminism and the Law: Theory, Practice, and Criticism, 1989, 23; Elizabeth Comack, "Feminist Engagement with the Law: the Legal Recognition of the Battered Women Syndrome" (Ottawa: CRIAW, 1993); and Jennie L. Abell, "Bringing It All Back Home: Feminist Struggle, Feminist Theory and Feminist Engagement with the Law, The Case of Wife Battering" (LL.M. Thesis, Osgoode Hall Law School, York University, North York, Ontario, May 13, 1991) at 247.

²⁷ There is an obvious dissonance between this statement and my use of the term "wife"

also the term that many programs for men who batter use in order to convey the message that this is what relationships should entail.

I have also thought a great deal about whether to refer to police departments as "forces" or "services". At times I prefer the term "service" to the more aggressive term "force" because I am writing about male violence against women and it is important to me to try to de-aggressionalize language while I am doing this. I also think that this is what police should be offering women, a "service". However, I also think that "force" is often a more accurate description of what some police officers actually do, particularly with black persons and persons of colour. Also, when discussing violence, de-aggressionalizing language can sometimes lead to the nature of the violence being hidden.²⁸ As all these points are significant, I have chosen to use both terms, depending on the context of the discussion.

One of the most challenging aspects of language, for me, surrounds how women are referred to in papers - our, their, them, us. As a white woman, I cannot obviously say "our" when I am referring to women of colour. And yet, "their" seems divisive and feels impersonal. Also, when I write "their experience", meaning the experience of women of colour and black women, or "our" responsibility, meaning the responsibility of white women, it feels like I am assuming women of colour will not be reading this paper. This is not what is intended. I am simply at a loss as to

Nonetheless, I continue to use the term wife in the context of wife battering because female partner battering seems just too much of a blatant oxymoron.

²⁸ I thank Diana Majury for this point.

how to change this, short of creating a new language, which often feels like a good thing to do. However, as I believe that it is absolutely necessary for me to identify myself as a white women, situate myself as a white feminist and take responsibility for "our" racism, I will be using "our" and "their".

I have chosen to put parenthesis around the word white when referring to the women's movement, as opposed to just using "women's movement".²⁹ I have made this choice in order to remind myself of how the whiteness of the movement is hidden by only referring to the "women's movement" and in only referring to "women" generally. It is with some reluctance that I do this because at times, when I type in (white) women's movement it seems as if it is white women who have ownership over the movement - that it is (our) movement. And while white women have often assumed we do, I wish this to change and do not want to perpetuate this sense of ownership. I also feel uncomfortable at times because I know there were (are) black women and women of colour who were (are) working in the movement and I do not want to make their work "invisible" because it was (is) ignored by white women. However, I think the need to bring attention to the false "inclusion" of women of colour and black women in "women" overrides the need to avert perpetuating ownership

However, I have chosen at times to refer to all women as women when

²⁹ I use brackets as opposed to quotation marks because when I am using brackets, I always think of the hiddenness of whiteness when we as white women refer to women. When I use quotation marks, this meaning is lost a little for me. I think quotation marks are typically used to delineate someone's else thoughts or to problematize a particular phrase and it feels distant from me. Brackets bring the issue closer.

discussing women's commonalities. When I am meaning to refer only to white women or only to women of colour and black women, this will be clearly delineated. It is my hope that by acknowledging which women I am referring to that the term "women" can be used for what it should represent - all women.

I have chosen to use the terms "women of colour" and "black women". It is my understanding that many people of colour prefer the term "person of colour" as opposed to "visible minorities". People of colour are not globally minorities, they are the majority³⁰. However, I do use the terms visible minority women and racial minority women when authors have specifically used the terms in order to respect their choices, conceptualizations and self-definition. The terminology "of colour" is not without its problems. The term "of colour" implies that white is not a colour, that it is not also racialized, and assumes that white is the norm against which persons of colour are compared.³¹

The other reason that I am uncomfortable with using "visible minority" is that the term "visible", while describing the social construction of their identity, places the focus on physical abilities, the part of their identity that can be "seen". It is a well entrenched norm of our language to use physical actions to describe a host of activities and I prefer to avoid using language in this way whenever possible.

³⁰ As Barbara Findley has commented: "With what arrogance do we call people of colour, who are the majority in the world, "minorities" to start with? And the word "minority" in a democracy where power is to the majority, imports a resonance of powerlessness, of a lack of right to power. So the term imports, constitutes, and perpetuates powerlessness". As quoted by Shelina Neallani, "Women of Colour in the Legal Profession. Facing the Familiar Barriers of Race and Sex", 1 Canadian Journal of Women and the Law 1985, 148, at 156

³¹ For a discussion of this, refer to Marlee Kline, "Race, Racism, and Feminist Legal Theory", 12 Harvard Women's Law Journal Spring 1989, at 116.

However, as you will notice, I do use terms such as voice and speaking, to describe women communicating our realities and experiences. I have a very difficult time with this. I find this terminology incredibly powerful and the number of times it is used suggests that many women deeply connect with this terminology. While I remain committed to strive against using ablist language, I have decided, at this point, that I cannot disengage from the conceptualizations of women's voices.

Women of colour and black women are discussed as separate groups of women in this paper. However, it is misleading to present women of colour and black women as a homogenous groups. It is not my intention to do this; indeed, my intention is to argue for a comprehensive recognition of the differences in women's experiences of wife battering and strategies for change. There are many differences between the experiences of these women, both in relation to each other and within their own communities. Cultures are multi-layered and complex and generalizations are often inappropriate. My aim with this paper is to discuss certain general experiences and perceptions of women of colour and black women, which may be similar, such as a shared experience of being from a non-dominant group, and how these experiences may shape their responses to being battered. In future work, more attention and care should be given to how all women experience wife battering and how this in turn affects their perceptions of, and needs for, strategies for prevention.

The experiences of immigrant women are also explored in relation to using

the legal system as a response to being battered by their male partner. Like non-immigrant women of colour and black women, immigrant women of colour and black immigrant women fear police brutality and other forms of racism from the criminal justice system. Immigrant women, also have other fears, such as the fear of deportation, which make it necessary and important to explore the specific impact of mandatory charging policies on their lives.

6. WHO AND WHAT WILL NOT BE DISCUSSED IN THIS THESIS

I always find it more difficult to explain what I have chosen not to do in a paper than to explain what I will be doing. The process of deciding who and what will not go into a paper is often painful and difficult. The reason for my choice to focus on the experiences of black women and women of colour is twofold. First, I want and need to learn more about the realities of these women generally and specifically with respect to racism and wife battering. Second, some black women and women of colour are powerfully speaking out in criticism of mandatory charging policies and I wanted to explore what this is about.

In the decision to focus on racialized women, there are many women that have I excluded from my discussion, such as women with disabilities,³² poor

³² There are many challenges that women with disabilities who are battered have to confront. For instance, in 1985, only 29% of the transition houses in Canada were wheelchair accessible and only 12% had staff persons that were proficient in sign language. As discussed by Linda MacLeod, *supra* note 2, at 28. A large number of women with disabilities experience violence. The DisAbled Women's Network has found that 53% of women that have had disabilities from time of birth have been abused, raped or assaulted and 40% of women who developed disabilities later in life have experienced sexual and physical abuse. As discussed by the Canadian Advisory Council on the Status of Women, "Male Violence Against Women: The Brutal Face of Inequality" A Brief to the House of Commons Subcommittee on the Status

women and rural women³³. Even within the choice to focus on women of colour and black women I have excluded many of their experiences, such as their experiences with disabilities, being poor or living in rural areas. This is an artificial distinction: discussing women of colour and black women as if some these women do not have disabilities and are not poor reinforces the separation of the complexities of women's oppression. In many ways, these distinctions are beyond the scope of this paper. It is not my intention to present a comprehensive analysis of mandatory charging policies in cases of wife battering. In fact, what I am arguing for is a more careful and comprehensive analysis of this policy in relation to the experiences of all women. It is also difficult, if not impossible in a single document, to carefully and comprehensively examine all women's experiences in the ways that are necessary without providing a superficial or overgeneralized account of women's realities. What is needed is a series of focused discussions.

The specific experiences of Aboriginal women are also excluded from my discussion. It is of no doubt that Aboriginal women experience racism from the legal system and that the racial impacts of mandatory charging policies have

of Women: Violence Against Women, February 13, 1991, at 8. For a discussion of the experiences of women with disabilities with wife battering refer to Advocacy Centre for the Handicapped, Responding to the Abuse of People with Disabilities (Toronto: 1990); DisAbled Women's Network: Canada, Beating the "Odds": Violence and Women with Disabilities (Toronto: 1989); and Linda MacLeod, "Wife Battering and the Web of Hope: Progress, Dilemmas and Visions of Prevention", Prepared for Working Together: 1989 National Forum on Family Violence, Family Violence Division Health and Welfare Canada, May 1989, at 33-35.

³³ For discussions concerning the experiences of rural women with wife battering, refer to Linda MacLeod, ibid., at 29-30.

affected Aboriginal peoples.³⁴ It is, however, my understanding that the experiences of First Nations women with wife battering are often different from the experiences of women of colour and black women. Again, this paper is not a comprehensive analysis of mandatory charging policies; the experiences of these women deserve full and particular consideration.³⁵

In this paper, I am only focusing on wife battering in heterosexual relationships and have excluded discussions concerning the impact of legal intervention in lesbian relationships where a partner is being battered. It is my understanding that the experiences of legal intervention for lesbians who are battered can be quite different given the discrimination and homophobic attitudes in the legal system, lack of support services for lesbians who are battered and our lack of understanding of the dynamics of abuse in lesbian relationships. It is for these reasons that the experiences of lesbians who are battered need to be

³⁴ It is being reported by Aboriginal women that they are not reporting male battering to the police due to fear of racism in the criminal justice system and for fear of police brutality. This was discussed at the March 15, 1995 meeting of the Criminal Justice Sub-Committee of Ottawa's Regional Coordinating Committee to End Violence Against Women.

³⁵ The Ontario Native Women's Association has maintained that it is the exception rather than the rule to find an Aboriginal women whose life has not been effected in some way by family violence. While it is estimated that one in five women will experience battering by their male partner, it is estimated that four out of five Aboriginal women have experienced battering. Ontario Native Women's Association, "Breaking Free: A Proposal for Change to Aboriginal Family Violence" (Thunder Bay: December 1989), at ii. For a discussion on wife battering and Aboriginal women, refer to Canadian Council on Social Development and the Native Women's Association of Canada, Voices of Aboriginal Women: Aboriginal Women Speak Out About Violence, (Ottawa: 1991). For discussion about racism against First Nations peoples in the criminal justice system, refer to the Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, vol. 1, 1991; Report of the Saskatchewan Indian Justice Review Committee, January 1992.

explored fully and specifically.³⁶

There are a number of other issues that will not be discussed in this paper. For instance, unlike many articles that discuss wife battering, you will not be reading in this paper about "why women stay" with battering male partners. While this issue is important in terms of understanding the complexities of women's lives and experiences, the ways that this question is often misconstrued and used against women can make raising it inappropriate and dangerous. This question presumes that the "normal" thing to do would be to leave and therefore, suggests that there must be some convoluted, psychological explanation, insinuating that there is something "wrong" with a woman who "stays". Such a question places the focus and the responsibility on the behaviour and thoughts of women who are being battered instead of on the men who are battering. This serves as yet another successful form of collusion in keeping men's violence hidden and violent men unaccountable. In addition, one of the implications of this question is that it is easy to "leave" an abusive man. This is simply a fallacy: not only does women's economic, political and social status make it difficult for a woman to "simply leave", men continue to abuse and assault women long after they have "separated". In fact, it is at this time that women are at most risk of being murdered by their ex-

³⁶ In one study on lesbian battering in Toronto, 20% of the 189 respondents said they were subjected to forms of psychological, physical or sexual abuse in lesbian relationships. For a discussion of the experiences of lesbians who are battered refer to Laurie C. Chesley, Donna MacAulay and Janice L. Ristock, Abuse in Lesbian Relationships: A Handbook of Information and Resources, (Toronto: Toronto Counselling Centre for Lesbians and Gays, 1992); Keriy Lobel, (ed). Naming the Violence: Speaking Out Against Lesbian Battering (Inland: Seal Press, 1986); and London Battered Women's Advocacy Centre, Confronting Lesbian Battering (London: 1993).

partners.³⁷ Less importantly, at a practical level, I am assuming the readers of this paper do not need to read yet another account of "why women stay".³⁸

7. PERSONAL GOALS OF THESIS

Although this thesis is about exploring feminist engagement with the law and the omissions being made by many (white) feminists of the experiences of women of colour and black women with respect to mandatory charging policies, this thesis is about much more. I have been working in the area of men's violence against women and know that I will continue to struggle against wife battering in my work, both as a student and in my other careers. In order to be potentially effective in this, I need to know more about how women experience wife battering and to think about more inclusive strategies for change. In many regards, this paper represents part of my struggle in thinking through how my understandings and perspectives on men's violence against women exclude the experiences,

³⁷ Refer to Maria Crawford and Rosemary Gartner, Women Killing: Intimate Femicide in Ontario 1974-1990 (Women We Honour Action Committee, April 1992).

³⁸ For a discussion and critique of the "learned helplessness" rationalization, refer to Elizabeth Comack, supra note 26, at 43; and Christine Littleton, supra note 26. Another issue that will not be discussed is the relationship between wife battering and child abuse and the effects of wife battering on children. For a discussion of these issues refer to Peter Jaffe, David Wolfe, and Susan K. Wilson, Children of Battered Women (Newbury Park, California, Sage Publications, 1990); Mark Anthony Drumbi, "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform" 12 Canadian Journal of Family Law 1994, 115, at 119; and Is Anyone Listening? The Report of British Columbia Task Force on Family Violence, (British Columbia, Minister of Women's Equality, February 1992) at 80. For a discussion on the relationship between elder abuse and wife assault, refer to Elaine Mastrocola-Morris, "Woman Abuse: The Relationship Between Wife Assault and Elder Abuse" (Ottawa: National Clearinghouse on Family Violence, 1989), and Elizabeth Podnieks, "The Lived Experiences of Abused Older Women" 12 Canadian Women Studies 2, Winter 1992, 38.

complexities and fluidity of the lives of women of colour and black women and to learn more about the realities of women of colour and black women who are battered.³⁹ This is important for the reader to know because in chapter five I go into more detail about the experiences of women of colour and black women than may be needed to "prove" my thesis. As I plan to continue to work in this area, I also am exploring how I feel about working with the law to help eradicate men's violence against women.

8. THE NEED TO CELEBRATE

There is much of the (white) women's movement that should be criticised, especially its almost exclusive focus on white, non-disabled bodied, heterosexual, middle class women. I think that there is a need to continue to expose how the movement has excluded so many women's experiences and realities. At the same time, I also have a need to celebrate the accomplishments of this movement. On an intellectual level (to artificially distinguish between thinking and feeling), I think that it is necessary at times to celebrate because to do otherwise is to discount the work and struggles of many women who have come before us. If they had not struggled, if they had not fought so hard for what we now have, I do not believe I would presently be writing about women who are being battered by their male

³⁹ I am conscious that this statement may appear to reflect what many women of colour and black women have criticized in white feminists, namely the tendency to be self-congratulatory in our attempts to do what we should have been doing all along (much like the legal system expects congratulations when it does what it should be doing). However, my purpose in expressing this is to explain that this thesis represents a lot more for me than the completion of a degree.

partners. The battered women's movement has accomplished a great deal, especially in the last 25 years. To have started over 360 shelters in Canada, to have won legal and social reforms, to have formed networks and coalitions against violence against women are all in and of themselves extraordinary achievements.⁴⁰ I also think it is important to honour the lives and stories of women who have been battered by their male partners. Their lives are a testament of women's courage and power.⁴¹

On a feeling level, I have often experienced overwhelming hopelessness at the tasks in which feminists are engaged. At times the eradication of men's violence against women seems absolutely impossible. If I had not learned at these times to celebrate what has been accomplished I probably would not be working on this paper. In my experience, celebration is not a part of what is being taught or encouraged and I think without some celebration, this work can be, at times, debilitating. However, I also must add that I feel dissonance in this need to celebrate. As previously mentioned, there is much that cannot be celebrated and

⁴⁰ Susan Schechter also makes this point: "I want to remind us that we have won what we now have because we, or others before us, struggled for it. It was not given to us. We had to be responded to because we publicly declared that women could not continue to be beaten. If we lose the political meaning of what we have worked for, the spirit of our work places, and our view of women's oppression, then although we still have won victories and still have protected women, we will have also lost something essential - our part in a struggle for human liberation". Susan Schechter, *supra* note 2, at 257.

⁴¹ As Linda MacLeod and Maria Shin have commented: "...their stories are real-life dramas of overwhelming loss, suffering, strength and endurance. Their stories are not tales of "helpless victims", nor of women who come from cultures which accept violence against women. Instead, these are the stories of women who, through their tenacity, their ingenuity, their sensitivity and often through their deep sense of spirituality, have endured their isolation and suffering and have survived... like proud, but wingless birds." Linda MacLeod and Maria Shin, "Like A Wingless Bird...", *supra* note 19, at 3.

should be criticized. Learning how to do both, and when to, is a continuing part of my participation in a movement that is both strong and wonderful and deeply flawed.⁴²

⁴² Susan Schechter has helped me with her recognition in the "I am at the movement's accomplishments as well as [her] belief in the need for gentle yet pointed criticism". Supra note 2, at page 8.

CHAPTER TWO
THE EXCLUSIONARY ACTIONS OF THE
LEGAL SYSTEM
AND OF THE (WHITE) WOMEN'S
MOVEMENT:
A CASE FOR COMPARISON

"I am not free while any woman is unfree, even when her shackles are very different from my own. And I am not free as long as one person of Colour remains chained. Nor is any one of you."⁴³

"...though all women are women, no woman is only a woman".⁴⁴

1. INTRODUCTION

Debates over whether it is useful or whether it is futile to try to use the law as a mechanism to promote women's emancipation have captured the attention of many feminists within the (white) women's movement. There is a proliferation of articles and books that specifically focus on this issue and struggle with what we⁴⁵, as feminists, are to do (if anything) with each area of the law, including criminal and constitutional reform.⁴⁶ Part of this activity has been kindled by

⁴³ Audre Lorde, "The Uses of Anger; Women Respond to Racism" in Audre Lorde. Sister Outsider (Freedom California: Crossing Press, 1984) 124, at 133.

⁴⁴ Elizabeth Spelman, Inessential Woman (Boston: Beacon Press, 1988) at 187.

⁴⁵ When I use the term "we" in the context of white women or the (white) women's movement, it is to situate myself as a white woman. However, I also, at times, use "we" when referring to feminists generally in order to situate myself within the broader feminist community. Although I am conscious of the hiddenness and dominance of "white" when just using "feminists", I hope that by explicitly delineating whiteness at other times, it is clear that I am referring to all feminists.

⁴⁶ Over the last few years particularly, there has been considerable debate in the literature about whether we can rely on the criminal law to assert that men's violence against women is

feminists experiencing continual disappointment with the effects of legal reforms and in our attempts to work with the law.⁴⁷ Although in the 'last two decades we have witnessed many legal changes, such as sexual assault legislation, the Canadian Charter of Rights and Freedoms, and policy directives in cases of wife battering, women still endure re-victimization, unequal status and an unsympathetic criminal justice system: There has been change, and yet there has been no change.

Feminist theory is just as much alive with debates concerning racism in the (white) women's movement.⁴⁸ Black women and women of colour are criticizing

wrong. This material will be discussed later in this chapter. Examples of this material include, but are not limited to: Jennie Abell, supra note 26, Christine Boyle, supra note 4 and supra note 6, Elizabeth Comack, supra note 26, Linda MacLeod, supra note 1 and supra note 2, Carol Smart, Feminism and the Power of Law (London: Routledge, 1989), Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987); Judy Fudge, "What Do We Mean By Law and Social Transformation?", 5 Canadian Journal of Law and Society 1990, 47; Kathleen A. Lahey, "Until Women Themselves Have Told All That They Have To Tell" 23 Osgoode Hall Law Journal 3, 1985, 519, and "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory", in Richard F. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Emond Montgomery, 1991) 319, Mari J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method", 11 Women's Rights Law Reporter Spring 1989, 7, Elizabeth Sheehy, "Personal Autonomy and the Criminal Law: Emerging Issues for Women" (Ottawa: Canadian Advisory Council on the Status of Women, 1987), and Patricia J. Williams, The Alchemy of Race and Rights. Diary of a Law Professor (Cambridge: Harvard University Press, 1991). Sherene Razack brings to our attention, that feminists are not the only ones confronting the limits of law as other legal scholars and activists have been engaged with this issue for decades. Sherene Razack, "Using Law For Social Change: Historical Perspectives" 17 Queen's Law Journal 1, Spring 1992, 31, at 35.

⁴⁷ Carol Smart comments that these disappointments have led to a re-evaluation of the usefulness of promoting legal change as a method of resisting women's oppression and a reconsideration of using legal strategies to challenge women's inequalities, given the law's role in creating and maintaining women's oppression. Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy", 14 International Journal of the Sociology of Law 1986 109, at 109.

⁴⁸ This material will be explored throughout this chapter. Examples of this work include, but are not limited to: Mari Matsuda, supra note 46; Patricia Williams, supra note 46; Sherene Razack, supra note 46 and "Exploring the Omissions and Silences In Law Around Race",

the (white) women's movement for ignoring women's array of experiences, silencing women of colour and black women and monopolizing the movement. As bell hooks has commented:

"Much feminist theory emerges from privileged women who live at the centre, whose perspectives on reality rarely include knowledge and awareness of the lives of women and men who live in the margin. As a consequence, feminist theory lacks wholeness, lacks the broad analysis that could encompass a variety of human experiences."⁴⁹

Struggles with racism and the effectiveness of legal reform are not new to this 'wave' of the movement. The demand for recognition and incorporation of multiple consciousness⁵⁰ was present from the very beginnings of the (white) feminist movement in the United States.⁵¹ Demands for law reform were also a major component of the early movement's struggles, as evidenced, for example, by nineteenth century calls by feminists for reforms in the area of wife battering

Paper presented to the Research Consultation on How to Study Gender Bias in the Law, the Courts and the Legal Profession, November 1-2, 1991, Simon Fraser University, Vancouver; bell hooks, Feminist Theory: from Margin to Center (Boston: South End Press 1984); Elizabeth Spelman, supra note 44; Marlee Kline, supra note 31; Himani Bannerji, (ed.), Returning the Gaze: Essays on Racism, Feminism and Politics (Toronto: Sister Vision Press, 1993); and Judy Scales Trent, "Commonalities: On Being Black and White, Different, and the Same" 2 Yale Journal of Law and Feminism 1990, 305.

⁴⁹ bell hooks, supra note 48, in preface.

⁵⁰ Mari Matsuda defines multiple consciousness as understanding the world from the viewpoint of the oppressed. As she comments: "Multiple consciousness as jurisprudential method... encompasses more than consciousness-shifting... it encompasses as well the search for the pathway to a just world. The multiple consciousness I urge... is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed". Supra note 46, at 9.

⁵¹ As evidenced in Sojourner Truth's question posed in 1851, "Ain't I a woman?", as discussed by Angela P. Harris, "Race and Essentialism in Feminist Legal Theory", 42 Stanford Law Review February 1990, 581 at 586.

and rape.⁵²

I think there are similarities between the ways in which the law has responded (is responding) to women⁵³ and how the (white) women's movement has responded (is responding) to women of colour and black women. Feminists have for decades critiqued the law as representing and reflecting only men's interests and experiences. Feminists have also challenged the legal system's treatment of women and demanded change for decades. It has only been after years of struggle that accomplishments have been achieved. Similarly, even though the women's movement may not be as "theoretically impervious"⁵⁴ to challenge as the legal system appears to be, it has only been with great effort and struggle that women of colour and black women have been able to make their voices heard. Feminist scholars have (and are) arguing and documenting how the legal system perpetuates and reproduces sexism⁵⁵ and that it is in need of

⁵² Julia Brophy and Carol Smart have commented that the women's movement in the 19th century engaged with this issue and faced many problems similar to those being experienced today. Julia Brophy and Carol Smart, (eds) Women in Law: Exploration in Law, Family and Sexuality (London: Routledge and Kegan Paul, 1985), at 2. For a discussion of historical struggles, refer to Constance Backhouse, "19th Century Rape Law", in David H. Flaherty (ed.) Essays in History of Canadian Law vol. II, (Toronto: University of Toronto Press, 1983), and Linda Gordon, Heros of Their Own Lives: The Politics and History of Family Violence (New York: Penguin Books, 1988).

⁵³ In this sense, I do mean how the law has responded to all women. However, within this response, there are many differences in the how the law has responding (is responding) to "women".

⁵⁴ Mary Jane Mossman has argued that the law and legal research methods are impervious to feminist challenges. Mary Jane Mossman, "Feminism and Legal Method: The Difference it Makes" 3 Australian Journal of Law and Society 1986, 30. Also as discussed by Carol Smart, supra note 46, at 21.

⁵⁵ The legal system also reproduces and perpetuates racism and homophobia. My focus on sexism is to delineate what the (white) women's movement has primarily focused on.

structural change, beyond that of a tinkering or re-formation of laws. In a similar way, black women and women of colour have (and are) illustrating that the exclusion of their issues and participation cannot be addressed through token representation or allusions in footnotes and parenthesis.

It seems that black women and women of colour are being excluded, silenced and tokenized within a movement that alleges it is for the emancipation of all women, much like the justice system often claims to provide justice equally for all persons. It is no surprise that some feminist legal scholars are responding to women of colour and black women in ways comparable to the legal system, since many feminist legal scholars are trained in this tradition.⁵⁶

Thinking about this comparison is intriguing for me. Although it is beyond the scope of this paper, I think this could be explored much further than the discussion upon which I am about to embark. I find myself wondering about how many women of colour and black women have, for instance, decided to "separate" from the white women's movement out of frustration and discouragement with racism, like many women have decided to disengage from law reform efforts out of a belief that it is of no value. I also wonder about how many women of colour and black women have participated in the movement to find their experiences negated and trivialized and wonder if there are similarities in this to how a woman experiences her "participation" in the criminal justice system.

However, I must also comment that I am, at times, uncomfortable with this

⁵⁶ I would like to thank Diana Majury for this point. It is also of little surprise given the existence of racism.

analogy. Although this is an appropriate comparison, it is sometimes difficult for me to think that the (white) women's movement is "as bad as" the legal system. This, however, may just be about my difficulty accepting how similar in fact they are. This too, needs further exploration. At the same time, I do think that the (white) women's movement has made more progress, as painfully slow (for women of colour and black women) as it has been. I also think that there is much more potential within this movement for change than there is in the legal system. The work and struggle of white women, such as Elizabeth Spelman and Marlee Kline, are a testament to this potential.⁵⁷ I also think that the movement has more of an inherent potential than the legal system has, given our foundational principles and our tools of learning.⁵⁸

In this chapter I will illustrate some of the ways in which white women have relegated women of colour and black women, and the issues that continue to be important for them, to the "margins".⁵⁹ The chapter will focus on how white women in the movement have responded (are responding) to women of colour

⁵⁷ To this I would add the work of Diana Majury and Renate Mohr - work I have observed and without which I would probably not be doing this paper - in the graduate courses they have taught at Carleton University, Department of Law. I would also add the work of Lynda Davies.

⁵⁸ Feminist principles of knowledge and learning would include: the belief in the partial nature of knowing, the biased nature of knowing, a rejection of decontextualized analysis and the need to have women's experiences as the foundation of theories and strategies for change. Marlee Kline discusses this point, supra note 31, at 149.

⁵⁹ The references to the legal system will be quite general. There is a proliferation of articles and books critiquing the legal system's claim to neutrality and objectivity, the racism and sexism within the criminal justice system and the lack of representation in the system of persons of colour, black persons, First Nations peoples, persons with disabilities, lesbians, gays and white women. Although I would like to examine this work more fully, my purpose in this paper is directed at exploring the omissions by (white) women in the movement.

and black women. I will also be discussing some of the effects this has had, both on women of colour and black women, and on their subsequent participation in feminism. This contextualization is necessary in order to frame the discussion which follows and which focuses on the issue of feminist engagement with the law, a struggle which also has, for the most part, excluded⁶⁰ the participation of women of colour and black women. This chapter will provide the framework from which the issue of mandatory charging policies will be examined.

2. THE POWER OF LAW AND THE (WHITE) FEMINIST MOVEMENT

2.1 THE ILLUSIONS OF NEUTRALITY

A cornerstone of the law has been, and continues to be, its claim to objectivity and neutrality. On the basis of this claim, the legal system has projected notions such as justice and equality, notions which then serve to strengthen the system's power and legitimacy.

Law's claim to neutrality and objectivity has been a major source of criticism by white feminists, feminists of colour and other critical legal scholars.⁶¹ They have exposed the falsity of these claims and have demonstrated how they

⁶⁰ Elizabeth Spelman has brought to our attention that the term "excluded" implies a sense of power over someone. In order for women to be able to "exclude", or "include" for that matter, they have to have the power by which to accomplish this. As such, I use this term deliberately. Supra note 44, at page 163.

⁶¹ Refer to Sheila Martin and Kathleen Mahoney (eds.) Equality and Judicial Neutrality (Toronto: Carswell, 1987); and Susan Boyd and Elizabeth Sheehy "Feminist Perspectives in Law: Canadian Theory and Practice", 2 Canadian Journal of Women and the Law 1, 1986, 1.

obscure the maleness, classness and the whiteness of the law. Feminists and other critical legal scholars have also revealed how the laws were (are) designed with white men's interests in mind and how they have been interpreted accordingly. The law has been criticized for playing a role in the reproduction and perpetuation of sexism, racism, heterosexism and classism.

Even though we have criticized notions of objectivity and neutrality because they mask whose interests are really being served the (white) women's movement has done much of the same. Women of colour and black women have criticized the (white) women's movement for making "women" appear to represent all women. They have illustrated that when (white) feminists refer to "women", it is often only white women who are really being discussed.⁶² The primary, if not exclusive, feminist focus on white women has left an incomplete and distorted image of what it is to be a "woman" and to experience oppression. It is assumed, for instance, that a woman can simply experience oppression "as a woman". Elizabeth Spelman has argued that this apparent ability to experience oppression solely on the basis of gender has been taken as the truest sense of what it means to be oppressed "as a woman".⁶³ Moreover, the image of black women has been

⁶² Marlee Kline, *supra* note 31, at 116-117

⁶³ Elizabeth Spelman, *supra* note 44, at 136. The notion that there is a unitary woman's experience, which can be described and isolated from other realities of experiences, has also been described by Angela Harris as "gender essentialism". *Supra* note 51, at 585. She further comments that there is also race essentialism, which is described as the belief in "the black experience". At 588.

obfuscated under a cobweb of oblivion, indifference and racism⁶⁴, "[w]omen of Colour have been systematically devalued, categorized and rendered "other" in a racist society",⁶⁵ and have been condemned to the "shadows".⁶⁶ Esmeralda Thornhill has theorized how this can be addressed:

"Our feminist lens must be readjusted so that the blurred negative of Black Women is brought into the total picture of Women. Our strengths, stamina for survival, self-respect, courage, conviction, and independence must be properly recognized. And we Black Women must be allowed to take and wield OUR share of "appraisal power" in helping to define...the emerging picture of Woman." (emphasis hers)⁶⁷

Audre Lorde has commented that as women we are taught to ignore our differences and to view them as causes for separation and suspicion.⁶⁸ When this is coupled with race privilege, white women have immense power to define our issues as all women's issues and to exclude from our analysis any experience we do not call our own. The assumption made by many white feminists that a woman primarily experiences oppression based on sexism is an example of race privilege. As Sherene Razack has remarked:

"...one can afford to have no clear sense of one's racial or class

⁶⁴ Esmeralda Thornhill, "Focus in Black Women" 1 Canadian Journal of Women and the Law 1, 1985, 153, at 153-154.

⁶⁵ Jean Trickey, "Feminism and Women of Colour", 12 Vis-A-Vis: A National Newsletter on Family Violence 1, Summer 1994, 9, at 9 and Esmeralda Thornhill, ibid at 155.

⁶⁶ Sherene Razack, has commented that universalizing women condemns women of colour and black women to the shadows. Supra note 48, at 6.

⁶⁷ Esmeralda Thornhill, supra note 64 at 157.

⁶⁸ Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House", in Audre Lorde, Sister Outsider (Freedom California: Crossing Press, 1984), 110, at 112.

identity only when those identities never pose a problem, that is to say when one lives close to centre. White middle-class, non-disabled women can be "simply women" in the same way that white, middle-class, heterosexual, non-disabled men can simply be human beings".⁶⁹

One of the results of this exclusion⁷⁰ is that the interplay between racism and sexism as a site of women's oppression is often ignored and the complex nature of oppression obscured. As bell hooks has commented:

"The idea of "common oppression" was a false and corrupt platform disguising and mystifying the true nature of women's varied and complex social reality. Women are divided by sexist attitudes, racism, class privilege, and a host of other prejudices".⁷¹

Focusing on white women and purporting to represent the interests of all women actually leads to a perpetuation and reproduction of racism. In not addressing racism, in denying its existence, we have not only helped it to continue, we have silenced and oppressed women of colour and black women. Racism is further left unchallenged when reform initiatives fail to take into account the differences in women's experiences.

Just as the law operates according to men's interests and alleges to be

⁶⁹ Sherene Razack, *supra* note 48, at 5. She has also commented: "Gender studies in isolation is an abstraction, rhetorical device that enables us to confine women's daily experiences to a frame in which race and class privilege and many other norms go unexamined". At 10. Also refer to Visible Minority and Immigrant Women's Committee of the National Action Committee on the Status of Women, Towards An Anti-Racist Women's Movement: A Handbook (Ottawa: National Action Committee on the Status of Women, 1990), at 2.

⁷⁰ It could also be argued this was actually a false "inclusion" in that "women" was presented as representing all women.

⁷¹ bell hooks, *supra* note 48, at 44. Audre Lorde has described the notion of a unitary experience as a "pathetic pretence", and an exercise in "academic arrogance". *Supra* note 68, at 112 and 110. This issue will be discussed later in this chapter.

accessible for all, the (white) women's movement has claimed to represent the interests of all women.⁷² In the remainder of this chapter, I continue to draw parallels between the critiques (white) feminists make of the legal system and the critiques black women and women of colour make of (white) feminism.

2.2 OMISSIONS

Black women and women of colour have exposed the racism of the (white) women's movement, as evidenced by the lack of attention afforded to certain issues, by many of the assumptions and attitudes in white women's work, and by the treatment of women of colour and black women in the movement.⁷³

One of the results of racism in the (white) women's movement is that black women and women of colour have been systematically excluded from full participation.⁷⁴ As has been commented:

⁷² Some (white) feminists have done better at incorporating the needs and experiences of poor women. However, this has also largely been done in isolation from race analysis. Refer to Marlee Kline, *supra* note 31 and Elizabeth Spelman, *supra* note 44.

⁷³ Marlee Kline, *supra* note 31, at 116. In examining some well known feminist work, Marlee Kline illustrates three overall tendencies of white feminists: the tendency to overlook racial identity when considering the impact of issues on women; defining issues in ways that more significantly address the experiences of white women; and the tendency to oversimplify the sites of women's oppression. These three tendencies point to the more general failure of white feminist scholars to recognize that women of colour and black women experience various forms of oppression simultaneously. These will be discussed within this chapter.

⁷⁴ The Visible Minority and Immigrant Women's Committee of the National Action Committee on the Status of Women identified the following practices that inhibit full participation: black women and women of colour are systematically excluded from decision making positions; black women and women of colour are pulled in to discussions and projects to give the illusion of a representative group; there is lack of discussion or debate with women of colour, which illustrates that they are not worth debating with; there is a perception among white women that the movement belongs to us; white women give little credence to issues that are critical to the lives of women of colour and when there is attention given, the issues

"...the prejudices, stereotypes and deeply rooted attitudes formed as a result of the legacy of racism have had a profound impact on the interactions between white women and women of colour...".⁷⁵

Fear of racism has been identified as one of the main reasons why women of colour and black women do not participate in the (white) women's movement.⁷⁶

The racism of (white) feminists makes it difficult for women of colour and black women to identify themselves as feminists⁷⁷ and to feel open to engaging in discussions about racism with white women.⁷⁸

Women of colour and black women are responding to white women's racism with demands for us to acknowledge its existence, to examine our race privilege and to examine how our perceptions are "loaded".⁷⁹ Women of colour

not integrated; analyses do not take into account effects of racism and if racism is discussed, it is only seen as single issue, not one to be integrated; experiences of women of colour are interpreted by white women with little prior consultation; and women of colour are expected to continually explain racism as white women do not recognize that it is also our issue for which we have to take responsibility and action. Supra note 69 at 7-8

⁷⁵ Visible Minority and Immigrant Women's Committee of the National Action Committee on the Status of Women, supra note 69, at 3.

⁷⁶ bell hooks, supra note 48, at 12.

⁷⁷ Jean Trickey, supra note 65, at 9. Also refer to Anita Sheth and Amita Handa, "A Jewel in the Frown: Striking Accord Between India/n Feminists" in Himani Bannerji (ed.), Returning the Gaze: Essays on Racism, Feminism and Politics (Toronto: Sister Vision Press, 1993), 38.

⁷⁸ Deborah L. Rhode has made the point that there is an unwillingness to broach the subject as doing so carries risks, such as a de-centering of the dialogue to focus on the needs of the privileged. "Enough Said" 4 Yale Journal of Law and Feminism 1991, 35, at 35.

⁷⁹ Patricia Monture has made the comment that white women have to examine how our perceptions are loaded. Despite my discomfort with the violent connotations it conjures, I think the phrase, "loaded perceptions", seems quite appropriate. When perceptions shape actions, as they have with white women, there is a real (realized) potential to harm someone - much like a loaded gun. Patricia Monture, "Reflecting on Flint Woman", Richard F. Devlin, Canadian Perspective on Legal Theory (Toronto: Emond Montgomery, 1991) 351, at 357. For a discussion regarding challenges made to white women regarding our racism, also refer to Marlee Kline, supra note 31 at 116.

and black women are also inviting white feminists to explore how racism and race privilege enable us to exclude black women and women of colour and how we have let this go unexamined in our own work and that of other feminist writers.⁸⁰

The attempt to get white women (feminists) to recognize and address racism in the movement and its impact on women of colour and black women has (is) not been without much resistance and struggle. There continues to be a denial of racism at this level and even when racism is addressed, it is often done so in ways that further marginalize black women and women of colour.⁸¹ Sherene Razack has commented that the denial of racism is absolutely central to how racism works.⁸² For instance, we often call upon women of colour and black women to "prove" the existence of racism.⁸³ This has also been said to be a exercise in privilege and oppression. As Audre Lorde argued:

"Women of today are still being called upon to stretch across the gap of male ignorance and to educate men as to our existence and our needs. This is an old and primary tool of all oppressors. Now we hear that it is the task of women of Colour to educate white women - in the face of tremendous resistance - as to our existence, our differences, our relative roles in our joint survival. This is a diversion

⁸⁰ Marlee Kline, *supra* note 31, at 120. For example, in 1985, Esmeralda Thornhill invited all white feminists to adjust our centre of inquiry and "focus on black women". Esmeralda Thornhill, *supra* note 64.

