"Protection Orders, Partner Abuse and Police Liability: A Socialist Feminist
Analysis"

by

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Abstract

The aim of this thesis is to critically analyze Canadian and American jurisprudence related to police enforcement practices of mandatory charging policies and protection orders for battered women through the lens of a socialist feminist framework. This thesis explores the civil liability of police officers, prosecutors and other public officials in relation to inadequate enforcement of protection orders in Canada and the United States and asks whether law has the potential to act in an emancipatory fashion on behalf of women. Moreover, it is argued that civil liability is a necessary mechanism for the accountability of public authorities such as the police. Successful tort claims would compel the police to enforce protection orders as mandated to secure women's safety. From a socialist feminist perspective feminists should be extremely cautious of resorting to law because of its historical mistreatment of women and its inability to make any real substantive change in women's lives. Nevertheless, it is recognized that law is an important site for feminist struggle.

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1

Introduction

1.1 Background

Partner violence against women is one of Canada's most important social issues. It is an issue that penetrates all sectors of Canadian society: it occurs in all regions, in all communities, and within all socio-economic, ethnic and religious groups across the country. Yet, it is also an issue whose severity is difficult to quantify. This is because incidents of partner abuse – defined as the violence or mistreatment that a woman or a man may experience at the hands of a marital, common-law or same-sex partner – tend to be greatly underreported, even on victimization surveys. Thus, the actual occurrence of partner abuse in Canadian society may be significantly higher than the rates published in official academic and government reports. Although both women and men experience partner abuse, the prevalence, nature and severity of partner abuse suffered by women is clearly disproportionate against them. Thus, partner abuse remains predominantly an issue of male violence against women. Feminist researchers maintain that women have been, and continue to be, the primary victims of partner abuse perpetrated by men and that violence is viewed as one of the several ways men maintain their dominance – socially, politically and economically - over women in both public and private domains (Currie, 1998).

The phenomenon of partner abuse has been increasingly studied and documented since the 1960s, and “by now, the extent of violence against women is well documented” (Currie, 1998: 41). The story is often told how, in 1982, Members of Parliament laughed when a Member reported Linda MacLeod’s findings that one in ten Canadian women annually are battered by their partners. Their laughter reminds us that, although this form of violence has existed since antiquity, ‘partner abuse’ has a short history as a contemporary political issue (Bonnycastle & Rigakos, 1998).

The most complete picture of the extent of partner abuse in Canada comes from the 1999 General Social Survey on Victimization (GSS). This survey asked 26,000 Canadian men and women about their experiences of violence and emotional abuse in their current or previous marriages and common law partnerships. The GSS found that the violence and emotional abuse experienced by women tends to be more severe, and more frequent, than that directed by women towards men. Compared to men, women were:

- six times more likely to report being sexually assaulted;
- five times more likely to report being choked;
- five times more likely to require medical attention as a result of an assault;
- four times more likely to report being threatened, harmed, or having someone close to them threatened or harmed;
- four times more likely to report being denied access to family income;
- three times more likely to be killed or physically injured by an assault;
- more than twice as likely to report being beaten;

- more than twice as likely to report having their property damaged or their possessions destroyed; and
- almost twice as likely to report being threatened with, a gun or a knife, or having one used against them (Statistics Canada, 2000).

Women were also more likely to fear for their lives, or the lives of their children; have sleeping problems, suffer depression or anxiety attacks, or have lowered self-esteem as a result of being abused; report incidences of being isolated from family and friends; and report name-calling and put downs (Statistics Canada, 2002). In all, Statistics Canada (2002) estimates as many as 220,000 women – 3% of the total female population in Canada – were assaulted by a current or ex-spouse during the 12 months previous to the survey. However, this is surely an underestimate given that other research has shown higher levels of violence at 32.9% (DeKeseredy & MacLean, 1998) and 67% in the United States (Straus, 1996).

The above statistics illustrate that partner abuse can take many forms. The most common of these include physical, sexual, psychological, economic and spiritual violence. *Physical abuse* may consist of just one incident or it may happen repeatedly. It includes using physical force in a way that injures someone – puts them at risk of being injured – including beating, hitting, shaking, pushing, choking, biting, burning, kicking, or assaulting with a weapon (<http://canada.justice.gc.ca/en/ps/fm/>). Other forms of physical abuse include rough handling, confinement, or any dangerous or harmful use of force or

restraint. *Sexual abuse* includes all forms of sexual assault, sexual harassment or sexual exploitation. This includes forcing someone to participate in unwanted, unsafe or degrading sexual activity, or using ridicule or other tactics to try to denigrate, control or limit their sexuality or reproductive choices. *Emotional abuse* includes verbal attacks, such as yelling, screaming and name-calling. Other forms of emotional abuse include criticism, verbal threats, social isolation, intimidation or exploitation to dominate another person. *Intimidation* includes criminal harassment, or "stalking", which may include threats against a victim or their loved ones, the damaging of their possessions, or the harming of their pets. *Economic abuse* includes stealing from or defrauding a partner. This includes withholding money that is necessary to buy food or medical treatment, manipulating or exploiting a person for financial gain, denying them access to financial resources, or preventing them from working (or controlling their choice of occupation). *Spiritual abuse* includes using a person's religious or spiritual beliefs to manipulate, dominate or control them. It may include preventing someone from engaging in spiritual or religious practices, or ridiculing their beliefs. A victim may be subjected to any of the above forms of spousal abuse, either singly or together in some combination. This may occur at any time during a relationship, including while it is breaking down, or after it has ended.

There is no single, definitive 'cause' of partner abuse. Partner abuse is a complex problem, and there are many contributing factors. These occur at the individual, relationship and societal levels. However, some explanations of

partner abuse include theories of individual pathology, psychological dysfunction and sociological accounts of male domination and patriarchy within the family (MacLeod, 1987). Beyond understanding family violence against women, there is a growing recognition of a larger systemic context of partner abuse. Vulnerability towards abuse can be accentuated by economic disparities and societal reinforcement of certain types of power relations reproduced within the family. The distinction between familial (private) patriarchy and social (public) patriarchy helps us understand the connection between public policy and private violence. Familial patriarchy manifests itself in the decentralized power and authority over women within the family unit. Social patriarchy describes laws and policies that reinforce familial patriarchy (Sheppard, 2000).

Many women who experience abuse from their intimate partners require protection for the safety of their children and themselves. Some women seek out alternatives to the criminal justice system such as women's shelters, family resources, counseling and legal clinics, while others may also search for more formal measures such as contacting the police and/or filing for a protection order.

1.2 Synopsis

The aim of this thesis is to critically evaluate Canadian and American jurisprudence related to police enforcement practices of mandatory charging policies and protection orders for battered women through the lens of a socialist feminist framework. This thesis will also explore the potential liability of police officers, prosecutors and other public officials in relation to inadequate

enforcement of protection orders, both in Canada and in the United States. Most importantly, this thesis will address whether law has the ability to act in an emancipatory fashion on behalf of women recognizing that law is an important site for feminist struggle. Thus, this is an investigation into police enforcement practices and judicial decisions, pertaining to liability, in cases of non-enforcement of protection orders for battered women from a socialist feminist perspective.

This thesis is organized into four main chapters. Chapter two explores feminism's relationship with the law, gives a brief overview of feminist theories of women's inequality, and describes the concepts of the 'universal woman', essentialism and offers a socialist feminist framework that examines the nature of women's subordination and the role of law in maintaining and perpetuating patriarchy and class distinctions. The problem with essentialism and notions of the 'universal woman' is that it assumes that women have a shared experience just because they are all 'women' and in doing so have overlooked the differences between women. Feminists should be extremely cautious of resorting to law because of its historical mistreatment of women and its inability to make any real substantive change in women's lives. Nevertheless, feminist engagement with the law is important and from a socialist feminist perspective it is viewed as a necessary evil.