⁸¹ This point will be discussed later in this chapter.

⁸² Sherene Razack, "What is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" 19 *Signs: Journal of Women in Culture and Society* 4, Summer 1994, 894, at 898.

⁸³ The demand of white feminists of black women and women of colour to "prove" the existence of racism seems to resemble the demand made to feminists to "prove" the existence of wife battering.

of energies and a tragic repetition of racist patriarchal thought".⁸⁴

Women of colour and black women are expressing that white women must take the responsibility to learn about racism, identify it and help to eliminate it.⁸⁵

Racism within the (white) women's movement is now a major concern. The efforts of women of colour and black women in challenging the construction of "woman" and in insisting that gender is not the sole factor in determining one's oppression has been described as a critical intervention that has led to a profound revolution within feminist thought.⁸⁶ Women of colour and black women are speaking loudly and persistently and their many voices have begun to be heard by white feminists.⁸⁷ Although there may be a general recognition by feminists of the necessity of multiple consciousness, Angela Harris has argued that this is less so among feminist legal scholars.⁸⁸ And yet, the experiences of white

⁸⁴ Audre Lorde, supra note 68, at 113

⁸⁵ As discussed by Marlee Kline, supra note 31 at 120. She comments that one way to do this is to make oneself an "apprentice". We cannot "demand" that women of colour and black women teach us about our racism and we cannot know about it simply through our imagination.

⁸⁶ bell hooks, "Theory as Libratory Practice" 4 Yale Journal of Law and Feminism 1991, 1, at 4. She further adds that this revolution in thought was one that truly interrogated and disrupted the hegemonic feminist theory produced primarily by white academic women.

⁸⁷ Angela P. Harris, supra note 51 at 587

⁸⁸ Angela P. Harris, supra note 51 at 587. Similarly, Sherene Razack has commented that feminist legal scholarship has been largely unaffected by this progress. She comments that even though Elizabeth Spelman's work is invoked in journals, she has not noticed any significant effect on our work. Sherene Razack, supra note 48 at 6. Elizabeth Comack makes a similar point in discussing the work of socialist feminists. "The tendency has been to conceive of race as "one more variable" to be added into the analysis, with the result that the diversity, complexity and fluidity of women's lives gets lost in the theorizing". Elizabeth Comack, supra note 26 at 7.

feminists with the intransigent maleness of the law should have made us more open to recognizing and responding to our own white intransigence.

White feminists and feminists of colour have amply proven the existence of sexism within the criminal justice system. Misogynist laws have been exposed for (unevenly) contributing to the oppression of all women. Since the 1970's, feminists have struggled for recognition of sexism in substantive areas of law. Feminists have also been demanding that the legal system take responsibility for ensuring more equitable gender representation in, and for addressing the sexist attitudes of, system personnel. More recently, the criminal justice system has been criticized for its inherent racism.⁸⁹

Changes to antiquated and sexist laws, like an awareness of racism within the (white) women's movement, have not come without much struggle and resistance. Women were continually charged to prove the existence of sexism and it often continues to be denied. The legal system has also demonstrated extreme reluctance to implement changes and, even when problems are recognized, the recognition continues to be undermined.⁹⁰ Just as the (white) women's

⁸⁹ Racism in the criminal justice system will be explored in chapter four.

⁹⁰ For example, changes to sexual assault legislation continue to be undermined through the actions of judges and through the interrogation of women by defense lawyers. One of the more recent antics of defense lawyers is to have a woman's file from counselling services and rape crisis centres subpoenaed so that she is cut off from her support system and in order to incriminate her through suggestions of "mental illness". For discussion on the limited effectiveness of sexual assault legislation refer to Julian V. Roberts and Renate Mohr, supra note 6. For a discussion of the later points, refer to Lea Weir and Susan Bazalli, "Resisting Defence Access to the Personal Records of Sexual Assault Victims", M.E.T.R.A.C., 1994; Hon. Justice Marie C. Corbett and Anne Sonner, "Disclosure of Complainant's Records in Sexual Assault Trials" 37 Criminal Law Quarterly 1994, 37.

movement has attempted to address racism by adding "black women and women of colour" to footnotes, the legal system has attempted to address sexism by tinkering with legislation, leaving the foundations of sexism unchallenged.

2.3 UNDERLYING ISSUES LEFT UNCHALLENGED

One of the main concerns that feminists and other critical legal scholars have in relation to engaging the law to help bring about social transformation is that legal reforms rarely, if ever, address the underlying causes of problems. By hiding the problem the law can claim to have addressed the issue. Furthermore, law reform initiatives have to be sifted through the personnel of the legal system, agents who have often illustrated their reluctance to change and their lack of understanding of the issues which necessitated a change.

The (white) women's movement often responds to the calls of women of colour and black women in a similar way, leaving the underlying racism unchallenged and intact. One way the (white) women's movement claims racism has been addressed and the concerns of women of colour and black women included, is to make reference to their experiences through footnotes or in parenthesis. In doing this, it is presumed that the work is "inclusive" and is thereby not racist. As Esmeralda Thornhill has so eloquently remarked:

"...the Women's Movement has failed to generate any in-depth analysis of the Black female experience. The silhouettes of Black Women are footnoted in books, dismissed in marginal asides, and relegated to obscure corners - the hesitant hint of a presence

hovering on the periphery of the total picture of Sisterhood".⁹¹

Angela Harris has referred to this response to gender essentialism as "nuance theory". Basically, white feminists appear to be sensitive to the notion of diverse experiences even when we are making generalizations about "all women" by qualifying the statements in footnotes. Here, subtle nuances of divergence are simply a matter of "context" or "magnitude", while white women quietly remain the norm.⁹² In this sense, black women or women of colour are "women plus".⁹³

What is effected when issues are left unexplored, is an incomplete, incomprehensive and exclusionary piece of work. By not addressing issues that effect women of colour and black women, these women are violated and their experiences negated. I am reminded of the words spoken by Patricia Monture:

"If we cannot understand this pain that women, that Indian women, that black women, that Hawaiian women, that Chicano women go through, we are never going to understand anything. All the mega-theory will not get us anywhere because without that understanding, mega-theory does not mean anything, does not reflect social reality, does not reflect people's experience".⁹⁴

2.4 DENYING WOMEN'S TRUTHS: NOT RECOGNIZING MULTIPLE OPPRESSION

The legal system often and unevenly responds to women by denying our

⁹¹ Esmeralda Thornhill, supra note 64, at 155.

⁹² Angela P. Harris, supra note 51, at 595.

⁹³ Angela P. Harris, supra note 51, at 598.

⁹⁴ Patricia Monture, "Ka-nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah", 2 Canadian Journal of Women and the Law, 1986, 159, 167-168.

realities. In order for any woman to be able to impart her experience to the legal system, her story first has to be transformed (malformed) into a legally recognizable and admissible argument or fact.⁹⁵ Once a women's adjusted story is received by the legal system, it is often negated or trivialized. A woman who was sexually assaulted for instance, might be told by the legal system that her experience was not "that bad" because there was no penetration of her vagina. The legal system further denies women's experiences, often to differing extents based on race, by not acknowledging the social positionings of women and the cumulative effects of our experiences as women. A sexual assault of a woman therefore is simply a sexual assault of an individual woman, not one of a hundred daily sexual assaults on women who experience various forms of everyday violence and social inequality. The legal system silences women, ignores our realities, misinterprets and disqualifies our experiences and revictimizes us.⁹⁶ As Carol Smart has stated:

"...law exercises power not simply in its material effects (judgements)

⁹⁵ The example that immediately comes to mind is the "battered women's syndrome". A women's experience of being battered is not sufficient to be rendered relevant by our legal system and instead needs the backing (corroboration) of "expert witnesses" and a "psychological" problem. It has also been found that black women do not have much success using the "battered woman's syndrome" as a defense. In Lenore Walker's studies, the ratio of black women who are convicted to white women when they use this defense is two to one. She attributes this to racism in the criminal justice system. Elizabeth Comack further adds that the prerequisites of "battered woman's syndrome" - helplessness, powerlessness - can play against black women as the stereotype may not apply. Lenore Walker supported Comack's argument when she commented that black women appear "angry" in court. As discussed by Elizabeth Comack, *supra* note 26, at 49. Also refer to additional references in *supra* note 26.

⁹⁶ For a discussion of this, refer to Carol Smart, *supra* note 46 and Marli F. Rusen, "Silencing Their Screams: The Legal System's Response to Male Battering of Women" (Ottawa: National Association of Women and the Law, 1992) at 2.

but also in its ability to disqualify other knowledge and experiences. Non-legal knowledge is therefore suspect and/or secondary. Everyday experiences are of little interest in terms of their meaning for individuals. Rather these experiences must be translated into another form in order to become 'legal' issues and before they can be processed through the legal system... So the legal process translates everyday experience into legal relevances, it excludes a great deal that might be relevant to the parties, and it makes judgement on the scripted or tailored account".⁹⁷

There are comparisons between what the legal systems does with women's realities and what the (white) women's movement does with the experiences of women of colour and black women. White women often respond to the questions or anger of women of colour and black women by asking that they frame their anger in a particular way to make it easier for white women to hear. And often when it is "heard", their experiences are altered (malformed) into something else. The experiences of women of colour and black women are often transformed through the grids of white women's feelings of guilt or our own anger, whether at ourselves or at the woman who has brought racism to our attention. As has been commented:

"When women of colour speak out of the anger that laces so many of our contacts with white women, we are often told that we are 'creating a mood of hopelessness', 'preventing white women from getting past guilt', of 'standing in the way of trusting communication and action'".⁹⁸

⁹⁷ Carol Smart, supra note 46, at 11.

⁹⁸ Audre Lorde, in a speech to the National Women's Studies Association Conference in 1981, as quoted by Arun Mukherjee, "A House Divided: Women of Colour and American Feminist Theory" in Constance Backhouse and David H. Flaherty, Challenging Times: The Women's Movement in Canada and the United States (Montreal: McGill-Queen's University Press, 1992) 165, at 170.

Audre Lorde has said that women of colour and black women are responding to the "...anger of exclusion, of unquestioned privilege, of racial distortions, of silence, ill-use, stereotyping, defensiveness, misnaming, betrayal, and co-optation".⁹⁹ To turn away from this anger, to ask a woman to express it in another way, or to transform it, is another exercise of race privilege and power.¹⁰⁰

The (white) women's movement, like the legal system, negates the experiences and realities of black women and women of colour by failing to recognize them. Women of colour and black women for decades have been referring to "multiple" levels of oppression and dimensions of experiences and the need for white feminists to recognize that sexism is not the only form of oppression women experience.¹⁰¹ It has been amply "proven" that not all women experience oppression simply as a result of her gender. As bell hook argues:

⁹⁹ Audre Lorde, supra note 43, at 124

¹⁰⁰ To again quote Audre Lorde: "To turn aside from the anger of Black women with excuses or the pretexts of intimidation is to award no one power - it is merely another way of reserving racial blindness, the power of unaddressed privilege, unbreached, intact." Audre Lorde, supra note 43, at 132. And in support of this: "...white women must realize that there is no way they can realistically ask someone to ignore her pain, her anger, her frustration, her humiliation, in effect, her identity, for the sake of a coalition. To ask that is not only to deny the other her personhood, but to demonstrate an inhumane lack of sensitivity, and to arrogantly flaunt race power and privilege." Nkiru Nzegwu, "Confronting Racism: Towards the Formation of a Female-Identified Alliance" 7 Canadian Journal of Women and the Law 1, 1994, 15, at 20

¹⁰¹ This point became clear for me in the readings regarding wife battering and women of colour, immigrant women and black women. Sherene Razack makes this point, commenting that a common theme in the work of women of colour is a theme of multiple subjectivities, voices, relations of ruling, and layers of "experience". Sherene Razack, supra note 48, at 7 and 10. In referring to the work of Catharine MacKinnon, Sherene Razack further discusses that when sexuality is identified as the central cause of women's oppression, there is little room left for understanding how racism and sexuality are constructed on racist lines. She further comments that the reality of women's multiple subjectivities does not get recognized within the male/female framework often employed by white feminists and how male domination is mediated by racism is not easily allowed into this framework. Sherene Razack, supra note 46, at 40.

"There is much evidence substantiating the reality that race and class identity creates differences in quality of life, social status, and lifestyle that take precedence over the common experience women share - differences which are rarely transcended".¹⁰²

Women who experience multiple levels of oppression often cannot, nor should they be expected to isolate what form of oppression is being experienced. As Patricia Monture, a First Nations woman, explains:

"Whenever something like this happens...I do not know, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian woman."¹⁰³

Within this framework of multiple oppression, black women and women of colour are pointing out that, although all women are oppressed in some way(s), women are not all equally oppressed. As Esmeralda Thornhill has voiced:

"All women are oppressed. Yes. But not all women are equally oppressed! Varying degrees of oppression have to be distinguished because the oppressed could in turn become the oppressor by using their class, race, education, privilege, and political options in such a way that they effectively oppress others". (emphasis hers).¹⁰⁴

When the dimensions of oppression are ignored by white feminists, we are exercising our power and privilege. When we, as white women, refuse to hear a woman of colour or a black woman describe the connections between the

¹⁰² bell hooks, supra note 48, at 4.

¹⁰³ Patricia Monture, supra note 94, at 162.

¹⁰⁴ Esmeralda Thornhill, supra note 64, at 157. Sherene Razack also makes this point in commenting that the oppression of women is universal, but it does not have a universal description. Sherene Razack, supra note 48, at 3.

oppression she is experiencing, we silence her.¹⁰⁵ When we do not take into consideration the dimensions of oppression women of colour and black women experience, we are doing violence.¹⁰⁶ And when we do not fully recognize the source of all women's experiences, we risk appropriating her pain.¹⁰⁷ It seems then that the (white) women's movement has duplicated many of the oppressive practices of the legal system.

2.6 RESPONSES TO CRITICISMS

While the language of the legal system, in denying its sexism, is about neutrality and objectivity, the language of the (white) women's movement, in denying our racism, is about solidarity and sexism. Many white women perceive divergence in women's experiences as threatening the possibility of a coherent

¹⁰⁵ I am cognizant of the implications of power and privilege terms like "allow" and "recognize" carry. However, I am using these terms to describe how many white women have responded to women of colour and black women when they have attempted to make their realities heard. I try to only use terms such as allow and include/exclude, for example, when discussing the power white women exercise and not when discussing the responsibilities of white women and what we must change.

¹⁰⁶ It has been commented that black women's reality is "one of institutionalized violence" and the perpetrators of this are not just institutions and white men, but white women. Nkiru Nzegwu, supra note 100, at 18. Sherene Razack also characterizes the omission of "chaos", or diversity, as violence and also mentions that she experienced violence the times when she did not speak (self-silencing) about the omissions made by white women. Sherene Razack, supra note 48, at 1 and 3.

¹⁰⁷ Marlee Kline makes this point. She explains that the tendency of white feminist scholars to overlook racial identity essentially renders specific experiences invisible and creates the potential to inappropriately attribute one woman's pain to all women: "Overlooking race identity also has the effect of appropriating the pain of specific groups by attributing the particular experiences of women of colour to all women, thereby denying the disproportionate impact of an oppressive situation on women of colour." Marlee Kline, supra note 31, at 124

women's movement by weakening or fragmenting our solidarity.¹⁰⁸ But as Marlee Kline brings to our attention, that assumption of solidarity is itself an illusion created by white solipsism¹⁰⁹:

"If we now attempt to maintain the appearance of uniformity and universality for strategic reasons at the expense of ignoring our own hegemonic position and the challenges of, among others, women of colour we risk irreparable fragmentation. While we should work toward building solidarity, we cannot pretend union when it does not exist".¹¹⁰

She further adds that instead of weakening the position of the movement, this acknowledgement will ultimately lead to its strength.¹¹¹ It is only by a movement that encompasses the experiences of all women that real change can occur.

The exclusion of race analysis by many white feminists has been rationalized as stemming from a fear of manyness, or in Elizabeth Spelman's term, "plethoraphobia".¹¹² Categorically discussing women as a unified group with essentially the same sorts of experiences is understandable and safe.¹¹³ To do otherwise, it is sometimes presented, is overwhelming. However, Marlee Kline has

¹⁰⁸ As discussed by Elizabeth Spelman, supra note 44, at 161.

¹⁰⁹ Elizabeth Spelman, "Theories of Race and Gender: The Erasure of Black Women" 5 Quest. A Feminist Quarterly 1985, 37.

¹¹⁰ Marlee Kline, supra note 31, at 147.

¹¹¹ Marlee Kline, supra note 31 147. bell hooks also makes this point in stating that women of colour and black women do not wish to diminish feminism as much as enrich it. bell hooks, supra note 48, at 15.

¹¹² Elizabeth Spelman, supra note 44, at 160.

¹¹³ Judy Scales-Trent has made this point. She explains that in her life, as a black white woman, categories do not clarify, they confuse. Supra note 48, at 305. Also refer to Angela P. Harris, supra note 51, at 589, 605-607.

argued that this is a poor excuse for white feminists scholars not to include complexity or diversity in our work.¹¹⁴ Not only is it a poor excuse, it is practically and theoretically dangerous. Without a comprehensive understanding of how most women experience wife battering, for instance, we risk developing and implementing strategies and solutions that not only ignore many women's lives, but which may further harm women and put them in increased danger.

There are additional explanations as to why many white women continue to ignore levels of oppression and cling to essentialism. Angela Harris has maintained that describing the world of women in this way is more convenient as it takes less work and is less intellectually rigorous. She also adds that by not addressing racism, white women are rewarded with emotional and political payoffs.¹¹⁵

Another rationalization put forth by a white woman is that in recognizing dimensions of oppression, we would risk and encourage a superficial treatment of differences. Mary O'Brien has termed this "hazard", "commatization", in which sites of oppression are added on comma after comma, thereby, in effect, submerging differences and suggesting equality among differences.¹¹⁶ While this

¹¹⁴ She comments that instead of avoiding complexity, we should continuously "problematize" our analyses, reconsider our assumptions and enrich our work. Marlee Kline, *supra* note 31, at 145. I have read a lot about "problematizing" women and I am not comfortable with this term. There is nothing "problematic" about black women and women of colour, what is problematic is how their experiences are ignored, silenced and oversimplified and how some white women continue to exercise our privilege. This point was validated for me when I read Elizabeth Spelman's book in which she also comments that the problem of difference is really a problem in privilege. Elizabeth Spelman, *supra* note 44, at 162.

¹¹⁵ Angela P. Harris, *supra* note 51, at 589, 605-607.

¹¹⁶ As discussed by Marlee Kline, *supra* note 31, at 146.

may be a genuine concern for some white women, particularly in recognition of the tendency of white women to add black women and women of colour in footnotes or parenthesis, this cannot be used as an excuse to do nothing.¹¹⁷ When discussing women's varied experiences, we need to make it clear who we are focusing on and recognize this potential danger.

The exclusive focus by (white) feminists on sexism has made it very difficult for other explanations and theories to emerge.¹¹⁸ As a result, we have an incomplete picture of women and an incomplete foundation of knowledge from which to base strategies and solutions for the betterment of women. Angela Harris has commented that the discernable essentialism in many feminist works is not only an insult, but a broken promise as the basic tenant of feminism is the promise to listen to all women's stories.¹¹⁹

¹¹⁷ On this point Marlee Kline has commented: "...we cannot allow our desire to avoid engaging in superficial analysis to impede our attempts to work out the implications of women's diverse experiences of oppression". *Supra* note 31, at 146. There are other reasons that have been presented for not discussing levels of oppression. Deborah Rhode has brought attention to a concern of some white women that discussing racism may expose our unconscious racism or that we are afraid we will not "get it right". She illustrated this point by mentioning that one white student told her that she was afraid to openly discuss this issue as she might end up in her teacher's footnote as example of unconscious racism. Deborah Rhode, *supra* note 78, at 37. However, racism cannot be avoided by not discussing it or not recognizing it. In fact, this further cements the impact of racism and perpetuates its existence. And meanwhile, women of colour and black women are being silenced and oppressed by a movement that is for the e(wo)mancipation of all women.

¹¹⁸ bell hooks, *supra* note 48, at 9. She further comments that those who do advocate different strategies or foundations often find themselves ostracized and silenced.

¹¹⁹ Angela P. Harris, *supra* note 51, at 600.

3. CONTEXTUALIZING LAW AND SOCIAL TRANSFORMATION

The examination of the practices and responses of many white women to racism has highlighted how similar in fact the (white) women's movement has been to the legal system we criticize and dismiss. Most, if not all, feminist legal scholars comment on the law's tendency to (unevenly) silence women, to negate our experiences and to decontextualize our realities. Women of colour and black women are telling white women that we are doing the same. We must keep these lessons in mind as we explore the problems involved in engaging the law to try to effect social change.

The question of the effectiveness of law in promoting social transformation has captured the attention and passion of many feminist legal scholars, particularly in the area of men's violence against women.¹²⁰ Engaging with law to effect change is not new to feminists. Demands have been made for decades to change antiquated laws and the treatment of (some) women in the courts. As feminists have had a long history with law reform, we have had plenty of experiences which led to disappointment and frustration.¹²¹

As a result of witnessing the limited effectiveness of law reform, many feminist scholars have entered into debates concerning the usefulness, or futility,

¹²⁰ For instance, refer to scholars in supra note 46 and supra note 48. As mentioned previously, feminists are not the only ones confronting the limits of law reform and who are engaged in this issue. Critical legal scholars for instance, who, as Sherene Razack comments, have typically been white privileged men, have also been engaged in this debate. Sherene Razack, supra note 46, at 35. For an example of this type of work, refer to Harry Glasbeek and Michael Mandel, *The Legislation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms*, 2 Socialist Studies 1984, 84.

¹²¹ For a discussion of this, refer to Carol Smart, supra note 46, at 67.

of this strategy. While many argue that law reform is a necessary component of most strategies to bring about the emancipation of all women, others argue that we should relinquish our efforts in this arena. Other feminists scholars have critiqued the debates, pointing out the absence of race analysis as part of these debates. In what follows, I will be presenting an overview of these arguments in order to provide a foundation for subsequent deliberations on the effectiveness of mandatory charging policies. It is important to note that the positions of feminist legal scholars on law reform can not easily be categorized into "for" and "against". There are often as many agreements between the positions as there are disagreements and both sides offer significant points that need to be considered. Generalizations about perspectives on law reform are being made solely for the purposes of discussion.

3.1 THE LIMITED EFFECTIVENESS OF LAW REFORM

One of the main reasons why law reform is limited is that a reorganization of legislation or technical changes to legislation leave fundamental and causal problems intact. Experience has demonstrated that even with what appear to be the most progressive changes, there is often a reversion back to the practices that led to problems in the first place. For example, the changes to the rape laws in 1983, even though they can be considered dramatic changes in and of themselves, have had limited effect in terms of improving the situation for women

who report sexual assaults.¹²² The inability, or unwillingness, of the law to address underlying issues has led many legal scholars seriously to question the purpose of even engaging with law reform. This is especially so because the act of law reform itself can serve to mask underlying issues and to legitimate the role of law by making it appear that the issue has actually been addressed.¹²³

Other legal scholars have brought attention to the inherent contradiction in inviting the legal system to address issues of oppression when the system itself is founded on oppressive principles. For instance, feminist scholars working in the area of violence against women have questioned how a criminal justice system built on such precepts as control and power, can effectively deal with some men's violent and controlling behaviour towards women.¹²⁴ Feminists scholars are also questioning how a racist legal system can respond to black women and women of colour who are being battered.

¹²² For sources, refer to supra note 6.

¹²³ Michael Freeman discusses the power of law to act as a symbol. He comments that the law first mystifies reality and then appears to order it. Michael D. Freeman, "Ideologies and Domestic Violence" in Michael Freeman, (ed.), *The State, The Law and The Family* (London, Tavistock, 1984) at 56. Carol Smart, in discussing rape law, makes a similar observation: "...legal reforms are not simply slow... they may be injurious to women or they may simply hide or relocate the fundamental problem". Supra note 46, at 43. Lorene Clark likened the state's inattention to the real cause of violence against women to a doughnut, with the hole in the middle representing ignorance of the central issue. "Feminist Perspectives on Violence Against Women and Children: Psychological Social Services and Criminal Justice Concerns", 2 Canadian Journal of Women and the Law, 2, 1987, at 428.

¹²⁴ Elizabeth Comack is one feminist who has commented on this contradiction. She has noted: "...when engaging the criminal justice system, feminists confront an institution whose main purpose is repression and control - not liberation. In carrying out its mandate, the criminal justice system readily embraces discourses which individualize and pathologize the actions and behaviours of those who stand before the court. This will include not just the actions of abused women, but abusive men as well". Elizabeth Comack, supra note 26, at 52.

3.2 UNEVEN DEVELOPMENT OF LAW

Many feminist and critical legal scholars have come to the conclusion that the implementation and development of law reform is always "uneven" and the consequences difficult to predict. Carol Smart has coined the term "uneven development of law" to describe this phenomenon. By this phrase, she is referring to the distinction between law as legislation and law as practice. She argues that the law operates on a number of dimensions at the same time and is not a simple tool of patriarchy or capitalism.¹²⁵ According to Carol Smart, law has a "refracted nature", meaning that there are various sites of law, such as judge made law, administrative law and law through enforcement.¹²⁶ Law reform initiatives are often undermined, or upheld, by system personnel whose agency often determines the outcome of reform initiatives. In discussing the unanticipated and unregulated outcomes of law reform, whether it be for the state, individuals or political groupings, Carol Smart comments: "...the law is not the mere instrument of an omnipotent state. Its effects are uneven in all dimensions, and the aim of legislators and even governments may be thwarted by the relative 'independence' of law and the judiciary".¹²⁷

¹²⁵ Carol Smart, supra note 47, at 117

¹²⁶ Carol Smart, supra note 46, at 164.

¹²⁷ Carol Smart, supra note 47, at 118. She has also made mention of this type of explanation of law reform in early work she did with Julia Brophy. In this book, the authors refer to "the contradictions that allow space for change", supra note 52, at 17. Other legal scholars make reference to the contradictions in law in ways that are similar to Carol Smart's approach. For instance, Michael Mandel makes reference to an inherent "tension" in law. As discussed by Stephen Brickey and Elizabeth Comack, "The Role of Law in Social Transformation: Is A Jurisprudence of Insurgency Possible?", 2 Canadian Journal of Law and

Carol Smart has also brought to our attention that the effectiveness of law reform is dependant on social conditions.¹²⁸ Even progressive reforms can not be constructive if there are little or no social supports. As an example, a law that helps women leave their battering partners will have little impact if there are no shelters, housing options for women, or laws mandating men who batter to leave the home.

One of the results of the uneven development, or refracted nature, of law is that it is often difficult, or impossible, to predict the potential for progressiveness in law reform. However, it is safe to say that law reform rarely accomplishes what the reformers intended. Elizabeth Comack has commented that if feminists have gained any insights over the past two decades, it certainly has been that law reforms are rarely, if ever, straightforward, and while they may appear to be a benefit for (some) women on the surface, closer scrutiny usually reveals the potentially dangerous consequences.¹²⁹ Those who resort to law reform often risk that the law will work against them.¹³⁰

Society 1987, 97, at 104 R.A. Samek also recognizes that law does not work in a direct fashion: "Law, in fact, does not operate in a straightforward manner as a package of rules. There are practices, conventions, discretion, expenses and delays - a host of countervailing forces, lurking like an iceberg below the surface" "A Case For Social Law Reform" IV The Canadian Bar Review 3, September 1977, 407, at 411

¹²⁸ Carol Smart, supra note 47, at 119.

¹²⁹ She comments that such knowledge suggests a need for more thoughtful and extensive critiques. Elizabeth Comack, supra note 26, at 4

¹³⁰ Carol Smart, supra note 46, at 138 Stephen Brickey and Elizabeth Comack also have recognized the difficulty in predicting when law reform will be constructive. Supra note 127, at 106.

3.3 PERSPECTIVES ON LAW REFORM

Some critical legal scholars claim that the law is simply a tool of the ruling class and that law reform initiatives are futile.¹³¹ Some feminist legal scholars have come to the same conclusion, albeit for different reasons, arguing that law reform strategies are ineffectual and should be abandoned. Considering the dilemmas in dealing with the criminal justice system to help eradicate men's violence against women, Laureen Snider forcefully argues:

"...a strategy relying upon the criminal justice system is practically, theoretically and morally wrong. While the apparatus of government is too powerful to ignore, the criminal justice system is not a reliable ally. Entrusting more power to it means investing it with increased control over women's lives, control that is essentially invisible and unmonitored".¹³²

While recognizing the inherent dangers, many other feminist legal scholars advocate engagement with the law and law reform. Many have criticized instrumentalist and structuralist positions on law reform that emphasize the law as a tool of the ruling class by arguing that adhering to such notions of the state is overly deterministic. Such analysis "....deprives it [the state] of any social character and treats it instead as something like a physical fact external to the concrete individuals who create, apply, and are affected by it".¹³³ Carol Smart, although

¹³¹ As discussed by Stephen Brickey and Elizabeth Comack, supra note 127, at 101

¹³² As quoted by Elizabeth Comack, supra note 26, at 2

¹³³ Stephen Brickey and Elizabeth Comack, supra note 127, at 98-99. They have further argued that maintaining such an approach assumes that the ruling class (or men, or white persons) are homogenous in their (our) beliefs. At 98-99. They also make the point that replacing the class structure of the judiciary would not necessarily change how law is administered and they discuss the "relative autonomy" of law. Jane Ursel has also expressed scepticism with such analysis. She argues that there is an over-deterministic view of the state

seemingly opposed to feminist engagement with law reform per se, recognizes that when law is analyzed as more than a tool of the oppressors, it is possible to view law reform as another means of "liberation".¹³⁴

The most significant position in support of engaging with the law to promote change is that the legal system is already involved with issues such as men's violence against women and it already affects the lives of women on a daily basis.¹³⁵ As the legal system does effect women, often in a most oppressive fashion, we cannot simply assert that it is irrelevant and then ignore it.¹³⁶ Moreover, many feminists of colour have embraced the law as a necessity for promoting change. As Mari Matsuda has remarked:

"Unlike the post-modern critics of the left... outsiders, including feminists and people of colour, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice. Thus, to the feminist lawyers faced with pregnant teenagers seeking abortions it would be absurd to reject the use of an elitist legal system, to the use of the concept of rights, when such use is

as one-dimensional patriarchy and that it begs the question of what feminists should do in the meantime. As discussed by Elizabeth Comack, supra note 26, at 3. Stephen Brickey and Elizabeth Comack have offered an alternative to this approach. They stress that the law offers an important source for realizing change and argue for a "jurisprudence of insurgency". Jurisprudence of insurgency is defined as: "...a certain kind of jurisprudential activity in which a group challenging the prevailing system of social relations no longer seeks to reform it but rather to overthrow it and replace it with another". Stephen Brickey and Elizabeth Comack, supra note 127, at 105.

¹³⁴ She further comments that law can be a means of reproducing oppressive social order, can facilitate change and can be an obstacle to change. For her, law reform is both valued and undervalued as a means of achieving social change. Carol Smart, supra note 47, at 117.

¹³⁵ Elizabeth Comack makes this point in her discussion of the "battered woman's syndrome". Supra note 26, at 13.

¹³⁶ Julia Brophy and Carol Smart, supra note 52, at 1.

necessary to meet the immediate needs of her client".¹³⁷

However, many feminists legal scholars stress that law can not be perceived as a solution. As has been stated:

"...law....provides an important way of giving meaning to the world and of organizing social institutions and processes. Whilst law occupies this position, from which it can define women's sexuality in such an oppressive form, it cannot be ignored. It must be challenged most fundamentally, but we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains".¹³⁸

Feminist legal scholars who advocate working with the legal system recognize that law is but one of many potential mechanisms for promoting change and that abandoning the law would negate one method that can be used to challenge the status quo.¹³⁹

In regard to the uneven development of law, some feminist legal scholars argue that this can actually provide opportunity for the promotion of change through the legal system. Sherene Razack defends this position and argues that because there are "cracks" in the development of law, there are times when law reform can benefit women. She states: "[t]he legal challenge is only the tip of the iceberg, but it may well be that crack in the system through which alternate values

¹³⁷ Mari Matsuda, supra note 46, at 8.

¹³⁸ Carol Smart, supra note 46, at 49.

¹³⁹ Stephen Brickey and Elizabeth Comack, supra note 127, at 113. R.A. Samek also takes this position and argues that although law reform is not a panacea, it can play a useful role. Supra note 127, at 415 and 418. Carol Smart also discusses this point, supra note 47, at 111.

might seep".¹⁴⁰ Jane Ursel also takes this position by asserting that even though that state does not share the interests of feminists, there are moments that arise where interests overlap. She adds that it is the task of feminists to recognize when this potential arises and to take advantage of it.¹⁴¹

There are other rationales supporting feminist engagement with law reform. Stephen Brickey and Elizabeth Comack have argued that if law is abandoned as a potential source of change, there would be a loss of the protections that are, or can be, afforded by the legal system. Following from this, they also argue that deserting the law leaves the field open and uncontested for other political groups to make demands of the law, based solely on their perspectives and wishes. Stephen Brickey and Elizabeth Comack perceive that abandoning the law in this way would deny the significance of past struggles that have resulted in some positive change.¹⁴² It has also been asserted that law can be an important symbolic victory and can provide a means through which social transformation can be realized.¹⁴³

¹⁴⁰ Sherene Razack, Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991), at 130. She discusses other feminist legal scholars, Shelley Gavigan, Mary O'Brien and Sheila McIntyre, and comments that they have also referred to the need to explore the "cracks in law", at 26.

¹⁴¹ She further stresses that the criterion for measuring the successes or failures of law reform should be the impact on the lives of women. As discussed by Elizabeth Comack, supra note 26, at 3.

¹⁴² They present the work of women, natives, youth and prisoners for legal rights as examples of the struggles that would be diminished by abandoning law. Stephen Brickey and Elizabeth Comack, supra note 127, at 102-03.

¹⁴³ Judy Fudge has made this point in her discussion of the role of law and social transformation using the Canadian Charter of Rights and Freedoms, the labour movement and the women's movement. Supra note 46, at 61.

On another level, Carol Smart has proposed that while feminist engagement with law reform is ineffectual, feminists should continue to challenge the legal system by "de-centering" law. In this, it is her aspiration that the power of law to define women's truths be confronted and undermined.¹⁴⁴ She comments:

"... feminism needs to engage with law for purposes other than law reform and with clear insight into the problems of legitimating a mode of social regulation which is deeply antithetical to the myriad concerns and interests of women. Precisely because law is powerful and is, arguably, able to continue to extend its influence, it cannot go unchallenged. However, it is law's power to define and disqualify which should become the focus of feminist strategy rather than law reform as such".¹⁴⁵

2.5 NEED FOR REDEFINING AND EXPLORING OMISSIONS IN THEORY OF LAW REFORM

Throughout the debates on law reform, there is often a feeling of hopelessness, that we must await "the revolution" before real transformation can occur. And yet, we are rarely, if at all, provided with any indication of how this is possible.¹⁴⁶ This has led some feminists to propose that we need to go much farther, both in terms of feminist theories of law reform and in terms of recognizing

¹⁴⁴ Carol Smart states: "...it is law's power to define and disqualify which should become the focus of feminist strategy, rather than law reform as such". Supra note 46, at 88.

¹⁴⁵ Carol Smart, supra note 46, at 164. She also has commented: "...it is...important for feminism to sustain its challenge to the power of law to define women in law's terms. Feminism has the power to challenge subjectivity and to alter women's consciousness. It also has the means to expose how law operates in all its most detailed mechanisms. In doing this it can increase the resistance to law and may effect a shift in power. Whilst it is important that feminism should recognize the power that law can exercise, it is axiomatic that feminists do not regard themselves as powerless". Supra note 46, at 25. She has also commented that by succumbing to its authority, by "colluding with law's overinflated sense of itself", we accord law more power. Supra note 46, at 25.

¹⁴⁶ As commented by Stephen Brickey and Elizabeth Comack, supra note 127, at 102.

various dimensions of oppression. As Sherene Razack has commented:

"It will not be enough, as Gloria Anzaldua reminds us, "to stand at the opposite side of the river bank shouting questions". At some point we will have to define clearly our vision of the good life. To do so will require us as women to forget earlier feminist notions of an uncomplicated and unitary female subjectivity. All women are not oppressed in the same way and oppression is multi-faceted".¹⁴⁷

Strategies for change that do not recognize and incorporate various dimensions of oppression that women experience are just as problematic as the process of law reform itself. In fact, I would further argue that (white) feminists have assisted in the limited effectiveness of such initiatives by narrowly identifying the issues and suggesting legal solutions that inevitably have negative effects on women of colour and black women. Although many feminist legal scholars are referring to "women", it again seems as though it is really white women who are being considered. For example, when discussing how law plays a role in women's lives on a daily basis, we (white women) have apparently given little attention to how racism in law and in the legal system effects the lives of women of colour and black women on a daily basis. In addition, racism rarely, if ever, appears in discussions concerning the potential ability of law to be one agent of social change. The focus typically has been how a system that perpetuates and reproduces sexism can effect transformation.

This tendency has not gone unnoticed. Sherene Razack, for instance, has observed that white feminists have excluded the intersections of race, class and

¹⁴⁷ Sherene Razack, supra note 46, at 49

gender in our discussions and approaches to law reform.¹⁴⁸ She has further argued that there is no "...casual, unreflective use of culture in the courts" and as a result, there should not be any non-reflection in the debate concerning law reform.¹⁴⁹ In discussions pertaining to law reform, it is imperative to recognize that not all persons or political affiliations can equally challenge or engage with the state.¹⁵⁰ Indeed, as Mari Matsuda has remarked, the starting point of analysis should be the viewpoint of the oppressed.¹⁵¹ In order for any law reform initiative to have the potential to be successful, we have to go beyond recognizing the limits and dangers in this arena to expanding our strategies to include the experiences of all women.

4. CONCLUSIONS

The tools used by the law to silence, exclude and diminish all women should not be perpetuated within the women's movement; our movement purports to have as its core operating principle the emancipation of all of us and we need to adhere to this principle. To quote, as many have done, Audre Lorde:

"For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game. but they will never enable us to bring about genuine change". (emphasis

¹⁴⁸ Sherene Razack, supra note 46, at 33.

¹⁴⁹ Sherene Razack, supra note 82, at 920. She adds that (white) feminists must reflect not only on how law is used against "women" but how it is as against "racialized women".

¹⁵⁰ Elizabeth Comack makes this point, supra note 26, at 10.

¹⁵¹ Mari Matsuda, supra note 46, at 9.

hers)¹⁵²

Those of us who are in the (white) women's movement who are using such tools must remember that silencing, exclusion and misappropriation may allow us to temporarily make gains and to create a perception of solidarity, but they will never allow us to reach our goal.

In this chapter, I have discussed the many ways in which white feminists have not accounted for differences in women's experiences. One of the clearest illustrations of this is in the area of wife battering. In the next three chapters I will highlight how (white) feminists in pursuing a policy of mandatory charging ignored the reality of racism in the criminal justice system and did not incorporate the experiences of black women and women of colour who were battered by their male partners.

¹⁵² Audre Lorde, supra note 68, at 112

CHAPTER THREE

AN INTRODUCTION TO MANDATORY CHARGING POLICIES

Last night I heard the screaming
Loud voices behind the wall
Another sleepless night for me
It won't do no good to call the police
Always come late, if they come at all
And when they arrive, they say they can't
interfere with domestic affairs
Between a man and his wife
And as they walk out the door
The tears well up in her eyes.

Tracy Chapman¹⁵³

1. INTRODUCTION

Current understanding and knowledge regarding wife battering, as well as the social concern about this issue, are a direct result of the research and organizing of the women's movement¹⁵⁴ during the last twenty years.¹⁵⁵ With

¹⁵³ Tracy Chapman, "Behind the Wall", from the album Tracy Chapman, Elektra/Asylum Records, United States, 1988.

¹⁵⁴ I do not use (white) women's movement at this point because I do not think it has not just been white women who have been doing this the work on wife battering.

¹⁵⁵ As Barbara Finesmith has commented: "...interest in this social problem has grown along with the use of feminist consciousness". Barbara K. Finesmith, "Police Response to Battered Women: A Critique and Proposals for Reform" 14 Seton Hall Law Review 1, 1983, 74, at page 75. For a detailed account of the battered women's movement in the United States, refer to Susan Schechter, supra note 2 and for a Canadian account of the battered women's movement refer to Gillian A. Walker, supra note 2. In saying this however, I am not suggesting that the work against wife battering has only occurred in this period. Women have been struggling against wife battering for centuries. Refer to infra note 175. Although there has been much work on wife battering, the main focus of much of this work has been on white women. Our knowledge and understanding of wife battering needs to be expanded, explored and perhaps readjusted accordingly.

the strength and determination of women who have been battered, and the women who have worked with them, the movement against male violence against women was able to identify the rate and severity of wife battering¹⁵⁶, its devastating effects on women and their children¹⁵⁷, the attitudes and beliefs about the role and nature of women that perpetuate male violence against women, and the inadequate responses of all social systems and institutions.¹⁵⁸ With the knowledge and understanding drawn from women's experiences and realities of being battered, feminists¹⁵⁹ organized and demanded social reform. These struggles for change took many forms. Feminists and (other) advocates fought for shelters for women who are battered, state provision of support services and later, programmes for men who are abusive.¹⁶⁰

¹⁵⁶ In 1980, Linda MacLeod estimated that one in ten Canadian women were battered by their male partners every year, a figure that was consistent with the experience in the United States. Supra note 1, at 21. This figure is now considered to be a conservative estimate. The Ontario Women's Directorate has since estimated that one in four Canadian women will be battered by their male partners. As quoted by Felicite Stairs and Lori Pope, supra note 25, at 154. For information concerning the severity of wife battering and some of its forms refer to Lenore E. Walker, supra note 1, Linda MacLeod, supra note 1

¹⁵⁷ For a discussion of the effects of wife battering on children refer to sources in supra note 38 and the Report of the British Columbia Task Force on Family Violence, supra note 38, at 80.

¹⁵⁸ Refer to Susan Thomas Gilman, "A History of the Sheltering Movement for Battered Women in Canada", 7 Canadian Journal of Community and Mental Health 2, Fall 1988, 9, Susan Schechter, supra note 2 at page 31; and Gillian Walker, supra note 2

¹⁵⁹ I often use the terms "feminists" and the "women's movement" interchangeably. I use the term "battered women's movement" to refer more specifically to the struggle of feminists against wife battering.

¹⁶⁰ Refer to Gillian Walker and Susan Schechter, supra note 2. Also refer to Linda MacLeod, supra note 1, at 93-94. The first Canadian program for men who batter women was established in 1980. By 1984, there were 24 programs for men who batter women. As discussed by Timothy A.O. Endicott, "The Criminality of Wife Assault" 45 University of Toronto Faculty of Law Review 2, Fall 1987, 355, at 361. In 1989, it was estimated that there are over

Recently, work in this field has focused more on the relationship between wife battering and the state generally, and has specifically focused on the effectiveness of the criminal justice system in responding to wife assault.¹⁶¹ In this area, feminists and (other) advocates highlighted the ineffective responses of police officers to women who were battered by their intimate male partners. Through research, it was found that the response of police services to male violence against women in the home, until relatively recently, had largely been a response of non-intervention, lack of concern and an abdication of the criminal law.¹⁶² When a woman called the police for help because she was being

100 programs for men who batter women. As discussed by Linda MacLeod, supra note 32, at ii. There are various types of approaches for working with men who batter women and accordingly, differences in their effectiveness. For a discussion of approaches and effectiveness of men's programs, refer to David Adams, "Treatment Models of Men Who Batter: A Profeminist Analysis", in Michele Bograd and Kersti Yllo (eds.) Feminists Perspectives on Wife Abuse (Beverly Hills, California: Sage Publications, 1988) 176; and Nanci Burns, Colin Meredith and Chantal Paquette, "Treatment Programs for Men Who Batter: A Review of the Evidence of Their Success" (Ottawa: Department of Justice, July 1990).

¹⁶¹ Of course, the state response to violence against women has long been a concern of advocates of women. Refer to Gillian Walker, supra note 2 and Jennie Abell, supra note 26, at page 235. For discussion regarding violence against women and the criminal law, refer to Elizabeth Sheehy, supra note 46 and Christine Boyle et al, supra note 6. For a discussion concerning the omissions of race analysis in this last reference, refer to Marlee Kline, supra note 31.

¹⁶² Workers in this field have long recognized the problems in the legal system's response to wife battering; police officers throughout North America have been criticized for their inadequate procedures and poor attitudes in cases of wife battering. Peter Jaffe and Carole Anne Burris, supra note 8, at page 26; and Carole Anne Burris and Peter Jaffe, "Wife Battering: A Well Kept Secret" Canadian Journal of Criminology 1984, 171. This has led one writer to comment that in effect, police simply did not police male violence against women in their homes. Jennie Abell, supra note 26, at page 237. Similarly, another writer has concluded: "[t]he use of physical violence in families has been condoned by...the criminal justice system, often locking a women into a brutal marriage". Donald Dutton, as quoted in Garet McGraw, "Wife Assault" 16 Canadian Forum, December 1983, at page 1

battered, she could never be sure that they would actually attend the call.¹⁶³ If they did arrive at the door, a woman could not be sure that they would effectively intervene and stop the battering. Sometimes women would find that the police officers bonded with the male batterer and took him outside to "cool down."¹⁶⁴

As Susan Schechter, in discussing the United States experience, comments:

"At the beginning of the movement, battered women complained frequently that the police simply would not come when called. If they did come, they would refuse to arrest, saying: "There's nothing we can do. It's a family matter; go to Family Court tomorrow". Or they would side with the husband, walking him around the block joking with him about the violence. Police refused to escort women to hospitals or to wait and protect them as they gathered their children and clothing. Continually looking through sexist blinders, the police failed to acknowledge that this victim was often frightened and intimidated because she lived with her assailant."¹⁶⁵

These types of responses from the police reinforced the man's belief that she deserved his attacks and that he was justified in his actions.

Other times, women were directly confronted with misogynist attitudes and remarks and were accused of wasting the police officer's time, such as being told

¹⁶³ When the lack of response of police officers was first being identified, one of the most frequent complaints of battered women was that police did not respond and if they did, they were not helpful. Refer to Mildred Daley Pagelow, "Application of Research on Spouse Abuse to Policy" Paper Presented for Presentation at the Third National Family Violence Research Conference, Durham, New Hampshire, July 7, 1987, at page 5. Also refer to Donald Dutton, who has found that police often would give calls of this nature a "priority two" basis - that is, the call was perceived as not needing an immediate and quick response. "The Criminal Justice Response to Wife Assault" (Ottawa: Solicitor General of Canada, 1984), at page 7.

¹⁶⁴ Mildred Pagelow describes the non-arrest policy of police services and how the duty was often perceived as one of "cooling down" these "lovers' quarrels by adjustment without arrest". *ibid.*, at 5.

¹⁶⁵ Susan Schechter, *supra* note 2, at 158

that it was not their job to be involved with relationship problems.¹⁶⁶ At other times, police officers did believe that an assault had occurred. However, unlike their response to other crimes, police officers in these circumstances often told the woman that she would have to press charges and that there was nothing the police could do. This again reinforced that what had just happened to her was not really a crime and, in essence, did not matter.¹⁶⁷ While there were times when police officers demonstrated support for the woman, made referrals, provided her with transportation to a safe place and did arrest or charge her battering partner, this type of response was very rare.¹⁶⁸

The women's movement responded to these atrocities by demanding changes to the criminal justice system, particularly in relation to police responses to wife battering. Although demands for reform of police practices were not the only site of contention, these changes were considered particularly important.¹⁶⁹

¹⁶⁶ Mildred Pagelow described police officers referring to calls about wife assault as "nuisance" calls. Supra note 163, at 5.

¹⁶⁷ In one study, Peter Jaffe and Carole Anne Burris found that police officers instructed women to lay their own charges in 62% of the calls they attended. Supra note 8, at 14. This study will be discussed further in this chapter.

¹⁶⁸ When arrests did occur, it was often because there was "serious" injury, the use of a weapon, an offensive attitude, repeated calls or a high probability of the battering being repeated - as determined by police officers. As discussed by Donald Dutton, supra note 163 at 17.

¹⁶⁹ The lack of adequate or effective intervention by police officers has been but one focus of feminist criticism with the legal system's treatment of women who are or have been battered by their male partners. Feminists have also struggled against the response to male violence by justices of the peace, prosecutors, defense lawyers and judges. Feminists have also struggled to secure a defense for women who have killed their battering partner. At these levels, women were again confronted with sexist attitudes and beliefs and a lack of concern or action. For references concerning the wider criminal justice system refer to Elizabeth Shuchty, supra note 46. In regards to criminal defenses and the "battered woman syndrome", refer to

The police are usually the first contact of the criminal justice system for women and in effect, set the entire system in motion. As Barbara Finesmith has commented:

"Police response at the scene of the assault is usually society's first formal response to the problem and may be the beginning - or the premature end of intervention by society and the justice system".¹⁷⁰

The importance of the police response is further emphasised in recognition that calls from women who are battered account for the largest category of requests for police assistance.¹⁷¹ This is so even though it is known that the vast majority of women who have been battered do not call on the police for help.¹⁷²

In this chapter, I will provide more detail about police responses to women battered by their male intimates and the rationales giving rise to these responses.

Christine Boyle, supra note 26; Christine Littleton, supra note 26, and Elizabeth Comack, supra note 26. In relation to prosecutors, refer to Ann McGillivray, "Battered Women: Definition Models and Prosecutorial Policy" 6 Canadian Journal of Family Law 1987, 15, Michael D.A. Freeman, "Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem" 3 Canadian Journal of Family Law 1980, 377, and Jane E. Ursel, "Examining Systemic Change in the Criminal Justice System: The Example of Wife Abuse Policies in Manitoba" 19 Manitoba Law Journal 1, 1990, 529. For discussion regarding judges, refer to Christine Boyle et al, supra note 26 and Manitoba Association of Women and the Law, Gender Equality in the Courts Criminal Law March 1991. However, these works that are cited do not simply address one area or the role of one agent in the legal system. The problems are interrelated and systemic in nature. The work of wife battering and the law is often contextualized in the broader, systemic nature of male violence against women and within the context of the criminal justice system more generally.

¹⁷⁰ Barbara Finesmith, supra note 155, at 76.

¹⁷¹ Donald Dutton, supra note 163, at iii.

¹⁷² Peter Jaffe and Carole Anne Burris found in one study that on average, a woman had been beaten 35 times before she called the police. Supra note 8, at 22. Donald Dutton estimates that less than 10% of actual incidents of wife assault are called in to the police. Donald Dutton, supra note 163, at iii.

I will discuss feminists' demands for mandatory charging and the research relied upon to support these demands. I will also highlight and explore some of the inconsistencies in the arguments utilized by advocates of arrest policies in the early 1980's. In this chapter, the policies themselves will also be explained.

Through this examination, it becomes clear that the research supporting mandatory charging policies operated from the perspective, whether conscious or unconscious, that the experiences of white women with police intervention could be taken as the basis for all women's experiences. There was no apparent attempt to include or explore the experiences of women of colour and black women with police intervention. It also becomes evident that this research was embraced by many women's advocates without challenging the problems with the studies or the omission of the experiences of women of colour and black women. Feminists also embraced research and supported mandatory charging policies in spite of all that was (is) known about the limits, and the often negative impacts, of law reform.

2. CONTEMPORARY POLICE RESPONSES TO WIFE BATTERING

Ideally, this section would begin with an overview of the history of the legal system's responses to wife battering and the responses of women to this treatment.¹⁷³ Indeed, the chronology of the legal system's response warrants comprehensive analysis. Its history is replete with revealing and disturbing

¹⁷³ Many writers chose to discuss the law's historical treatment of wife battering as a method to contextualize and illustrate what women were confronted with, both in terms of reform movements and women who were battered. For instance, Barbara Finesmith, *supra* note 155, Linda MacLeod, *supra* note 1, and Zoe Hilton, *supra* note 14.

testimony of the lack of care for women who were battered. The history of women's struggles against the legal system abounds with testimonies of women's strength, courage and dedication.¹⁷⁴ Additionally, the history of the legal system's responses can be revealing in its resemblance to contemporary approaches to wife battering.¹⁷⁵ However, a comprehensive analysis is way beyond the scope of this paper and this section begins with a discussion of more contemporary police responses to wife battering. Before proceeding to this discussion, I again stress the importance of a historical contextualization and encourage further exploration in this area.¹⁷⁶

¹⁷⁴ The struggle against male violence against women has been alive for hundreds of years, even though it is sometimes presented as though women have only been actively resisting male violence in the last 25 years. One example of this resistance can be found within the often cited rule of thumb doctrine, which permitted men to beat their wives with a weapon, such as a stick or branch, as long as it was no wider than their thumb. Although this is an example of the law's tolerance to wife battering, Linda Gordon argues that at the same time, it can be appreciated as evidence of women's resistance. She suggests that this regulation was the effect of women fighting for their right to be protected against a certain level of excessive violence. Linda Gordon, *supra* note 52, at 26. There was probably more resistance from women to wife battering and the law's response than has been documented. As Jennie Abell has commented, "...given what feminists have established about the way women's history has been obscured, it seems likely that there have been more resistance than that already documented and that apparently isolated examples of struggle had a backdrop and context that has not necessarily been elaborated fully" Jennie Abell, *supra* note 26, at 228. For a discussion of the "rule of thumb", and a wonderful account of women's resistance in Boston, refer to Linda Gordon, *supra* note 52 at 26 and Wini Breines and Linda Gordon, "The New Scholarship on Family Violence" 8 *Signs: Journal of Women in Culture and Society* 3, Spring 1983, 490.

¹⁷⁵ For example, of form \ ; the historical "rule of thumb", appears to be in operation today. Linda Davies has explained that it is not uncommon to hear someone, such as a probation officer, question why a man was charged for "just pushing", or commenting that police officers are charging for "everything now". As Linda Davies succinctly commented, this is much akin to the historical rule of thumb. Certain actions of violence committed by men against women are still being considered, by some people within the legal system, acceptable and are considered beyond the appropriate realm of the law. Personal communication.

¹⁷⁶ It is with great reluctance that I exclude an historical exploration. I would refer the readers to the following sources: Linda Gordon, *supra* note 52; R. Emerson Dobash and Russell Dobash, *Violence Against Wives* (New York: Free Press, 1979); Shelley Gavigan "Petit

2.1 POLICE RESPONSES

The contemporary response of police officers to wife battering in Canada essentially was not to respond. Many police departments, both officially and unofficially, dictated a policy based on minimal intervention and avoidance of arrest when they were called for assistance.¹⁷⁷ Many police officers responded with attempts at informal conflict resolution and often identified with the men who were battering women. Many police officers further held women responsible for men's violence.¹⁷⁸ As a result, many police officers refused to lay criminal charges and at best instructed women to lay their own charges.¹⁷⁹ Indeed, many police

Treason in 18th Century England: Women's Inequality Before the Law" 3 Canadian Journal of Women and the Law 335, 1989-1990; Frances Power Cobbe, "Wife Torture in England" in Jill Radford and Diana E.H. Russell, (eds.) Femicide: The Politics of Women Killing (New York: Twayne Publishers, 1992), 46; Elizabeth Pleck, "Feminist Responses to 'Crimes against Women', 1868-1896" 8 Signs: Journal of Women in Culture and Society 3, Spring 1983, 451; and Jennie Abell, supra note 26, at 226. For a discussion of the brutality of wife battering in terms of early divorce cases refer to Constance Backhouse, "19th Century Canadian Marriage" McGill Law Journal 1986, 264; and Constance Backhouse, Petticoats and Prejudices: Women and Law in Nineteenth-Century Canada (Toronto: Women's Press, 1991). For a discussion of religion and the law, refer to Kathleen A. MacDonald, "Battered Wives, Religion, and the Law: An Interdisciplinary Approach" 2 Yale Journal of Law and Feminism 1990, 251.

¹⁷⁷ Peter Jaffe and Carole Anne Burris, supra note 8, at 28

¹⁷⁸ Barbara Finesmith, supra note 155, at 85. Also refer to Linda MacLeod, supra note 1, at 38.

¹⁷⁹ In one study, discussed later in this section, it was found that women laid their own charges 5 times more than the police. Carole Anne Burris and Peter Jaffe, supra note 12, at 309. The problems with women having to lay their own charges include that women were forced to hold the men who battered them accountable for his actions and that many men threatened and harassed women into dropping charges. This was often exacerbated when police officers would ask women if they wanted to have charges laid, especially when they would ask this question in front of the man that had just battered her. Moreover, when a woman was instructed to lay a charge herself, legally known as a "private information", she had to go to a Justice of the Peace who then decided if grounds existed, if a charge should be laid, what type of charge, when it was to be heard in court, what court and whether there would be a warrant or summons for the batterer's appearance. The woman then had to go to the police station for an interview where a police officer recorded the details of the assault. As discussed by Peter Jaffe and Carole Anne Burris, supra note 8, at 7. Women who laid a

services did not regard "wife assault" as "police work" at all.¹⁸⁰ As has been quoted:

"He (sic)¹⁸¹ (the officer) believes that his (sic) job is to quiet things down, to avoid making an arrest, to keep the matter unreported, and to settle the problem without resorting to criminal charges, the court, or lawyers."¹⁸²

The treatment wife assault as a "non-criminal" matter has been part of the informal permission given to men to continue their violence.

Police officers had a number of alternatives, ranging from arrest to referral, in how they could have responded to wife battering situations.¹⁸³ Their choice to regard their role as "cooling down" a "private family squabble" makes a clear

private informations faced a wide array of obstacles. Women were continuously threatened by the batterer and were met with negative attitudes by the legal system's personnel. For instance, Peter Jaffe and Carole Anne Burris found that Justices of the Peace often encouraged women to "cool down" before going through with a charge. Supra note 8, at 17

¹⁸⁰ Peter Jaffe and Carole Anne Burris, supra note 8, at 28. Prior to 1983, the Ontario Police College manual described the approach to incidents of wife assault as part of their "non-criminal order maintenance duties" Monica Ruitort and Shirley Endicott Small, Working With Assaulted Immigrant Women: A Handbook for Lay Counsellors (Toronto: Education Wife Assault, April 1985), at 4

¹⁸¹ (Sic) is often used to mean "spelling in context" I prefer to think of it as "sexism in context".

¹⁸² R. Langley and R. C. Levy, Wife Beating: The Silent Crisis (New York: Robert Brooks, 1979), at 175, as quoted by Peter Jaffe and Carole Anne Burris, supra note 8, at 26.

¹⁸³ Peter Jaffe and Carole Anne Burris, supra note 8, list a number of responses police officers could have chosen. Police officers could have: 1) arrested when sufficient evidence was established that assault causing bodily harm had occurred or when it was needed to prevent a further assault or to ensure the assailant appeared in court; 2) charged the assailant with assault causing bodily harm with no arrest; 3) advised the woman of her options to lay a charge with the Justice of the Peace 4) arrested the man even if they were not sure an assault had occurred by having reasonable and probable grounds to believe that a breach of the peace was likely to have continued under section 31 of the Canadian Criminal Code; 5) attempted to mediate and ask one of the persons to leave; 6) referred the woman to another agency; 7) have taken no further action. At 6-7.

statement of how they viewed the problem.

In order to find out more about the responses of police to wife battering situations, Peter Jaffe and Carole Anne Burris researched the actions of police officers in London Ontario, from January to June of 1979. The results of this inquiry had dramatic effects in terms of prompting the London police department to initiate its own charging policy and subsequently in terms of charging policies across Canada.¹⁸⁴

During the period that was researched, the London police department received 228 calls for assistance. Police officers laid charges in only 4% of these calls, even though in 20% of the cases the woman was advised by the officer to seek medical assistance.¹⁸⁵ This study concluded that the police laid very few charges, in spite of serious injuries, that it was the responsibility of women to find their way through the legal system with minimum support, conflicting policies and few consequential results and that women were treated as second class citizens with few rights and no advocates in the legal system.¹⁸⁶

¹⁸⁴ Peter Jaffe and Carole Anne Burris, supra note 8. The impact of this research and the follow up studies will be discussed later in this chapter.

¹⁸⁵ Peter Jaffe and Carole Anne Burris, supra note 8, at 9 and 21. 222 of these cases involved kicking, biting and hitting with fist. It is not unusual for women to be injured to the point of needing medical attention. In one study by Solicitor General of Canada, 15% of women who were battered were incapacitated for up to 5 days, 19% for 20 days and 18% for 3 weeks or more. As discussed by the Canadian Advisory Council on the Status of Women, supra note 32, at 10. Many women suffer permanent injuries, such as back injuries and hearing loss, as a result of being battered.

¹⁸⁶ Peter Jaffe and Carole Anne Burris, supra note 8, at iii. Other interesting findings include that the battering men had extensive involvement with the police for a variety of reasons before and after this call; 19% of these cases where charges were laid proceeded to court; 1/5 of the cases were dismissed and 1/5 were withdrawn; and 13% of the defendants received a term of incarceration or a fine.

Although many women chose not to call the police, other women did who were in situations where they wanted police assistance.¹⁸⁷ Peter Jaffe and Carole Anne Burris found that when women did call the police, they hoped that the officer would be able to terminate the violence, provide her with protection, remove the man from the home, arrest and charge him and send a clear message to the batterer that he does not have the right to beat her.¹⁸⁸ However, as discussed above, these were rarely the actions that were taken and rarely the message that was given.¹⁸⁹ There is no doubt that these police responses to wife battering caused detrimental effects. Women's need for assistance, support and

¹⁸⁷ Many women did not want the criminal justice system involved and did not consider it to be a solution to the battering. Refer to Linda MacLeod, *supra* note 1, at 38. However, some women do want this type of intervention and have long wanted this type of intervention. In studying the lives of women in Boston during 1880-1960, Gordon found that the police were active in the nineteenth century in wife assault and were frequently being called. Linda Gordon, *supra* note 52, at page 280. As can be expected, the police response to the calls was almost always unsatisfactory. As with recent history, police officers identified with the husband, trivialized his assaultive behaviour, and physically removed men from the home for a short period of time in an attempt to calm him down. The police often simply refused to respond to women's calls and at the most they would charge him with drunkenness and disorderly conduct. Linda Gordon, *supra* note 52, at page 280. The issue of what women wanted when they called the police, and how many women wanted to call the police, will be discussed later in this chapter.

¹⁸⁸ As discussed by Carole Anne Burris and Peter Jaffe, *supra* note 12, and Peter Jaffe and Carole Anne Burris, *supra* note 8, at 26. In the first study, 2/3 of the women said they wanted the abusive man removed from the home and/or arrested and 61% wanted assault charges laid.

¹⁸⁹ It has been noted that arrests were more likely to happen when there was "serious injury", use of a weapon, an offensive attitude on the part of the man or the woman, repeated calls for assistance, and a high probability of an assault being repeated. Refer to Donald Dutton, *supra* note 163, at 17. The problems with this being the case are, of course, that it is the police officer who decides what is serious, men do not need to use "weapons" to cause bodily harm, women are beaten a number of times before they call the police and given what is known about wife battering, there is always a high probability that an assault will occur. In addition, one study found that a serious injury was determined by some forces using the "6 stitch rule". In this case, if a wound required six or more stitches an arrest was made. As discussed in Linda MacLeod *supra* note 1, at 38-39, and Donald Dutton, *supra* note 163, at 12.

understanding were rarely met and women were given the message that an assault against her was not important and furthermore, that she probably caused the violence.¹⁹⁰ In contrast, a battering man was often given the message that he had a right to hit his partner and that he would not be held responsible for his actions.¹⁹¹

2.2 RATIONALES FOR POLICE RESPONSES

Numerous explanations have been put forth to explain the lack of adequate response from police officers.¹⁹² Attitudes and beliefs about women, the sanctity of the family and the appropriateness of male violence have been cited repeatedly "...as perhaps the most significant problems responsible for creating and maintaining the violence, and for the lack of appropriate remedies for the problem".¹⁹³ Donald Dutton, for example, holds that "certain widely held beliefs about family violence" are one of the main reasons why police do not arrest or lay charges in cases of wife battering.¹⁹⁴ As Linda MacLeod has commented:

"The officer's effectiveness may be... compromised because police are also members of the wider society and... shares general beliefs about the privacy and peace of the family and the women's role

¹⁹⁰ For a discussion of this, refer to Linda MacLeod, supra note 1, at 38 and Peter Jaffe and Carole Anne Burris, supra note 8, at 27

¹⁹¹ Carole Anne Burris and Peter Jaffe, supra note 12, at 310.

¹⁹² Barbara Finesmith comments that none of reasons put forth would ever hold against stranger assaults. Supra note 155, at 85

¹⁹³ Barbara Finesmith, supra note 155, at 83.

¹⁹⁴ Donald Dutton, supra note 163, at 1.

within the family".¹⁹⁵

Peter Jaffe and Carole Anne Burris have added that many police officers believe that violence is a normal male response when women behave insubordinately.¹⁹⁶ For example, in a well publicized case, an officer was quoted as saying: "If it had been my house, I would have beaten my wife for the condition it was in".¹⁹⁷

The belief that police officers are at most risk for death or injury when they are responding to a "domestic disturbance" has often been used to explain officers' reluctance to intervene. During the 1960's and 1970's, this belief was widely articulated and soon became readily accepted. For instance, Donald Dutton ranked this perceived danger as the number one reason why police officers were reluctant to respond.¹⁹⁸ However, many researchers have since

¹⁹⁵ Linda MacLeod, supra note 1, at 38. Barbara Finesmith also cites reference to a Detroit Police Manual, which dictates that police officers should "'recognize the sanctity of the home" and diplomatically end the "disturbance without making an arrest" (emphasis hers) Supra note 155, at 84. She also cites another police manual from the Ohio Police Department "...officers may consider the possibility of an arrest as a workable method of helping the family". Supra note 155, at 85.

¹⁹⁶ Peter Jaffe and Carole Burris, supra note 8, at 27. Another author has commented: "Traditionally the attitudes and policies of the legal profession have reflected an accepted bias: keep the family together at all costs - including the wife's sanity or even her life" Gareth McGraw, supra note 162, at 2.

¹⁹⁷ This case was publicized in a Calgary newspaper. As discussed by Linda MacLeod, supra note 1, at 38. One police commander in Detroit recognized the impact attitudes about women have on the activities of the legal system. "It is my view that police, and later prosecutors and courts, contribute to domestic violence by their laissez-faire attitudes toward what they view as essentially a "personal problem". This is made even more problematic because police are socialized to regard females in general as subordinate" As quoted by Susan Schechter, supra note 2, at 158.

¹⁹⁸ Donald Dutton, supra note 163, at 1. Both Dutton and Linda MacLeod have cited the statistic that between 1961 and 1973, 14.6% of the 41 police officers killed in Canada were killed while intervening in "family disputes". Linda MacLeod comments, "Many men are incensed that the police have been called and become more violent both towards their wives and towards the police officers" Linda MacLeod, supra note 1, at 38.

demonstrated that this claim, and the perceptions on which it is founded, are inaccurate. In one study, robbery calls were consistently more dangerous in terms of the threat to police officers' lives than calls for wife assault.¹⁹⁹ Desmond Ellis, in his study on the dangerousness of responding to wife assault calls, found that the proposition that police officers are in imminent danger of being killed when they attend "domestic disturbances" was based on studies with inaccurate data and statistics that did not support such a conclusion.²⁰⁰ From his research, she concludes that "...attending domestic disturbances calls is nowhere as near hazardous an undertaking as we have all been led to believe" and concludes that "...for the past twenty years, the risks of death and injury to police officers attending domestic disturbances have been greatly exaggerated".²⁰¹ Mildred Daley Pagelow, in discussing this "favourite myth", further argues that police officers, who are always at some risk in their duties, were particularly reluctant to put themselves at risk in responding to wife assault because they often viewed these situations as "nuisance" calls.²⁰² The refutation of this claim has had important implications for the change in police response.²⁰³

Another rationale that was given to explain why police officers did not arrest

¹⁹⁹ As discussed in Mildred Daley Pagelow, supra note 155, at 7.

²⁰⁰ Desmond Ellis, "Policing Wife-Abuse: The Contribution Made by 'Domestic Disturbances' to Deaths and Injuries Among Police Officers" 2 Journal of Family Violence 4, 1987, 319, at 324.

²⁰¹ Desmond Ellis, ibid at 320 and 324.

²⁰² Mildred Daley Pagelow, supra note 163, at 6.

²⁰³ Also as discussed by Mildred Daley Pagelow, supra note 163, at 7.

men who battered women was the concern that an arrest would lead to further violence. Many police officers believed that by placing a man who was abusive under arrest, they would be intensifying an already emotionally charged situation and exacerbate the abusive behaviours rather than diminishing or preventing the violence.²⁰⁴ Although this could be perceived as reflecting a concern for the woman's safety, it becomes suspect in recognition of other police practices related to wife battering, such as siding with the batterer and holding the woman who was battered accountable for his actions. In addition, this is rarely a concern in other serious crimes of violence.²⁰⁵ There was no consideration given to what would happen to the woman in the future if there was no intervention. To treat men's violence as simply retaliatory ignores what women have known for years. Men who batter women do not need any "excuse" to be violent: men choose to batter women at any time, of any day, under a variety of circumstances and their violence usually increases in frequency and severity.²⁰⁶

²⁰⁴ As discussed by Donald Dutton, supra note 163, at 14. He also mentions that it seemed to be a concern of police officers that an arrest may be the cause of a break up in the relationship. There was no research to support the conclusion that men's violence would be intensified. Desmond Ellis Supra note 200, at 331. This will be discussed further in the next section of this chapter.

²⁰⁵ Kathleen Waits makes the point that whether an arrest is an effective deterrent is not considered in other crimes of violence. "The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions" 60 Washington Law Review 1984-85, 267, at 302.

²⁰⁶ Maria Pastoor also discusses this point. "Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws" 2 Law and Inequality: A Journal of Theory and Practice 1984, 557, at 594. For a discussion on how men's violence against their female partners usually increase in terms of frequency and severity, refer to Deborah Sinclair, Understanding Wife Assault: A Training Manual for Counsellors and Advocates (Toronto: Publications Ontario, 1985), at 19 and Lenore Walker, supra note 1, at 19.

Research has also found that police have traditionally been reluctant to lay charges because women later wanted the charges withdrawn anyway and laying charges was thus perceived as a waste of their time.²⁰⁷ Unlike other excuses, however, the hesitance of police officers to lay charges out of this concern was based in reality. Often, women would want the criminal charges against their male partners withdrawn. There were a number of reasons why a woman might want the charges dropped, including that she did not want him to go to jail, she was economically dependant and/or she had little or no supports.²⁰⁸ More often than not, crown prosecutors honoured women's requests to have charges dropped.²⁰⁹ However, there does not appear to have been much analysis of why women might want the charges withdrawn. This rationale seems to be more about blaming the woman for her lack of response than attempting to understand the situation she was in.

Lack of support from other agents in the criminal justice system has been cited as a primary reason why police officers were reluctant to lay charges. Police

²⁰⁷ Refer to Donald Dutton, *supra* note 163, at 1, and Garet McGraw, *supra* note 162, at 2.

²⁰⁸ Peter Jaffe and Carole Anne Burris, *supra* note 8, found there to be a number a factors why women did not want to proceed with charges. They included: women being emotionally and legally attached to the men who battered them; women were economically dependant; the man was the father of their children; women were still living with the man; no personal support system; women had low self-confidence and were depressed as a result of the battering; women had previous negative responses with the legal system; and women felt helpless and ill prepared to deal with the criminal justice system alone. (31). It does not appear that there was a race analysis integrated into this appraisal. Given what is now known about the fears women of colour and black women have of racism in the criminal justice system and police brutality against their partners, these considerations might also have impacted on women's wishes to have the charges withdrawn

²⁰⁹ For instance, in 1983, 41% of all wife assault cases were dropped by the crown because the woman refused to testify. Jane Ussel, *supra* note 14, at 173.

officers were not alone in their belief that violence against women is less serious than other crimes of violence. Crown attorneys often attached a low priority to wife assault cases and often themselves chose to drop the charges against men who battered. These practices may have led police officers to feel their "efforts were in vain".²¹⁰ As Susan Schechter has discussed, prosecutors considered these cases a bother, demanded proof of severe injury, a promise to follow through from the woman who was battered, and character checks to verify her credibility.²¹¹ Further, when charges did reach a courtroom, judges usually dealt with men who battered leniently, rarely imposing stiff penalties.²¹² According to Linda MacLeod:

"A judge will not send a man with a good salary to prison and put his wife on welfare. In terms of our social values, his capacity to earn money is of greater weight than the probability that he will injure his wife".²¹³

²¹⁰ Donald Dutton, supra note 163, at 8.

²¹¹ Susan Schechter, supra note 2, at 166

²¹² Donald Dutton, supra note 163, at 3. He also adds that judges did not want to break up the family unit and that there were no penalties for breaching a restraining order. Susan Schechter has noted that many women witnessed the charges reduced or withdrawn by prosecutors hearing them and judges with their constant taunts "you don't want to lock him up, he will lose his job, your kids need a father". Susan Schechter, supra note 2, at 166

²¹³ Linda MacLeod, supra note 1, at 38. She further notes: "Not only do police know that many families will suffer loss of financial support if the husband is imprisoned and that many men will retaliate against their wives when they are released, they also know that if the husband is arrested he will probably be promptly released from custody under the provisions of the Canadian Criminal Code and also that the sentences handed down against him will likely be very lenient". At 39. There were other rationales put forth by police officers to explain their "non-response" to wife assault. For instance, police did not want to intervene because they received either no or very little training about wife battering and appropriate police responses - in spite of the fact that "domestic disturbances" represented the majority of calls for assistance. As discussed by Peter Jaffe and Carole Anne Burris, supra note 8, at 26, and Garet McGraw, supra note 162, at 1. Peter Jaffe and Carole Burris found that police officers only received a few hours of training on wife battering and in one study of police attitudes concerning wife assault, police officers themselves expressed the need for clearer policies, direction and training. As discussed by Peter Jaffe and Carole Anne Burris, supra note 8, at

An appraisal of police responses to wife battering and the explanations given for non-intervention clearly reveals a response that is very different from the police response to other crimes. Women who were being battered by men they lived with very soon learned that calling the police was not a solution to their situation. Many women also determined that by calling the police they may be caused more pain. Society received the message that this form of violence was acceptable. As Barbara Finesmith has commented:

"Indeed, it is clear that a non-arrest policy conveys the unintended message that society's standards do not include protection of women from their violent spouses, and more importantly, suggests that battering is a socially acceptable form of behaviour".²¹⁴

2.3 IMPETUS FOR THE IMPLEMENTATION OF MANDATORY CHARGING POLICIES

When the realities of women who were battered and called the police for protection were exposed through the work of feminists and other advocates who worked with women who were battered, feminists raised an outcry and demanded change. Feminist advocacy and struggle for reform in the legal system took many forms and a number of strategies were utilized to procure changes in police and

26. In addition, it has also been found that police officers do not particularly want to respond to calls of wife assault because there were no rewards for handling these cases and no promotions based on their responses; responding to wife assault calls was associated with social work. As discussed by Donald Dutton, supra note 163, at 8 and 9. Peter Jaffe and Carole Anne Burris cite another study where police officers reported they did not want to respond to these calls because they did not provide any personal satisfaction. Supra note 8, at 27.