Chapter three provides a critical overview of protection orders available to abused women in Canada, including peace bonds and restraining orders, as well

as civil domestic violence legislation. Civil domestic violence legislation is an important and potentially empowering tool for battered women because of the immediacy of the protection order and because it offers an important alternative to a criminal proceeding. However, given the laws' ability to silence women and disqualify their experiences it is important to ensure that all battered women are given equal access to these new forms of protection.

Chapter four specifically considers the interaction of abused women and police enforcement practices of protection orders as well as mandatory arrest and charging policies and their effect on battered women. We will see that the police response to partner abuse has been minimal and is quite often clouded by notions of male supremacy and stereotypes regarding battered women. On the one hand, battered women contact the police to stop the violent incident and ensure their immediate safety, while on the other hand they are met with sexism, classism and racism. A general mandatory charging policy is often inadequate to many women because it is based on the assumption that all women share the same experiences.

Chapter five investigates the possibility of civil remedies such as tort law to achieve police liability and accountability of police non-enforcement of protection orders. Tort law, through civil liability, allows for the police to be held accountable for non-enforcement of protection orders. Successful tort claims against police officers has the potential to compel officers to fulfill their mandate and enforce

protection orders properly. In addition, I will explore the possibility of establishing a police-citizen fiduciary relationship. While such a relationship would contribute to establishing a breach of duty, it may not be necessary given that an undertaking of responsibility may already be sufficient to result in a duty in tort. Moreover, the establishment of a police-citizen fiduciary relationship should be approached cautiously in light of the potential of creating an infantilizing or dependent relationship between battered women and the police.

The overall goal of this thesis is to argue that law does have the potential to offer protection and reparation for abused women, however laws' historical treatment of women must not be forgotten. The law is strife with potential pitfalls and setbacks for women. Through feminist inspired litigation, civil liability can act as a mechanism for the accountability of public authorities such as the police. Judgments against police officers who do not enforce protection orders properly will make it expensive for police departments and compel officers to enforce protection orders and domestic violence legislation as mandated. Successful tort claims could ensure uniform police decision-making and secure women's safety. Feminist engagement with the law has proven an uneven endeavor that has actually resulted, in certain cases, in more harm than good. This is particularly so given universalizing notions of 'womanhood' and essentialism. So, while tort law offers a viable alternative to strengthening the criminal justice system which is quite often contrary to women who are already disadvantaged by other structural forces such as race and class, it is still necessary to cautiously approach law.

1.3 Terms and Definitions

Language is not value-neutral, and therefore, care must be taken to ensure that the terms and definitions used do not communicate the wrong message and values (MacDonald, 1992). In many instances, defining a term or an issue can influence the measures and results of the research. Thus, the terms in this thesis were designed to be inclusive and as accurate as possible.

Defining 'law' is just as problematic as defining feminism. 'Law' can be understood from a variety of perspectives. The traditional sense of 'law' is a body of rules and regulations set out for a community to follow enforced by the imposition of penalties. A more descriptive view of 'law' is that law is a social system, which has become a subject of study and a site for struggle. Others have defined law as "a site of discursive struggle where competing visions of the world and women's place therein, are fought out" (Cossman, 2003: 87) and "law represents both a discourse and a process of power" (Albertson Fineman, 1991: xiv).

Partner abuse has been defined as "physical or sexual assault, or the threat of physical or sexual assault of women [family member] by men [or woman] with whom they have, or have had ongoing or intimate relationships, whether or not they are legally married or living together at the time of the assault or threat" (Ontario Ministry of Attorney General, 1995). Partner abuse can also include criminal harassment, such as stalking, intimidation and unlawful interference with

personal liberty, such as forcible confinement. While it is recognized that men are susceptible to partner abuse, the focus of this thesis will surround the primary victims of partner abuse: women.

Many battered women seek out a variety of legal remedies including *peace bonds, restraining orders and emergency orders*. The term *protection order* is used throughout this thesis as an umbrella term to describe court orders and/or injunctions such as civil restraining orders and criminal peace bonds, which are designed to prevent and/or deter violence against partners.

Peace bonds are governed by s. 810 of the *Canadian Criminal Code*. Section 810 allows for any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or child or will damage his or her property to apply for a protection order from the court. Upon the protection order being granted, the court may stipulate that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance. In addition, the court may commit the defendant to prison for a term not exceeding two years if he or she fails or refuses to enter into the recognizance.

In the civil realm, *restraining orders* are a court order or recognizance that is available to help protect a person from a family member (i.e. a spouse, ex-

spouse, common-law spouse or someone with whom you have children with) A restraining order can be obtained with or without the assistance of a lawyer, however, all applications must be made in person at court. There are no time restrictions on the length of the order, unless the judge specifically states.

Finally, new developments in provincial legislation have resulted in *emergency orders* that the police can obtain on behalf of a victim from the court. This type of protection order is governed by provincial domestic violence legislation (currently in force in five provinces, Alberta (*Protection Against Family Violence Act*), Saskatchewan (*The Victims of Domestic Violence Act of Saskatchewan*), Manitoba (*The Domestic Violence and Stalking Prevention, Protection and Compensation Act of Manitoba*), Nova Scotia (*Domestic Violence Intervention Act*) and Prince Edward Island (*Victims of Family Violence Act*), and one territory, the Yukon (*Family Violence Prevention Act of Yukon*), in Canada. It can provide immediate protection from an abusive family member. Conditions on the order may include restrictions on contact with other family members and being forbidden to possess guns, knives and other weapons. The application for an emergency order may be made by telephone or in person at any hour of the day or night.

The terms 'battering' and 'abuse' are common. I recognize that these terms have been criticized for emphasizing the pathological and the physical violence resulting in isolating and stigmatizing women. It is not my intention to

characterize these women solely as victims. I use this term with the understanding that partner abuse involves the individual damage done to women as well as emotional, psychological, economic and physical violations. I also recognize women's agency and the important role women play in their own lives, as well as the strength and determination women possess to separate themselves from their abuser. This renders a more complete perspective to the problem.

1.4 Summary

In this chapter I have introduced the phenomenon of partner abuse and given a snapshot of partner violence in Canada. In addition, I have explored components of partner abuse including – physical, sexual, emotional, economic and spiritual abuse. I have defined terms and definitions that are used throughout the thesis such as law, partner abuse, protection orders, peace bonds, restraining orders and emergency orders. Finally, I have outlined the organization of the thesis individually by chapter and stated the goals of the thesis - to argue that law, through feminist inspired litigation such as tort law and civil liability, has the potential to offer protection and reparation for battered women. Successful tort claims against police officers who do not enforce protection orders properly could hold officers accountable and compel them to enforce protection orders and domestic violence legislation as mandated. However, laws' historical treatment of women must not be forgotten. Thus it is necessary to cautiously approach law as a mechanism for women's emancipation. Chapter 2 discusses feminist theories

of inequality, takes a critical look at notions of the 'universal woman' and essentialism and the limitations of feminisms' resort to law.

2

Theorizing a Feminist Framework

Feminism has been defined in many different ways. Defining feminism however involves taking a political stance but I believe that feminism primarily seeks to upset the power imbalance between men and women. Defining feminism solely as a political movement does not accurately describe smaller semi-organized local groups of women who may not formally describe themselves as political activists but who nevertheless engage in political activities. In addition, it is impossible to define a single feminist political movement, since the goals and political strategies of different feminist groups vary widely.