²¹⁴ Barbara Finesmith, supra note 155, at 104. I am not convinced that the message was "unintentional".

prosecutorial procedures. In the legal arena, feminists advocated and lobbied for directives encouraging crown attorneys to vigorously prosecute cases of wife assault and for legislation that mandated police to arrest batterers.²¹⁵ Feminists' dissatisfaction with legal responses to wife battering also manifested itself in a variety of law and social reviews, articles and feminist writings.²¹⁶

One of the most important demands of the battered women's movement, in terms of the subsequent attention and response it received, was the demand to have wife battering taken seriously as a crime.²¹⁷ Feminists and (other) advocates insisted that the law convey the message that the use of physical force against women by men, regardless of the relationship, is intolerable. Women's

²¹⁵ Jennie Abell, *supra* note 26, at 237. Jennie Abell comments: "Demands have been made that violence against women be treated as a crime, that the law be redefined, that the 'law as it works' be evaluated, that shifts be made in the personnel of the criminal justice system (in police, in prosecutors, and in judges), that education be provided to encourage shifts in attitudes, and that strategies and resources be provided to enable women to escape violence (e.g. shelters, self-help groups)". At 230. Also refer to Elizabeth Sheehy, *supra* note 46 and to Linda MacLeod, *supra* note 2, at 78-79. In the United States, a number of law suits were filed against police departments for failing to protect women from battering men. In one case, a woman filed suit against the New York police department and challenged its non-arrest policy. The Supreme Court of New York ruled that police officers have a duty to protect battered women. For a discussion of *Bruno v Codd*, refer to Barbara Finesmith, *supra* note 155, at 86. For a discussion of other cases filed against police departments, refer to Amy Eppler, "Battered Women and the Equal Protection Clause. Will the Constitution Help Them When the Police Won't" 95 *The Yale Law Journal* 1985-86, 788-809; and Joan Zorza, "Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies" 23 *New England Law Review* Summer 1994, 929, at 934.

²¹⁶ Barbara Finesmith, *supra* note 155, at 86. This is evidenced by the extensive feminist literature now available critiquing the legal system's response to wife battering.

²¹⁷ Susan Schechter, *supra* note 2, at 159. In essence, it seems the battered women's movement was fighting to have wife battering regarded as a public issue and not a private matter. She adds that "...parts of the movement asserted that because this victim lives with her victimizer and faces recurrent intimidations and danger, police arrest powers should be expanded". For a discussion about the public/private distinction in law and how this effects the legal treatment of wife abuse refer to Jennie Abell, *supra* note 26.

organizations argued that women who are battered must be able to expect an appropriate response from police officers when they call for assistance; that the onus of holding men accountable for their violence should rest with the state - not individual women.²¹⁸ By insisting that the law reflect such a principle, it was hoped that battering men, police officers, society in general and women who were battered, would receive the message that men's violence against women is wrong and socially unacceptable.²¹⁹ It was also hoped and believed, relying on the results of research studies, that charging men who batter would act as a deterrent to future violence.²²⁰ Feminists were turning to the law for more than a response to a crisis; feminists were engaging with the law for its ideological function, its power to educate and effect change in social attitudes, to signal the importance of the issue and to challenge and undermine current beliefs.²²¹

To expose the realities of the legal system's response to wife battering and to support feminist demands for change, advocates for women conducted research on the effects of police policies directing intervention. Researchers

²¹⁸ Linda MacLeod, supra note 1, at 47. In January 1980, the Canadian Advisory Council on the Status of Women demanded that the criminal justice system recognize that wife assault is a crime. They recommended that any direction in reform must reflect this, regardless of whether the assault occurs within or outside the home, and that victims of this form of violence have the right to police protection. As discussed by Linda MacLeod, supra note 2, at 79

²¹⁹ It is a widely held belief that law influences society. As Linda MacLeod has argued: "It is undeniable that laws have a considerable influence in shaping the values of society as well as reflecting the attitudes of those who framed them. When these values are in question, the law must also be put under scrutiny". Supra note 1, at 47.

²²⁰ The research studies that indicated arresting men would act as a deterrent to future violence will be discussed shortly.

²²¹ Jennie Abell, supra note 26, at 20

primarily focused on exposing the myths that have historically supported a non-interventionist approach, illustrating the detrimental effects of non-response on women, proving the benefits of arresting battering men and advocating the adoption of a policy of police intervention. The research conducted on the traditional response of police officers and the damage it effected was instrumental in the demand for more aggressive charging policies. Policy makers, feminists and academics alike relied heavily upon this research in their choice to support and demand more aggressive charging policies. Indeed, this issue seems to have united women's advocates, researchers and feminists, resulting in a dramatic change in police practices. As Mildred Daley Pagelow has observed: "The symbiotic, mutually-beneficial relationship between the battered shelter women's movement activists and researchers led to many changes in social policy during the last decade".²²²

As this research has had such a direct and instrumental influence on the demand for mandatory charging by police officers and the subsequent decisions to implement such a policy, it is important to explore this research and the conclusions that were reached. From an initial review of the arguments and rationalizations used to support charging policies, it appears as though feminists and policy makers embraced this research in spite of obvious concerns and limitations, such as a small sample of participants and generalized conclusions. More significantly, in terms of this paper, there was no apparent attempt, in this

²²² Mildred Daley Pagelow, supra note 163, at 4

research, to explore the experiences of women of colour and black women with police intervention. As will be discussed, the implications of this omission are far-reaching and have particular significance with respect to the impact of current charging policies.

2.4 RESEARCH STUDIES IN LONDON, ONTARIO

In 1981, less than two years before Parliament encouraged police departments to charge men who batter, London became the first city in Canada to instruct police officers to lay charges in all cases of wife assault where reasonable and probable grounds existed to do so, whether or not the woman wanted the charges to be laid.²²³ Two and a half months after this policy was implemented, preliminary research was conducted to assess its effects. Overall, the researchers found a significant increase in charging rates in cases of wife assault.²²⁴ In addition, the preliminary research indicated that over one third of the women interviewed supported police departments adopting a different

²²³ This instruction was initiated by the London Police Force itself in conjunction with London's community coordinating committee on wife assault. This initiative was prompted by the study discussed earlier in this chapter which indicated police were laying charges in these situations in only 4% of the calls they responded to. These changes received a vast amount of attention and media coverage. Refer to the previous discussion of this study and to Peter Jaffe and Carole Anne Burris, supra note 8, at 11.

²²⁴ During this time, 26 common assault and 16 assault causing bodily harm charges had been laid by the London police. In the six months prior to this, in 1979, only five assault causing bodily harm charges had been laid even though police officers had instructed the women themselves to lay charges in 62% of the cases. Peter Jaffe and Carole Anne Burris, supra note 8, at 14.

approach to wife assault, namely a policy of mandatory charging.²²⁵

A number of conclusions were drawn from the results of this preliminary study by the researchers themselves and by feminists and policy analysts. Relying on these findings, the researchers generally supported four overall recommendations: a police policy mandating an arrest, a victim advocate or support system, self-help groups for men and public and professional education.²²⁶ They also argued that these recommendations must be part of a coordinated and "...integrated response to wife assault rather than piecemeal solutions which fragment services and confuse victims through conflicting policies, procedures and attitudes".²²⁷

This research was followed by a more indepth examination of the perceptions and impact of the London police department laying charges.²²⁸ In this study, 73 women who had called the police for assistance were interviewed and police officers were surveyed as to their attitudes regarding the policy. Overall,

²²⁵ Peter Jaffe and Carole Anne Burris, supra note 8, at 27. However, women were not completely satisfied with this approach. For instance, 40% of the women still found that the man was receiving more support from police officers than they did. For a complete discussion of other findings, refer to Peter Jaffe and Carole Anne Burris, supra note 8.

²²⁶ Peter Jaffe and Carole Anne Burris, supra note 8, at iv.

²²⁷ Peter Jaffe and Carole Burris, supra note 8, at "... They argued that this integration and "...coordination between all human service systems is essential to ensuring that all of the victim's and assailant's needs are being met by the community". At 1-2. It was also recognized that there had to be efforts to change attitudes, to increase training in order for police officers to uphold their responsibility to inform men that battering is not tolerated by society. At 28.

²²⁸ Peter Jaffe et al, supra note 8.

there was a dramatic increase in the number of charges being laid by the police.²²⁹ The study also showed that there was a significant decrease in the number of private information charges pursued by women.²³⁰

A number of the assumptions and rationalizations that were employed to fuel policies of non-arrest were addressed in these studies. As discussed earlier, a common fear often expressed by police officers and researchers was that police intervention would result in an increase in men's violence towards their partners. However, the study did not support this supposition. The women surveyed in this study reported a significant reduction in the violence they experienced after they had called the police and charges were laid against their partner.²³¹

Another concern commonly expressed by police officers and advocates of non-intervention policies was that once a police officer charged the man who was battering, it would deter the woman from calling for assistance the next time she needed protection. Advocates of non-arrest also argued that if charges were laid against a women's wishes she would be less cooperative and would demand that the charges be withdrawn. These concerns were addressed in this study and it

²²⁹ The number of charges laid increased by 2500%. Peter Jaffe et al, supra note 8, at 37. Between 1979 and 1983 the number of charges increased from 12 in 1979 to 298 in 1983, even though there were a similar number of occurrences. In 1979, 2.7% out of 2941 calls resulted in charges and in 1983, 67.3 % of 3295 calls resulted charges. At 46.

²³⁰ In 1979 there were 92 private charges laid and in 1983 there were 22. Peter Jaffe et al, supra note 8, at 43.

²³¹ Peter Jaffe et al, supra note 8, at 37. The researchers recognize that although there appears to be a short term effect of reducing violence, the long term effects of arrests have not been proven. The authors also recognize that even though "[t]he police response appears to be a strong deterrent in the majority of the cases, violence was not eliminated entirely". At 43.

was concluded that women were not deterred from calling the police after a charge had been laid.²³² The researchers also found that the laying of a charge by police actually led to a significant decrease in the number of charges being withdrawn or dismissed.²³³ Moreover, the authors found that women were actually more satisfied with the response of the police than they had been before the charging policy had been introduced.²³⁴

This research has continually been cited as support for more aggressive charging policies, both within Canada and the United States. Peter Jaffe and Carole Anne Burris's research is also referenced as evidence that arresting men who batter their partners provides a deterrent to future violence. For instance, in his examination of police responses in Canada, Donald Dutton discusses this research and presents it as confirmation that police intervention can prevent more serious crimes of violence from occurring.²³⁵ Barbara Finesmith, in the United States, also references this work arguing that the arrest itself may be unpleasant enough to act as a deterrent and may dissuade some abusers from repeating violent acts.²³⁶ This research continues to be referenced today. Linda MacLeod,

²³² Peter Jaffe et al, supra note 8, at 37

²³³ Peter Jaffe et al, supra note 8, at 39. In 1979, 1 out of every 16 cases proceeded to court whereas in 1983, 3 out of 4 cases proceeded to court

²³⁴ Peter Jaffe et al, supra note 8, at 45. In 1983, 5.5% of the women were dissatisfied whereas in 1979, 47% were dissatisfied with the response of the police

²³⁵ Donald Dutton, supra note 163, at 1.

²³⁶ Barbara Finesmith, supra note 155, at 106. She argues that at the least, the man is stopped from abusing while he is detained by the police.

2

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PRECISIONSM RESOLUTION TARGETS

Although there are a number of similar concerns and criticisms with Canadian research, Jaffe and Burris's work seemed to escape this level of scrutiny.²⁶¹ Many feminists and (other) advocates of women embraced this research in support of mandatory charging policies without criticizing the exclusions of women of colour and black women or analyzing the effects of police intervention in terms of what was known about the limited effectiveness of law reform. This embrace has had serious implications on the subsequent effects of police policies on all women. As will be discussed in the next chapters, (all) women are still reporting that police officers are not charging men who batter and are displaying sexist attitudes. Black women and women of colour are also reporting that they are afraid of police brutality against their partners of colour and are fearful of other forms of racism in the criminal justice system. These are effects that could have been predicted, given the knowledge and experience that feminists have with law reform and racism in the legal system. However, it appears this knowledge took a back seat to the driving force behind implementation of police policies.

Although it may seem out of sequence to present this discussion at this point, I would like to consider the more recent research on charging men who batter at this point. This research was designed to examine the impact of police charging policies in London Ontario over the last ten years.²⁶² Overall, this research has similar findings to those of the earlier studies conducted by Peter

²⁶¹ There must have been critics of this research; I have just not come across any written accounts of such criticism.

²⁶² London Family Court Clinic, supra note 15.

In the initial research, the authors examined 222 cases of wife assault where police officers had attended a call. Of the 222 cases, only 62 of the women involved participated in the research.²⁴¹ In the subsequent study, although the authors attempted to include 412 women in their sample, only 73 women responded to their requests and participated in the interviews.²⁴² One of the implications of this small sample size relates to the stability of the conclusions that were drawn. There are obviously many reasons why 72% of the women in the initial study were unable to be interviewed. Experience would suggest that some of the reasons have to do with individual women not being safe enough to be involved in the research due to the use of violence and control by their male partners. And yet, the researchers still conclude that 61-62% of women wanted the man arrested and that an arrest helped to reduce or terminate his violence.²⁴³ Simply put, if a woman is unable to participate in this research for issues of safety, the level of violence she may be experiencing may not be able to be effected by police intervention.²⁴⁴

²⁴¹ Peter Jaffe and Carole Anne Burris, supra note 8, 21-22. Between January and June of 1979, 222 women had called the police for protection. The researchers sent out invitations to all of the 222 women but only 62, or 28% of the women, responded

²⁴² Peter Jaffe, et al, supra note 8, at 41. I do not mean to negate that this is a good sample size for a study concerning wife battering and given the problems associated with interviewing women about their experiences of being battered, the percentage is relatively high. However, I would still argue that the conclusions reached appear to be more far reaching than a sample of this size would warrant.

²⁴³ Peter Jaffe and Carole Anne Burris, supra note 8, at 22

²⁴⁴ Moreover, it is also noted by the researchers that in the second study, the 73 women interviewed had more contact with the criminal justice system than did the non-respondents. As such, their experiences and perceptions of the entire criminal justice system may have effected how they viewed the police intervention. Obviously, if the result of intervention is a

In addition to the small sample size, there is no obvious attempt in this research at a race analysis.²⁴⁵ Indeed, the reader is left wondering if there were any attempts at having a representational sample at all and if there were any women of colour or black women interviewed. If there were, there was no attempt to integrate or analyze differences in perspectives or experiences.²⁴⁶ As such, conclusions were made that "women" wanted police intervention and that "women" were not afraid to call upon the criminal justice system. If there had been an attempt at race analysis, the researchers might have found that women of colour and black women, as they are now, were afraid of police brutality against their male partners and other forms of racism in the criminal justice system. The conclusions drawn from the research then, might have been different.²⁴⁷

This research appears to be typical of the research on wife battering at that time. Most research and writing simply did not take into consideration the various levels of women's oppression and how women of colour and black women would experience strategies of intervention. This does not excuse the omissions however, particularly since the primary researchers have made the same exclusions in more recent work. Research on the police policies in London in 1990 continue to

desired outcome, then women will be more likely to view the whole response as positive. Women who did not have as much contact with the criminal justice system, however, may have felt differently towards the intervention.

²⁴⁵ Or class or ability analysis.

²⁴⁶ Ramifications of this omission will be explored in the following chapter.

²⁴⁷ However, I doubt this. The experiences of women of colour and black women may simply have been further ignored.

disregard the various levels of women's oppression and experiences. I find this even more disturbing, given the cumulated knowledge of the necessity for race analysis that is now accessible.²⁴⁸

There are other concerns with the conclusions drawn from this research. The conclusion that police intervention does not present a risk for increased violence after police have left the home should have been given much more attention than it appears to have been given. There is evidence from other studies that suggests that calling the police may in itself increase the chances of subsequent attacks. The Assaulted Women's Helpline, in 1991, found that 23% of women who called the police were beaten after the police officer(s) left and half of the attacks occurred within three hours of their departure.²⁴⁹ There is also other evidence indicating that, in the absence of certain conditions, an arrest may actually increase the abuse.²⁵⁰

While the violence would have likely increased in frequency and severity regardless of police intervention, this issue demands more analysis. I do not think this concern can be easily "dispelled" by one study, particularly given its small sample size and its short period of follow-up study. Moreover, many women are still reporting that they do not call the police out of fear of reprisal from their male

²⁴⁸ This work will be discussed later in this section

²⁴⁹ As discussed by Mark Drumbl, supra note 38, at 135

²⁵⁰ A study in Nebraska in 1990, found that arresting a man who battered produced more abuse except when the arrest led to treatment. M. Steinman "Lowering Recidivism Among Men Who Batter Women" (1990) 17 Journal of Police Science and Administration 124, as discussed by Mark Drumbl, supra note 38, at 146. Carole Anne Burris and Peter Jaffe did recognize this potential, supra note 12, at 1.

partner - which suggests that women do not feel the violence will stop if they call the police.²⁵¹ Given this evidence, this issue seems far too complex to be dismissed without more indepth research.²⁵²

Additionally, Jaffe and Burris concluded that women wanted police intervention when they were being battered by their male partners. However, there is other evidence that suggests, or at least questions, what women want when they call the police. In one study on wife battering, only 6% of the women interviewed said they thought calling the police was the best way to end abuse. When the women were asked what they needed, only 12% said they wanted an increase in the effectiveness of police or the legal system as first priority.²⁵³ Moreover, there are also questions as to what women want from calling the police. As Linda MacLeod has discussed, women may have called police to have the men removed from the premises until the violent outburst passed, to frighten him into good behaviour, to use the threat of a future arrest as a defence, or to obtain medical attention.²⁵⁴ Peter Jaffe and Carole Anne Burris's research was based

²⁵¹ In one study, 50% of women who were battered said they did not report out of "fear of revenge by the offender" Canadian Urban Victimization Survey: Female Victims of Crime (Ottawa: Ministry of Supply and Services, 1985), as discussed by Mark Drumbi, *supra* note 38, at 120.

²⁵² It may have been that the authors, and other advocates of women who are battered, wanted to dispel the concern of what is described as retaliatory violence. As discussed earlier, this belief has allowed police officers and policy makers to avoid responding to women who are battered. By claiming that police intervention would exacerbate men's violence, many police services could abdicate their responsibility, cloaked under a penumbra of concern for women.

²⁵³ As discussed by Linda MacLeod, *supra* note 2, at 80.

²⁵⁴ Linda MacLeod, *supra* note 1, at 38. She further comments, "even the majority of women who report the violence do so out of hope - that, by reporting the violence, she and

on the experiences of women who had already called the police - not women who chose not to call the police. If they had interviewed women who did not call the police, there may have been differences in what they found.²⁵⁵

Another problem with the conclusions drawn from the research concerns the unique location in which the research was conducted. The potential impact of this issue was acknowledged by the researchers in their warning that the results of their studies had to be analyzed in recognition of certain considerations. The authors caution that the city of London has demonstrated considerable leadership, integration, coordination and training in the area of wife battering and that the positive findings of the study may not be easily duplicated in other areas that lack such coordination.²⁵⁶ Although it did not prevent the researchers from drawing conclusions, they also recognized that only the short term effects of police laying charges had been evaluated.²⁵⁷

This research did not occur in isolation; it was supported by research conducted in the United States. The American research, conducted by Richard

her partner will be helped to return to their pre-violent state" Supra note 2, at 45

²⁵⁵ I also wonder if there are not differences between what women who call the police themselves want and what women who have had the police called by someone else want. Men who batter sometimes do call the police "on their partners" as yet another form of abuse. Also, children of women who are battered and neighbours call the police. I would like to know how often women themselves call, how often it is someone else, and what difference this makes, if any, in what women want, need and expect from police officers.

²⁵⁶ Peter Jaffe et al, supra note 8, at 47. There may be other ways in which their reported success may be difficult to duplicate in other jurisdictions. For instance, London also has a battered women's advocacy clinic, offers legal and emotional counselling and has a treatment program for abusive men.

²⁵⁷ Peter Jaffe et al, supra note 8, at 39. To my knowledge to date, there are no Canadian studies that attempt to address the long term effects of a charging policy.

Berk and Lawrence Sherman, found that the arrest of a man who was battering his partner, in and of itself, acted as a specific deterrent against subsequent violence, regardless of future legal action.²⁵⁸ Much like its Canadian counterpart, this research received national attention and is credited with promoting the movement in the United States toward changes to law enforcement practices.²⁵⁹ Unlike Jaffe's and Burris's research however, Sherman and Berk's work was criticised and met with a healthy dose of scepticism from researchers and feminists.²⁶⁰

²⁵⁸ These researchers found that 10% of men who were arrested, 19% of men who were warned and 24% of men who were removed from the home committed subsequent acts of violence against the same woman. The women interviewed in this study also confirmed that the arrest of the batterer put them at less risk compared to other approaches. Lawrence Sherman and Richard Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault" American Sociology Review 49(2), 1984, 261. Also refer to Richard Berk, et al, "Cops on Call, Summoning the Police to the Scene of Spousal Violence" Law and Social Policy Review 18(3), 1984, 479.

²⁵⁹ This research is discussed and cited in many papers. Mildred Daley Pagelow comments that it is due to this research that law enforcement departments across the United States changed, or are changing, their non-arrest policies. Supra note 163 at 5. Also refer to Timothy A.O. Endicott, supra note 160, at 368.

²⁶⁰ This research has consistently been criticized. Criticisms surround the inadequate sample size, the number of cases dealt with by the same police officers, inadequate controls such as police officers knowing what approach would be taken before they arrived on the scene and a failure to incorporate the effects that surveillance would have on men's actions. It has also been noted that the findings are inconclusive as the authors only studied a six month time period after the initial arrest. Joan Zorza points out that only 49% of the women who had been battered participated in the follow-up study because they had relocated or refused any future involvement. Supra note 215, at 935. The author's positive conclusions regarding the perceptions of women become suspect, given half the women did not participate. For a discussion of the criticisms of this research refer to A. Binder and J.W. Meeker, "Experiments As Reforms" 16 Journal of Criminal Justice, 1988, 347, as referred to by Ira W. Hutchison and J. David Hirschel "A Critical Analysis of the Movement Toward Preferred Arrest Policies in Spousal Abuse Cases", Paper presented at the Annual Meeting of the Academy of Criminal Justice Scientists, Denver, Colorado, March 1990, at 5. Also refer to J.D. Hirschel, I.W. Hutchison and C.W. Dean, "The Failure of Arrest to Deter Spouse Abuse" 29 Journal of Research in Crime and Delinquency 7, 1992, as discussed by Mark Drumbi, supra note 38, at 145. Interestingly enough, Hutchison and Hirschel also refer to Jaffe and Burris's research when discussing the need for coordination among service providers in the community.

Although there are a number of similar concerns and criticisms with Canadian research, Jaffe and Burris's work seemed to escape this level of scrutiny.²⁶¹ Many feminists and (other) advocates of women embraced this research in support of mandatory charging policies without criticizing the exclusions of women of colour and black women or analyzing the effects of police intervention in terms of what was known about the limited effectiveness of law reform. This embrace has had serious implications on the subsequent effects of police policies on all women. As will be discussed in the next chapters, (all) women are still reporting that police officers are not charging men who batter and are displaying sexist attitudes. Black women and women of colour are also reporting that they are afraid of police brutality against their partners of colour and are fearful of other forms of racism in the criminal justice system. These are effects that could have been predicted, given the knowledge and experience that feminists have with law reform and racism in the legal system. However, it appears this knowledge took a back seat to the driving force behind implementation of police policies.

Although it may seem out of sequence to present this discussion at this point, I would like to consider the more recent research on charging men who batter at this point. This research was designed to examine the impact of police charging policies in London Ontario over the last ten years.²⁶² Overall, this research has similar findings to those of the earlier studies conducted by Peter

²⁶¹ There must have been critics of this research; I have just not come across any written accounts of such criticism

²⁶² London Family Court Clinic, *supra* note 15.

Jaffe and Carole Anne Burris.²⁶³ In this research, it was again found that women are satisfied with a police response that dictates the laying of charges²⁶⁴ and that arresting men acts as a deterrent against future violence.²⁶⁵

Without negating the importance of this work, nor the success that the London police department can rightfully claim from the implementation of charging policies,²⁶⁶ this study raises some concerns. Firstly, only 5% of the women interviewed were women of colour. Although the researchers recognize this and encourage future research, they make no attempt to discuss differences with these women's experiences, stating that it is impossible to make generalizations on such a small sample.²⁶⁷ In fact, after the initial breakdown setting out the 5% women

²⁶³ As has been discussed. In this study, the researchers interviewed 90 women who had one of three interventions; police arrested the man (52 women), police did not arrest the man (14); and no police intervention (24). At 8. At the time of the interview, 66.7% of the women were separated. Supra note 15, at 9.

²⁶⁴ They found, overall, a high level of satisfaction. 74.1% of the women interviewed said the police responded quickly, 65.2% said they were satisfied with the advice of the officer, and 87% said that they would call the police again. Supra note 15, at 16.

²⁶⁵ They concluded that there was a "statistically significant reduction on the level of future violence after police intervention." Supra note 15, at 17.

²⁶⁶ I do think that this work is of significance and there is much to be learned from their experiences. The London Police department has been able to claim much success with its charging policies. Between 1979, when the department first initiated a charging policy, and 1990, the rate of charges increased from 2.7% to 89.9%. However, it is again noted that the results of this study may be hard to duplicate as London has a coordinated and integrated response to wife battering.

²⁶⁷ I find it interesting they would recognize the problem of drawing conclusions based on a small number of experiences here but not in other areas. The authors comment that the number of women of colour interviewed is consistent with the population of women of colour in London. Supra note 15, at 9. On a number of occasions, I attempted to contact the researchers that worked on this study in order to ask them about the omissions they made and if they found any "trends" in the experiences of women of colour and black women. However, after several attempts to reach each other by phone I received no further response.

of colour, the race of the women being discussed is not mentioned.²⁶⁸ An additional limitation surfaces from the low number of women who were interviewed that did not have police intervention.²⁶⁹ It appears that the researchers made little attempt to find out why some women are not calling the police. Despite this problem, they seem to have no reservations about concluding that women are not afraid to call the police. Even more disturbingly, they made no reference to what the women who were interviewed who did not have police involvement communicated.²⁷⁰

I think that these factors have implications for the conclusions being drawn by the researchers. I have particular concern with the conclusion that women are not afraid to call upon the police for assistance when no, or little, attempt has been made to ascertain why women are not calling the police and how women of colour and black women experience police intervention. I am also particularly concerned with the conclusion that arresting men who batter deters subsequent violence. First of all, as the researchers note, London has a coordinated response to wife

²⁶⁸ Moreover, in the questions put to police officers regarding what they take into consideration when deciding to lay a charge, no questions were asked about the impact (if any) of race or culture. And, while they may not have received an honest answer, this does not excuse the fact that there were no attempts to address this issue in the study or to discuss its possible impact on police response.

²⁶⁹ They recognized this limitation. Supra note 15, at 20

²⁷⁰ There is much more in this study that went unexamined. For instance, the researchers note that 61% of the women interviewed called the police themselves. The remaining police contact was made as follows: 15% other, partner 5%, child 5% and neighbour 14%. Supra note 15, at 10. However, the researchers do not discuss if there are any differences between the experiences of women who had someone else contact the police and do not discuss whether counter charges were laid against women when the men had called.

battering, but it appears that there has been a lack of consideration of how this affects men's future violence against their female partners. It may be that it is the arrest coupled with an appropriate response from the crown, judge, probation officer and treatment program, not just the arrest, that influences his violent behaviour. Secondly, almost 2/3 of the women were separated from the men who had battered them. Separation might have played a part in reducing the violence.²⁷¹

Thirdly, there is evidence in the United States that raises questions about the deterrent value of arresting men who batter. A number of research projects were initiated in attempts to replicate the findings of Jaffe and Burris's American counterparts, Sherman and Berk. Overall, these research studies were unable to duplicate earlier findings and instead found that arrests only act as a deterrent in certain circumstances²⁷² and further that the significance of arrests as a deterrent was not much more than other interventions, such as not arresting men.²⁷³

²⁷¹ I am not suggesting that men stop abusing women after separation. I am suggesting that this should have been examined within this study. Separation can mean that some men have less access to batter the women, it may have meant that one of the partners moved out of the vicinity; or the man could have been with another partner and he is battering her. Conversely, the fact that they were separated may have meant that some men were more abusive. In addition, I am sceptical about a study that is so self-congratulatory and does not problematize many of the issues.

²⁷² Studies in Milwaukee, Wisconsin and Colorado Springs concluded that arresting an unemployed man was less effective in deterring violence than arresting an employed man. Refer to Joan Zorza, *supra* note 215, at 945 and 957. The research in Milwaukee also found that white men were deterred more than black men. At 960. However, as Joan Zorza also argues, there was an overall lack of race analysis in the research studies.

²⁷³ The study in Omaha Nebraska, while finding arrest deterred future violence within the six month period after the arrest, found that women were injured as often, and slightly more,

There have been similar criticisms made of this research as I have made with respect to Jaffe and Burris's research.²⁷⁴ While I am not prepared to dismiss the scientific validity of any of this research, I think that, at the least, there are some serious questions. The uncertainty of an arrest to act as a deterrent elicits some questions about what is being expected of mandatory charging policies, particularly since the deterrent value of charging was a major impetus to have the policies implemented. At the very least, the American research, and the difficulties with Jaffe and Burris's work, suggest that more research and analysis is needed before it can be argued that arresting men deters them from future acts of violence against women.

by the same men when compared to the group of women where another approach had been utilized. This finding was also supported in the study conducted in Milwaukee, Wisconsin and in Charlotte North Carolina. Joan Zorza, supra note 215, at 945. Overall, no response that was utilized in these studies was found to be very effective in deterring violence. At 952. Zorza comments that, although the studies lack consistency and are difficult to compare to one another, the general conclusion is that arresting men is about as effective as other approaches in terms of deterrence. At 964.

²⁷⁴ Joan Zorza makes a number of criticisms of this research. For instance, the researchers did not take into account the women's perspective (964 and 980); they assumed the police officers' attitudes and conduct did not have any effect on women, even though some officers uttered misogynist comments and minimized the abuse (973 and 976); they did not account for the impact of the separation of the men and women (975); the research measured the effectiveness of arrest to deter future violence without considering that violence usually increases in frequency and severity; almost no attempt was made to account for the impact that other players in the criminal justice system have over the men's likelihood to commit future violence (972); there was an overall absence of race analysis (958); women who were charged with assault because they were defending themselves were included in the sample; and finally, the studies assumed that the only benefit of arresting men who batter is the deterrent value and not for instance, the opportunity it gives women to access resources. Supra note 215.

3. MANDATORY CHARGING AS A POLICY

In the late 1970's, the Canadian Advisory Council on the Status of Women engaged Linda MacLeod to conduct research on wife battering.²⁷⁵ When this research was released by the Council in 1980, it received unprecedented public and media attention, particularly in relation to MacLeod's estimate that one in ten women are battered by their male partners every year in Canada.²⁷⁶

By the spring of 1982, the Parliament of Canada received MacLeod's report on the nature and extent of male violence against women in their homes. The initial response from a number of the Members of Parliament was to laugh. This quintessentially inappropriate response became a benchmark, used time and time again, to demonstrate resistance, embarrassment and insensitivity to the problem of wife battering.²⁷⁷ The ensuing response of the Canadian government to this issue was to establish a committee to make recommendations on appropriate changes to the criminal justice system, and specifically police services. After two

²⁷⁵ Linda MacLeod, Personal Interview, July 7, 1994. In this interview, MacLeod explained that every year the Advisory Council commissioned research in particular areas given the needs at the time. Since there was little research in Canada on wife battering, and as Linda MacLeod had been wanting to do research in this area, the Council undertook this project. This study was the first attempt at collecting national information on wife battering in Canada. Her sample, the largest available, was from women who stay in shelters and places that accept women that have been battered, as well as the women working in these places. This work culminated in her publication, supra note 1.

²⁷⁶ Linda MacLeod explained that all reports that were released by the Council received some media attention, but never to the level that this publication received. Personal interview. Also refer to supra note 1, at 21.

²⁷⁷ Refer to Susan Thomas Gilman, supra note 158, at 17; Jennie Abell, supra note 26, at 225; and Linda MacLeod, supra note 2, at 3. MacLeod commented that this "unthinkable public display of levity generated high level of public outrage, concern and insistence for action".

months of public hearings and investigation, the Standing Committee on Health, Welfare and Social Affairs came back with 17 recommendations.²⁷⁸ The Committee concluded by emphasizing that "...wife battering should be treated as a criminal activity...". In furtherance of this emphasis on wife assault as a crime, the committee's most important recommendation was that all police officers should be instructed to lay charges for wife assault.²⁷⁹ On July 8, 1982, the Parliament of Canada followed the Committee's recommendations by unanimously passing a motion encouraging all Canadian police services to establish a charging policy.²⁸⁰

Various provinces of Canada responded to this encouragement by directing their Solicitor Generals to direct all police officers to lay charges in cases of wife assault.²⁸¹ In 1983, the Attorney General of Manitoba, Roland Penner, introduced a charging policy with the following statement:

"We think the wife is in a very dependant position and in a threatening (sic) position and that unless there is early interference by authorities, it could lead to serious on-going wife battering, and

²⁷⁸ Susan Thomas Gilman, supra note 158, at 16.

²⁷⁹ As discussed by Zoe Hilton, supra note 14, at 329. The final report of the Standing Committee on Health, Welfare and Social Affairs also supported, as its second recommendation, legislative funding for transition houses. The Committee also recommended the training of all criminal justice system personnel. As discussed by Susan Thomas Gilman, supra note 14, at 16.

²⁸⁰ Gareth McGraw comments that until 1983, the government had done very little in response to wife battering, save a small amount of funding for some shelters. Supra note 162, at 1.

²⁸¹ For instance, in 1983 the Solicitor General directed the RCMP to lay charges. Between 1982 and 1984, six provinces were instructed to lay charges: Nova Scotia, Prince Edward Island, Ontario, Manitoba, Saskatchewan and British Columbia. As discussed in Timothy Endicott, supra note 160, at 369.

we want to do everything possible to stop that... . If the wife says 'I just don't want to press charges', charges will still be laid.²⁸²

Since that time, all provincial and territorial police have been issued directives that "...encourage rigorous investigation and prosecution of wife assault cases. In most cases, police need not actually witness the violence but must have reasonable and probable grounds to assume that an assault took place".²⁸³ As it was later summarized, these charging policies were to

"...serve two goals: to convey to abusive men that it is just as unacceptable to assault their own wives as it is to assault anybody else; and secondly, to convey to assaulted women that help is available through the legal system".²⁸⁴

Canada has since been recognized as the first country in the world to have developed and adopted nation-wide charging policies in wife assault cases.²⁸⁵

²⁸² As quoted by Jennie Abel, "Women, Violence, and the Criminal Law. "It's the Fundamentals of Being a Lawyer that are at Stake Here"" 17 Queen's Law Journal 1, Spring 1992, 17-173, at 159. Also refer to Government of Canada, "Justice Minister and Solicitor General Take Steps Against Spousal Assault" News Release Decembe 21, 1983

²⁸³ Patricia Begin, "Violence Against Women: Current Responses" Background Paper (Ottawa: Research Branch, Library of Parliament, September 1991), at 17. The provincial offices of Attorney General have also directed crown attorneys to proceed with all cases of wife assault regardless of the wishes of the woman who was battered. These policies will be briefly discussed in chapter four.

²⁸⁴ Status of Women, Canada, Final Report on the Federal, Provincial, Territorial Group on Wife Battering (Ottawa: 1986), as discussed by Zoe Hilton, supra note 14, at 331. It was also later commented that: "An aggressive intervention policy can be seen as not only providing some protection to victims but also making an important statement to society that violence against women is unacceptable and will not be tolerated." The British Columbia Task Force on Family Violence, supra note 38, at 82.

²⁸⁵ Patricia Begin, supra note 283, at 17.

3.1 INITIAL REACTIONS TO THE IMPLEMENTATION OF CHARGING POLICIES

The initiation of more aggressive charging policies in Canada was applauded by many women's activists and feminists.²⁸⁶ The change in police charging policies marked years of struggle and effort to make public the violence women were experiencing from their male intimates, to have wife battering recognized as a serious violent crime and to have the state respond to it as such. That this accomplishment was achieved in a climate that strongly favoured non-response from police officers is a testament to the movement's dedication and success.²⁸⁷ I also believe there is much in this work that deserves recognition and celebration. And yet, this celebration cannot occur in isolation from the often necessary criticisms.²⁸⁸ As discussed, both feminists and researchers excluded the experiences of women of colour and black women from the movement for police charging policies. As will be discussed in the next chapters, this exclusion has serious implications.

To give the impression that all within the women's movement or other women's advocates embraced charging policies with fervour would be misleading.

²⁸⁶ Linda MacLeod, Personal Interview. However, not all feminists, nor all women, embraced this change in police policy.

²⁸⁷ As Zoe Hilton comments, the move to have police officers lay charges was a pioneering move in a climate that favoured non-interventionist and non-legalistic approaches. Supra note 14, at 328. However, as Gareth McGraw argues, the changes only meant that the law was going to be applied as it should have been all along. Supra note 162, at 1.

²⁸⁸ Susan Schechter has commented that the choices a movement makes, especially in a time of limited political activity, are filled with contradictions and are tightly circumscribed by political and financial constraints. As a result, Schechter has grown more generous towards the battered women's movement. Supra note 2, at 8.

Some women's advocates were concerned about the changes and found the issue of police charging a serious dilemma. One woman who grappled with this dilemma has commented:

"No one is clear about what to do with the police. Do you change attitudes or make them act differently by forcing their departments to adopt new guidelines? Some activists say do both, while others say sexism is so pervasive that almost all reform efforts are continually sabotaged".²⁸⁹

One main area of concern was whether the impact of increased arrests would actually assist women and meet their needs. This concern was expressed in early work on wife battering. As Linda MacLeod, an apparent advocate of charging policies, warned:

"While the need for action is undeniable, careful consideration of the expressions of what women who are battered really want is imperative if their needs are to be met....To truly help women who have been battered, we must look closely at what they really want, at what these statements really mean and avoid imposing an interpretation that does not reflect the women's experiences".²⁹⁰

Some feminists were also concerned about the impact aggressive charging policies would have on women of colour and black women. The (white) women's movement was just beginning to pay attention to what black women and women of colour were expressing and the specificities of their experiences. The racism they encounter was also just beginning to be incorporated by (white) feminists)

²⁸⁹ As quoted by Susan Schechter, supra note 2, at 174.