In 2004 it is more appropriate to speak of a *plurality of feminisms* rather than a singular, unified feminism. Harris (2000: 401) argues that “feminism should be seen not merely as a prescription for granting rights to women, but as a far broader vision”. The goal of feminism is not just to give women equal rights; rather, its objectives are to dissolve the inequality and power differentials between *all* peoples. Thus, “it would seem realistic to accept that feminism is contradictory” (Ramazanoglu, 1989: 22), and very fitting for a movement that purports to represent a diversity of women. However, “it is certainly possible to construct a base-line definition of feminism and the feminist which can be shared by feminists and non-feminists” (Delmar, 2001: 5). Many would agree that at the very least a feminist is someone who holds that women suffer discrimination

because of their sex and that equality for women would require a “radical change (some would say revolutionary even) in the social, economic and political order” (Delmar, 2001: 5). But beyond that, things immediately become more complicated.

While it is possible to develop a skeletal description of feminism, “defining feminism remains difficult because feminism entails rethinking the past and the future, and seeing women as active agents in achieving change. Feminists share at least some understanding of what women’s oppression might mean, but they differ enormously over what could constitute women’s liberation” (Ramazanoglu, 1989: 8). The disagreement over the ways to achieve equality for women sets the foundation for feminists’ differences of feminist engagement with law. These differences will be discussed later in this chapter. There are two sources of conflict in conceptions of how women should engage with the law – one relates to the idea of autonomy and sees feminisms’ reliance on the law as disempowering and infantilizing women. Women’s reliance on law will also often have unwanted side effects, as state agents make decisions on behalf of women as part of their function of protecting them. The other source of conflict relates to the idea of diversity and notions of the ‘universal woman’. Some people suggest that the reliance of feminism on law, particularly criminal law, to attain its goals reflects the dominance of white middle class or professional women within the feminist movement. This group is more likely to see the law and particularly the police as potential allies, but other women, particularly minority women, see police power as a threat and might feel they and their families are unfairly

targeted for scrutiny by police. Thus, this chapter explores the contradiction within the feminist movement regarding essentialism, it problematizes notions of the 'universal woman' and examines the limitations of feminisms' resort to law to achieve substantive equality for women.

2.1 Feminist Theories of Women's Inequality

Contemporary gender relations are complex. Defining differences between men and women is distinguished between sex and gender. Sex refers to the biological sex of an individual – whether a person is born physically female or male. Sex is determined by genes. In contrast, gender is a social construct which refers to the social role of being a 'woman' or being a 'man'. Gender is composed of various features that the society or particular culture labels as appropriate for, or typical of, one sex, but not the other, including behaviour, attitudes, opinions, feelings and dress.

Two dominant feminist theories emerged concerning women and the law through women's struggle for equality. Liberal and radical feminisms explore the inter-relationship between men and women and the instrument of law. These theoretical points of view differ in terms of how they explain women's historical subordination to men, and what they advocate as the route to women's liberation and equality with men. The tenets of liberalism include a basic "assumption of sameness among individuals that rests on the (hu)man ability to reason and make rational choices" (Chunn & Lacombe, 2000: 4). Thus, from a liberal

perspective, there are no innate differences between women and men although liberal feminists do acknowledge that “women are unequal in society, and that women do not have the same access to power and resources as men” (Comack, 1999: 45).

The account of women’s historical subordination to men is one of the major differences between liberal feminism and radical feminism. The general liberal account of women’s position in society is explained as influenced primarily by unequal law and policy, rather than a result of men conspiring to oppress women. Most women in Western countries by this time had achieved formal or legal equality with men. This was accomplished by efforts to make all laws gender-neutral and new policies that enhanced women’s equal opportunity. Overall, liberal feminism holds that women’s equality can be “achieved without a revolutionary transformation of existing social structures and institutions...[and] once discriminatory (sexist) rules are changed and equal opportunity exists, women’s equality will follow” (Chunn & Lacombe, 2000: 5).

In comparison, radical feminism is portrayed as “everything liberal feminism is not” (Chunn & Lacombe, 2000: 5). This theoretical approach is based on the ideas that gender relations are composed of male dominance and female subordination, and that the state and law – which is an instrument of the state - reinforces this hierarchal relationship. Catharine MacKinnon (1989), likely the most well known radical contemporary feminist, states “the state is male in the

feminist sense; the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms, forms, relation to society, and substantive policies” (161). Rather than viewing law as a gender-neutral instrument, radical feminist theorists regard law as “an integral formalized carrier of patriarchal relations” (Jhappan, 2002: 13). Unlike liberal feminism, radical feminists view women’s historical oppression as a manifestation of patriarchy or male supremacy. The control of women’s sexuality and the use and/or threat of violence towards women operates as a device to maintain women’s subordination and unequal status in relation to men. “Dominance theory does not focus on whether women are similar to men, rather it focuses on how men use women’s differences to dominate them” (Cain, 2003: 18). Thus, the law cannot be seen as the key to women’s liberation for radical feminists. “Binding ourselves to rules would help us only if sexism were a legal error” (Scales, 1986: 1382). Instead, the separation or disengagement from traditional male institutions such as the state and law and a commitment to ‘woman-centered’ strategies such as consciousness-raising (Fonow & Cook, 1991 ; MacKinnon, 1989 ; Ramazanoglu, 1989 ; Scales, 1986) offer the greatest possibilities for achieving substantive equality with men.

Liberal and radical feminist theories have not escaped criticism. While both these ideologies offer a narrative on women’s unequal status in society, they have failed to transform women’s lives in any substantive sense. Although liberal

feminism has gained many formal equalities previously not granted to women, some argue that it seems to have only created an illusion of fairness. In reality, treating women exactly the same as men has proved to be detrimental to women in some circumstances such as pregnancy legislation and employment law. Furthermore, the limitations of radical feminism have become evident with the realization that disengagement from male institutions is not easily put into practice, and that there is a necessary amount of interaction required with these institutions in order to secure important resources such as funding. Of course, you can disengage politically from the law all you like, but you are still subject to the law and to police power. If women refuse to participate in the law's institutions they will have no influence over the ways in which those institutions may actively or indirectly contribute to women's oppression.

An alternative to these dominant theories is socialist feminism. Socialist feminism stems from Marxism and its theory of production, i.e. factories, which are owned and controlled by one class – the bourgeoisie. The labour is performed by another class – the proletariat or 'working class' – who do not own the means of production but instead trade their labour in return for a wage. This is in contrast to peasant farmers who both owned and laboured on their own farms in the past – a feudal relationship. Thus, we see a transition from work being performed in the home, where it had been under the ownership and control of the workers into the factories. Socialist feminists, starting from this theoretical and analytical framework understand power relations in terms of class exploitation and gender

oppression through the structure of capitalism, and contend that women's subordination not only results from unequal gender relations, but also class position. More specifically, socialist feminists argue that one of the main reasons for women's subordinate status is the undervalued work they perform inside and outside the home. For instance, women primarily perform unpaid domestic labour and are employed in low paying jobs that are commonly referred to as 'pink collar' work. Dominance of men over women is represented by a sexual division of labour in which women as a group, regardless of class, perform tasks that are less valued and paid less which benefit men as a class.