²⁹⁰ Linda MacLeod, supra note 1, at 8. Her concern was that women's voices were often ignored. She explained that women want, above all, immediate physical protection for themselves and their children, emotional support and most of all, they want things to be all right again. At 58.

into the analysis of violence against women.²⁹¹ As it was recognized that the criminal justice system discriminates against low income defendants and defendants of colour, there was a concern that women of colour and black women would not be protected by the charging policy and would be hesitant to call upon a racist criminal justice system.²⁹² Susan Schechter, discussing the experience in the United States, comments:

"Institutional reforms, clearly needed, were won through years of effort. Yet even as they pursued their immediate, daily struggles, many women understood that reforms within a racist and sexist society would not protect all women..."²⁹³

Supporting this statement, one shelter worker commented:

"While we wanted to activate police protection for abused women wherever possible, we were hesitant to support the extension of discretionary powers of arrest, so open to abuse, particularly against Third World and low income people".²⁹⁴

Another concern expressed by women's advocates about police charging policies was that the arrest powers may further facilitate police racism. Experience in the United States has demonstrated that black men and men of colour are disproportionately arrested in cases of wife assault and there was a fear that police policies would exacerbate this by giving police officers even more power to

²⁹¹ As discussed by Jennie Abell, supra note 26, at 241.

²⁹² As discussed by Mildred Daley Pagelow, supra note 163, at 9.

²⁹³ Susan Schechter, supra note 2, at 37.

²⁹⁴ Susan Schechter, supra note 2, at 178. She further commented that many a woman, "feeling the necessity of working within the criminal justice system, yet recognizing its racism...maintains an ambivalent stance toward the criminal courts". At 178.

arrest.²⁹⁵ At the same time there was also some hope that charging policies, by reducing officers' discretion, would help combat racism. In Duluth Minnesota, the proportion of black men being arrested for wife assault did decrease with the implementation of police charging policies.²⁹⁶ However, as it has been commented, charging policies cannot reduce other racist treatment, such as brutality and disrespect.²⁹⁷ As will be discussed in chapter five, the fear of racism against their male partners profoundly impacts on how women of colour and black women experience the mandatory charging policies

4. CONCLUSIONS

It is no coincidence that wife battering has been recognized as a crime and these changes to police practices have occurred when feminism has flourished.²⁹⁸ In many ways, the ability of the women's movement to have an

²⁹⁵ Maria Pastoor discusses the potential for increased arrest power to facilitate racism and that police disproportionately arrest people of colour. For example, in Minnesota, 1980, although black persons represented 1.3% of the population, they represented 8.23% of the arrests. In addition, Native Americans who were .86% of the population represented 4.32% of the arrests; "brown" persons were .79% of the population and represented 1.11% of the arrests; and white persons were 96.57% of the population and represented 86.98% of the arrests. Maria Pastoor, supra note 206, at 597.

²⁹⁶ In Duluth, Minnesota, before the police policy was implemented, minority men accounted for 33% of all the men arrested by police. With the policy, more minority men are being arrested, but they accounted for only for only 8.5% of the total arrests, a figure which is in line with their population percentage. As discussed by Mark Drumbl, supra note 38, at 143. As mentioned, this figure does not address whether or not men of colour and black men experienced racism.

²⁹⁷ Maria Pastoor makes this point. She further comments that black men may believe they are being arrested because they are black and not because wife assault is unacceptable. Supra note 206, at 598.

²⁹⁸ Michael Freeman, supra note 165, at 383.

impact on police responses at all is a testament to women's determination, dedication and desire to end male violence against women. It is my belief that these gains, in terms of the struggles they represent, should be acknowledged and celebrated. However, and there always seems to be an however, celebrating the actual changes is not easy or simple. Police policies are not having the impact that was hoped for and the experiences of women of colour and black women have been ignored throughout the process. These things cannot be celebrated.

It seems as though, from my perspective 12 years later, that the social and political climate of the time was one that supported the demand for mandatory charging policies. From a policy maker's perspective, supporting these policies would have been relatively easy. According to the studies, no massive changes in the criminal justice system were needed in order to effect change. It was easier for the government to consider relatively minor changes than a complete overhaul of the criminal justice system.²⁹⁹ It also makes sense that it would have been easy for feminists and (other) women's advocates to embrace mandatory charging policies as "the answer". The inadequacy of the police response to women who called them for protection had just been exposed; clearly, something needed to be done. The research was able to give both policy analysts and feminists hope and a vision for change. The government was responding, women's voices were apparently being heard, and wife battering, or so it may have seemed, was

²⁹⁹ Peter Jaffe and Carole Anne Burris, *supra* note 8, at 4 Kathleen Waits also makes the point that the de-politicization of wife battering made it palatable for the government to respond. *Supra* note 205, at 302.

beginning to be taken seriously.

The implementation of police charging policies did advance rather quickly. In less than a year, we went far from the laughter of Members of Parliament echoing through the House of Commons to mandatory charging policies. As Linda MacLeod commented, it seemed simple enough:

"Give the woman a safe shelter, arrest the man and insist through the courts that he keep the peace and his distance from his wife. Then, give the women the information, referrals and support she requires to forge a new life without violence and probably without the batterer".³⁰⁰

However, it was not that simple.

³⁰⁰ Linda MacLeod, supra note 2, at page 4

CHAPTER FOUR CURRENT ISSUES WITH MANDATORY CHARGING POLICIES

1. INTRODUCTION

As discussed in chapter two, feminist legal scholars and other critical legal scholars have long recognized the difficulties in securing change for women through law reform initiatives. Law reform rarely, if ever, addresses the underlying problems giving rise to the concerns, rarely impacts on the attitudes and beliefs of criminal justice system personnel and changes are often met with resistance from the legal system. Furthermore, law reform efforts can be actively, rather than simply passively, a problem; they often serve to legitimate the state's response and undermine the ability to openly challenge the legal system. Not only are women's needs unaddressed but it is difficult to initiate subsequent analyses and additional reforms.

The reforms to police charging practices are no exception to the dilemmas inherent in law reform. Many police officers continue to exhibit sexist and racist attitudes and other agents in the criminal justice system do not fully support the changes in how wife battering is dealt with. The needs of women, and women of colour and black women particularly, have not been addressed. However, the perception that mandatory charging policies have been a positive gain has made it very difficult to discuss the problems being encountered.

In this chapter, I will explore the indications that some police officers are not charging men who batter and continue to espouse inappropriate comments. The

response of other agents in the criminal justice system is briefly examined, as is the sexism in the legal system that impacts on women's experiences of the charging policies.³⁰¹ Before proceeding to the following chapter on the particular experiences of women of colour and black women with these policies, I will also explore how women continue to want criminal charges against their male partners dropped and how the criminal justice system has responded to some of these requests.

However, before engaging in the critique, it is important to comment that there have been some positive changes as a result of mandatory charging policies. Without doubt, there are caring and sensitive police officers and some officers have changed how they respond to women who are battered by their male partners. The progress made through the strategy of "wife assault as a crime" also needs to be acknowledged and further explored

2. ATTEMPTING TO CHANGE POLICE OFFICERS' ATTITUDES AND ACTIONS

One of the primary aspirations of feminists and (other) advocates of women with respect to mandatory charging policies was that the discretion of police officers that allowed them not to lay criminal charges would be severely restricted. However, despite the "implementation" of the police charging policies across Canada, there has been consistent evidence that the attitudes of some police officers remain much as they were before the policy was implemented and that

³⁰¹ Racism with the criminal justice system and the experiences of women of colour and black women with mandatory charging policies will be the specific focus of chapter five.

police are not adhering to the principles embodied in the directives.³⁰²

2.1 LIMITED IMPACT OF POLICIES

Police officers have, time and time again, expressed atrocious attitudes about the nature of wife battering and about the appropriateness of men's violence against women. In 1983, one police officer expressed that criminal charges are often inappropriate in such cases because they involve extenuating circumstances. He explained this remark with: "Maybe she wasn't giving him what he needed sexually".³⁰³ In another example, a sheriff, in telling a police officer what he should have done when a woman was uncooperative, said that the officer should have given her an open-handed slap because it works well with hysterical women.³⁰⁴ There is further evidence that police officer's attitudes and actions are shaped, in part, by the race of the parties involved.³⁰⁵

³⁰² As the Manitoba Association of Women and the Law noted, even after changes to police policies on wife assault, reports of police inaction and apathy continue to be prevalent. Supra note 169, at 3-6

³⁰³ As discussed by Kathleen Waits, supra note 205, at 269. In another example of police sexism that was cited by the Manitoba Association of Women and the Law, a police officer in Minnesota was quoted as saying: "...the problem with battered women is that their alligator mouths can't keep up with their hummingbird brains". Supra note 169.

³⁰⁴ When the sheriff made this comment, several other officers heard him and left the comment unchallenged. As discussed by Maria Pastoor, supra note 206, at 603. Although this comment was made ten years ago, evidence of this type of attitude can still be found in the criminal justice system. When reading this comment, I was reminded of a comment made by a Manitoba judge during an assault case. After the man had pled guilty to striking his partner, Judge Peters said "Sometimes a slap in the face is all she needs". As discussed by the Manitoba Association of Women and the Law, supra note 169, at 1-23.

³⁰⁵ Jennie Abell discusses how an officer's response is shaped by the race and class of the woman. She particularly focuses on officers' responses to Aboriginal women. For a discussion of this, refer to Jennie Abell, supra note 26, at 232. The intersection between an

Limiting the discretion of police officers will not suddenly lead them to disavow their traditional attitudes or to abandon their reluctance to intervene in cases of wife battering.³⁰⁶ A change in policy cannot change police officers' attitudes towards the violence itself or the persons involved. There is ample evidence available supporting this, as there is evidence demonstrating that arrest policies are being inconsistently and unevenly implemented across Canada.³⁰⁷ Shortly after charging policies had been introduced throughout Canada, the rate of arrests for the R.C.M.P. for wife assault was 51% between 1985 and 1988 and 60% in 1989.³⁰⁸ In Toronto, the rate of arrest in 1985 and 1986 was 31% and in 1988 the rate of arrest was 58%.³⁰⁹ A more recent investigation indicates that in

officer's actions and racism and the perceptions of women concerning racism in the criminal justice system will be discussed in the following chapter

³⁰⁶ Ira Hutchison and David Hirschel, supra note 260, at 11. These authors discuss one study regarding police officers' attitudes toward wife battering. The researchers found that 99% of the police officers surveyed expressed their belief that they should be able to make their own decisions, 77% reported that they "usually do what they think necessary even if they expect their supervisor to disagree" and 43% said they should use their own policy even if it is against departmental policy. Jennie Abell brings attention to the point that a police officer's gender influences how they perceive the cause of men's violence and their role in responding to wife assault. She cites an Australian study designed to examine police officers' attitudes towards wife battering. They found that male police officers strongly identified with the male batterers. In fact, four out of 10 male officers said that the women's behaviour was the single most contributing factor that had to be taken into consideration (i.e. her use of alcohol or her provocation). As discussed by Jennie Abell, supra note 26, at 231.

³⁰⁷ For instance, refer to the British Columbia Task Force on Family Violence, supra note 38, at 82. Moreover, as the British Columbia Task Force points out, the extent of the inconsistency is often not known because record keeping systems have either not been implemented or are not adequate. At 82. Patricia Begin, in an information paper to the government, also acknowledged that the enforcement of the charging policies varies widely across police departments. Supra note 283, at 18.

³⁰⁸ As discussed by the British Columbia Task Force on Family Violence, at 83.

³⁰⁹ London Family Court Clinic, supra note 15, at 15.

1991, Toronto police officers laid charges for 65% of the 5100 calls for assistance from women who were being battered.³¹⁰ During 1990 and 1991, the arrest rate in Vancouver varied between 21% and 50%.³¹¹ A Quebec report in 1990 revealed that 45% of calls to the police from women who are battered do not result in charges being laid.³¹² The provincial average for Ontario in 1989 for arrests in cases of wife assault was 46%.³¹³ There has also been a recent indication that

³¹⁰ As discussed by Mark Drumbi, *supra* note 38, at 131. This study also found that 12% of the men arrested had previous convictions for assault against women. In explaining the average arrest rate for Toronto, the Sergeant explained that charges cannot be laid 100% of the time as there has to be reasonable grounds that it occurred in order to make an arrest. Staff Sergeant Gary Dealy told the Toronto Star that "It has to be the second or third time the victim has called police, or there have to be other witnesses, or there have to be visible signs of a struggle". Dana Flavelle, "Who's Listening to their Cries for Help?" *The Toronto Star*, November 10, 1989, C1. Mark Drumbi later mentions that in 1992, the Metro Toronto police force modified its policy to allow police officers to be disciplined if they failed to lay charges when probable grounds existed to do so. I am not aware of the subsequent impact of this modification. However, I think the concept of disciplining officers who do not follow the mandatory charging policy is worthy of future exploration. I am particularly interested in how this could affect an officer's response to women and perceptions of wife battering.

³¹¹ This research was conducted by the Vancouver police department and Simon Fraser University. They found that in July of 1990, 50% of the 90 incidents were "cleared by charge" and sent to crown while 47% of 78 incidents in January 1991 and 45% of 86 incidents in July 1991 were sent to the crown's office. The researchers established that where charge not laid, the policy was in often breached. For instance, the police proceeded contrary to policy in 18% of all incidents in July 1990; in 34% of the incidents in January 1991 and in 21% of the incidents in July 1991. They also found that the crown upheld the charge in almost every case and that the knowledge and understanding of policy among individual personnel varied from enthusiastic support to ignorance in the policy's existence. As discussed by the British Columbia Task Force on Family Violence, *supra* note 38, at 83.

³¹² This study also revealed that 53% of men who were charged with assault were never sentenced and that on average, men who kill their intimate female partners receive a three year prison sentence. As discussed by Linda MacLeod, *Wife Assault: A Fact Sheet Prepared for the National Panel on Violence Against Women*, (Ottawa: Linda MacLeod and Associates, January 1992) at 8.

³¹³ In 1991, the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, also received evidence that the police response is still often inadequate and in contravention of the policies. The First Report of this Committee cites a study by the Ontario Solicitor General that found that police did not lay charges in 50% of the "domestic violence occurrences". Barbara Greene, Chair, *The War Against Women*, The First Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women,

the knowledge of the charging policies is piecemeal.³¹⁴

It is clear from these statistics that there are discrepancies between provinces in the implementation of police charging policies. Given the apparent clarity of police charging policies, namely that an officer does not need to witness an assault - they just have to have probable grounds to believe an assault occurred - to lay a charge, one would expect the arrest rate to be higher and more consistent. While it may be that charges cannot, and should not, be laid every time the police receive a call³¹⁵, the evidence is also clear that police officers are breaching the policies.

In addition to not laying charges, it also has been reported that some police officers are still asking women, often in front of the men who have battered them, if they would like to press charges. The study conducted by the Manitoba Association of Women and the Law found that some police officers continue to ask women if they want charges laid.³¹⁶ The National Organization of Immigrant and

House of Commons, 1991, at 38.

³¹⁴ A preliminary study in Hull, Quebec, found that the overall knowledge of the charging policy at detachment was "patchy". Some officers did not know that a policy existed and others thought there probably would be something, but they were not sure if there was. Some of the officers interviewed commented that they make their decisions based on "common sense" approach. The findings of this preliminary study has lead the researchers to a more in-depth research project. At this point, I am unaware when the findings will be published. Valerie Cromack and Ada Kewley, "The Policing of Domestic Violence: A Pilot Study" 23 Family Law October 1993, 594, at 595.

³¹⁵ Assault charges may not be appropriate in all cases as, for example, the police might have been called before an assault occurred and they may have been called by a neighbour and no evidence is offered.

³¹⁶ Manitoba Association of Women and the Law, supra note 169, at 2-32. In my experience working in the area of male violence against women, it is not unusual to hear about incidents where police officers ask if the woman wants to lay charges or simply do not

Visible Minority Women, in their forums on wife battering, heard testimony from women that police officers continue to ask if they want to lay charges.³¹⁷ The concern with such a practice, as discussed in chapter three, is that it places the responsibility for holding men accountable for their violence on the women whom they are harming. To a man who batters and is charged in this way, it is not that he is breaking the law, but that the woman is "having him charged"; he is able to deny his responsibility and blame her for the repercussions. Asking a woman if she would like to press charges is in contravention of the police charging policies. Police officers are to lay the charges themselves and not put women in this predicament.³¹⁸

Women's advocates are concerned about the lack of response by the

lay charges. One (white) woman that I spoke to about wife battering told me that a friend of hers had called the police as her male partner had thrown her to the floor and was attempting to strangle her. The woman's friend helped to get him off of her and by that time, the police had arrived. The officer that attended this call asked her if she wanted to press charges. He further explained that he could not press charges because he did not witness the assault. It was less than two years ago that this incident took place. Another (white) woman I spoke with had called the police herself as her male partner had assaulted her. When the police arrived, they told her they were unable to press charges because they did not witness the assault. The woman went to the police station the next day and laid a private information.

³¹⁷ National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 9.

³¹⁸ However, and without in any way excusing this action, I find myself wondering in what situations officers are asking women this. I would imagine that officers know well the problems women will confront once a charge is laid, such as long waiting periods before the charge is dealt with and an often lenient and inappropriate sentence, and I wonder if this questioning from some police officers arises out of concern for the woman. I am hesitant to make these comments and find it difficult to do so. While typing these words, I am reminded of the rationales used by police officers to not lay charges and know well the criticisms of such excuses. However, I do sometimes think that these concerns could be explored more instead of simply chalking it up to police officers not following the directives. At other times, I think it is just that - police resistance. Perhaps this is one area that needs more exploration and research.

police to charging policies. In one survey of shelter workers, only 1% reported that police officers lay charges in all cases where reasonable and probable grounds exist to do so and only 16% thought they did so most of the time.³¹⁹ One shelter worker commented:

"I find that it depends which police officer is involved. It is very subjective. I have also found that in most cases the assault needs to be fairly serious. However, I have known women to be placed in the hospital for a few days with no charges against the abuser ever laid. It is so confusing to our volunteers, clients, and myself".³²⁰

During the first few years after aggressive charging policies were introduced, the Assaulted Women's Helpline in Toronto continued to hear from women about their experiences of calling the police and being told there was nothing that the police could do, that the women would have to lay their own charges.³²¹ The Helpline responded to this information by alerting the appropriate government departments, time and time again, with letters requesting that the government address the inconsistencies in the application of mandatory charging policies and the actual responses of police officers. With each letter, the Helpline enclosed detailed

³¹⁹ Shelter workers reported that in one third of cases where charges were not laid, the woman would have liked them to be. As found and discussed by Linda MacLeod, supra note 2, at 86.

³²⁰ As presented by the British Columbia Task Force on Family Violence, supra note 38, at 86. The Task Force also received evidence from a shelter's log book. A worker commented: "The first time she called the police they said not to call them again - they weren't in the relationship business. The second time she called they asked her 'Are you willing to lay charges?'" At 87.

³²¹ The Assaulted Women's Helpline was established in 1985 and was funded by the Ministry of Community and Social Services and the Municipality of Metropolitan Toronto. During this time they received approximately 400 calls per month from women who were being assaulted by their male intimates. At least 30-40 women each month complained about the response they received from police officers.

descriptions of the women's stories they were hearing.³²² During one call, a woman told a worker that she had been physically assaulted by her boyfriend and had called the police for assistance. Although they escorted her to the hospital to have a fractured rib attended to, no charges were laid. Another woman, who was an immigrant to Canada, told the helpline that she had called the police for assistance several times when her husband had assaulted her. Each time the police came, they told her that her husband would go to jail if she insisted on him being charged. Each time the woman heard this, she asked them not to charge him and no charges were laid.³²³

The Helpline was very concerned about the ramifications of ineffective legal intervention. As Lynda Davies wrote in her letter to Ian Scott, then Attorney General of Ontario; "An ineffective response can actually increase the danger for many women".³²⁴ The Helpline also stressed the critical importance of reinforcing the public message that "wife assault is a crime". The fear was, and continues to be, that when a police officer investigates an assault and does not lay charges, the message sent to the batterer is, as it was for a long time, that his actions are

³²² I would like to deeply thank Lynda Davies for providing me with copies of their correspondence as well pages and pages of women's experiences when they called the police. As it always is for me, it was a great privilege to be able to be in touch with women's direct experiences.

³²³ Another women had just had her husband attempt to strangle her and had marks on her neck when the police arrived. Her husband was given a warning and no charges were laid. Between October 1988 and August 1989, the Assaulted Women's Helpline documented over 38 pages of incidents similar to the ones mentioned.

³²⁴ Letter, July 21, 1989 to the Attorney General of Ontario, Ian Scott, on file with the author.

acceptable. Discussing her concern for public perception of the policy, Lynda Davies was quoted as saying: "It's just not working for assaulted women. We're really concerned the public perception is that things are changing. They're not".³²⁵

There are further indications that some police officers are not taking wife assault seriously as they do not respond to calls in a timely manner. The Toronto Assaulted Women's Helpline estimated that in 24% of the calls women made to the police, the response time varied from 30-60 minutes. In 7% of the calls, the response time was between one and two hours.³²⁶ The British Columbia Task Force received similar evidence that some officers are not responding immediately to these calls even though the policy specifies that calls from women who are being battered should be dealt with on a priority one basis.³²⁷

³²⁵ Cited by Dana Flavelle, *supra* note 310, at C1. The day following this article, Michele Landsberg described examples of police officers' refusals to lay charges in her column of the same paper. She refers to one example in which an immigrant woman was told by a police officer that "If we charge him [her husband], they'll put him on a boat and you'll never see him again". Michele Landsberg refers to a "notorious" case in which the police failed to respond in a timely manner to a woman's plea for assistance because she asked "too politely" and did not sound "convincing" enough. A few hours after this call, the woman was found dead. Michele Landsberg believes that it is the attitudes of many police officers that obstructs their ability to deal with this crime appropriately. "Too many police have classically chauvinistic attitudes. They can't hear a women's real fear; they can't see a crime against a woman when she's standing in front of them and bleeding". Michele Landsberg, "Students Learn Sexist Lesson At University", *The Toronto Star* November 11, 1989, H1

³²⁶ B. Farge and B. Rahder, "Police Response to Incidents of Wife Assault (Toronto Women's Helpline, 1991), reproduced in J. Mosher, *Wife Abuse: Assessing the Intervention of Law and Social Work* (Toronto: University of Toronto Press, 1992), as cited by Mark Drumbl, *supra* note 38, at 134

³²⁷ It has been suggested that part of the problem may lie in the dispatch of the call. British Columbia Task Force on Family Violence, *supra* note 38, at 87. One fatal example of how wife battering is not taken seriously, and how the classification of calls can effect the police officer's response, involved a woman who was severely beaten and raped in her home by an intruder. She called the police for assistance and was not responded to because the

The Assaulted Women's Helpline has heard numbers of stories from women about their experiences of inappropriate treatment from police officers. In a letter to the Minister Responsible for Women's Issues, a representative of the Helpline commented:

"In many situations the police officer's attitude toward the crime and the victim is less than respectful. Frequently, officers do not seem aware of basic information regarding the offense and what the officer's options are. Frequently, the women receives incorrect or little information as to her options".³²⁸

The British Columbia Task Force also "...received many submissions from across the province that indicated that police, Crown counsel and judges still do not take wife assault seriously and lack the training to deal with it effectively".³²⁹ There is other evidence that police officers continue to rely upon biased assumptions about women who are battered and about men who batter. In 1989, Kathleen Ferraro and her research assistants accompanied police officers to calls of wife assault

911 dispatcher said he has thought the call was for a "domestic dispute". Barbara Greene, supra note 313, at 38. An example of the failure of police to respond to women's calls for assistance in spite of the focus on wife assault prevention is the necessity for an inquest into the murder of a woman in 1988. This woman was shot and killed by her former husband. The inquest revealed that she had called the police at least 20 times over several months asking for them to enforce a court order prohibiting him from approaching her. Her requests were ignored. Dana Flavelle, supra note 310, at C1.

³²⁸ From a letter to the Solicitor General, dated July 21, 1989. The Helpline wrote numerous letters to the Solicitor General, the Attorney General and the Minister Responsible for the Status of Women. In a letter dated May 8, 1989 to the Solicitor General, the Helpline expressed that they were "...deeply concerned that in many cases, charges are not being laid" and that it was critically important that this was responded to, as many women and children remain at risk. In a response letter written by the Solicitor General of Ontario, the Ministry recognized that there were lapses in police practices of the policy. Meetings were arranged between the personnel of the Assaulted Women's Helpline and the Ministries to further discuss the problems and the potential for resolution.

³²⁹ The British Columbia Task Force on Family Violence, supra note 38, at 86.

and recorded the comments made by the officers. Overall, they found that, regardless of the charging policy, police officers relied upon stereotypical assumptions in deciding whether the law had been broken.³³⁰

By not responding to calls for assistance in a timely manner and not responding to women appropriately, police officers are revealing that their attitudes towards wife assault have not really changed since the implementation of mandatory charging policies. Against the hopes for charging policies, it appears that wife assault is still being viewed as a "priority two" call by some police officers and women who are being battered and call the police for assistance are still being treated inappropriately.³³¹

³³⁰ Kathleen Ferraro, "Policing Woman Battering" 36 *Social Problems* 1 1989, 61 as discussed by Marli F. Rusen, *supra* note 96, at 22-25. Ferraro further observed that police officers tend to divide communities into "normal" and "deviant" citizens. "Normal" citizens included those who were employed, sober, raised and supported a nuclear family and had a clean home. They were also usually white and anglophone. "Deviant" citizens were those who were intoxicated, unemployed and usually non-white. When police officers were in "normal" homes, the battering behaviour was often regarded as a response to stress. In "deviant" homes, the violence was perceived as a natural part of their life. She further found that some police officers believe that because women "choose to stay" in violence, it is not a police responsibility. Police officers made reference to women dropping charges and thought that laying a charge was useless. In addition, Ferraro also found that some police officers judge the women's behaviour and hold her accountable for the man's violence depending on her actions, such as being intoxicated. This obviously has implications for women of colour and black women who are battered, and the men who are battering them. This will be discussed further in chapter five.

³³¹ Another concern that has arisen, one beyond the scope of this project, is that police may be overzealous in their approach to assault and may be inappropriately charging women when they act in self-defense. In 1989, the Toronto Women's Helpline heard from a woman who had a disability who had been charged by the police. To get her male partner to stop punching her in the head, she bit him. Although she was still bleeding when the police arrived, they charged her. As discussed by Dana Flavell, *supra* note 310. More recently, in a forum on wife battering and the experiences of immigrant and visible minority women, one woman of colour explained to the group that she had been arrested and jailed by the police even though she had a restraining order against her male partner. National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", *supra* note 17, at 13. At a workshop in Ottawa, "Putting the Pieces Together: Improving the Criminal Justice System's Response to

Police officers themselves recognize that the charging policies are not being consistently followed across the country. In one study, a police officer explained that the directives were not being consistently followed because the procedures are not explicit enough and there is a lack of coordination with the rest of the criminal justice system. Another officer supported this comment by remarking:

"It's fine for us to be firm about charging, but the lawyers and judges aren't up on the policy, so they keep giving those guys discharges and that can be pretty frustrating, so some of the police get discouraged and stop charging".³³²

Some police officers are not consistently laying charges because they believe that wife assault cases will not benefit from legal intervention. They rationalize that women will continue their relationships regardless of police action, will not appear or testify in court and that the man will be acquitted anyway.³³³ As is discussed later in this chapter, there is reason for police officers to be frustrated with the

Violence Against Women, January 12 and 13, 1995, there was much concern over women being charged. A prosecutor from Winnipeg explained that this is happening quite often in her jurisdiction. This effect of mandatory charging policies needs to be explored

³³² Linda MacLeod, *supra* note 2, at 86. The frustration experienced by police officers as a result of the lack of support from other players in the criminal justice system will be discussed later in this chapter.

³³³ As discussed by Barbara Greene, *supra* note 313, at 38. The report criticizes this frustration as reflecting a "profound lack of sensitivity towards the complexity of wife assault". I recently came across another example of a police officer's frustration with women wanting to drop charges, and an example of some police officers' attitudes towards wife assault. A male police officer wrote an anonymous letter to *Vis-A-Vis*, a national newsletter on Family Violence. In this letter he explained how he believed the criminal justice system had a role to play in ending men's violence against women and was anxious to play his part in this. However, he became discouraged when women wanted to drop charges and reconcile with the men who had battered them. He commented: "When I turned to senior officers for an explanation, I was greeted with a chorus of 'I told you so's' and told this was a prime example of why I should not bother taking these things too seriously". 11 *Vis-A-Vis* 4 A National Newsletter on Family Violence, Canadian Council on Social Development, Spring 1994, at 10.

response from the rest of the criminal justice system. Often, there is a lack of follow through with charges, and unlike what police officers are told through police charging policies, the actions of the judiciary do not reflect the seriousness of wife assault. It may also be frustrating for police officers that women choose to remain in their relationships and may be reluctant to testify. However, police officers who choose not to arrest based on this frustration are contravening charging policies. It was this type of reluctance to charge and exercise of discretion that mandatory charging policies were supposed to have curtailed. It appears that they have not

2.2 RESPONSES TO LIMITED IMPACT

Provincial governments across Canada have responded to police officers not following the charging policies by issuing memorandums stressing the importance of laying charges and following the policy directives. The government's message continues to be clear, police officers are expected to lay charges in all cases of wife assault where probable grounds exist to do so³³⁴. In 1986, Ian Scott, then Attorney General of Ontario, introduced a subsequent guideline to the initial 1983 policy with the following comment:

"We're determined that every person in this province will know once and for all, that family violence just like violence in the street is a criminal act, not a domestic or family affair, and that anyone who committed such a crime will have to be prepared to take the

³³⁴ For example, refer to Ministry of Solicitor General and Correctional Services, January 14, 1994, Memo re. New policing Standards - Wife Assault, Hate Bias Motivated Crimes and Hate Propaganda.

consequences".³³⁵

In 1989, another guideline was introduced by the Acting Deputy Minister of the Ministry of the Solicitor General. In explaining the need for a stronger guideline, he wrote:

"[W]e know the laying of charges by officers results in a significant reduction in victim-reported violence as well as a significantly higher level of satisfaction by victims with police services in this area... A preliminary review indicates that charges are being laid in less than one half of spousal assault occurrences in Ontario. In approximately one third of occurrences where no charges were laid, officers cited 'No charge - victim's request' as the reason".³³⁶

These memorandums are further evidence that some police officers continue to resist charging men who batter women.

While there is much to criticize in the responses of police officers to mandatory charging policies and to women who are battered, it needs to be acknowledged that some police officers respond with care and sensitivity. As Linda MacLeod reminds us, some police officers have served as diligent advocates of battered women and know well the myriad of problems women encounter.³³⁷

³³⁵ As cited by Timothy Endicott, supra note 160, at 370

³³⁶ This was sent to all Chiefs of Police in Ontario. This memorandum went on to suggest steps that would encourage police officers to lay charges. As discussed by Jennie Abell, supra note 26, at 321. The recommendations were: police should interview the parties separately, that police not ask if the woman wants charges laid but assert it is the duty of the police to do so, that police officers proceed to lay a charge, police make it clear that neither parties nor police can withdraw charges, police should file an occurrence report whether they respond to an altercation between a married couple or a couple living together, supervisors review those reports and discuss any pattern of a particular officer not to lay charges with that officer, and that there be better record keeping in order to notify officers of previous history of assault and weapons. Memorandum to All Chiefs of Police, Re: Spousal Assault (6 April 1989), as discussed by Jennie Abell, supra note 26, at 160.

³³⁷ She also reminds us that as this policy has given almost sole responsibility for responding to wife battering to the police, often at the expense of focusing on other areas of

Recognition of this leads me to consider that more analysis is needed in order to find out more about what is going on at this level. Although I have no doubt that some police officers simply continue to base their arrest decisions on antiquated ideas about the role of legal intervention in cases of wife battering and on their own assumptions about what women want, I wonder if other police officers are witnessing some of the negative impacts mandatory charging policies have on women. It could be that some police officers are not laying charges because women are pleading with them not to and because they know that legal intervention in all cases of wife battering is not going to help women. Before future directions are mapped out to respond to the inconsistencies and ineffectiveness of mandatory charging policies, I think we need to know more about why some police officers are responding the way that they are³³⁸ Part of their response, as reported by police officers themselves, arises from the reactions of other agents in the criminal justice system. It is to this concern that I now proceed.

3. THE LACK OF SUPPORT FROM THE CRIMINAL JUSTICE SYSTEM

There has been extensive feminist work on how the criminal justice system negates men's violence against women and operates on stereotypical assumptions

the criminal justice system, and police are often frustrated and discouraged. Delegating the responsibility to the police can increase the potential for the ineffectiveness of the policy as other responses in the criminal justice system are not necessarily in line with the charging policy. Chivalry, 22. At a later point, MacLeod comments that police officers repeatedly echo the theme of frustration that "...legal intervention provides neither a complete nor an enduring solution to the problem of domestic violence". Linda MacLeod, *supra* note 237, at 24.

³³⁸ This type of investigation would be supplemental to the research needed on all women's experiences of mandatory charging policies.

about the role and nature of women in society.³³⁹ As Jennie Abell has remarked:

"Overall, there is a discounting of the extent of wife battering, and when it is acknowledged, myths prevail which excuse or justify the man's conduct (provocation, stress, alcohol) or which rationalize the criminal law's failure to intervene in the private world of the family...".³⁴⁰

If the strategy that wife assault is a crime is to be taken seriously, and if it is to be effective, all agents of the criminal justice system would need to uphold this claim and consistently support it. However, not all agents of the justice system adhere to the philosophy that wife battering is a serious crime.

3.1 CROWN PROSECUTORS

At the same time as the government was encouraging police to lay charges in cases of wife battering, the federal government and four provincial governments issued policy directives to crown attorneys to vigorously prosecute charges of wife assault.³⁴¹ These guidelines were introduced in order to support police practices

³³⁹ In as much as I would like to discuss how the entire criminal justice system negates wife battering, this discussion is beyond the scope of this project. The discussion that follows is brief and mainly focuses on how the system is undermining the charging policies and how some women are experiencing their "participation" in the system. For discussions regarding the nature of the system's response to men's violence against women, refer to supra note 46. For specific references regarding crown prosecutors refer to Lynn M. Gaudet and Paula Pasquali, "As If Victims Mattered: A Guide to More Rational Prosecutions of Men Who Violate Women and Children" (Whitehorse: Unpublished paper, February 1992), Ann McGillivray, supra note 169; Jane E. Ursel, supra note 14 and supra note 169; and Timothy Endicott, supra note 160, at 367.

³⁴⁰ Jennie Abell, supra note 26, at 234. She further discussed how wife battering is not considered by the criminal justice system as a public harm, that it is individualized and the focus is usually on why women stay.

³⁴¹ The four provinces that issued directives at this time were Ontario, Manitoba, Saskatchewan and British Columbia. With much publicity, Quebec joined the other provinces in 1986 and issued directives to crown prosecutors. As discussed by Timothy Endicott, supra

and increase the potential effectiveness of charges as a deterrent to men's violence. The concern was that failure on the part of the crown prosecutor to follow through on the charge would have the effect of minimizing the seriousness of the violence and undermine the assault. As has been remarked:

"Non-enforcement of the law may convey the message that wife assault is acceptable, that public sanctions are inappropriate, and that women will remain in a position of powerlessness against their partner's violence and control."³⁴²

The directives issued by the Attorney General specify that prosecutors are to drop charges of wife assault only in exceptional or unusual circumstances. However, there is evidence that prosecutors are dropping a large number of charges.³⁴³ In Toronto, in 1988, the Metro Police laid 2005 charges of assault against men who assaulted their female partners. Of those 2005 charges, 900 were withdrawn by the crown prosecutor with explanations that the woman did not show up in court, the man was in counselling, or a peace bond had been issued.³⁴⁴

note 160, at 370. The province of Ontario designated funding to public education campaigns aimed at increasing awareness that wife assault is a crime. In 1989, for example, the province spent \$860,000 in this regard. In 1984, the month of November was declared Family Violence Prevention Month by the province of Ontario and in 1989, the theme of the month was "Wife Assault is A Crime". As discussed by Dana Flavelle, supra note 310.

³⁴² Status of Women, Canada, Final Report on the Federal, Provincial, Territorial Group on Wife Battering (Ottawa, 1986): as discussed by Zoe Hilton, supra note 14, at 331.

³⁴³ Timothy Endicott provides a good discussion of some of the problems associated with the non-prosecution of such cases. Supra note 160, at 369.

³⁴⁴ As cited in Dana Flavelle, supra note 310. There is also other evidence that crown prosecutors are dropping more charges than the policy would lead one to expect. Also refer to Zoe Hilton, supra note 14, at 330, for a similar discussion. A study in Quebec revealed that crown attorneys often do not follow through on charges of wife assault. Crown attorneys explained that they do not prosecute some cases because of the "poor job done by the police", because of "lack of time" and because of biases. As discussed by Linda MacLeod, supra note 312, at 8.

In another study conducted by the Ottawa Police Department, it was found that 43% of charges of wife assault were dropped by the crown attorney.³⁴⁵

Some women whose male partners have been charged with assaulting them are experiencing frustration with crown prosecutors. Part of this dissatisfaction results from the insensitivity and lack of awareness of some crowns. The Manitoba Association of Women and the Law received many submissions regarding women's concerns. Two of the main concerns women expressed were the number of charges being "stayed" by the crown and the amount of inappropriate plea bargaining in their cases.³⁴⁶ Women further informed the Association that crown attorneys were often ill-prepared for their cases and did not provide support to women.³⁴⁷

³⁴⁵ In response to a number of police officers and women expressing concern with the number of cases being dismissed by the crown attorney's office in Ottawa, Debra MacLeod, from the Ottawa police, conducted a study assessing how often charges were being dismissed. In a random survey of 175 cases (in which 296 charges had been laid), she found that 127, or 43% of the charges, were withdrawn at the request of crown. She concluded that there is a "...systematic over reduction of charges and penalties.." in Ottawa. Debra MacLeod, supra note 16, at 9-13.

³⁴⁶ Manitoba Association of Women and the Law, supra note 169, at ix. In a five year period, crown prosecutors in Manitoba stayed one third of all cases involving wife battering. At 1-41. The Barbara Schiffler Women's Clinic in Toronto also found that in Ontario, crown attorneys will often proceed with plea bargaining even if the woman openly expresses her opposition to it. Your Rights: An Assaulted Women's Guide to the Law, (Toronto: Ontario Women's Directorate, 1991), at page 63, as discussed by Mark Drumbl, supra note 38, at 132.

³⁴⁷ Manitoba Association of Women and the Law, at x. The study also found that crowns drop charges without consulting or telling the woman, do not feel a great sense of responsibility to the woman, do not keep her well informed and sometimes seem very disinterested in the whole matter. Page 2-25. In addition to the power crown prosecutors have over whether or not to proceed with the charges, prosecutors also have the power of deciding how to proceed with the charge. The vast majority of wife battering cases are prosecuted under the simple assault provisions of the Canadian Criminal Code, sections 265 and 266, under which the prosecutor has the discretion to proceed summarily or by way of indictment. The importance of this decision is that the maximum sentence for an assault charge proceeded summarily is eighteen months incarceration and a maximum fine of \$2000.00. If the

In as much as some women are concerned that crown attorneys are not following through with charges, some women are disconcerted that crowns will not drop charges. Some women do not wish to be involved with the criminal justice system, for many and varied reasons. Some women do not trust the criminal justice system³⁴⁸ in that judges do not take into consideration what is best for women nor do they always administer appropriate sentences, women fear retaliation from the men who batter them, they may fear racism and they may fear that their partner, if of colour or black, will be met with racism from the system.³⁴⁹ Some women also find the criminal justice system to be coercive and controlling.³⁵⁰ As one women who has been battered commented:

"Participation in the criminal justice system wasn't presented to me as a right. It was an obligation. I was made to feel that I had no choice if I wanted any other kind of support or help." ³⁵¹

crown proceeds by way of indictment, the court can impose a maximum of up to five years incarceration (a maximum sentence that is rarely imposed). Obviously, the crown can limit the disposition that a judge can impose by their election of proceedings. An inappropriate election can serve to trivialize the offense. For a discussion of this, refer to Drumbl, 132

³⁴⁸ As discussed in Barbara Greene, supra note 313, at 38

³⁴⁹ The fear of racism and how it impacts on the experiences of women of colour and black women with mandatory charging policies will be discussed in the following chapter

³⁵⁰ The British Columbia Task Force on Family Violence has commented that many women continue to find the criminal justice system coercive, controlling and unresponsive, and do not want to be involved with the system. Some women have also said that the control by the criminal justice system is worse than the control of the batterers. As discussed by Linda MacLeod, supra note 32, at 6. Some women also have little faith in the system's ability to stop the violence. The British Columbia Task Force on Family Violence, supra note 38, at 96. Also refer to the Canadian Advisory Council on the Status of Women, supra note 32, at 18 for a discussion about women not believing the police can help

³⁵¹ As quoted by Linda MacLeod, supra note 20, at 8

Another woman, who is a First Nations woman³⁵², has commented:

"Why did I even call the police? They took my family, my home, my security, my dignity, and my belief in what's right. I would rather be beaten every day of my life by my husband than have a bunch of strangers take my life away without even asking".³⁵³

Some women so strongly want out of this process that they perjure themselves on the stand, refuse to testify or do not show up in court. The criminal justice system, in what can be described as a control mechanism, has responded to women who refuse to take part by charging them with contempt of court.³⁵⁴

The implications of this are far reaching. As a result of mandatory charging policies and the no-drop policies of crown attorneys, some women are experiencing coercion from the system, some are being put in situations where

³⁵² I specify that the woman is a First Nations woman as it is how she is described in the source I am citing and I do not want to appropriate her pain to all women. There are times when I do not distinguish whether a woman is of colour or has a disability as it is not presented in the source that I am citing. I am conscious that this is perpetuating the notion that when "woman" is not prefaced it is assumed she is white. Apart from mentioning it at this point, I am not sure how else to address it in this paper.

³⁵³ As quoted by the Canadian Advisory Council on the Status of Women, supra note 32, at 18. Another woman has commented. "I've been living with fights for the past 15 years. As far as I can tell, taking him to court is another fight. I just want to put all those battles behind me". As quoted by Mark Drumbi, supra note 38, at 150.

³⁵⁴ For a discussion on women being charged with contempt of court, refer to the Canadian Advisory Council in the Status of Women, supra note 32, at 18; Zoe Hilton, supra note 14, at 330; Linda MacLeod, supra note 2, at 228; Christine Boyle et al, supra note 6, at 31-32; and Ann McGillivray, supra note 169, at 15. She discusses how many women would rather face contempt charges than the consequences she would receive from the man if she testified. At page 36. In February of 1988, a 26 year old woman served 2 days of a 7 day sentence for contempt of court. The media report of this charge resulted in a public outcry and she was released early. As discussed by the Manitoba Association of Women and the Law, supra note 169, at 3-45 and 3-46. A court of appeal has upheld that victims should be compelled to testify because it is the state's duty to protect the public. R. v. McGinty (1986), 16 W.C.B. 329 (B.C. Court of Appeal), as discussed by Timothy Endicott, supra note 160, at 370.

they need to lie, and other women are being charged with contempt of court.³⁵⁵

As Jennie Abell has commented, the focus of the criminal justice system once again, has been on the woman and she is being perceived as a barrier to the course of criminal justice.³⁵⁶

One question that is raised by women's experiences with the criminal justice system concerns whether the system is duplicating the dynamics of control that some women experience from their male partners. As Linda MacLeod has commented:

"The ramifications of inadvertently creating solutions which mirror some or all of the characteristics of the battering experience touch more than just the women who are battered and those men and women working to prevent violence. We are all diminished by a vision of help... which controls, isolates...and puts the major responsibility for change on only part of our population - on women. Through this controlling, limiting vision, we are all robbed of hope, energy, and creating passion. We are left wondering what went wrong".³⁵⁷

Without doubt, the impact of mandatory charging policies at this level needs to be examined.³⁵⁸

There are a number of issues concerning the appropriateness of crown

³⁵⁵ Mark Drumbi has further commented that forcing women to testify risks reinforcing stereotypes of women as unstable and lacking credibility because many women will lie on the stand. Mark Drumbi, supra note 38, at 149.

³⁵⁶ Jennie Abell, supra note 26, at 244

³⁵⁷ Linda MacLeod, supra note 20, at 14-15

³⁵⁸ Many other issues are raised that are beyond the scope of this discussion. For example, there is considerable debate around whether women need to testify at all in cases of wife assault. Some argue that crown attorneys should (could) prosecute cases without women's testimony. This should also be explored.

attorney's having the power to decide when and why charges will be dropped. Arguments put forth by advocates of no-drop policies have traditionally argued that because women are harassed and threatened into dropping charges by the abuser, they are not "free" to make a decision about the charge and the state has the responsibility to protect her and uphold the criminality of the violence. Proponents of vigorous prosecution further argue that while a woman should not be forced to testify when she fears for her safety, "victim non-cooperation" should be removed as a rationalization for dismissing charges and other methods should be used to secure a finding of guilt.³⁵⁹

Those against directives for vigorous prosecution insist on a women's right to self-determination. They argue that women who are battered themselves must decide how to proceed and that no-drop policies take away her power to make her own decisions. It is further argued that to take the decision away from the woman replicates the dynamic of victimization; she is stripped of her control and prosecutors will abuse their power and ignore women's concerns for safety.³⁶⁰

A number of these concerns also pertain to mandatory charging policies. As discussed in chapter three, part of the impetus behind their implementation was

³⁵⁹ For a discussion around this strategy, refer to Susan Schechter, *supra* note 2, at 175. Proponents of this strategy also point out that women should not be held responsible for controlling the abuser's violence, that the state has to take a stand against men's violence against women and punish abusers, that the victim should be treated as a witness rather than a complainant and that government institutions should take responsibility for addressing men's violence against women.

³⁶⁰ It is also argued that the criminal justice system cannot be given more power over women or the shaping of their lives and that legal intervention is too narrow an approach. As discussed by Susan Schechter, *supra* note 2, at 175.

to relieve women from the burden of deciding whether or not a charge should be laid and to "protect" her from being harassed and threatened by the male partner.³⁶¹ Advocates of charging policies also stress the state's responsibility in denouncing men's violence against women. Alternatively, it can be argued that mandatory charging policies take away a woman's right to decide for herself if she wants to be "involved" with the criminal justice system. As discussed above, some women continue to find the system coercive and controlling and yet are forced to participate. These are very difficult dilemmas to address and I do not think there are any easy answers. Each of these points have some validity, in terms of theoretical significance and real impact on some women's lives. It is because these arguments have such legitimacy that I think there are some very serious questions we³⁶² need to ask ourselves - about what we are expecting from charging policies and no-drop policies and the effects they are having on some women.³⁶³ In relation to the effects that "wife assault as a crime" has had on the

³⁶¹ I use "protect" in quotations because I do not think women can be protected from being harassed or threatened by having police lay charges. Some men do not need a "logical" reason to control and abuse their female partners and will continue to harass women regardless of whether the police "laid the charge" or "she laid the charge". At the same time, I do understand that police initiation of charges gives some women "power" to claim that they have no "power" over what happened to the charge. I just do not know if this "power" means as much as it is hoped it does.

³⁶² "We" meaning feminists and (other) advocates of women.

³⁶³ My initial feeling about the responses of some crown attorneys is that, to a large extent, this is about perceptions and attitudes toward wife battering and women. However, I still think that there may be, in some cases, more to this. Like police officers, crown attorney's might know well the issues and concerns women are experiencing as a result of the "wife assault as a crime" strategy. They are often faced with women who plead with them to drop charges and they know that the sentences given to men who batter are not always appropriate.

criminal justice system, and the ways in which this effects all women, no aspects of the system should be left unobserved.³⁶⁴

3.2 JUDGES

There are also concerns being raised by some women and police officers about the treatment of wife battering by the judiciary.³⁶⁵ One concern with the Canadian judiciary is that judges are treating defendants too leniently. It is reported that in Toronto, 15% of all wife assault charges brought before a judge are dismissed absolutely; 16% of defendants receive a fine, usually in the amount of \$250.00; and 65% of all men convicted of assaulting their female partner receive either a conditional discharge, probation or a suspended sentence. It is estimated that, in Canada, only 5% of men convicted of assaulting their intimate partners receive any term of incarceration.³⁶⁶ The point here is not necessarily to argue for stiffer punishments, but rather to call into question what message and meaning such actions entail, both for the strategy of wife assault as a crime and for

³⁶⁴ Linda MacLeod points out that the focus and responsibility of this approach lies with police officers. She suggests, like I am, that more scrutiny should be given to other areas of this system. Supra note 237, at 7.

³⁶⁵ For a discussion of the judiciary's treatment of wife battering, refer to Timothy Endicott, supra note 160, at 371.

³⁶⁶ Mark Drumbl, supra note 33, at 135. Drumbl adds that in order to receive a term of incarceration, the man must either kill or grievously (as defined by the court) assault his partner. He also adds that only 6% of men convicted in Toronto receive an order to attend a batterer's counselling program and when it is ordered, their attendance is not always mandatory. This latter fact is even more problematic given that the majority of women who have been battered want the man to attend counselling. Linda MacLeod found that over 80% of women would call the police for assistance if they knew the batterer would receive treatment. Supra note 2, at 227.

particular women.³⁶⁷ As Linda MacLeod has argued, lenient sentences convey the wrong message; they can be seen as absolving the batterer from his responsibility and blaming the woman for the behaviour.³⁶⁸

Another, and to some extent more disturbing, concern with respect to the judiciary's behaviour is the misogynistic attitudes and bias being revealed through judge's remarks during trials and in sentencing. As Jennie Abell has explained, many comments made by judges in cases of wife assault demonstrate underlying assumptions and attitudes which are bound to shape how they regard men's assaultive behaviour, their findings in the cases and the sentences they impose.³⁶⁹ Much like lenient sentences, if not more so, inappropriate comments during any part of the hearing can have the effect of downplaying the seriousness of the battering.³⁷⁰

The Manitoba Association of Women and the Law received many submissions from women who expressed that they were frequently discouraged by the lenient sentences given by judges, the lack of consistency in sentencing

³⁶⁷ The issue of increased punishment is one that deserves more investigation. I certainly have concerns about using a coercive criminal justice system to deal with controlling and abusive men. Linda MacLeod also makes the point that the over use of fines can be punitive for women and children. Supra note 2, at 87.

³⁶⁸ Linda MacLeod, supra note 2, at 87.

³⁶⁹ Jennie Abell, supra note 26, at 233. She points out that this is not at all surprising given the composition of our judiciary and what we know about patterns of judicial decision making.

³⁷⁰ For a discussion of this, refer to the Manitoba Association of Women and the Law, supra note 169, at 3-28. For a more in depth and adequate discussion of judicial sexism, refer to Sheila Martin and Kathleen Mahoney, supra note 61.

and the inappropriate and sexist comments made by members of the judiciary.³⁷¹ Women spoke of judges referring to the battering as "modest" or "trifling", not holding the man responsible for his actions and condoning the man's violence through the reinforcement of stereotypes of women. The Association cites references to cases in which judges have demonstrated their sexism. In Manitoba, provincial court judge Allen was presiding over a case in which a man slammed his former partner's head against the wall, held her hostage and threatened her with a loaded gun. The judge, in his remarks, commented: "Women - can't live with them - can't live without them. From 60-odd years of experience there isn't anyone worth the trouble you've caused yourself".³⁷² In a case in 1991, Justice John Murphy of the Ontario Court, Provincial Division, gave an absolute discharge to a

³⁷¹ Manitoba Association of Women and the Law, *supra* note 169, at ix. Examples of lenient sentences are frequent. In Ontario, 1989, District court Judge Houston ordered a man to spend 90 days in jail. This man, described by the judge as a "pillar of the Italian community" beat his wife unconscious with a baseball bat. The judge further commented it was an aberration of this man's character and described this man as "an excellent family man" who was "devoted to his children". As a result of this beating, the woman suffered a fractured skull, required neurosurgery and a three week stay in the hospital. There is much in this case that further highlights inadequacies in the criminal justice system. The charge, originally for attempted murder, was plea bargained to aggravated assault, the defense lawyer argued the man was provoked because the woman did not live up to a mandated role, as, for instance, she was drinking and failed to regularly do the laundry. *R. v. Capretta* (May 23, 1989, E.J. Houston, J. (Ont. Dist. Ct.), as discussed by Jennie Abell, *supra* note 26, at 218 and 249. Abell continues to discuss how attitudes about the private nature of the family and misconceptions about the nature of men's battering shape judicial decision making.

³⁷² Manitoba Association of Women and the Law, *supra* note 169, at 1-22. This report cites many other references to sexist comments made by the judiciary. In a Quebec court, Judge Dionne made the following comment: "Rules are like women, they are made to be violated". In an Ottawa court, district court Judge Mercier gave a man a suspended sentence after a jury had convicted him for raping his former partner. Although he attacked and raped this woman in a park, with the help of a friend, Judge Mercier said: "I cannot in good conscience sentence a man to prison for a crime I firmly believe he did not commit". He cites the fact that the woman did not report the attack to the police immediately and was reluctant to come forward. At 1-32.

man convicted of severely beating his wife. In a comment that so obviously shows his lack of knowledge, the judge stated that "...it takes two to tango, and there were two tangoing here". He added that "...both parties went a little bit overboard". This was in spite of the fact that the woman had injuries commensurate with being hit, pushed and having her face slammed into the floor and the accused had nail scratchings (probably from self-defense).³⁷³ In another case, provincial court Judge Ken Peters, in sentencing a man for striking his partner, remarked:

"How does a person admonish his wife if she goes out on the town with other people, to wit: guys, drinking, and comes home late when she should have been home looking after the children or cooking, or whatever she is expected to do. Sometimes a slap in the face is all that she needs and might not be such unreasonable force after all".³⁷⁴

As has been commented, this attitude is much akin to the historical "rule of thumb". Apparently, this judge believes that there are times when a man has the right to discipline his wife in order to keep her in line and that the law should tolerate such "discipline".³⁷⁵

³⁷³ As discussed by Mark Drumbl, supra note 38, at 140. Another judge of the Quebec court, presiding over a preliminary hearing for a man charged with uttering death threats, said to the woman who was threatened that he "wouldn't lose any sleep if she was to be killed by her husband". As discussed also by Mark Drumbl, at 140.

³⁷⁴ This comment was made in 1989. Manitoba Association of Women and the Law, supra note 169, at 3-31.

³⁷⁵ However, the Manitoba Judicial Council, when reviewing this comment, did not think it was so problematic. They ruled that his conduct was not "unbecoming of a provincial judge" and they accepted his apology. No further action was taken. Manitoba Association of Women and the Law, supra note 169, at 3-32. Judges also rely on racist stereotypes in their judgements. For example, Judge Michael Bourassa commented that a rape in north is different than a rape in south because in the north it happens to First Nations women. For a discussion of this case, refer to National Association of Women and the Law, the National Organization of Immigrant and Visible Minority Women of Canada and the Canadian Association of Elizabeth Fry Societies, "Submissions to the Ontario Commission on Systemic Racism in the Criminal

There is an indication that inappropriate comments and behaviours by the Canadian judiciary may in future be addressed. On January 6, 1994, Chief Justice Lamer stated:

"I don't want any judges whose behaviour is unacceptable. I don't want them on the bench. I want to get them off. If there are judges that are misbehaving or are making sexist or racist comments, I want to know. It's all very well to alert everybody to gender bias, but I want to get rid of those who are biased."³⁷⁶

Although this may seem encouraging, knowing what we know about judicial accountability, it seems unlikely that much of consequence will follow. However, as with police officers and crown attorneys, it is not the case that all judges are sexist or do not understand the realities of wife battering.³⁷⁷ Feminists also need

Justice System" (Ottawa: National Association of Women and the Law, 1993), at 8. They also discuss the lack of mandatory training of judges and how it is often excused with the claim that training reduces judicial neutrality. Att 9. Judicial neutrality has been exposed as a myth. John Hogarth, in 1971, found that if a judge's attitudes, values and beliefs were known, one could predict the sentence that would be given to an accused five to six times more accurately than if just the facts of the case were known. John Hogarth, Sentencing as a Human Process, (Toronto: University of Toronto Press, 1971). Hogarth also found that extra-legal factors, such as political affiliation, social class, religious back ground and ethnic origins, had a profound influence in the decisions of the judiciary. As Renate Mohr has discussed in her article, gender is conspicuously absent from this list. "Sentencing as a Gendered Process: Results of a Consultation", 32 Canadian Journal of Criminology 3, 1990. Also refer to Sheila Martin and Kathleen Mahoney, supra note 61.

³⁷⁶ As discussed by Mark Drumbl, supra note 38, at 141. As a result of some judicial comments coming from the Manitoba bench, the Attorney General, Jim McRae, called for a judicial review. In explaining this call, he commented: "I'm trying to deliver a message, not only to an accused person who might engage in abusive behaviour, but also anybody else involved in our system of justice that this kind of behaviour is not acceptable, nor should it be perceived to be trivialized". As discussed by Manitoba Association of Women and the Law, at 3-29

³⁷⁷ For example, Judge Howland, of the Ontario Court of Appeal, who presided over the Kirby Inwood case, held that the "domesticness" of an assault should no longer be a mitigating factor in sentencing. R. v. Inwood (1989) 69. C.R. (3d) 181 (Ont. C.A.), as discussed by Mark Drumbl, supra note 38, at 138. Progressive, yet somewhat concerning, perspectives can also be found in the Supreme Court of Canada's decision in Lavallee (1990), 55. C.C.C. 97 (S.C.C.). For references for a discussion of the progressiveness and concerns of this cases, refer to

to examine what is happening with the strategy of "wife assault is a crime" at this level.

3.3 LACK OF PROTECTION

Another concern that has often been expressed by women is the lack of protection afforded after charges are laid. Bail is often granted in cases where the man should not be released³⁷⁸ and breaches of bail conditions or restraining orders are not taken seriously by officials.³⁷⁹ This is particularly disturbing knowing that many women are at the greatest risk of being murdered by their male intimates when they are attempting to leave or threatening the position of the relationship.³⁸⁰ In addition, many women continue to be beaten when the man

supra note 26.

³⁷⁸ One example that immediately came to mind happened in Ottawa in January, 1995. A man had held his ex-partner captive, beating her and strangling her into unconsciousness in front of her two children. Against the crown's request, Judge Poulin, of the Provincial Division Court in Ottawa, released the man on bail. This was in spite of the fact that he had made death threats to this woman and had ignored previous restraining orders. Refer to Bob Harvey and Sherri Davis-Brown, "Group Angry At Release of Accused Woman Beater", Ottawa Citizen, January 15, 1995, C1.

³⁷⁹ The Manitoba Association of Women and the Law heard many stories from women concerning this lack of protections after charges had been laid. Supra note 169, at x. On October 13, 1990, a woman was killed by her former partner. He had been arrested on three different occasions and each time he was released on bail, apparently with the crown prosecutor's consent. At 3-48.

³⁸⁰ When thinking about this lack of protection being afforded to women, we must remember that the murder of a woman by her (ex)partner accounts for 40% of all homicides in Canada and that 62% of all women who are murdered in this country are victims of wife battering. Refer to Maria Crawford and Rosemarie Gartner, supra note 37. Between 1969 and 1975, 51% of all homicides were "domestics" (Donald Dutton, supra note 163, at 5); between 1974 and 1983, 812 women were killed (Felicite Stairs and Lori Pope, supra note 25, at 173); in 1988, 97 women were killed; and in 1989, 119 women were killed in Canada by their current or former male partners. Trudy Don, then executive director of the Ontario Association of Interval and Transition House, has commented that the number of women being killed by their

is on probation, parole, a peace bond or some other form of restraining order.³⁸¹

The lack of follow through from the criminal justice system after charges have been laid also needs to be examined. If one of the effects of mandatory charging policies is that women are being put at risk and not being afforded protection, then we need to ask some serious questions. The fact that some women are reporting that they are being beaten after charges have been laid certainly calls into question the findings of Peter Jaffe and Carole Anne Burris that charging is a deterrent to future violence. The deterrent factor in police charging policies was a significant impetus behind their implementation and it continues to be cited as support. If mandatory charging policies are not having a deterrent value, and are instead putting some women at risk, then we seriously need to reconsider what is valuable about charging policies. There needs to be much more research on the impact of these policies.

3.4 LACK OF COORDINATION

The lack of coordination between agents of the criminal justice system and community agencies has also been expressed as a concern by women's

(ex) male partners has increased in the last 4 or 5 years. As discussed by Barbara Greene, supra note 313, at 7. It is now estimated that approximately two women are killed every week in Canada by their (ex) male partners. For additional discussion about men killing their intimate female partners, refer to Margo Wilson and Martin Daly, "Till Death Do Us Part" in Jill Radford and Diana E.H. Russell, (eds.) Femicide: The Politics of Women Killing (New York: Twayne Publishers, 1992) 83.

³⁸¹ Study by the Ontario Women's Directorate, as discussed in Mark Drumbl, supra note 38.

advocates and women who have been battered. This lack of concerted effort diminishes the potential of the crime strategy to effect change and increases women's sense of isolation, fear and frustration. Peter Jaffe has commented:

"If the laying of charges is seen as an overall community response, where the police and support services from the shelter or other agencies work with the police from the moment the charges are laid, from the moment the assault had taken place through to the court appearance, then you are providing proper community service".³⁸²

It is obvious that if a crime strategy to address wife battering is to be in any way successful, then the needs of women have to be met through a coordinated approach. However, the issue for me is more complex. It seems that the key to a more successful approach lies in what is being coordinated, not how it is being coordinated. As has been discussed, there are some serious questions being raised about the extent to which mandatory charging policies are being enforced, how police officers are responding to women, how other criminal justice agents respond to wife battering and whether or not charges are having an effect in terms of deterrent value. It is these issues, not whether they are being coordinated, that need to be examined and analyzed in order to determine what effect mandatory charging policies are actually having.

³⁸² Peter Jaffe, as quoted by Patricia Begin, supra note 283, at 21-22. Linda MacLeod has said that with lack of coordination - "...the end result is that the hoped-for marriage between legalistic and helping approaches to wife battering is not to be consummated". She further mentions that there has been little or no action between community services and if there is, it is usually for information sharing. While this is necessary, it is insufficient. Supra note 237, at 6-9.

4. CONCLUSIONS

Some advocates of police charging policies in cases of wife battering have been questioning the impact of this law reform initiative. Within two years of the policy's implementation, Linda MacLeod, a key player in the drive for changes to police practices, began questioning what had happened. In 1987, Linda MacLeod openly referred to the policy's failure to address the needs of women who are battered:

"This early clarity of vision was essential to allow the decisive action necessary to rally public and professional support around the problem. The early clarity of vision accomplished much. But at the same time it produced quandaries and inconsistencies: it failed the test of reality - the test of battered women's realities".³⁸³

With information, such as what is presented in this chapter, it appears as though people are questioning police charging policies. However, the climate does not seem to have shifted to allow doubts and concerns to be openly expressed and there seems to be a lack of literature expressly criticizing the policies. In a recent workshop I attended on improving the criminal justice system's approach to violence against women, police charging and no-drop policies were taken as a given: there was no discussion about the success or the effects of these policies and any attempt to openly express concern was met with a strong negative

³⁸³ Linda MacLeod, *supra* note 2, at 4. She explained that battered women are not always prepared to support the "bad man, good woman" assumption and were not willing to give up their relationships. Women rarely blamed the man completely and often spoke about their relationship and love. In an article published in 1988, MacLeod made reference to the source of her concerns with mandatory charging policies: "My doubts were fuelled by conversations with battered women. To my dismay, few battered women shared my excitement at the growth of more aggressive charging policies. Some were openly hostile to the idea of greater police intervention". Linda MacLeod, "A Changing Vision of Wife Battering" *Transitions* September 1988, 6, at 7.

reaction.³⁸⁴ One of the concerns of feminists and other critical legal scholars is that law reform often serves to legitimate a state response and acts as a safeguard against scrutiny or criticism. It appears as if this has been one effect of mandatory charging policies.

Although they may be having this legitimization affect, charging policies are not having the effects that were hoped for. Even though there has been a dramatic increase in the number of charges laid by police, the policies continue to be applied unevenly and inconsistently across Canada and women continue to report incidents of being treated poorly by officers. The charging policies are not being consistently supported by other agents of the criminal justice system and there has been an overall lack of integration.³⁸⁵ There is an absolute need to further explore the impact of charging policies on many levels. For instance, one focus should be to explore the success that has been reported in London. However, as the test of success should always be the experience of all women, we must explore whether women are feeling safer and freer and how women of colour and black women are experiencing these policies. It is to this that I now proceed.

³⁸⁴ Supra note 331.

³⁸⁵ A Canadian study has found a 700% increase in the number of charges being laid by police officers since the implementation of the policy. The study also found a decrease in conviction rates, an increase in not-guilty findings, an increase in withdrawals and an increase in the number of fines. As discussed by Linda MacLeod, supra note 237, at 23.

CHAPTER FIVE
EXPERIENCES OF POLICE INVOLVEMENT IN WIFE
BATTERING:
BLACK WOMEN, WOMEN OF COLOUR
AND IMMIGRANT WOMEN

1. INTRODUCTION

When examining the issue of mandatory charging policies in cases of wife battering, it is essential to contextualize women's experiences. Without doubt, many of the needs of women who have been battered are similar; all women need support, need understanding and are usually in need of protection. In some ways, such needs transcend class, race, culture, language, age, sexual identity and ability differences.³⁸⁶ There are many similarities in the experience of wife battering among women. Almost all women experience some sense of isolation, vulnerability and hopelessness. Even when the needs are similar, however, they are often magnified by other experiences such as racism, loneliness and a newness of environment.³⁸⁷

Women also experience interventions to prevent wife battering, such as mandatory charging policies, in distinctive ways. While some women may want legal intervention when they have been battered by their male partners, black

³⁸⁶ Linda MacLeod and Maria Shin, for instance, have conducted research with immigrant women who have lived in Canada for a number of years and who speak neither English or French. They found that many of the needs of these women were similar to women who are abused generally and women who recently immigrated to Canada. "Like a Wingless Bird", supra note 19.

³⁸⁷ Linda MacLeod and Maria Shin articulated this in relation to immigrant and refugee women. "Isolated", supra note 19, at 7. Variations in experiences of being battered can be shaped by a woman's class, race, culture, physical and mental ability, and sexual orientation.

women, women of colour and immigrant women often fear racist brutality from police officers and interventions by police can result in ostracization from their families and communities. As discussed in the second chapter, many women of colour, immigrant women³⁸⁸ and black women are critical of mainstream approaches to wife battering and white-middle-class feminist models which marginalize their needs and realities.³⁸⁹ The strategy of "wife assault as a crime" is one response to wife battering that is being criticized. Black women, women of colour, immigrant women, and their organizations argue that the focus on legal strategies does not recognize the complexities of violence against women within a racist society.³⁹⁰ As Linda MacLeod and Maria Shin have remarked:

³⁸⁸ The definitions or understandings of the term "immigrant" used in the literature on wife battering and immigrant women often vary. Sometimes, when women are referred to as "immigrant women", it is only immigrant women of colour that are being alluded to. I have chosen to use the term as Linda MacLeod and Maria Shin do in their monograph "Isolated". This "everyday" definition includes recent immigrants, refugee claimants, persons with temporary status such as visitors, landed immigrants, and permanent residents who consider themselves outside of the mainstream. The definition encompasses women of colour and white women. Linda MacLeod and Maria Shin, "Isolated", *supra* note 19, at 8. As is apparent from this definition, immigrant women and men are not a homogeneous group; they vary in culture, ethnicity and language. As discussed by San San Sy and Sudha Choldin, "Legal Information and Wife Abuse in Immigrant Families" (Ottawa: Department of Justice, Canada, 1994), at 7.

³⁸⁹ Maria Shin and Michele Kerisit, *supra* note 17, at 1. Maria Shin and Michele Kerisit, in their work on violence against immigrant and visible minority women comment that their voices have been "raised" and they are speaking from their experience. To categorize the voices of immigrant women and women of colour as being "raised" communicates much about what was needed in order for their voices to be heard. If they were being listened to, then I wonder if their voices would have had to have been "raised"

³⁹⁰ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", *supra* note 17, at 3. Another forum sponsored by the National Organization of Immigrant and Visible Minority Women of Canada addressed the issue of legal strategies to address men's violence against women within a race context. The participants involved in this work included women's advocates, survivors, health care professionals, lawyers, educators, counsellors, cultural interpreters, police, and community workers. They found that many women of colour, black women, and immigrant women, are not accessing police intervention

"Many immigrant and refugee women fear involvement with the justice system, often because their experiences with police as a repressive force in their country of origin, sometimes because of their fear that involvement with the justice system will mean deportation, often because the justice system is intimidating and because many immigrant and visible minority women and men report experiences of racism from justice system responses..."³⁹¹

In order to discover the issues concerning mandatory charging policies, and the strategy of wife assault as a crime more generally, it is necessary to explore these experiences. Often, black women, women of colour and immigrant women are put in precarious positions, caught between a system that is offering help but is oppressive and a community that provides support but does not respond appropriately to their experience of being battered. This is particularly true in relation to a racist criminal justice system that often discriminates against and brutalizes persons of colour and black people. Women's fear of police brutality and other forms of racist violence in the legal system has profoundly impacted on their experiences of mandatory charging policies. This impact, and the perspectives of some black women, women of colour and immigrant women on police charging policies are explored in this chapter. I also explore additional problems and dilemmas encountered by women of colour, black women, and immigrant women in their decisions to involve police services in their and their

(9), are afraid of police harassment or their partner being shot (10) and often experience systemic racism in the legal and immigration systems (11). In fact, the fear of deportation experienced by some immigrant and refugee women, coupled with restrictive immigration laws, made it impossible for some women in the focus groups to report their experiences of abuse. The work and findings of this group will be referred to throughout this chapter. National Organization of Immigrant and Visible Minority Women of Canada, "Impact", *supra* note 17, at 3-4.

³⁹¹ Linda MacLeod and Maria Shin, "Isolated", *supra* note 19, at 11.

partner's lives. This exploration entails examining some of the realities that women of colour, black women, and immigrant women face that affect how they experience being battered by their male partners.

Before I continue, I think it is important to stress that it is misleading to present women of colour, black women, and immigrant women as a homogenous group. It is not my intention to do this; indeed, my intention is to argue for a comprehensive recognition of the differences in women's experiences of wife battering and of strategies for change. There are many differences between the experiences of these women, both in relation to each other and within their own communities. Cultures are indeed multi-layered and complex and generalizations are often inappropriate. Immigrant persons, for instance, vary in terms of culture, language and ethnicity³⁹² and, while women may share oppression based on gender, this oppression often plays out differently in different cultures. My aim with the following chapter is to discuss certain general experiences and perceptions of women of colour, black women, and immigrant women which may be similar, because of the shared experience of being from a non dominant group, and to explore how these experiences shape their responses to being battered.³⁹³

³⁹² San San Sy and Sudha Choldin, supra note 388, at 7.

³⁹³ Linda MacLeod, supra note 2, at 26, also makes this point and proceeds to discuss similarities in experiences.

2. RACISM IN THE CRIMINAL JUSTICE SYSTEM: ITS EFFECTS ON MANDATORY CHARGING POLICIES

The National Organization of Immigrant and Visible Minority Women of Canada has commented that the needs of women of colour, black women, and immigrant women are not reflected in policies and programs and there is very little, if any, consultation with these women regarding social policy development and program planning.³⁹⁴ The result of non-consultation or participation is predictable; often programs to assist women who are battered and policies designed to address wife battering are culturally and linguistically inappropriate.³⁹⁵

The example of mandatory charging policies is no exception. Women of colour, black women, and immigrant women are experiencing this policy in different ways than white women. They report that they, and their partners, experience racism within the criminal justice system and that they are often afraid to call the police for fear of police brutality. Black women, women of colour and immigrant women are also expressing that the "wife assault as a crime" strategy does not take into account all of the dimensions of their oppressions and their experiences of being battered. As a result, women of colour, black women, and immigrant women may not be reporting wife battering to police services.³⁹⁶ It is

³⁹⁴ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", supra note 17, at 3.

³⁹⁵ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", supra note 17, at 3.

³⁹⁶ A police officer who attended a forum sponsored by the National Organization of

to these concerns that I now direct my attention.

2.1 RACISM WITHIN THE CRIMINAL JUSTICE SYSTEM

Persons of colour, First Nations people and black persons have long criticized the criminal justice system for being racist.³⁹⁷ The Commission on racism in the Ontario criminal justice system opened its report with the following statement:

"For several years now, black and other racial minority people have insisted that systemic racism is a reality in the criminal justice system in Ontario. Concerns about racism were so strong that many people within affected communities have been losing confidence in the justice system".³⁹⁸

In one study conducted by the Department of Justice in 1994, racism was reported as the number one barrier that prevented visible minority and ethnocultural

Immigrant and Visible Minority Women of Canada explained that police are no longer able to keep records of a person's ethnicity. However, he did add that in his experience, there are not many women of colour, black women, and immigrant women reporting wife battering to the police services. "Impact", supra note 17, at 11. This issue will be discussed further in this section.

³⁹⁷ As discussed by Kevin Davis, "Controlling Racial Discrimination in Policing: A Discussion Paper" 51 University of Toronto Faculty Law Review 2, 1993, 179, at 180. He explains that aboriginal peoples have long protested against being singled out for law enforcement and against being stereotyped as alcoholics and inherently violent. At 193. The Commission on Systemic Racism in the Ontario Criminal Justice System, which was commissioned as a result of much lobbying by members of the black community, has met with and received submissions from communities of colour. These groups continue to assert that there is overt and systemic racism in the criminal justice system. Commission on Systemic Racism in the Ontario Criminal Justice System, Discussion Document, Public Forums, September 1993, Toronto, at 3.

³⁹⁸ Commission on Systemic Racism in the Ontario Criminal Justice System, Racism Behind Bars: The Treatment of Black and Other racial Minority Prisoners in Ontario Prisons Interim Report, January 1994, at 1. As will be discussed later in this chapter, this lack of faith in the justice system is evident upon an examination of feelings and beliefs about the appropriateness of legal intervention to help eradicate violence against women of colour, black women, and immigrant women by their male partners.

communities from obtaining justice.³⁹⁹ Many individuals and organizations articulated to the Department of Justice concerns about unequal treatment in the justice system and referred to problems of bias, stereotypes and systemic discrimination. They also expressed a perception of two levels of justice which result in more convictions and harsher sentences for persons of colour.⁴⁰⁰

The concerns of persons of colour, First Nations peoples and black people with racism in the criminal justice system have been supported. In the last decade, a number of reports⁴⁰¹ have been commissioned to investigate allegations of racism and have concluded that there is systemic racism against First Nations

³⁹⁹ The Department of Justice surveyed many organizations and individuals about their thoughts, feelings and concerns regarding gaps in obtaining justice for ethnocultural and visible minority communities. This study was commissioned in response to the growing concern of visible minorities with the criminal justice system. Joanne Godin, "More Than a Crime: A Report on the Law of Public Legal Information Materials for Immigrant Women Who are Subject to Wife Assault" (Ottawa: Department of Justice, March 1994), at 10-11. For further discussion of racism, refer to Rosalind Savary, "When Racism Meets Sexism: Violence Against Immigrant and Visible Minority Women" 12 *Vis-A-Vis* 1, Summer 1994, 1, at 4, and the reports of National Organization of Immigrant and Visible Minority Women of Canada, *supra* note 17

⁴⁰⁰ Patricia File, "Gaps in Obtaining Justice: A Study of Justice Issues of Importance to Ethnocultural and Visible Minority Community Organizations" (Ottawa: Department of Justice Canada, 1994), at 32-33. In addition to harsher sentences, organizations commented on disparate practices in plea bargaining (at 36), over policing and harassment of minority communities, lack of policing (56-59) and racist judges (36-37). One group gave an example of racist stereotyping in which a judge commented: "All Greeks are liars and you can't trust them" (52).