Part of socialist feminism's exploration into women's' unequal status also concerns the uneven effects that law can have on women of different social classes. It does seem that Marxist feminism and radical feminism have in common the belief that oppression of women arises from structural, systematic patterns in the organization of social and economic life, and not necessarily from sexist individuals actively excluding women from particular kinds of jobs, etc. I think many radical feminists would agree with Marxists that the way capitalist labour is organized inherently excludes women from areas of the labour market and therefore from full participation in society in that it does not take account of the demands of child rearing and other care-giving tasks. At the time the foundations for social organization were laid down, women were invisible in the sense that they performed an essential labour that was not recognized by civil society and that was not engaged in the market. But it was still essential for

someone to do these tasks in order to free others (men) to participate in the labour market and meet the demands of capital. No one thought that women would ever demand full participation and those demands have in a way exposed some of the underlying contradictions of capitalist labour. The error of liberal feminists, according to socialist critics, is in assuming that the existing system can accommodate those demands simply by eradicating practices that directly discriminate.

2.2 The Public / Private Dichotomy

Feminists have brought the phrase ‘the personal is the political’¹ into mainstream western culture. Historically, women have been regarded as physically and intellectually inferior to men, and in need of protection from outside elements. “Cloaked in the rhetoric of protection and deference, women were kept in a state of inequality in which their domestic, and reproductive labour (and their paid labour for those who had it), sexuality, and their economic and physical security were largely under male control” (Majury, 2002: 105). The conflict between employment and familial responsibilities has traditionally been seen as a private matter. The public sphere is founded on the private sphere, namely on the unpaid work that women perform in the home. Women were almost totally excluded from participation in the public sphere; women were unable to vote,

¹ The analysis that ‘the personal is the political’ came out of consciousness raising. It has four interconnected facets. First, women as a group are dominated by men as a group, therefore women are individually dominated. Second, women are subordinated because of their biology not their character. Third, there exists a gender division including a sexual division of labour which keeps women in low status and low paying jobs. Fourth, since a woman’s problems are not hers individually but those of women as a whole, they cannot be addressed except as a whole. Thus, under this argument, the personal becomes the political (Becker, Bowman, & Torrey, 1994).

hold public office, sit on juries, or practice most trades and professions. By excluding rights, through law, women were denied the opportunity to influence the political process. Women were ghettoized and underpaid in terms of paid labours; women's work in the home was devalued to the point of rendering that work invisible (Barnett, 1998; Majury, 2002). The law failed to intervene in the 'private' lives of women, leaving women to suffer marital rape and violence in the home, while simultaneously not legitimizing women in public. The fight for women's equality, in law reform efforts and litigation, is based on the idea "that if women were just allowed in, we could prove that we are just as good as men" (Majury, 2002: 105). Women's confinement to the 'private' ensured that women were largely invisible to the law. Thus we can see that patriarchy operates in both the 'public' and the 'private' sphere of life.

2.3 Feminist Methodology

The ways in which knowledge is produced and evaluated is an important epistemological concern for feminism. Feminists have often been criticized despite their use of traditional legal methods. This is because feminist approaches often lack a systematic way of critiquing society, or a coherent 'methodology'. Feminists such as Martha Albertson Fineman have attempted to sketch out feminist methodologies and how feminist knowledge is produced in feminist legal analyses. She outlines three distinct characteristics that construct a feminist legal methodology. First, a feminist methodology is often critical. This critical stance is gained from adapting a woman-centered perspective; that is, a

perspective that is based on women's experiences. Second, much of the feminist work done in law uses a methodology that critically evaluates not only outcomes, but also the fundamental concepts, values and assumptions which are embedded in legal thought and institutions. Third, since the objective of feminism is to transform society from its' present state, feminist legal methodology seeks to present alternatives to the existing hierarchal structure (Albertson Fineman, 1991). Thus, a feminist legal methodology seeks to understand and create knowledge explicitly from the point of view of women.

Feminist jurists use a broad range of legal reasoning, such as analogy, deduction and induction. In addition to these conventional methods, they also employ other methods which have also come to be associated with feminism. These include (1) '*Asking the woman question*', which is designed to expose how law silences the perspectives of women and other groups. 'Asking the woman question' means examining how the law fails to take into account women's experiences and/or how existing laws might already disadvantage women, then suggesting how this may be corrected; (2) *Feminist practical reasoning*, which views problems not as a dichotomy – that is, men/women or public/private – but as dilemmas with multiple perspectives that require contextualization; (3) *Consciousness-raising*, which operates almost as a sub-method, and allows other feminist methods – including 'the woman question' and feminist practical reasoning – to witness evidence of patriarchy through women's experiences (Bartlett & Kennedy, 1991; Becker et al., 1994). However, women's experiences

must be put into perspective. "The fact that subjects are culturally formed does not mean that they are without critical capacities; what it does mean, however, is that critique can only be socially situated" (Conaghan, 2000: 381). Thus, it is not only possible, but necessary to be self-reflective. Feminist methodologies and epistemologies will "transform the way we produce legal knowledge, legal doctrines and practice, as well as the way we think about law, based on the situated, positioned and contextualized experiences that women have with the law" (Menkel-Meadow, 1992: 1518).

2.4 Sameness-Difference Dichotomy and the Universal 'Woman'

Much of the debate within feminism and feminist legal theory continuing from 'first wave' feminism has centred on the 'sameness-difference' dichotomy. Feminists during the 'first wave' of feminism focused on whether women were the same as men, and justified their activism on the premise that women were indeed the 'same' as men, and therefore, deserved to hold the same privileges and rights as men. The equal treatment principle was inadequate for two main reasons. First, the presumption of sameness ignored women's differences. Second, equal treatment was commonly understood under the same standard that applied to men, but because the standard is itself gendered, it was formed from a male perspective (Jacobs & Dowd, 2003). Cultural feminists argue that acknowledging and understanding differences in women is critical to achieving real equality.

Thus, during the 1960s and the 1970s, feminists began to question their previous assumptions, and instead offered that women were indeed different from men, and that the law needed to reflect these differences. During the suffrage movement, the courts determined that there were no demonstrable differences between men and women that justified denying women civil rights, such as the right to vote and the right to participate in public roles and functions. However, this 'sameness approach' becomes problematic when courts are faced with situations such as pregnancy, which are specific only to women. In such situations, the effect of being treated exactly the 'same' as men proves to be detrimental to women's employment status, job promotion and salary earnings. "No consideration is given to the possibility that treating people 'the same' may yield unequal outcomes in a context of systemic inequality" (MacDonald, 1992: 8). Feminists have tried instead to outline a theory of 'special rights' for women for the judiciary. This is designed to prevent further inequitable occurrences and to reveal the presumed 'real' differences between men and women, not the stereotypical differences often foisted upon genders through role socialization and expectation.

This practice has not been without criticism. "Difference is only meaningful as a comparison . . . legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities'" (Minow, 1993: 218). It has been argued that

feminists have allowed the debate to become narrowed by “accepting as correct” those questions which seek to “arrive at a definitive list of differences”. In doing so, we have adopted the vocabulary, as well as the epistemology and political theory, of law as it is...we participate in the underlying problem – the objectification of women” (Scales, 1986: 1376). This participation – in prescribed legalistic terms – offers little advancement of feminist jurisprudence. The continued equal/special rights debate presumes “a fixed reality of gender to which law must conform” (Scales, 1986: 1376), when, in reality, gender and gender roles are relatively fluid, and no amount of debate will account for the eventuality of every possible circumstance. Patricia Cain (1991) argues that feminist legal theorists have neglected to account for the differences amongst women. Most feminist legal theorists, by focusing on sameness and difference, either ignore the reality of differences between women or say that the differences generally does not matter. Either way they collapse into each other to the extent they treat women as a single class that is essentially the same. It is not enough just to name differences in race, class and sexuality: the differences need to be explicitly addressed.