⁴⁰¹ Refer to Province of Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People Volume 1, (Winnipeg, 1991); and Province of Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution Volume 1, (Halifax, 1989); Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 397 and *supra* note 398. This Commission also cites other reports across Canada, such as the Cawsey Report in Alberta, the Marcellus Francois Inquest Report in Montreal and the Linn Reports in Saskatchewan. The Commission comments that all of these reports have confirmed the existence of systemic racism in the criminal justice system. For a discussion of the Donald Marshall, Jr. case, refer to Michael Harris, Justice Denied: The Law Versus Donald Marshall (Toronto: MacMillan, 1986) and to Sherene Razack, *supra* note 82, at 914-916.

persons, black persons and persons of colour at all levels of the criminal justice system: police treatment of suspects and victims⁴⁰², the ability to obtain quality legal assistance and information⁴⁰³, processes of plea bargaining,⁴⁰⁴ jury selection and decision making,⁴⁰⁵ judicial commentary and sentencing,⁴⁰⁶ treatment in prison and probation and parole supervision.⁴⁰⁷

⁴⁰² One of the first instances that came to mind of racist treatment of victims was the response to a First Nations woman, Kitty Nowdlok-Reynolds. Although she was the victim of a sexual assault, she was the one that was arrested by the R C M.P and jailed for five days in order to get her statement and ensure attendance her in court. Kitty was then forced by the R.C.M.P to ride in the same vehicle as the man who had raped her. For a discussion of this case, refer to Sherene Razack, supra note 82, at 914-916

⁴⁰³ Patricia File, supra note 400. One of the groups who made submissions to this inquiry commented: "The justice system is a major bastion of ethnocentrism in Canada. To become a true "justice" system it must find appropriate ways of being flexible and open in its development to Canadian people". (At 30). One of the recommendations of the report was that all levels of the system need to be representative of the people it is serving. The report also recommended that there be cultural training and sensitization of all system personnel. At 29-30.

⁴⁰⁴ Refer to the Commission on Systemic Racism in the Ontario Criminal Justice System, supra note 397, at 16

⁴⁰⁵ Refer to Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" 38 McGill Law Journal 1993, 147, and B J. Serr and M. Maney, "Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance" 79 Journal of Criminal Law and Criminal, 1988, 1

⁴⁰⁶ The Commission on Systemic Racism in the Ontario Criminal Justice System has found that overall, black persons receive the harshest sentences. Supra note 397, at 16

⁴⁰⁷ For a discussion concerning racism in the probation and parole system, refer to the Commission on Systemic Racism in the Ontario Criminal Justice System, supra note 397, at 16. The Ontario Commission on racism in the criminal justice system has found both overt and systemic racism in Ontario prisons. They commented that racist attitudes plague the environments of many prisons and there is an overall disregard of the problem. The Commission focused on three recurring themes that surfaced throughout their work: racial hostility and intolerance in prison settings, racial segregation and racial inequality in service delivery. Commission on Systemic Racism in the Ontario Criminal Justice System, supra note 398, at 3. The Elizabeth Fry Association of Ottawa is also hearing evidence of racism in Ontario's correctional facilities. Black women who were in prison have reported to the Association that during the late stages of pregnancy, they were forced to complete hard labours that white women did not have to. Elizabeth Fry Society of Ottawa, The Voice, Autumn 1994, at 2. The fact that the criminal justice system does little to address its racism is another

One of the main areas of concern for persons of colour, First Nations peoples and black persons is police racism. There is a strong perception among communities of colour that police officers do discriminate against people on the basis of their race. A survey conducted by the Royal Commission on the Donald Marshall Jr. Inquiry found that 60% of respondents believed that police discriminate against black persons. In a similar survey in Montreal, 53% of the respondents said police officers mistreated racial minorities.⁴⁰⁸ There is evidence documenting that police officers respond differently, and often brutally, to black persons and persons of colour.⁴⁰⁹ Racism among police officers is alarming given their discretionary powers and the impact they have at subsequent levels of the criminal justice system.⁴¹⁰ Racism among police officers is particularly disconcerting given the

concern of many communities of colour. As discussed by Kevin Davis, supra note 397, at 180. The Commission on Systemic Racism in the Ontario Criminal Justice System has similarly concluded that the system is not very accountable for its racism. Supra note 398, at 8.

⁴⁰⁸ Both of these surveys were discussed by Kevin Davis, supra note 397, at 180.

⁴⁰⁹ Refer to sources in supra note 401. Other studies have demonstrated that police activity is strongly influenced by the perceptions of "stigmatized neighbourhoods", perceptions that are racially based. For a discussion of these studies, refer to Kevin Davis, supra note 397, at 192.

⁴¹⁰ Kevin Davis discusses that police make a wide array of decisions, such as whether to arrest, stop, search, detain, and investigate a crime, each of which gives the potential for discrimination based on race. He cites a number of American and British studies that indicate young black men are the most likely to be stopped by police compared to any other group. Kevin Davis, supra note 397, at 182 and 194. As will be discussed later in this chapter, there is also evidence that Canadian police discriminate in this way. This abuse of power that some police exercise has been explained by Richard Ericson in this way: "...a not-so-subtle way of reminding marginal people of the 'order of things'". As quoted by Kevin Davis, supra note 397, at 194. In his article, he also discusses and evaluates a number of avenues to address the racism of some police officers and hold them accountable. For a discussion of police work generally, refer to Richard V. Ericson, Reproducing Order: A Study of Police Patrol Work (Toronto: University of Toronto Press, 1982).

level of racialized violence against many black persons and persons of colour.⁴¹¹ Police violence has left many women and men of colour fearful for their lives and the safety of all persons of colour.⁴¹² This fear of police racism has a substantial impact on how black women, women of colour and immigrant women experience mandatory charging policies.

There are many ways in which black women, for instance, learn about the racism in the criminal justice system and come to fear for the safety of their partners.⁴¹³ In thinking about a recent media account of "alleged" racism by three police officers, I found myself contemplating how knowing about this incident might affect an abused black woman's decision to involve the police in her situation. As this example highlights how police officers can exercise, and abuse, their discretionary powers and black women, women of colour and immigrant women learn about police racism, it merits a brief exploration.

Ralph Kirkland, a black man, was on his way to a local community centre when he was approached by a police officer and asked to stop. The police officer

⁴¹¹ There is a strong perception that police use excessive force against persons of colour, particularly black youth. In the United States, 60% of those killed by police are black persons, even though they represent only 12% of entire population. As discussed by Kevin Davis, supra note 397, at 200-201. For further discussion of police racism and brutality, refer to Commission on Systemic Racism, supra note 397 and 398.

⁴¹² In the study conducted by the Department of Justice, some of the most compelling concerns that were communicated related to the shootings of black youth by police, hate crimes, systemic racism and the brutal treatment of black people. Patricia File, supra note 400, at xv and 36-37.

⁴¹³ Joanne St. Lewis has commented that many women of colour and black women are motivated by the community perception of racism in the criminal justice system. Personal interview, January 24, 1995.

explained that his license was not "attached", meaning the computer records did not show that the plates belonged to a particular vehicle. The officer told him that she suspected the car was stolen. When Ralph Kirkland did not immediately produce his driver's licence, the police officer called for back up. When one of the "back up" police officers explained to Kirkland what "unattached" meant, he produced his licence. However, one of these police officers then said: "Forget it, take him down. Cuff him". He then threw Kirkland to the ground, shoved his face in the snow and tore his clothes, kneeled on his chest and ignored his shouts for help. Ralph Kirkland then spent five hours in a cell block before being released, without any charges being laid and no apologies being offered.⁴¹⁴ However, three days after this incident, Kirkland was charged with failing to identify himself under the Highway Traffic Act.⁴¹⁵

When I read the newspaper account of this incident, I found myself thinking about two related notions.⁴¹⁶ I first thought about how terrifying it would feel to be thrown to the ground by a police officer, not knowing what was about to

⁴¹⁴ Ralph Kirkland is a highly respected leader of the black community in Ottawa, is the president of the National Council of Jamaicans, teaches at Algonquin College, has a consulting practice that specializes in race relations, has worked with the Ottawa police concerning race relations and has worked with his partner, Glenda Simms, president of the Canadian Advisory Council on the Status of Women, on police racism. A probe into the allegations of racism as the motivation for this treatment of Ralph Kirkland is planned. Carolyn Abraham, "Police Plan Probe of Racism Charge", The Ottawa Citizen, Sunday February 5, 1995, A1.

⁴¹⁵ As discussed by Sherri Davis-Barron, "Police Inquiry flawed, black leader charges", Ottawa Citizen February 20, 1995, A1- A2.

⁴¹⁶ Of course, there were many things I thought about in the first few days after I heard about this. The day after I was picking up some dry cleaning. While the man, who was a black man, found the clothes and gave them to me, I wondered how this story impacted on him and other black men who heard about what these police officers did to Ralph Kirkland.

happen you, not knowing whether the violence was going to get worse, knowing that police officers have brutally beaten black men before you, and knowing that these actions were being done to you because you were a black person.⁴¹⁷

The second thing I wondered about was what women who were being battered by partners who are black men thought when they heard of this incident. I cannot imagine that knowing this level of police racism, knowing how black men are treated by the criminal justice system, makes it anything but impossible to call on this institution for protection. If the woman herself is also of colour, she must be concerned about the response she, as a black woman, will receive. And knowing that black men are at risk of being beaten in this way by police officers must, at some level, affect her thinking about whether or not to use the criminal justice system for her protection. Contemplating on this incident helped me to frame this chapter.⁴¹⁸

2.2 IMPACT OF POLICE RACISM ON WOMEN WHO ARE BATTERED

The racism, feared and experienced by immigrant women, women of colour and black women, is having a substantial impact on how they experience the

⁴¹⁷ Kirkland was quoted in the Ottawa Citizen as saying: "It was racism. Why else would I be given this kind of treatment.. I can think of no other reason. What other motivation would there be". Sherri Davis-Barron, supra note 415.

⁴¹⁸ It also made me angry. This anger was intensified when, less than three weeks later, the internal police investigation exonerated the three officers involved. The investigation concluded that the officers "followed the correct policies and procedures". Ralph Kirkland was never interviewed by the review board. However, he was not surprised that the officers were exonerated: "I haven't come across any police investigations that have done anything but exonerate the police. I put no confidence whatsoever in inside police investigations". As discussed by Sherri Davis-Barron, supra note 415.

policy of mandatory charging. These women are expressing that they are afraid to call on a racist criminal justice system, that they are fearful their partners of colour will be brutalized by police officers if the police are called and they are expressing that the strategy of "wife assault as a crime" is not meeting their needs because it does not recognize racism. An immigrant woman who works in a shelter for battered women summarized the difficulties with police intervention in wife battering situations:

"Many immigrant women object to the mandatory charging policy because of inherent racism in the legal system. Women from other cultures may hesitate to call the police for help because they are afraid of how the police will treat their husbands or partners.... Although police services maintain that immigrant women do not call for help, it is not because the women don't need it; they are often fearful for their families and communities".⁴¹⁹

Woman of colour, black woman, or immigrant woman fear that if they report the battering to the police, they will be at risk of being discriminated against by the police. In addition to having the battering done to them trivialized by the police because they are women, black women, women of colour and immigrant women also risk encountering discrimination because they are women of colour and black women.⁴²⁰ In a joint submission to the Commission on systemic racism in the criminal justice system, women's organizations commented:

"Women face discrimination on the basis of their sex in a variety of

⁴¹⁹ Symadel Coke, "Immigrant Women and Members of Visible Minorities" in 12 Vis-A-Vis Summer 1994, at 8.

⁴²⁰ As discussed by the British Columbia Task Force on Family Violence, supra note 38, at 229. This may be further compounded if she is describing the abuse of a white man as she may be less likely to be taken seriously and believed.

ways: at best, women's experiences are ignored or misunderstood by the justice system; at worst, the justice system wields stereotypes against them which do irreparable damage to these women's lives... Women of colour experience a discrimination which goes beyond the experience of gender. They are also subjected to myths and biases based on perceptions of their race... [W]omen of colour face stereotypes on the basis of their gender, on the basis of their race, and on the basis of their experience of race and gender."⁴²¹

The fear of encountering discrimination may itself deter women from calling the police for assistance. As Mark Drumbl has commented: "Fear of having to face an unfriendly and overwhelmingly white criminal justice system might inhibit many women of colour from calling the police in the first place".⁴²²

Women of colour, black women, and immigrant women also fear for the racism that their partner, if also a person of colour, will experience if police are involved. As discussed earlier in this chapter, all levels of the criminal justice system discriminate against persons of colour and black persons. Moreover, this fear that inhibits some black women, women of colour and immigrant women from calling the police when they are battered goes beyond the fear of discrimination in the system; many of these women fear that police will brutalize their partners who battered them.⁴²³ Advocates for women who are battered hear about this

⁴²¹ Brief to Commission on Systemic Racism, supra note 375, at 1-2. They comment that this reality has largely been ignored by government.

⁴²² Mark Drumbl, supra note 38, at 147.

⁴²³ Refer to San San Sy and Sudha Choldin, supra note 388, at 27; Patricia File, supra note 400, at 56-57; reports of the National Organization of Immigrant and Visible Minority Women of Canada, supra note 17; Felicite Stairs and Lori Pope, supra note 25, at 159; Canadian Advisory Council on the Status of Women, supra note 32, at 8, and Linda MacLeod, supra note 2, at 26.

fear in their contacts with black women, women of colour and immigrant women.⁴²⁴ In one research study conducted in Ontario, 42.5% of the immigrant women interviewed cited the "fear that [her] husband will be brutalized/victimized by police" as a somewhat or very important reason for not calling the police.⁴²⁵

Fear of police racism and brutality can also be exacerbated if the woman has experienced this in her country of origin. Monica Ruitort and Shirley Endicott Small have commented:

"...many immigrant women have learned from first hand observation in their country of origin that the police are a repressive force on the side of tyranny, a force to be feared at all costs".⁴²⁶

This distrust can be, and is, easily transferred to the Canadian legal system.⁴²⁷

Fear of police brutality against black men and men of colour leaves women in precarious positions. If they call the police for assistance when their male partner is battering them, they may be subjecting him to racialized violence. Many women of colour, black women, and immigrant women feel pressure from their

⁴²⁴ Joanne Godin emphasizes that many people working in this field and social services believe that women of colour and many immigrant women fear calling the police because of the fear that their spouses might be brutalized by the police and that they may be dealt with more harshly in the legal system. Supra note 399, at 11.

⁴²⁵ ARA Consultants, "Wife Battering Among Rural, Native and Immigrant Women (Toronto: ARA Consultants, 1985), as discussed by the British Columbia Task Force on Family Violence, supra note 38, at 213. The Task Force also commented that there have been similar findings in British Columbia.

⁴²⁶ Monica Ruitort and Shirley Endicott Small, supra note 180, at 2.

⁴²⁷ San San Sy and Sudha Choldin, supra note 388, at 25. Monica Ruitort and Shirley Endicott Small have commented: "Many immigrant women have come to associate the police as a repressive, brutal force to be avoided because of their experience with their country of origin". As quoted by Joanne Godin, supra note 399, at 10. Similarly the Ontario Women's Directorate explained in their fact sheet on wife assault: "...many refugee and immigrant women fear the police because in their countries of origin the police are a repressive force".

communities not to report their experiences of wife battering to the police because of police violence. Some women have found themselves in a position of having to defend their partners against the police.⁴²⁸ As Maria Shin and Michele Kerisit have commented:

"...given the reality of increasing police violence against some communities, immigrant and visible minority women are being forced into precarious situations in which they feel they may have to defend their abusive partners against the police or they are pressured by their communities from seeking police intervention".⁴²⁹

I also wonder if men of colour and black men use this fear of police racism to deter black women, women of colour and immigrant women from calling the police. Many men who batter threaten women that they will call the police on them and have them charged. Men also threaten that if the police are called, they will take the child(ren) away and deport the woman and her child(ren). Men who batter also threaten women that if they call the police and he is charged with assault, he will lose his job. Given then that abusive men use a variety of tactics to control women, it is imaginable that black men and men of colour would use fear of police racism. As Linda Davies has commented, most women who are battered internalize a sense of loyalty to their partners and are reluctant to expose them to police scrutiny. Accordingly, if women of colour and black women have, in addition, internalized the fear of police brutality, their partners may not have to use

⁴²⁸ As discussed by National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", supra note 17, at 3.

⁴²⁹ Maria Shin and Michele Kerisit, supra note 17, at 52. This was also discussed in the Brief to Commission on Systemic Racism, supra note 375, at 4.

this threat at all.⁴³⁰ Jean Trickey, of the National Capital Alliance on Race Relations, and of Visible and Immigrant Women Against Abuse, agrees that many black women and women of colour internalize the fear of police racism and that it does not need to be stated. She further added that mandatory charging policies "...have tied the hands of a large segment of the population to do anything".⁴³¹

The racism in the criminal justice system has led women's organizations to question mandatory charging policies. Many black women, women of colour and immigrant women conclude that this policy is simply not responsive to their needs.

As women's associations have commented:

"The strategy of "wife assault as a crime" is not responsive to the complexities of violence against women in the context of a racist society. We must carefully consider the consequences of calling for increased police involvement in "domestic violence" situations and whether this will lead to a greater presence of police in our communities and an increased risk of racist violence... We cannot afford to minimize or deny one form of violence women experience for the sake of another".⁴³²

The strategy of "wife assault as a crime" was designed to address men's violence against women. It was not designed with an acknowledgement of police violence and other forms of racism. As a result, we now have a policy that does what "we cannot afford"; we have denied one form of violence for the "sake of another".⁴³³

⁴³⁰ I thank Lynda Davies for this point. Personal conversation.

⁴³¹ Jean Trickey, personal communication. She also added that there are many women, who may or may not be women of colour and black women, living in stigmatized areas who are afraid to call the police for fear of police brutality.

⁴³² Brief to Commission on Systemic Racism, supra note 375, at 5. The decontextualization of this strategy will be discussed later in this chapter.

⁴³³ I am reminded of the words of Audre Lorde: "What woman here is so enamoured of her

The effects of not recognizing police brutality and other forms of racism are far reaching. Not only are women of colour, black women, and immigrant women denied full access to police services and negatively impacted by police charging policies, they are forced to endure continued abuse and violence. In a keynote address to conference participants, Glenda Simms, president of the Canadian Advisory Council on the Status of Women, explained:

"...[T]here are minority women who choose to endure the violence inflicted on their bodies and their psyches by husbands, lovers and sons and other males in their communities. They endure because they know that the justice system does not offer rehabilitation - instead, their men-folk face horrific levels of violence in the systems that were designed to protect all persons in society".⁴³⁴

Wife battering, and responses to it, must be addressed within the context of racial oppression, police violence and the experiences of women of colour, black women, and immigrant women. Mandatory charging policies have to be evaluated carefully in terms of women's experiences, specific needs, and the needs of communities.⁴³⁵

3. ADDITIONAL PRESSURES NOT TO REPORT TO THE POLICE

There are additional constraints that can prevent black women, women of colour and immigrant women from reporting when they have been battered by

own oppression that she cannot see her heelprint upon another woman's face?". Supra note 43, at 132.

⁴³⁴ As quoted by Maria Shin and Michele Kerisit, supra note 17, at 53

⁴³⁵ Maria Shin and Michele Kerisit, supra note 17, at 52-54

their male partner to the police. These women can be pressured from their communities not to report the battering and may be threatened with ostracization from the community. The fear of perpetuating stereotypes and biases against their community also inhibits some black women, women of colour and immigrant women from calling the police. For immigrant women, there is also the fear that they will be deported if their male partner is charged by the police.

3.1 PRESSURE AND OSTRACIZATION FROM COMMUNITIES

Women from immigrant communities, women of colour, and black women are often at risk of being pressured by their communities not to report incidents of battering; and if women do involve social agencies, they often are subjected to community ostracization⁴³⁶ and exile.⁴³⁷ This is particularly true if their community has been the target of police harassment and violence.⁴³⁸

Although all women who are battered may experience this influence, for women of colour, black women, and immigrant women there are additional

⁴³⁶ Refer to the National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6. Kathy Wiebe has explained: "Immigrant women in abusive situations are often reluctant to leave because they know it is they who will be held responsible for disrupting the family unit and not their husbands. Attempts to leave and/or seek help from authorities or social services, whether successful or not, may well result in rejection or ostracization from the community... Because immigrant women are tied in so many ways to their community, the decision to leave is an extremely difficult one, even when their personal lives and safety are at risk". Kathy Wiebe, Violence Against Immigrant Women and Children: An Overview for Community workers (Vancouver: Women Against Violence Against Women and the Vancouver Rape Crisis Centre, 1985), at 4.

⁴³⁷ Joanne St. Lewis also made this point. Personal interview, January 24, 1995.

⁴³⁸ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", supra note 17, at 4.

dimensions of the pressure not to report. In many immigrant communities, there is a great deal of shame attached to admitting violence and allowing social services, such as the police, into the home.⁴³⁹ Although there is almost always some element of shame and responsibility felt by women who are battered, cultural values may exacerbate these feelings.⁴⁴⁰ Just as families can serve as a great support system, families can also exert extreme pressure and collude in keeping the battering hidden.⁴⁴¹

For some women, particularly immigrant women, leaving a partner can mean a loss of her community and all its support.⁴⁴² For women who have lived

⁴³⁹ San San Sy and Sudha Choldin have commented that experiences of shame affect how immigrant women use the law. They comment: "Bringing in the law and legal system to resolve family problems is a foreign concept and brings shame and dishonour to the family". Supra note 388, at 27.

⁴⁴⁰ As discussed by Felicite Stairs and Lori Pope, supra note 25, at 158. Also refer to Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 11. Moreover, while ostracism is not a unique experience for women who are battered, it can be especially immobilizing if the woman does not speak English. As discussed by Monica Ruitort and Shirley Endicott Snall, supra note 180, at 2. In addition, it appears that while men can escape social ostracization for violence, women cannot, even when it is in self-defence. Stairs and Pope discuss one example of this, a woman had been battered for 20 years. In self defence, the woman threw an object at her abusive partner and he called police. When the police arrived they charged her with assault with a weapon and the community responded by making her do penance for bringing shame on them all. Supra note 25, at 159. Given the importance of community and the apparent impact they have, it is unfortunate that more men were not subjected to community criticism when they use violence and control.

⁴⁴¹ Connections of black women, women of colour and immigrant women to their families will be discussed later in this chapter. Last year I had the privilege of meeting with a woman to discuss her experience of being battered by her male partner. She had immigrated to Canada quite a few years ago. When I last met with her, it was over two years after she had called the police for assistance during an episode of her partner battering her. Because she called the police, both her husband and his family still continue to tell her that she is "no good", they keep secrets from her, rationalizing that she cannot be trusted and often exclude her from family events. This response from the family has been very difficult for her and causes her a lot of pain.

⁴⁴² As discussed by Symadel Coke, supra note 419, at 8.

in extended families, the thought of leaving their partner, family and community can be overwhelming. As a representative from the British Columbia organization for Immigrant and Visible Minority Women Against Abuse has commented:

"For a women who has lived her entire life in an extended family, the idea that she should move out, get an apartment, live on her own, get the phone on, apply for welfare, look for work, and so on, is very, very stressful. It's like giving her a row boat and oars and saying, Now row across the Pacific".⁴⁴³

For women of colour and black women, the pressure not to report can be about remaining in solidarity with a community that experiences oppression and violence from the social institutions she would be contacting for assistance. As a result, women of colour and black women often find themselves in a precarious position, caught between a system that is offering help but is oppressive and a community that provides support but does not respond appropriately to her experience of being battered.⁴⁴⁴

3.2 FEAR OF DEPORTATION

Another dimension of violence that immigrant and refugee women in

⁴⁴³ As told to the British Columbia Task Force on Family Violence, supra note 38, at 211. In addition, this can particularly devastating for immigrant women if they have left their own families to immigrate to Canada. The impact of this social ostracization has implications for her entire family. The woman's family is often subjected to community isolation and if there are any child(ren) involved, their future(s) within the community may be jeopardized. San San Sy and Suhda Choldin, supra note 388, at 25.

⁴⁴⁴ This was discussed by the British Columbia Task Force, supra note 38, at 229. At this point I am reminded that black women, women of colour and immigrant women can also experience "psychic exile". As Nourbese Philip has explained: "...scourges such as racism and sexism can also create a profound sense of alienation, resulting in what can be best described as psychic exile". M. Nourbese Philip, Frontiers: Essays and Writings in Racism and Culture (Stratford: The Mercury Press, 1992), at 28.

particular experience is the fear that they will be deported if they report the battering. The majority of women who have immigrated to Canada are here as sponsored immigrants.⁴⁴⁵ As such, their status in Canada is dependant on their sponsoring partner. As would be expected, men who are abusive use this power to threaten women with deportation and to force them into isolation and seclusion.⁴⁴⁶ This is especially disturbing in light of the fact that the sponsorship process can take up to two years. Until the process is completed, the sponsor, in this case her abusive partner, can withdraw sponsorship.⁴⁴⁷

The fear of deportation has been described as "...the big thing which immigrant women really fear. .".⁴⁴⁸ This fear extends beyond her own safety and includes the fear that her partner and her family will also be deported if she reports

⁴⁴⁵ For a discussion of sponsorship, refer to Joanne Godin, supra note 399, at 4-6; Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 9, and Felicite Stairs and Lori Pope, supra note 25. Stairs and Pope discuss grounds to stay in Canada that immigrant women can claim and the problems with each of the grounds. For an additional discussion of immigration laws also refer to Lori Pope, "Immigrant Law and Wife Assault", DIVA March 1991, 38. In this article, Lori Pope also discusses the systemic racism in immigration laws and how the laws particularly victimize women. Also refer to Maria Shin and Michele Kerisit, supra note 17, at 51.

⁴⁴⁶ As discussed by National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 7

⁴⁴⁷ As discussed by Joanne Godin, supra note 399, at 6. This can be especially powerful given that many immigrant women are not given adequate information on their legal rights and the laws in Canada. As a result, even when a woman is protected from being deported, she may not be aware of this. One study conducted in Ontario confirmed that many immigrant women avoided seeking assistance specifically because of the mistaken belief they can lose their status. ARA Consultants, discussed by the British Columbia Task Force, supra note 38, at 214. Even for women who are "informed", the laws pertaining to immigration and sponsorship can be very confusing. There is also documentation that some women have been deported even though they have landed immigrant status. Refer to National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 7 and Joanne Godin, supra note 399, at 4 for further discussion.

⁴⁴⁸ San San Sy and Sudha Choldin, supra note 388, at 17

the battering. The fear, as well as the reality, of deportation have obvious implications for whether or not immigrant and refugee women feel safe to call the police when they have been battered. These implications have to be recognized.

As women's organizations have commented:

"The pressures which are faced by immigrant and visible minority women who live in abusive homes as well as the fear of deportation which a refugee claimant or domestic worker may experience must be understood if the police are to deal with violence in the home in a sensitive manner".⁴⁴⁹

3.3 FEAR OF PERPETUATING STEREOTYPES

The fear of black women, women of colour and immigrant women of perpetuating racist stereotypes about their communities is another factor that impacts on their decision regarding police involvement when they have been battered by their male partner. One myth that black women fear perpetuating is the myth of the "violent black man".⁴⁵⁰ Women from immigrant communities also fear perpetuating biases by reporting incidents of battering. As Sherene Razack has explained:

"...in a racist society any discussion of culture and violence in immigrant communities can be interpreted by white society as "another" sign of "backwardness". That is, violence in immigrant communities is viewed as a cultural attribute rather than a product

⁴⁴⁹ Brief to Commission on Systemic Racism, supra note 375, at 6.

⁴⁵⁰ Rosemarie Tong has commented that this myth has caused black men to suffer the law's savagery, as discussed by Mark Drumbl, supra note 38, at 148. San San Sy and Suhda Choldin also discuss this fear, supra note 388, at 25. Also refer to Felicite Stairs and Lori Pope, supra note 25, at 159 for a discussion of the fear that reporting can exacerbate stereotypes of violence in women's communities.

of male domination".⁴⁵¹

The law often uses stereotypes against racialized communities to validate its harsh treatment of men of colour and to excuse men's violence against women. For instance, the stereotype of the "violent black men" has led the legal system to treat black men with severe harshness, particularly in cases of sexual assault.⁴⁵² The racist myth that men of colour and black men are inherently violent and that communities of colour accept violence, has also been used by the criminal justice system to support its non-intervention in wife battering.⁴⁵³ Conversely, it has also been used to support over-policing of communities of colour and First Nations communities.⁴⁵⁴

As society often misinterprets incidents of violence in communities of colour, black women, women of colour and immigrant women are in precarious positions when deciding whether to report incidents of wife battering. To again quote Sherene Razack;

⁴⁵¹ Sherene Razack, supra note 82, at 896. She later adds: "...the culturalization or racism... makes any foray into cultural difference risky. Attempts by women of colour to draw the connections between racism, sexism and violence have sometimes floundered in the wake of these powerful currents of racism". At 916

⁴⁵² Joanne St. Lewis has commented on her belief that the criminal justice system perceives inter-racial and intra-racial violence quite differently. She explained that this perception often manifests in differences in sentencing practices. Personal interview, January 24, 1995. Refer to Jennifer Wriggins, "Rape, Racism and the Law" 6 Harvard Women's Law Journal 1983, 103, and Angela Y. Davis, "Rape, Racism and the Myth of the Black Rapist", in her Women, Race and Class, (New York: Vintage Books, 1981), 172

⁴⁵³ As discussed by the British Columbia Task Force, supra note 38, at 220. Barbara Finesmith also discusses how these myths have led police officers not responding to wife battering of black women and women of colour. Supra note 155, at 85.

⁴⁵⁴ Jennie Abell, supra note 26, at 242. She adds that stereotypes and myths are used to justify over-imprisonment, particularly of First Nations peoples.

"...racialized women who bring... violence to the attention of white society risk exacerbating the racism directed at both men and women in their communities; we risk, in other words, deracializing our gender and being viewed as traitors, women without community. The risks are particularly acute when, as so often happens, it is the dominant group who controls the interpretation of what it means to take culture into account".⁴⁵⁵

Black women, women of colour and immigrant women are further put in untenable situations when they are pressured from their communities not to report men's violence against them for this reason.⁴⁵⁶

The experiences of black women, women of colour and immigrant women with pressure from their communities, fear of deportation and fear of perpetuating stereotypes make it difficult, if not impossible, to call the police for assistance. One woman expressed her frustration with this situation:

"The Asian community wants to be seen as the model type of good immigrant who never gets involved with the police or anything. Meanwhile, the Black community is afraid to call the police for fear of police brutality. Either way, women can't call and if they do - the whole community condemns them for it".⁴⁵⁷

None of these issues seem to have been acknowledged in the design and

⁴⁵⁵ Sherene Razack, supra note 82, at 896.

⁴⁵⁶ The Ontario Native Women's Association faced this dilemma after the completion of their report on wife battering in Aboriginal communities. Susan Hare, then president of the Association, explained that the dilemma focused on two concerns. Firstly, they were afraid of the backlash that would inevitably result from the male Native leaders. Secondly, they were concerned that the findings would contribute to an overall stereotypical perception of Aboriginal men as the "hostile savage". The Association decided that the protection and safety of Aboriginal women and children was its primary concern and released the report. After the report was released, male leaders did in fact try to deride the report. As discussed by Susan Hare, "Breaking Free: A Proposal for Change to Aboriginal Family Violence" in 6 Canadian Women's Studies: Violence Against Women 4, York University, Summer 1991, 79 at 80.

⁴⁵⁷ A forum participant, quoted in National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 7.

implementation of mandatory charging policies. Black women, women of colour and immigrant women have been put in precarious positions by a strategy that depends upon police intervention in wife battering, and that, once that police intervention has been initiated, proceeds without choice, input or control by the woman who is battered. That is what mandatory charging is supposed to do; this is what (white) feminists and other (white) advocates fought for. And yet the focus of this strategy on police and on an inflexible process makes the strategy a dangerous, if not impossible, one for black women, women of colour and immigrant women. These women cannot call upon the police for short term protection without setting the entire (racist) criminal justice system in motion. Policies that focus on police charging further marginalize these women by not recognizing the dimensions of oppression that they experience and by not addressing their needs for assistance.

4. DECONTEXTUALIZING WIFE BATTERING: THE WIFE ASSAULT IS A CRIME STRATEGY

Women's organizations for immigrant women, black women and women of colour are criticizing the strategy of "wife assault is a crime" for not taking into account women's experiences of racism and the complexities of black women, women of colour and immigrant women's experiences of being battered by their male partners. It is argued that this strategy, in attempting to address one form of

violence, ignores another.⁴⁵⁸

4.1 SITUATING AND UNDERSTANDING OF MALE VIOLENCE AGAINST WOMEN

Women of colour, black women, and immigrant women have long been arguing that it is essential that wife battering be contextualized by other experiences, political realities and oppressions.⁴⁵⁹ Women of colour, black women, and immigrant women often refer to this contextualization or understanding of battering with portrayals such as "dimensions of violence"⁴⁶⁰ or a "constellation of violence"⁴⁶¹. The National Organization of Immigrant and Visible Minority Women of Canada explains that the interactions between certain barriers, like racism and sexism, "creates a spider's web" in which women are often caught.⁴⁶² Similarly, Rosalind Savary has commented:

"For the non-white woman...the issue of violence goes far beyond violence in the home. It is embedded in the individual, institutional and cultural racism and sexism in Canada".⁴⁶³

These references describe connection to the broader social violence and oppression experienced by these women, such as racism, language barriers,

⁴⁵⁸ Refer to Maria Shin and Michele Kerisit, supra note 17, at 52.

⁴⁵⁹ San San Sy and Suhda Choldin, supra note 388, at 5 and 26.

⁴⁶⁰ Maria Shin and Michele Kerisit, supra note 17, at 41.

⁴⁶¹ Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 12.

⁴⁶² National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6.

⁴⁶³ Rosalind Savary, supra note 399, at 4.

unequal access to services and isolation. For black women, women of colour and immigrant women, wife battering is not simply an experience of male oppression; it is experienced as one form of oppression among others, such as racism. The racism experienced by women of colour, black women, and immigrant women cannot be separated from the violence experienced from their male partners. The all-encompassing impact of racism means that it is always a factor in everything. Again, as Rosalind Savary has articulated:

"...[M]any abused non-white women and men have named racism as another form of violence, a form more pervasive than the physical and emotional violence in their homes. Racism violates not only their mind and body but questions their very right to existence as human beings".⁴⁶⁴

In order to understand these women's experiences of wife battering, we then must understand their experiences of racism

Racism impacts on how black women, women of colour and immigrant women understand their male partner's violence against them. It is generally accepted that wife battering in communities of colour and immigrant communities is similar to battering in all other communities in both incidents and kind.⁴⁶⁵ However, the racism that the woman experiences, and the racism her male partner experiences if also a person of colour, may affect the woman's understanding or contextualization of her partner's violence against her. If the man who is battering

⁴⁶⁴ Rosalind Savary, supra note 399, at 4.

⁴⁶⁵ San San Sy and Suhda Choldin, supra note 388, at 15 and 16. This is of course with the recognition of the unique variables that add unique dimensions, such as effects of immigration and racism.

her also experiences racism, the woman may understand his violence as partly stemming from his racial oppression and not just from his sexism or his privileged position in society.⁴⁶⁶ bell hooks sets out her position of this issue

"While I agree with Schechter that male violence against women in the family is an expression of male domination, I believe that violence is inextricably linked to all acts of violence in this society that occur between the powerful and the powerless, the dominant and the dominated".⁴⁶⁷

Further explaining that some black women may understand their partner's violence against them as being rooted in his unequal position in society, bell hooks continues:

"Alienated, frustrated, pissed off, he may attack, abuse and oppress an individual woman or women, but he is not reaping positive benefits from his support and perpetuation of sexist ideology. When he beats or rapes women, he is not exercising privilege or reaping positive rewards; he may feel satisfied in exercising the only form of domination allowed to him".⁴⁶⁸

First Nations women are also expressing that men's violence against women in their communities is integrally connected to the racism and dispossession they have experienced from colonization and forced attempts at assimilation.⁴⁶⁹ These understandings of men's violence impact on how women experience both the battering and strategies for change. If wife battering in communities of colour, for instance, is integrally linked with the racism being experienced by those

⁴⁶⁶ As discussed by bell hooks, supra note 48, at 18

⁴⁶⁷ bell hooks, supra note 48, at 118

⁴⁶⁸ bell hooks, supra note 48, at 75.

⁴⁶⁹ Refer to supra note 35 for sources on wife battering in First Nations communities.

communities, then strategies designed to eradicate male violence against women will have to incorporate strategies for anti-racism work. This contextualization of battering must be fully incorporated into all attempts at reform, as does the experience and feeling of being caught between two forms of violence.⁴⁷⁰ It appears as though the strategy of "wife assault as a crime" has not integrated recognition of racism nor the necessity for anti-racism work.

4.2 CONNECTIONS TO FAMILY

Women who experience battering often have concerns about the impact of their decisions on their family, particularly when their families are a source of great support and comfort.⁴⁷¹ Connections of women of colour, black women, and immigrant women to their families add further dimensions to these concerns and

⁴⁷⁰ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", *supra* note 17, at 4. From my perspective, it seems as though white feminists have not fully incorporated the understandings of male violence of women of colour, black women, immigrant women and First Nations women into our analyses and strategies for protection and prevention. It often seems like attempts by black women, for instance, at describing black men's violence against women as connected to racial oppression are not well received. Having learned that "explanations" of men's violence beyond that of sexist oppression are attempts to "excuse" his abusive behaviour, and believing that men who batter do exercise and reinforce privilege in the abuse, I often find it difficult to integrate what black women, such as bell hooks, are expressing. Since I have been reading more about black women, women of colour and immigrant women, I find myself being continually challenged. I wonder if this is, in part, what Elizabeth Spelman was referring to when she commented that certain assumptions at the heart of feminist theory may need to be discarded. Elizabeth Spelman, *supra* note 44, at 172

⁴⁷¹ White feminists who have been doing work in the area of wife battering have often criticized the term "family violence" for taking attention away from wife battering and subsuming the violence in another category and making women again, indiscernible. As such, when I would come across an article on wife battering that used this term I would often think to myself that there had to be a certain lack of analysis by the author. However, after reading some of the sources I have for this paper, I am now beginning to wonder if the term "family violence" is used by some women to express the contextualization of the experience within broader violent and oppressive constellations.

may make it extremely difficult to report battering to the police or to involve other social agencies. Despite issues of sexism, many black women, for instance, find their families to be the least oppressive social institution. As bell hooks has explained:

"Despite sexism in the context of family, we may experience dignity, self-worth, and a humanization that is not experienced in the outside world wherein we confront all forms of oppression.... [F]amily ties are the only sustained support system for exploited and oppressed people. We wish to rid family life of the abusive dimensions created by sexist oppression without devaluing it".⁴⁷²

In similar deliberation, Linda MacLeod and Maria Shin have asserted:

"For most immigrant and refugee women, the economic difference, political upheavals, physical hardships, loss of friends and family, and the racism they experience leave them feeling vulnerable, confused, depressed and alone. Under these circumstances, women may come to depend strongly on their husbands and find it difficult to contemplate leaving their partner, no matter how brutal the abuse".⁴⁷³

Some immigrant women find the focus on Canadian individualism difficult to accept as they value their family and culture and want their men and children

⁴⁷² bell hooks, supra note 48, at 37. Marlee Kline has similarly deliberated: "...for women of colour the family often functions as a source of support for its members against the immediate harassment of racism and provides a site of cultural and political resistance to white supremacy". Marlee Kline, supra note 31 at 122. She adds that white women also may experience family in contradictory ways, but that no matter how we do, we do not experience the contradictions in terms of racism. I would add to this that white women whose partners are persons of colour may experience the impact of racism at some level when they are deciding whether to call the police. Ruth Frankenburg, in her study on how white women learn about racism, found that white women whose partners were racialized were concerned about its impact on their decisions and did affect how they experienced the relationship. Ruth Frankenburg, Ruth, The Social Construction of Whiteness: White Women, Race Matters (Minneapolis: University of Minnesota Press, 1993), at 112 and 118.