Two issues stemming from the ‘sameness-difference’ debate that has caused a divide within feminism(s), are how ‘woman’ is constructed, and whether feminists can indeed speak for all women. Simone de Beauvoir’s proclamation that “one is not born a woman, but rather becomes, a woman” (de Beauvoir, 1989: 267) demonstrates that the socially constructed nature of woman is influenced by

many factors, including gender, race and sexuality. "Women are shaped by law, law language and legal institutions" (Dalton, 1995: 12). Thus, "woman is no longer self-evident" (Chunn & Lacombe, 2000: 16). The experience of being a 'woman' changes through space and time, and this creates significant obstacles to developing a common basis for feminism in representing all women. Law reflects the notion of the 'universal woman' as being white, heterosexual, able-bodied and middle-class.

The notion of 'woman' has political implications. While the concept of the universal woman has been greatly criticized, politically it offers more opportunities for transformation compared to individualization. Theoretically, individualization may feel more comfortable to many feminists but practically it does not seem to work. For example, a group of five hundred women marching up to city hall is much more influential than one woman representing only herself to voice her grievance. The notion of 'universal woman' does not have to be based on male perceptions of women. It can be as sensitive and diverse as we would like. This is a concept that feminists can reclaim. Since 'woman' gets enshrined in law in only one particular way, at some level we have to accept that 'woman' is an important political construct. Law, with its need to create discrete categories, seems to require such a definition. However, this is a tension that we may just have to live with, though it is important to recognize that the tension does exist and to try to negotiate our way through it as best we can.

2.5 The Problem with Essentialism

Can feminism speak for all women? "Theorists have begun to ask whether there is any core to feminism, if 'woman' is totally socially constructed and fractured by multiple and different experiences" (Menkel-Meadow, 1992: 1503). Mainstream feminism has been rigorously critiqued for essentialism in a discourse that assumes that 'woman' is white, middle class, heterosexual, able-bodied and English speaking.

The feminist attempt to discover a universal truth of women has not been without criticism. The main difficulty with feminist theory and essentialism lies in the assumption that women have a shared experience just because they are all 'women'. Western feminism has been continually critiqued for neglecting voices of other women who are not white, middle class women.

"A strong feature of [the] feminist theoretical critique has been to highlight how male-dominated discourses, while claiming to speak for women and men alike, too often express the views of men alone. Yet, once feminists invoke the experience of women to challenge the dominance of male points of view, they risk falling into the same trap: to claim to speak for *all* women is, inevitably, to exclude the voices and experiences of some while privileging those of others" (Conaghan, 2000: 367).

Despite the difference that exists between women, is it possible for feminism to represent all women based on a consensus from which to work from? Maybe women are so diverse that it is not possible to extract a commonality among women to form the basis of a narrative on 'women's experience'. However, acknowledging the multiplicity of women does not deny the possibility of commonality. I would concur with Conaghan that "virtually all women, howsoever situated, have, up to a point and to varying degrees, experienced oppression

and/or domination, an experience they 'share' in some sense with other oppressed groups" (Conaghan, 2000: 373).

While "making judgments [is] always a painful process for a feminist" (Menkel-Meadow, 1992: 1495), we can see that nonetheless the essentialist critique of feminist legal scholarship and of feminism as a whole is persuasive. (White) feminists understood their position as normative and assumed all other women had similar experiences and/or even completely overlooked women not in familiar social positions.

2.6 Feminist Legal Studies

The development of feminist scholarship in law – resulting from 'second wave' feminism and women's increased participation in law schools, legal professions and a variety of other academic disciplines – has been broad and diverse. Significant theoretical contributions have included liberal, radical, integrative² and socialist feminist thought, which focus on areas such as criminal law, family law, employment law, Constitutional law, legal education, sexual harassment, pornography, sexual assault, and violence against women. From the 1960s to the 1980s, the pioneering work of feminists and the combination of students and a few (mostly white) women faculty led to the development of women's studies programs. Soon courses in feminism, such as 'Women and the Law', 'Feminist

² Integrative feminists accept the radical feminist position on the role of patriarchy and male control over women in society, however they reject extreme political position of separation or disengagement from mainstream institutions. Instead, Integrative feminism focuses on integrating feminist themes or women-centered approaches into all institutions (Chunn & Lacombe, 2000: 8).

Legal Thought' and 'Feminist Jurisprudence' began to permeate academia. The presumption that feminist contribution to law can be encapsulated into a single course may contribute to its devaluation, which serves in turn as a further safeguard against the possibility that its influence might spread (Dalton, 1995: 3). This might be referred to as ghettoization – one could argue that the fact that we need specific courses regarding women and the law demonstrates how women's experience is systematically excluded from other areas of law – why wouldn't you talk about women in a tax law course or a criminal law course? It suggests that the idea of maleness as the default position is very deeply entrenched in the way we think about legal discourse. This may be less true now than it used to be, as many professors integrate gender along with race and class issues into their courses. However, the availability of these specialized courses may serve as a promising environment for students to engage in feminist theory and allow for the free exchange of ideas that would normally be prohibited or suppressed in non-feminist friendly environments.

Unfortunately, while white women feminists benefited from new found hiring initiatives, women of colour, lesbian women and disabled women initially did not. Instead, new faculty members were often treated as token representatives from liberal feminism, while at the same time the practice became an unspoken justification for delaying real institutional equity for other historically excluded groups (McIntyre, 2002). In addition, feminist scholars analyzed gender oppression in relation to the white privileged men they interacted with, and

constructed gender oppression through the lens of gender alone, often neglecting other variables that determine women's oppression, such as class, race, sexual identity and ability (Majury, 2002; McIntyre, 2002). These scholars rationalized this practice on the basis of being "too overburdened to take on 'additional' political issues" (McIntyre, 2002: 65). While feminism has gained academic legitimacy, these are issues that we are still grappling with some, thirty years later.

According to Kravaritou (1997), feminist legal theory comprises three major schools of thought, empiricism, stand-point theory and postmodernism. (1) *Empiricists* argue that the foundation of legal regulations, especially in legal areas such as family and employment law, are neither rational nor neutral, but are actively discriminatory towards women. The empirical school argues for a full and equal inclusion of women in law within the same basic legal structures and institutions that presently exist; (2) *Stand-Point Theory* contends that knowledge regarding women is determined by the masculine culture within which it is produced, and that it is necessary to identify with their struggle to recognize the collective female subject. Stand-Point theory advocates for dramatic law reform in order for women's experiences to be fully taken into account; (3) *Postmodernists* reject all grand theories and contest dichotomous divisions such as public/private and men/women. Postmodern jurists believe that gender is only one of the many attributes that contribute to being a person, and that gender is not the cause of the largest differences between people. In addition, legal

theorists hold that the category 'woman' is incorrect and the current description of 'woman' cannot be applied to women's lived realities. Therefore, in this sense, 'women' as we know them today do not actually exist in any absolute or categorical sense. Postmodernists view this category as subjective, and one that is created only in comparison to that of 'men' (Bartlett & Kennedy, 1991; Kravaritou, 1997).

Feminist legal scholarship engages with the law by seeking to highlight and explore the gendered content of law, which attempts to conceal itself as neutral, and participate in a cross-disciplinary effort to challenge traditional social and legal perceptions of women by placing women's experience at the centre of study. Finally, feminist legal scholarship seeks to bring about social and political change (Conaghan, 2000). "Feminist legal theory draws from the experiences of women and from critical perspectives developed within other disciplines to offer powerful analyses of the relationship between law and gender and new understandings of the limits of, and opportunities for, legal reform" (Bartlett & Kennedy, 1991: 1).