⁴⁷³ Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 9

helped as well.⁴⁷⁴ Immigrant women often perceive themselves in relation to their family, not in terms of the individualized approach this society, and the criminal justice system, frequently impose.⁴⁷⁵ Linda MacLeod and Maria Shin have commented:

"These women may see efforts to encourage them to take advantage of counselling for themselves as ways to separate them from their family or communities, and as selfish and irresponsible ways of approaching their pain".⁴⁷⁶

As discussed in chapter four, the criminal justice system often imposes inappropriate dispositions and forces women to follow its impositions, such as not dropping charges. Black women, women of colour and immigrant women may also experience these efforts as "irresponsible" ways of responding to wife battering.

Strategies to address wife battering, such as the strategy of wife assault as a crime, that do not take into consideration the desire of some women to assist the entire family, are not addressing the needs of black women, women of colour and immigrant women. Like many women who are battered, women of colour, black women, and immigrant women may fear not being able to survive on their own if their partner is in jail or they are forced to leave their community. Given women's social, economic and political position, this fear is well founded,

⁴⁷⁴ Refer to Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 12.

⁴⁷⁵ Refer to Linda MacLeod and Maria Shin, "Like a Wingless Bird", supra note 19, at iv; Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 11, Linda MacLeod, supra note 32, at 6; and Joanne Godin, supra note 399, at 9.

⁴⁷⁶ Linda MacLeod and Maria Shin, "Isolated", supra note 19, at 11

particularly for black women, women of colour and immigrant women.⁴⁷⁷ This fear also needs to be acknowledged and integrated in strategies to address wife battering.

4.3 ADDITIONAL DIMENSIONS OF EXPERIENCE

There are many other dimensions to the experiences of black women, women of colour and immigrant women that affect how they experience wife battering and strategies for prevention. These women experience profound isolation, often encounter racism in social services, have difficulty accessing services due to language barriers and are effectively denied access to some services. All of these experiences deserve comprehensive analysis. However, such attention is beyond the scope of this paper. Instead, each of these dimensions of experiences will be briefly referred to in order to provide a more inclusive contextualization of their experiences.

Isolation is a common experience for women who have been battered. But for immigrant and refugee women, the isolation that relates to the battering can be compounded and complicated by language barriers, cultural barriers, racism and

⁴⁷⁷ Although terms of incarceration are infrequent, this may be less so for men of colour and black men. For a discussion of the fear of not being able to survive if a women's partner is in jail, refer to Linda MacLeod and Maria Shin, "Isolated", supra note 19. Immigrant and refugee women may also fear that by calling social services into their homes, they risk losing their children in custody battles. Symadel Coke has remarked that there are very different implications for custody in some communities and family laws are not the same as they are in Canada. Symadel Coke, supra note 419.

the separation from friends and family that immigration often entails.⁴⁷⁸ Further compounding this isolation are the additional and systemic barriers immigrant women and visible minority women experience when attempting to access help and support. These barriers, that essentially deny some women access to support, in turn reinforce and perpetuate their isolation.⁴⁷⁹ Immigrant women, women of colour and black women are further isolated by a society that does not recognize their needs and realities.⁴⁸⁰ Experiences of isolation can make it particularly difficult for immigrant and visible minority women to leave partners that are abusive.⁴⁸¹

Black women, women of colour and immigrant women often encounter

⁴⁷⁸ Linda MacLeod, "Isolated", supra note 19, at 7. She adds that the disadvantages and isolation experienced by many immigrant and refugee women reduce their choices and increase their vulnerability and entrapment. At 11. This is also discussed by San San Sy and Suhda Choldin, supra note 388, at 24.

⁴⁷⁹ National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", supra note 17, at 4.

⁴⁸⁰ Linda MacLeod and Maria Shin, "Like a Wingless Bird", supra note 19 at 3. In another article, Linda MacLeod commented, "Linguistic and cultural isolation as well as fear frequently keep immigrant women trapped in their more familiar ethnic communities and menial low paying jobs". Linda MacLeod, supra note 2, at 28. Isolation can be experienced by the entire family. If the family has immigrated from another country, they may have lost connections with and support of their extended family and their friends. San San Sy and Suhda Choldin, supra note 388, at 18.

⁴⁸¹ As discussed in chapter one, I have made a conscious decision not to discuss reasons why women who are battered find it difficult to leave abusive partners. However, I have found in the readings that for many women of colour, black women, and immigrant women, calling the police can be associated with initiating the process to leave the relationship and it may in fact mean that they must leave their communities. Accordingly, I, at some places, refer to the difficulties women of colour, black women, and immigrant women may experience in this sense. However, it is only for this purpose that I refer to the difficulties in "leaving" relationships and not to validate the overused and problematic question, 'why does she stay?'. I would also like to add that the term "leaving" is simply fallacious when describing this situation. Many women find that they cannot "leave" an abusive relationship, men who batter often continue to exert control and inflict violence long after the "relationship" has ended.

racist attitudes and stereotypes when approaching social services designed to help all women who are battered.⁴⁸² Women continue to express their frustration with racial discrimination in almost all areas of social development, such as housing, employment, education and the media.⁴⁸³ Policy or reform initiatives that do not recognize and accept the all pervasive impact of racism in women's lives can do little to meet women's needs.

There are also concerns with the cultural appropriateness of many services.⁴⁸⁴ For instance, many immigrant women and women of colour find existing shelters culturally unsuitable and would prefer a shelter that was more responsive to their needs.⁴⁸⁵ Inappropriate services, or detrimental experiences of services, can cause harm to women of colour, black women, and immigrant women by increasing their isolation or by violating them with racial discrimination. The National Organization of Immigrant and Visible Minority Women has asserted

⁴⁸² Service providers in traditional agencies are overwhelmingly white and may not be trained in dealing with racism and may themselves hold stereotypes and biases against communities of colour, immigrant communities and black communities. The British Columbia Task Force on Family Violence, supra note 38, at 227. For a discussion on experiences of racism in shelters, refer to Maria Shin and Michele Kerisit, supra note 17, at 57.

⁴⁸³ National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6. Many women interviewed by Linda MacLeod and Maria Shin also vocalized their experiences of racism and discrimination. "Like a Wingless Bird", supra note 19, at 33. As discussed earlier, black women, women of colour and immigrant women also fear perpetuating racist stereotypes by reporting to social service agencies.

⁴⁸⁴ Match International has commented: "...an ignorance about legal rights in Canada, the experience of discrimination by mainstream agencies and services, an unfamiliarity with community resources, and absence of family and friends for support combine to limit a battered immigrant women's options and the needs of immigrant women are different". Match International, Linking Women's Global Struggles to End Violence (Ottawa, June 1990), at 64.

⁴⁸⁵ Maria Shin and Michele Kerisit, supra note 17, at 57. They also discuss the lack of funding for culturally appropriate shelters and the lack of long-term counselling.

that non-tolerant, disinterested or dispassionate service provision actually increases women's sense of oppression and distance.⁴⁸⁶ Linda MacLeod has added that inappropriate, even if unintentional, interventions can actually ensure a woman's ostracization from her community.⁴⁸⁷

There is a discernable need for appropriate services for women of colour, black women, and immigrant women where counsellors are aware of cultural practices and beliefs, where women can speak their language of choice and where women are not confronted with racist attitudes and stereotypes.⁴⁸⁸ The National Organization of Immigrant and Visible Minority Women, referring to what immigrant and visible minority women need, made the following comment:

"They need to have support that is concrete; a counsellor who can give them realistic solutions and advice based on a knowledge of the cultural context and ethno-cultural services available".⁴⁸⁹

It has also been expressed that there is need for cultural sensitivity and anti-racist

⁴⁸⁶ National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6. This organization has also articulated that there is a lack of counsellors who understand a woman's culture and that the majority of services available are based on white feminist models of response and are based in anglo-saxon culture. At 8. They add that "[a]gency mandates may restrain the creativity and spontaneity of those who are prepared to meet the challenge of untangling the web of barriers facing immigrant women." At 8

⁴⁸⁷ Linda MacLeod, Web of Hope, supra note 32, at 28. She comments, for instance, that service providers may not be aware of religious practices and may send the woman in a direction that is against her beliefs or her community's beliefs. At 31

⁴⁸⁸ For a discussion of the needs of immigrant and visible minority women related to this issue, refer to National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6.

⁴⁸⁹ National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 6

training with all service providers.⁴⁹⁰ For women who do not speak English or French⁴⁹¹, there is an additional barrier to gaining access to services.⁴⁹² Language barriers affect all areas of life. Linda MacLeod and Maria Shin, in their work on wife battering, found that women who do not speak an official Canadian language often encounter discrimination, are taken advantage of, dismissed as stupid and are purposefully exploited.⁴⁹³ Non-English speaking women have

⁴⁹⁰ This is essential if immigrant, visible minority and refugee women are to access and benefit from services. National Organization of Immigrant and Visible Minority Women of Canada "Impact" supra note 17, at 9. However, there are a number of barriers to women of colour, black women, and immigrant women having access to appropriate services. There is a chronic lack of funding for organizations to meet these women's needs and when funding is awarded, it is rarely core or permanent funding. Organizations for immigrant and visible minority women are understaffed, over-worked, under-funded and are exploited by agencies that request memberships on and presentations to committees and free translations services. For a discussion of the chronic lack of funding, refer to Maria Shin and Michele Kerisit, supra note 17, at 45-46 and National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 10.

⁴⁹¹ English however, is the dominant language of Canada's two official languages.

⁴⁹² Although this barrier also affects immigrant and refugee men, it appears that more men than women enter Canada speaking English. Findings from Statistics Canada indicate that more immigrant men can speak English than immigrant women. In 1980 through 1985, 48% of immigrant women entering Canada did not speak or read English or French and in 1986, 64% of immigrant women did not. As discussed by the British Columbia Task Force, supra note 38, at 206. Immigrant women and refugee women also experience difficulties in acquiring the opportunity to learn English as their access to training programs is often restricted. As such courses are funded through government agencies, enrolment is often limited. For those women who are afforded entry to a language course, other problems, such as limited access to day care, may prevent them from attending. Women may have to depend on their partners not only for paying for the training but for providing day care. This raises obvious concerns for women who are being battered by the men they depend upon. The impact of limited access to language training is gender specific. Language training is often offered by the government to the "head of the house", who are typically men. Immigrant women are therefore denied access to government funded training programs and their full participation in society is thereby restricted. As discussed by San San Sy and Sudha Choldin, supra note 388, at 5. She adds that an additional problem arising from this lack of service is that gaps can grow between family members, particularly if children are involved and they speak English.

⁴⁹³ Linda MacLeod and Maria Shin, "Like a Wingless Bird", supra note 19, at 11. San San Sy and Sudha Choldin have also commented that not speaking English limits a woman's access to the job market and keeps women in low paying and unskilled labour. Supra note 388, at 25.

described feeling helpless, dependant, isolated and hopeless.⁴⁹⁴ These are all noticeable dynamics that would compound experiences of wife battering; not only are these women denied access to services, they are experiencing feelings similar to those often invoked by battering.

Women's experiences of not speaking English or French have considerable impact on how they experience the battering and how they are able to access support and assistance. Linda MacLeod and Maria Shin have commented: "...the isolating shame and fear so characteristic of experiences of abuse were amplified many times over by their language isolation".⁴⁹⁵ For instance, women who do not speak English are often dependent on their partners and their community for their knowledge of rights.⁴⁹⁶ Not speaking English or French makes it more difficult, if not impossible, for women to access support and assistance from service agencies, such as the police. There is evidence that when women who do not speak English do contact the police, that the police often respond inappropriately. Many immigrant women have reported that police take their "story" from their husbands or use children as interpreters. In addition to few charges being laid under these conditions, this behaviour puts the woman in danger.⁴⁹⁷ As far as the police officer(s) may know, the man could be uttering death threats

⁴⁹⁴ Linda MacLeod and Maria Shin, "Like a Wingless Bird", supra note 19, at 27. Also refer to San San Sy and Sudha Choldiri, supra note 388, at 5.

⁴⁹⁵ Linda MacLeod and Maria Shin, "Like a Wingless Bird", supra note 19, at ii.

⁴⁹⁶ As discussed by Kathy Wiebe, supra note 436, at 2. Moreover, if their partner speaks English this strengthens his power over her.

⁴⁹⁷ As discussed by Felicite Stairs and Lori Pope, supra note 25, at 159.

to the woman while they are present.⁴⁹⁸

Black women, women of colour and immigrant women's experiences of wife battering cannot be separated from their experiences of exploitation, racism and lack of services.⁴⁹⁹ The experiences of these various dimensions of violence are integrally connected⁵⁰⁰ and must be validated and incorporated in service planning and delivery.

Black women, women of colour and immigrant women are expressing general dissatisfaction with the strategy of wife assault as a crime. They are arguing that this strategy fails to recognize racism in society, ignores the various

⁴⁹⁸ The National Association of Women and the Law also has evidence of this. A woman called the police for assistance during an episode of abuse and because the woman did not speak English, the police allowed her battering husband to translate for her. Brief to Commission on Systemic Racism, *supra* note 375, at 6. There are other concerns associated with the use of translators by police services. In a recent community meeting regarding wife battering and the criminal justice system, an advocate for immigrant women provided an example of the problems with using translators for women's written statements to the police. An immigrant woman who was being battered by her male partner, wrote a 25 page statement for the police describing her experience of abuse; the translation of this statement was two pages long. Leonora Hernandez, at the Criminal Justice Committee, a sub committee of the Regional Coordinating Committee to End Violence Against Women, Ottawa, Ontario, Monday, January 9, 1995.

⁴⁹⁹ There are many additional dimensions that are beyond the scope of this project but deserve comprehensive attention. For discussion of these dimensions, such as how the process of adaptation to a new environment affects immigrant women's experiences of wife battering, refer to Linda MacLeod and Maria Shin, "Isolated", *supra* note 19, at 9; San San Sy and Suhda Choldin, *supra* note 388, at 5 and 16; Kathy Wiebe, *supra* note 436, at 2; National Organization of Immigrant and Visible Minority Women of Canada, "Racial Oppression", *supra* note 17, at 14; Linda MacLeod and Maria Shin, "Like a Wingless Bird", *supra* note 19; and ARA Consultants, "Wife Battering Among Rural, Native and Immigrant Women (Toronto: ARA Consultants, 1985). For a general discussion of the adaptation process of immigrant persons, refer to Derrick Thomas, "Immigrant Integration and the Canadian Identity", (Ottawa: Employment and Immigration Canada, November, 1990).

⁵⁰⁰ Linda MacLeod and Maria Shin presented an example of the integral connection between all forms of violence. A woman she was interviewing told her that she associate the links between being used by both her husband and her boss as "cheap labour". "Like a Wingless Bird", *supra* note 19, at ii.

forms of oppression they experience and neglects their specific needs. As many women of colour, immigrant women and black women have specific alliances with their family and community, strategies that individualize the problem and the solutions do little to provide them with concrete assistance. This is particularly so when the levels of racism are ignored.

Women's organizations are asking for dialogues with policy makers and criminal justice system personnel on a range of issues. They are expressing that there is a real need to "re-define the terminology on the criminality of wife assault", to have full participation of immigrant women and visible minority women on policy decisions and police accountability.⁵⁰¹ Part of this redefinition entails developing an alternative strategy, one that begins with women's experiences of violence and reflects the economic, social, political and racialized complexities of women's lives.⁵⁰²

⁵⁰¹ National Organization of Immigrant and Visible Minority Women of Canada "Impact", supra note 17, at 10. This organization has also recommended that there needs to be creativity, a secure funding base for women's organizations, systemic reviews of policing, and anti-racist sensitization at 10-11. The forums sponsored by the National Organization of Immigrant and Visible Minority Women stressed the need for a fundamental and comprehensive shift in conceptualization and implementation of services for immigrant women, refugee women and visible minority women who face violence. They want an holistic approach based on the following principles: that funding should reflect the reality of immigrant, visible minority and refugee women; cultural sensitivity and anti-racist training for all institutions; wife assault should be re-conceptualized as systemic sexism and misogyny and that government policies and programs should be reframed; ethno-cultural and visible minority communities need opportunities to develop innovative strategies for education, prevention and increased access to appropriate services; an holistic approach and recognition of a full range of issues effecting immigrant, refugee and visible minority women; and an incorporation of survivors in all aspects of service provision and organization. This organization argues that alternative protective strategies must be explored and determined according to the local needs of the specific community. National Organization of Immigrant and Visible Minority Women of Canada, "Impact", supra note 17, at 3-5.

⁵⁰² National Organization of Immigrant and Visible Minority Women of Canada, "Racial

5. CONCLUSIONS

For a policy that was designed to encourage women to report wife battering, mandatory charging policies are seemingly ineffective. Many black women, women of colour and immigrant women, as discussed throughout the chapter, are reluctant to contact the police because of racism in the criminal justice system, police brutality, fear of deportation, fear of community ostracization and concern that they will perpetuate racialized stereotypes about their communities. Glenda Simms has commented:

"Black women and other racial minorities have long perceived elements in police forces and social service agencies as dangerous to their communities. They know that by calling the police, they risk getting their men maimed, psychologically humiliated and often times killed. Systemic racism in Canadian society and the institutions of justice place racial minority women between a rock and a hard place - we have forced them to choose between their loyalty to community and their personal safety. These women will continue to choose silence, until our society and justice institutions deal with anti-Aboriginality, racism and sexism".⁵⁰³

When I read "we have forced them", I immediately thought about mandatory charging policies. By focusing on legal strategies, without the necessary thought and analysis, we have failed to meet many women's needs and we have forwarded a strategy that in effect leaves women with little or no options.

Mandatory charging policies need to be carefully examined and reassessed with the awareness and knowledge that we now have after a decade of

Oppression", supra note 17, at 4. They are also recommending that polices be established according to the particular needs of communities. Brief to Commission on Systemic Racism, supra note 375, at 5.

⁵⁰³ As quoted by Maria Shin and Michele Kerisit, supra note 17, at 53.

experience. These policies exacerbate the difficulties black women, immigrant women and women of colour experience with a racist criminal justice system: these women cannot simply call upon the police without setting the whole racist system in motion. Women's experiences of racism, sexism, fear and isolation ring throughout this chapter and chapter four and "nag at our euphoria".⁵⁰⁴ The impact, or more accurately the lack of impact, that mandatory charging policies, are having on black women, women of colour and immigrant women raises some difficult questions about what this all means in terms of the exclusions of women of colour and black women from discussions and decision making, feminists engagement with the law, the worth of mandatory charging policies and where we go from here.

⁵⁰⁴ Linda MacLeod has commented that the disturbing reports and apparent contradictions between these policies and success "nag at our euphoria" and suggest that more critical analysis is needed. Linda MacLeod, supra note 237 at 3

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CHAPTER SIX

DISCUSSION

1. INTRODUCTION

I was tempted in this chapter to address the number of strategies that attempt to deal with the problems with mandatory charging policies.⁵⁰⁵ There are times when I do think that piecemeal re-form of the criminal justice system can make it somewhat more responsive to some women's needs. However, these thoughts are becoming fewer and farther between. More and more, I have serious doubts as to the legal system's ability and willingness to appropriately respond to all women - in ways that would make mandatory charging policies "work". As such,

⁵⁰⁵ Since the implementation of mandatory charging policies, many strategies for improving their impact have been conceived. Both the cities of Winnipeg and London have initiated family violence courts to deal with wife battering and both areas report improvements in how these cases are being dealt with by the justice system. For instance, in Winnipeg, sentencing practices in wife assault cases have become more responsive to (some) women's needs and crown attorneys are more sensitized to the issues of wife battering. Refer to Jane Ursel, *supra* note 14, "The Family Violence Court of Winnipeg" 21 *Manitoba Law Journal* 1, 1992, 100; and "The Winnipeg Family Violence Court" 14 *Juristat Service Bulletin* 12, May 1984, 1. The hallmark for the success in London has been their coordination and integration of their support services. Refer to Peter Jaffe and Carole Ann Burris, *supra* note 8, and Peter Jaffe et al, *supra* note 8. It has also been suggested that expanding the types of charges that men are charged with can improve how the criminal justice system responds to violence against women. Refer to Lynn Gaudet and Paula Pasquali, *supra* note 339. Proceeding with charges without the testimony of the woman who was battered has also been heralded as a responsive and appropriate way of ensuring findings of guilt without further victimizing the woman. This was one of the main focuses of discussion at the recent workshop in Ottawa, *supra* note 331. Other strategies for improving the legal system's response to male violence against women have also been suggested. These include, but are not limited to, training and education on wife battering, anti-racism work, and anti-sexism work. I have no doubt that such reforms have some potential to improve the present situation. However, before we put more precious energy into struggling for such changes, I think we need to examine what it is we are hoping to accomplish. And if mandatory charging policies are worthy of our struggles, then these reform initiatives should be examined more closely and analyzed according to the needs and experiences of all women. However, regardless of the approach taken on mandatory charging policies, anti-sexism and anti-racism work is essential.

I am not going to focus on strategies to improve the legal response to male violence against women within the strategy of mandatory charging policies. Since researching and working on this thesis, my doubts have shifted: I am now doubting whether mandatory charging policies, in and of themselves, are an effective response to wife battering.

In this, I am not arguing that feminists should necessarily relinquish law reform as one means of addressing male violence against women. I think law reform at times can be an important and significant part of our struggle in eradicating male violence against women, particularly since law does affect women's lives, whether we are victims or offenders and law does have the power to shape our lives.⁵⁰⁶ I think the challenge is determining at what "times" law reform efforts merit our attention and struggle, a challenge that has not been undertaken with respect to mandatory charging policies. Another challenge that has not been met is the formulation of law reform strategies that represent all women's needs.

The questions that have been raised for me in doing this thesis concern what it is we should be demanding from the police response to wife battering. While questioning police charging policies may not be a safe or popular approach to wife battering at this time, I think there is a very real need to stop for critical reflection: to stop formulating adjustments to the system and examine what it is we actually expect from mandatory charging policies and if these expectations are

⁵⁰⁶ As discussed in chapter two.

achievable. The questions that have been raised for me through this thesis, and what it is I think we "should do" with these questions, will be the primary focus of this chapter. I will also discuss the need for feminists to examine our own development of law reform initiatives. While feminist law reform efforts are often coopted and undermined (consequences that feminists can not be held responsible for), reform strategies that do not take into consideration all women's experiences of oppressions are inadequate from the inception and are fated to be ineffective and detrimental (and for this, we are responsible).

2. "INCLUSIVE" LAW REFORM

The limits of effecting change in women's lives through law reform strategies are apparent in the reform initiative of mandatory charging policies. As discussed in chapter two, law reform usually does not address the underlying causes of the problem being addressed, the uneven development of law affects the implementation of reforms, and the issue is often coopted by the state. Mandatory charging policies are no exception. The underlying causes of wife battering have not been challenged by this policy.⁵⁰⁷ police officers are not consistently or

⁵⁰⁷ Linda MacLeod discusses how the legal system has done little to address the underlying causes of men's violence against women or the roots of women's oppression. She argues that the state has focused on "rescuing" the woman and has not attempted to prevent wife battering through increasing or creating appropriate services. She comments: "Such policies, because they are deeply rooted in chivalrous symbols of social justice and order, and because on the surface they espouse the value of women and the importance of their problems, have the potential to mask the ultimate inequities they create, to direct attention from more basic inequities and to garner support from the very people they keep unequal. Ultimately, therefore, wife battering may be providing governments with a convenient, safe and popular way to respond to demands for greater equality for women without seriously tampering with the institutions which perpetuate inequality". *Supra* note 237, at 15.

evenly charging men who have assaulted their female partners and the personnel of the criminal justice system continue to undermine the message that "wife assault is a crime". At the same time, the policy of mandatory charging has become so legitimated that it is difficult⁵⁰⁸ to question.⁵⁰⁹

As discussed in chapter two, the (white) women's movement has consistently denied, ignored and trivialized the experiences of black women and women of colour in our research and policy initiatives. The research of, demand for, and implementation of mandatory charging policies have been no exception to this "exclusion". Research conducted in London ignored the experiences of

⁵⁰⁸ Now that mandatory charging policies have become engrained in our thinking, it is very difficult to openly question and criticize the policy. What seems to be acceptable is criticizing the players in the system for not following the policy; the fundamental principle behind mandatory charging policies is off limits. A number of people with whom I have discussed this issue, have commented that it would be "political suicide" to openly suggest a re-thinking of these policies. A number of feminists have addressed the difficulty in challenging reforms once they have been legitimated by the state. Linda MacLeod has characterized these policies as a "smokescreen" for the lack of progress in establishing effective programs. Linda MacLeod, supra note 237, at 15. Zoe Hilton has commented that the cooptation of the issue of wife battering by the state is responsible for the failure of the battered women's movement. She has commented that, despite partial success in terms of public policy, the movement has failed. Although "battered women" achieved prominence on the public agenda, the very issues which necessitated the recognition of wife beating as a social problem have been refined and even reversed through government cooptation of the problem. Attention has been distracted from the patriarchal social structure whose legitimacy has been perpetuated by its "ownership" of the law. Zoe Hilton, supra note 14, at 314. Gillian Walker has completed a detailed analysis and documents the process by which the movement was coopted by the state. Supra note 2. For further discussions, refer to Susan Schechter, supra note 2, at 179 and 247; Linda MacLeod, supra note 237, at 4-12; Elizabeth Comack, supra note 26, at 1; and Jan Barnsley "Feminist Action, Institutional Reaction" 17 Resources for Feminist Research 3, 1988, at 181.

⁵⁰⁹ Although I am again tempted to focus on how mandatory charging policies demonstrate the limits of law reform, I have chosen instead to briefly make this reference and refer readers to additional sources. As in chapter two I explored the debate concerning the usefulness of feminists engagement with the law, and as by now most feminists are well versed in these issues, I feel it is not necessary, for my purpose, to go into any more depth. However, it is with some reluctance that I do this, I find the issue to be of much importance and enjoy participating in such discussions.

black women and women of colour; the (white) women's movement, for the most part,⁵¹⁰ supported mandatory charging policies and in doing so, denied the experiences of racism.

Without doubt, the impact of mandatory charging policies would have been undermined by the criminal justice system, regardless of the analysis that went into them. However, I think some of the problems we are witnessing with these policies stem from a lack of analysis and race consciousness. The fears that black women and women of colour experience - fear of police brutality and other forms of racism in the criminal justice system - have not arisen from the policies, they have long been a reality for these women. Similarly, immigrant women have long feared racism, experienced pressure from their communities not to report incidents of being battered, and have feared deportation.

Law reform initiatives that do not integrate the experiences of all women, place many women in precarious positions, perpetuate oppressions and do little to effect change in women's lives. Mandatory charging policies provide stark evidence to this.

3. RE-THINKING MANDATORY CHARGING POLICIES

As I complete this thesis, I find that I have more questions than when I began this research. In this way, I have fulfilled my purpose: to explore the impact of police charging policies on black women and women of colour and to formulate

⁵¹⁰ As discussed in chapter three, some women were expressing concerns with the policy of police intervention because of racism in the criminal justice system.

questions for future research. The questions have been discussed throughout, but in this section I want to highlight the primary concerns I have with mandatory charging policies.

One of these concerns is the impact of these policies on black women, women of colour and immigrant women. As discussed in chapter five, these women are often fearful that their partners will suffer police brutality and are fearful of the likelihood of encountering other forms of racism in the criminal justice system. By devising a policy that makes these women more fearful, not only have their needs not been addressed, but they are in the precarious position of having to risk further violence - the racism in the criminal justice system - in order to escape the violence from their male partners. As black women and women of colour are experiencing the policy in this way, and as many of these women are not utilizing police intervention, I think there is a need to re-think mandatory charging policies. This has to be accomplished with the full participation of black women and women of colour.

Another primary question is whether mandatory charging policies are serving any deterrence value. Many feminists and (other) women's advocates hoped that by having police officers charge a man that batters his female partner, he would be less likely to re-assault her in the future. Peter Jaffe and Carole Anne Burris "found" that charging men did reduce the chances of recidivism. This perception of the value of police intervention was a dominant factor in the push for

mandatory charging policies.⁵¹¹ However, studies in the United States have found that police charging policies are not necessarily more effective in providing a deterrent to subsequent violence than other approaches of intervention. Moreover, these studies have also found that the potential for deterrence in charging men who batter their partners depends upon their economic status, whether or not they are employed, and their race. Police charging policies, in response to abuse against black women and women of colour, may not be providing any deterrent value.⁵¹²

In addition to there being no race analysis in the research of Jaffe and Burris, there were many methodical problems in their research that also call into question the effectiveness of charging as a deterrent. Their conclusions were reached with relatively small sample sizes and factors, such as separation and the impact of other players in the criminal justice system, were not taken into account.

The potential of mandatory charging policies to be a deterrent to future violence is also called into question by the fact that many black women, women of colour and immigrant women are not calling the police. Mandatory charging policies may instead actually deter black women, immigrant women and women of colour, who fear the racist impacts of such policies, from calling the police.

The potential of charging being a deterrent to subsequent violence is also

⁵¹¹ Donald Dutton discusses this. supra note 163, at 37-38.

⁵¹² As discussed in chapter three, there was also some concern expressed that men of colour and black men would be arrested more than white men. I am not aware of how police racism is playing in this regard but given the indications of how some police officers treat men of colour and black men, the arrest rates of these men should be researched.

challenged by the information that other players in the criminal justice system, namely the crown attorneys and judges, do not consistently support the policy of "wife assault is a crime". Evidence exists that crown attorneys and judges undermine the message through dropping charges, plea bargaining, sentences and judicial commentary.⁵¹³ In addition, there are also concerns about the impact of sexist comments being made by police officers and judges. Without doubt, even if charges are being laid, remarks of this nature can undermine any potential effect of charging men who batter women.⁵¹⁴

The bottom line question is whether mandatory charging policies are/can be a deterrent to men's violence against their female partners. It has been ten years of the policy "wife assault is a crime". Perhaps we need to examine what deferent affects, if any, this policy is having on wife battering.⁵¹⁵

⁵¹³ It could be that restructuring or implementing training programs for crowns and judges could address these problems at some level. But given what we know about the willingness of the judiciary, and to some extent crown attorneys, to be "educated", it is doubtful that there will be significant change. Moreover, this does not address the fundamental question of what we are doing with mandatory charging policies to all women, specific women, and what it is that can be accomplished with mandatory charging policies

⁵¹⁴ Other players in the criminal justice system may also be negating any potentially positive impact of mandatory charging policies. For instance, in my experience working at New Directions, a local re-education program for men who batter women, probation officers often undermined the impact of the court referral to the program, undermined the work of the program and refused to follow up on breeches of probation orders when men did not attend the program.

⁵¹⁵ Even if mandatory charging policies are not a deterrent to future violence, some writers argue that, at the very least, police intervention immediately deters that battering episode. Refer to Maria Pastoor, *supra* note 206, at 809 and Mark Drumb, *supra* note 38, at 146. Kathleen Waits has also argued that the specific deterrence value of arrests for other crimes of violence, such as homicide, is not a deciding factor in the arrests of offenders. These arrests are considered only to have a general deterrence value. But regardless of the absence of specific deterrence value in charging people with murder, they are still charged. As such, she supports arresting men who batter under these terms. *Supra* note 205, at page 301. While it may be that arresting men serves the function of stopping the immediate episode of battering,

Other concerns relate to how mandatory charging policies have taken away women's power to choose. Although there are many "good" reasons⁵¹⁶ for not allowing women to drop charges, such as knowing that men threaten and coerce women to drop charges, there is a philosophical contradiction in trying to assist women by taking away their power to decide for themselves what is best for them. As Joanne St. Lewis has remarked: "If feminism is about providing for autonomy for women, reinforcing women's agency in her capacity to chose, I would say, is there not something inconsistent with female agency and the construction of mandatory charging policies?"⁵¹⁷ Although it is difficult to balance the dilemma between women's agency and women's needs of protection when being battered, I think it would be easier to evaluate it with a knowledge of the effects that

other issues, such as what the woman then goes through, potentially may negate this affect. As discussed in chapter four, some women experience the criminal justice system much like their male partners abuse: coercive, controlling and abusive.

⁵¹⁶ As Maria Pastoor has explained, arresting men who batter their female partners socially confirms that it is wrong, injuries are made visible and real to society, it protects women from continuing abuse, and it may empower women as an "arrest can rekindle the battered women's perception that society values her and penalizes violence against her. This perception counteracts her experience of abuse. When a battered woman calls the police and they arrest the man who beats her, her actions, along with the officer's actions, do something to stop her beating." She further comments that when a charge is not laid, implicit permission is being given to him to continue the battering. Maria Pastoor, *supra* note 206, at 594-596. Other writers have argued that the problems with mandatory charging policies should be addressed and are not reasons to forego this policy. As Mark Drumbl has commented "The simple fact that pro-arrest policies have rough edges does not mean they should be jettisoned, especially give the deleterious effects of not having a policy at all. The real challenge is thus to render these policies sufficiently flexible and contextual so that they can effectively meet the needs of the victim as well as society's more generally." Mark Drumbl, *supra* note 38, at 146.

⁵¹⁷ Joanne St. Lewis, personal interview, January 24, 1995. The Canadian Advisory Council on the Status of Women has commented: "Too many responses to violence do not reflect the experiences of women and simply reinforce their knowledge that they are unequal and powerless". *Supra* note 32, at 17. I wonder if mandatory charging policies are one strategy that does this.

mandatory charging policies are having. If these policies are doing more harm than good, then why coerce women into following through with charges, particularly when women are being charged with contempt of court?

In recognition of these concerns, I think there is a real need to (re)think⁵¹⁸ what we want from mandatory charging policies, research more fully what the effects are, and what the potential effects are given our understanding of the limits of law reform.⁵¹⁹

Coming to terms with the issue of mandatory charging policies, for me, is particularly difficult. As discussed in chapter three, the situation with the traditional police response to women who were battered was abhorrent. Knowing this makes it difficult to think about relinquishing what we have gained. I think that is why so many women's advocates are unwilling to question the policies in and of themselves (that and the cooptation of the issue by the state). However, I am not suggesting that we relinquish what we have gained. On the contrary, we need to examine what it is we think we have gained and what it is we have not gained. Through this, perhaps we can formulate more appropriate responses to women who are battered by their intimate male partners. It may be that mandatory charging policies need to be strengthened; it may be that only parts of the policy

⁵¹⁸ I use "re" in brackets because I am not sure they were comprehensively thought about in the first place.

⁵¹⁹ There may be positive impacts of mandatory charging policies. For instance, it has often been suggested that the power of law is located in its symbolic role. It may be that there is potential power in the strategy of "wife assault is crime": like all effects of mandatory charging policies, I think this has to be researched.

needs to be revised; and it may be that the whole policy should be rejected.

We need to continue challenging racism and sexism within the criminal justice system: indeed until we do, no law reform will ever affect real change.⁵²⁰ At the same time, I think we need stop what we are doing with mandatory charging policies; I think there needs to be much more research. This research needs to be conducted in the context of all women's experiences of mandatory charging policies and what it is women are needing from the legal response to wife battering.⁵²¹

4. CONCLUDING THOUGHT

I began chapter two by expressing that the responses of white feminists to women of colour and black women are similar to the responses of the criminal justice system to male violence against women. While some feminists are arguing that the legal system has to expand to reflect more than the perspectives of white privileged men, black women and women of colour are expressing that white

⁵²⁰ I think, at this point in our knowledge and understanding of men's violence against women and all forms of oppressions, that little needs to be expressed about the need to address the underlying causes in order to emancipate women. Although, I am again tempted to engage in this discussion, as I always find comments made by feminists on this need powerful and passionate, when they are made at the end of papers, with little or no explanation of how to accomplish such an enormous task, they begin to feel trite.

⁵²¹ There is much to be thought about in relation to wife battering and the involvement of the criminal justice system. For instance, we know that police officers have responded to women's calls for assistance previous to the women being killed by her male (ex) partner. I am not quite sure what this means or what we are to do with this information, except that it indicates present responses are not effective in preventing male battery and killing of women. For a discussion of this form of femicide, refer to sources cited in supra note 380, and generally Jill Radford and Diana E.H. Russell, (eds). Femicide: The Politics of Women Killing (New York: Twayne Publishers, 1992).

women need to re-think our approaches to them and perhaps change some of the underlying tenets of feminism itself. While we are being told that current white feminist responses are not responsive to the needs of women of colour and black women, we have long criticized the legal system for trivializing men's violence against women. And as the legal system is often impervious to feminist challenge, we are also being told that theories of male violence against women do not account for all women's experiences.

In as much as I have learned through this exploration of mandatory charging policies about the need to re-assess this strategy, I have learned that white feminists need to re-assess our focus on white women. And yet, in many ways I fear that there are too many similarities between how white women are addressing our racism and the how the legal system responds to men's violence against women. Nourbese Philip strengthened this thought in me when she said:

"We must, however, question whether these changes are fundamental and lasting, or whether the systems are merely changing so as to remain the same. By their very nature, organizations function so as to perpetuate themselves as they are; this, combined with systemic racism, suggests that the system is merely fine-tuning its racism and becoming more sophisticated in how it continues to remain the same. It will, therefore, become even more difficult to identify, challenge, and eradicate racism". (emphasis hers).⁵²²

Although she is not, Philip could be referring to the limits of law reform in her first thought; and in her second, she could be referring to the (white) women's movement. In addition to struggling against the limits of law reform then we

⁵²² Nourbese Philip, supra note 444, at 169.

(meaning white women) must also fight against resembling the legal system in our responses to black women and women of colour

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