Patricia Cain describes three stages of feminist legal scholarship. (1) *Formal equality*, where feminists focus on equal opportunity and formal equality with men in areas such as entry into the workforces and pay. (2) *The Women are different from men stage*, where women seem as different from men in ways that go way beyond biology. For instance, Carol Gilligan's work on moral development

discovers a 'different voice' in girls compared to boys in navigating moral dilemmas (Gilligan, 1982). However, such notions are refuted by MacKinnon, who argues that the only difference between men and women is that men dominate and women are subordinate (MacKinnon, 1989). (3) *The stage of postmodernism*, which rejects grand theorization and argues that, feminist theory is limited by the assumption that there exists one essential commonality among all women. For example, cultural feminists who focus on 'woman' solely as 'mother' do not and cannot speak for all women.

2.7 How is Law Male?

"The representation of the world, like the world itself, is the work of men; they describe it from their own point of view which they confuse with absolute truth" (de Beauvoir, 1989: 143). Isn't this also true in the case of law? Robin West argues,

"jurisprudence is 'masculine' because jurisprudence is about the relationship between human beings and the laws we actually have are 'masculine' both in terms of their intended beneficiary and in authorship. Women are absent from jurisprudence because women as *human beings* are absent from the law's protection: jurisprudence does not recognize us [women] because law does not protect us. The implication for this should be obvious. We will not have a genuinely ungendered jurisprudence (a jurisprudence 'unmodified' so to speak) until we have legal doctrine that takes women's lives as seriously as it takes men's . . ." (West, 1991: 231).

We need to recognize that law pervades every aspect of our life and that it is not a neutral instrument. Simone de Beauvoir contends that "it is doubtless impossible to approach any human problem with a mind free from bias" (de Beauvoir, 1989: xxxiv). Gender bias includes stereotyping, myths and misconceptions of the nature and roles of men and women and the devaluation

of women and the work that they perform. "Gender bias arises from stereotyped assumptions about the roles of women and men. When the bias disadvantages women, women as a group are treated as, or believed to be, less entitled, less valuable or less worthy than men" (O'Donovan, 1998: 50).

While law has been accused of as being androcentric, it has also not escaped criticism for being deficient and discriminatory in other areas. "Women of colour, Aboriginal women, women with disabilities, lesbians, and non-Anglophone women have expanded feminist legal theory to recognize that the law is not only a carrier of patriarchal relations, but also of racial hierarchy, heterosexism, ablism, and Anglo-dominance, among other things" (Jhappan, 2002: 13; Smart, 1989a). Historically, law has shown that it has not had the motivation to relinquish some of its power to less privileged groups. This is due in a large part to the political climate where a limited number of key actors – such as politicians and lobby groups – have tremendous influence on legal outcomes and law reform. Since the state governs law, it too plays a role in the maintaining and reproducing a gender hierarchy by "upholding a legislative and juridical system based almost entirely on male experiences, by attributing and enlarging the scope of male power within the family, and by failing to intervene against the status quo of women's social subordination, the state adopts and perpetuates male power" (Bahar, 1996: 105). Feminists have been a lot more successful in implementing law reforms that involve increasing state power to coerce, especially through criminal law, than those that involve improving social supports

for example, single mothers and sex workers etc. Feminist demands have met a lot of success where they have been consistent with the maintenance/expansion of state power. Therefore, if law is a site of inequality against women, why do feminists utilize law as a primary strategy for women's liberation?

2.8 Feminism's Resort to Law

It is evident that law has failed to radically transform women's everyday lives, but within feminism there is a continued debate as to whether law holds the key for women's emancipation from inequality and patriarchy. Many feminists have questioned the utility of law as an instrument for addressing women's inequality (Jhappan, 2002; Lacombe, 1998; MacKinnon, 1989; Majury, 2002; Smart, 1989b). Feminism is primarily concerned with issues of power. Feminist jurisprudence's objective is to investigate if and how the law takes women into account. "As an institution, law has both helped to implement and constrain feminist agendas" (Bartlett & Kennedy, 1991: 2). The law's guarantee of equality has enabled feminists to begin law reforms. However, the mechanisms of law, as Bartlett and Kennedy argue, limit the transformation feminists would like to make in society in a couple of ways. First, law's respect for precedent is problematic because existing precedents are often androcentric and act to reinforce the status quo. Arguments that deviate significantly from precedent are also often considered extreme or 'radical' and are more likely to be rejected than more moderate proposals. Second, law insists on rational and tangible arguments,

rather than the more ambiguous and descriptive arguments that many feminists make, and are based on women's experiences.

Smart warns about the dangers of using law to gain gender equality. On the one hand, Smart argues that law and legal institutions are "so deaf to core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law" (Smart, 1989a: 2). She explains her pessimism by arguing that law persistently silences women, and argues that law is not an instrument to remedy women's inequality because its "pretense of neutrality prevents it from recognizing power differentials" (Lacombe, 1998: 156). As a result, feminists must be careful of law's aptitude to reproduce existing power relations. MacKinnon's advocacy for the disengagement of feminism from law recognizes how difficult it is to consider women when the legal system is oriented towards men. However, law is also seen as a necessary evil to women's freedom. "Law is, afterall, a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable" (Scales, 1986: 1380) and "despite the difficulties and costs of seeking change through law, law represents opportunities for feminism. Law is power . . . it is a necessary precondition for meaningful social change" (Bartlett & Kennedy, 1991: 4).

The law has not always proved to be an instrument of empowerment for Canadian women. An example of this is the *Charter*. "As early as two years after section 15 came into effect, male complainants were making and winning ten

times as many equality claims as women” (Jhappan, 2002: 7). Nevertheless, constitutional cases have been, and continue to be, important focal points for feminist litigators and activists because they set out the parameters for public policy-making (Jhappan, 2002). Feminist litigators and activists have taken the opportunity to participate in these watershed activities. For example, the Women’s Legal Education and Action Fund (LEAF) act as intervenors in constitutional equality litigation. LEAF is an organization of feminist lawyers dedicated to ensuring “that the rights of women and girls in Canada, as guaranteed in the *Charter* [section 15] are upheld in our courts” (LEAF, 2004). “Section 15 provides the entry point through which a woman-centered intersectional analysis and argument can be made” (Majury, 2002: 117). As the lead feminist equality rights intervenor in Canada, LEAF has participated in over 140 cases (LEAF, 2004) involving equality related issues, and has played a significant role in the “evolution of constitutional equality jurisprudence in the *Charter* era” (Jhappan, 2002: 9). While LEAF’s litigation record is formidable, it must be viewed in context.

First, as Radha Jhappan describes, LEAF’s intervention in constitutional cases only represents a small fraction of the cases decided in the lower courts which have substantial effects on women’s equality. Second, not all cases seen to be successful were decided on equality or section 15 grounds. In addition, the court has not always accepted LEAF’s version of equality presented to them. Third, few of LEAF’s interventions have resulted in unanimous support from women’s

groups in Canada. For instance, the contentious *Butler*, [1992] 1 S.C.R. 452 [*Butler*] case, in which LEAF delivered a radical feminist argument for pro-censorship approaching pornography in Canada, sparked a debate within feminism itself. It has also been noted (Jhappan, 2002) that in some sense, LEAF's successful cases have been offset by its 'losses'; either by the court not accepting LEAF's arguments or by LEAF not participating in important constitutional cases. Examples of this are the *Seaboyer*, [1991] 2 S.C.R. 577 [*Seaboyer*] decision which struck down the rape shield law that prevented victims' past sexual history being presented as evidence of consent in sexual assault cases, the *O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*] decision which allowed access to therapeutic and school records of child sexual abuse victims, and the *Daviault*, [1994] 3 S.C.R. 63 [*Daviault*] decision, in which the Supreme Court accepted extreme intoxication as a defence for rape.

While we may be able to agree that law often 'outlaws' women, it has not always done so. "The outlawing of women, including battered women, is not given, but produced . . . it is the task of our analysis to demonstrate how the process of outlawing takes place hegemonically through the inclusion and exclusion of various discourses and practices along the axes of gender, race, class, age, sexual orientation and others" (Lacombe, 1998: 162). To some feminists, law has shown that it can respond and address women's concerns appropriately. For instance, the *Butler* decision ruled that 'degrading and dehumanizing' depictions of women in pornography contribute to a climate in which women were

systematically oppressed. In other words, the sexually explicit content of pornography is not the problem *per se*. Rather, the problem is with the way that women are depicted with regards to sex (e.g. the association of sex with violence that causes the real harm to women). Anti-pornography feminists did not anticipate that soon after *Butler*, 'degrading and dehumanizing' would be used against gay and lesbian literature in the Vancouver *Little Sisters*, [2000] 2 S.C.R. 1120 [*Little Sisters*] case against Canada Customs demonstrating how the law can be used for discrimination. This illustrates how the law can also act contrary to feminist values and acts as an example of the law's inability to take account of power imbalances in its application of rules.

It has been suggested that women's engagement with law has been counterproductive by pursuing the interests of mainstream feminists at the expense of marginalized women, and by placing too much interest on formal equalities and not enough energy on the realities of women's lives. Yet, despite the pitfalls discussed above, "law is an important (though often 'malevolent') site for feminist struggle" (Jhappan, 2002: 13). The power and influence of law cannot be ignored.

"Law is not a monolith that exists independently of human volition, but instead is fashioned and refashioned by human beings with varying agendas and for specific purposes. . . non-legal political strategies *per se* are insufficient: the law exists, it participates in the subjugation of oppressed groups, and, therefore, it must be tackled as one important element of a multi-pronged approach to an inclusive feminist vision" (Jhappan, 2002: 13).

Carol Smart argues that women should be extremely cautious of resorting to law because it disqualifies women's knowledge and experiences, but that we should

continue to focus on and challenge law anyway. Most feminist jurists seem to accept the inevitability of engagement with law, liberal feminists, radical feminists and social feminists point out the impossibility of equality within patriarchy, but who nevertheless regard legal activism as a necessary evil (Jhappan, 2002: 179).

Feminist jurisprudence unmask and critiques patriarchy entrenched in law and engages in what West describes as a 'reconstructive jurisprudence' constituting of law reforms for the creation of a non-masculine feminist jurisprudence. "Law is powerful, forcing feminists to work within and even strengthen the very structures they must dismantle" (Bartlett & Kennedy, 1991: 3). The law can be used for feminist purposes by crafting legal tools and institutions to meet the needs of women. Feminist legal scholars' engagement with law remains a useful strategy as long as they do not purport to represent all women and as long as the diversity of women is recognized.

"Despite its pitfalls for different women, law is an important site for feminist struggle. To the extent that the law itself creates, reinforces, or at the very least, fails to intervene in the equality and subjugation of women, it exerts its power in concrete consequences for women's daily life experience" (Jhappan, 2002: 13).

While not all developments have produced substantive change in women's lives, feminism has led to many women's gains in formal law, and this should not go unrecognized. Even Smart, one of laws' biggest critics, admits "law should remain an important focus for feminist work, not in order to achieve law reforms (although some may be useful) but to challenge such an important signifier of masculine power" (Smart, 1989a: 2). Smart reluctantly admits that in addition to challenging the institution of law, law can be useful to women in the area of law

reforms. It has been pointed out that hesitancy, seen in movements such as the antiviolence movement, regarding the possibilities and risks of working within and through dominant institutions such as law to “secure systemic egalitarian change is an obvious prerequisite of responsible political activism” (McIntyre, 2002: 46). Thus, the reluctance of turning to law may indeed be a healthy and progressive action to building a more dynamic and theoretically sound feminist foundation.

2.9 A Socialist Feminist Framework

Up to now, I have critically examined feminist theorizing on equality, power, the public/private divide and notions surrounding the ‘universal woman’. Law tends to reflect the notion of the ‘universal woman’ as being white, heterosexual, able-bodied and middle-class. Postmodern thought has taught us not only to question these ideas and other grand theories, but also to deconstruct and to be skeptical about beliefs concerning truth, knowledge and power. Moreover,

“laws, however complex and ambiguous, do not generally wreak havoc upon dominant groups. They are practically never interpreted in ways which threaten the rights of males or upper-class people, because both dominant ideology and social practice direct judges away from this reconstruction of reality. When asked to decide on two equally plausible interpretations of a statute, the one chosen will generally favour the status quo, and benefit established concentrations of power” (Snider, 1995: 251).

It is, after all, easier to talk about violent men than violent institutional practices, or personal, rather than social, responsibility. This framing, however, narrows the contested terrain of ‘justice’ to ‘criminal justice’ - that is, from a white, middle-class perspective, that generally perceives established institutions as capable of addressing their interests (Currie, 1998).

A socialist feminist perspective is sympathetic toward explorations of women's unequal status, which is based not only on gender but on class position. This critical analysis of law is, for me a cogent approach recognizing that women have been, and continue to be, disadvantaged materially, socially and politically. Patriarchy and capitalism are inter-related because of women's unpaid labour in the private sphere. While marriage and motherhood are deemed natural roles for women in patriarchal cultures, socialist feminists view this arrangement as extending the property rights of men to include women's productive labour as wives and mothers. Women's unpaid work at home, including child-rearing and taking care of husbands, is necessary to support a capitalist economic system. In addition, traditional gender roles in the family home create women's economic dependency on men. "While patriarchy is supported by values and attitudes that favour men's interests, it is rooted in the material conditions of women's lives" (Currie, 1998: 44).

A socialist feminist perspective examines the nature of women's subordination and explores the role of law in maintaining and perpetuating patriarchy and class distinctions. The current trend in feminist criminal law reform initiatives focuses on retributive goals which are dangerous and short-sighted (this will be discussed in greater detail in chapter 4). Some advocates for battered women who want the issue of domestic violence taken seriously by the courts, as well as public recognition of the plight of women, focus their energy on lobbying for more severe penalties for criminals, less protection for the accused and more rights for

victims. While this may initially sound appealing, power over battered women's lives is still held in the hands of upper middle class white men, and this is only augmented when dealing with vulnerable underclass populations. This trend is particularly troubling since the criminal justice system is sometimes held up to be a mechanism of 'healing' or 'closure' for women crime victims. These women are deployed as arguments for 'get-tough' approaches by aspiring political agendas. "The negative effects of relying on criminal justice to remedy domestic violence are now clear. Lower income, visible minority, and Aboriginal women have paid a heavy price" (Snider, 1998: 146).

The social implications of criminal policies associated with partner abuse are short sighted because massive amounts of time and financial resources are spent collating information on the potential of prisons to rehabilitate offenders and on 'high-risk offenders' (namely poor and/or minority populations). Snider argues that while the apparatus of government is too powerful to ignore, the criminal justice system is not a reliable ally. Strengthening the criminal justice system means increasing repressive measures against populations already victimized by other structural forces such as race and class. In addition, attention is directed away from structural problems inherent in patriarchy and capitalism and towards 'solutions' that accept the present socio-economic system as "a given". Feminist efforts to make the criminal justice system the primary response to women's issues have contributed to the marginalization and silencing of many groups of women. This has been brought about, at least in part, by eliminating

class and race analysis from the interrogation of gender oppression and by universalizing the experiences and interests of white, middle-class women to all women. The dilemma is that by focusing on demands on the criminal justice system, we are merely fortifying the very institution so reluctant to help battered women.

Despite the criminal justice system's failure to provide long-term assistance to women, feminist support for criminalization can be explained by higher levels of public fear and general recognition that violence against women is a serious and important public issue. Criminalization accomplishes two important objectives: (1) it temporarily incapacitates violent men to protect abused women; and (2) it significantly denounces partner abuse and supports society's strong social disapproval. While Snider (1995) argues that feminism is at risk of emphasizing the negative, adopting punishment and injury-obsessed agendas, she concedes that short-term intervention strategies by the state are essential to protecting women from violence. "The justice system remains the dominant external voice in the discourses of abuse. The system, in its own view is the ultimate arbiter of violence and its meaning, beyond the control of a sweet-talking abuser, an overly-tolerant community, or a victim or community in denial" (McGillivray & Comaskey, 1998: 141). The purpose of the system is to protect the violated and denounce violation. After all, feminist legal strategies have brought about remarkable changes, as Snider (1991) outlines. These changes include (a) assaults on the male dominance of language forms, (b) challenges to established

religions, (c) the documentation of the virtual absence of women at the top levels of government and business, and (d) a major re-evaluation of what has passed for conventional knowledge in the major disciplines in universities.

In conclusion, despite the difficulties and pitfalls previously experienced with legal strategies, it seems unwise to abandon legal struggles. Indeed, the focus of this thesis is to interrogate how law has responded to these concerns in the context of protection orders for battered women and the potential for laws' capacity to assist women. Law is fundamental for its symbolic importance. Laws against partner abuse emphasize that it is a social and political problem, rather than a personal one. Engagement with law, particularly civil law, can be seen as a key strategy to empowerment because it improves economic and political levels, transforms women's lives, and ultimately, prevents gender-related injuries (Snider, 1995). Civil law is useful in entrenching changes on a social and economic level. On the other hand, criminal law only seeks to limit behaviour, and therefore offers less potential for success. Moreover, consideration should be given to civil laws' potential for mobilizing women as a category through mechanisms such as 'class-action' lawsuits in contrast to criminal law which cannot deal with the issue of group claims of harm or punishing en masse. From a socialist feminist perspective, this offers more potential for reviewing the group affinity that women share. Feminist inspired litigation, for example, challenges dominant discourse by producing knowledges from women's lived experiences of injustices (Currie, 1998). It also has positive practical implications for women.

Because the legal system supports a capitalist economic system, a successful critical feminist movement would need to challenge the civil and criminal laws that have a particular impact on women. As law creates its own internal contradictions, feminists need “not to strengthen the present system of oppression by calling for more of the same, but to use law against itself to redefine the system of social relations which keep women and lower/working class groups under control” (Snider, 1991: 257).

Feminists have such a difficult time because they are fundamentally at odds with many ideological assumptions. Primarily, socialist feminists seek to reform the existing patriarchal structure of our legal system. They question the status quo and seek to empower women as well as those who are typically socially and economically disadvantaged. To bring about the kind of changes envisioned by socialist feminists, massive reforms would need to be implemented to bring women the same distribution of wealth and power as men. Mobilizing support against male violence has been relatively easy compared to the difficult challenge of obtaining recognition of the ways interpersonal violence in women’s everyday lives is linked to larger economic and political demands for social justice (Currie, 1998). There is a need to turn away from viewing partner abuse as individual pathologies. Instead, the social and structural conditions which force women to remain in abusive relationships should receive more attention. “While [liberal] legal reforms, specifically, can guarantee equality ‘in principle’, formal statements of equality are not the same as equality ‘in fact’” (Currie, 1998: 44).

Thus, liberalism, through its tendency toward universalizing women, and omitting class and race inequalities, is inadequately equipped to achieve substantive equality for women. It is important for feminist legal theory to analyze and critique women's positions in society through theoretical issues regarding the interaction between law, gender, race and class and applies a feminist perspective to all areas of law, and in the case of this thesis, family law, criminal law, tort law and violence against women.

2.10 Summary

In this chapter, I have critically examined feminist of women's inequality, notions of the 'universal woman', essentialism and feminisms' resort to law. The problem with essentialism and notions of the 'universal woman' is that it assumes that women have a shared experience just because they are all 'women' and in doing so have overlooked women not in familiar social positions. Feminists should be extremely cautious of resorting to law because it disqualifies women's knowledge and experiences and has been unable to make any real substantive change in women's lives. Nevertheless, gains in formal law are important and most feminists accept the inevitability of engagement with law as a necessary evil. I have discussed a socialist feminist framework for the thesis that explores women's unequal status, which is based not only on gender but on class position. The concluding portion of this chapter argues that it would be unwise to abandon legal struggles as law is fundamental for its symbolic importance. In addition, liberalism is inadequately equipped to achieve substantive equality for

women because of its tendency to universalize women and ignore class and race inequalities. A socialist feminist perspective offers a more comprehensive approach to the integration between law, class, race and gender. The following chapter describes the legal context of protection orders in Canada today. Peace bonds (section 810 of the *Canadian Criminal Code*), restraining orders, specialized domestic violence legislation and emergency protection orders are discussed at length.

3

Legislative Legal Context: Protection Orders in Canada

Protection orders, specialized domestic violence legislation, domestic violence courts, victim services, shelters, and counseling and domestic violence intervention programs are all ways for government to respond to partner abuse in Canada³. All jurisdictions in Canada offer protection orders for abused women. However, a number of provinces and territories offer extended legislation, and by doing so, ostensibly provide more options to women than those available within existing criminal and civil remedies.

The traditional approach to addressing partner abuse has been two-pronged. First, the criminal justice system is a reactionary mechanism, which arrests and prosecutes offenders who commit criminal acts such as partner abuse. This approach serves both as a general deterrent to society at large, and as a specific deterrent to individual offenders, because, if enforced, it presumably sends the message that domestic violence is not going to be tolerated. Second, this legislation allows victims of domestic abuse to obtain restraining orders or 'no

³ Domestic violence courts have been established in some jurisdictions, which allow courts to offer specialized services and focus on domestic violence cases. For more information on domestic violence courts see: Salvaggio, F. (2002). K-Court: The Feminist Pursuit of an Interdisciplinary Approach to Domestic Violence. *Appeal: Review of Current Law and Law Reform, Volume 8*, pages 6-17 and Canada, Department of Justice (2001). *Second Federal/Provincial/Territorial Forum on Spousal Abuse Cases: Summary - Aylmer, Quebec, March 8-9, 2001*.

Specialized services include women's advocacy, victim/witness programs, treatment and counseling programs and specialized prosecutorial units. Victim services include assistance with victim impact statements, referrals to other agencies and assistance with navigating throughout the court system experience. Domestic violence intervention programs are designed for abusive partners and offer anger management and educational programs.

contact orders' from family courts. This chapter will examine protection orders available in Canada (peace bonds and civil restraining orders) and will take a detailed look at domestic violence legislation. From the perspective of a socialist feminist framework, the potential for assistance to women who are seeking or who have obtained protection orders must be seen in the context of laws' historical treatment of silencing women.

3.1 Criminal Code

In Canada, all criminal matters fall under the purview of the federal government. The *Criminal Code* is designed to prohibit all behaviours that are offensive to society. Offences committed in the context of domestic violence may include,

1. Assault, assault with a weapon, assault causing bodily harm and aggravated assault (s. 265; 268; 269 and 268 respectively);
2. Sexual assault, sexual assault with a weapon, sexual assault causing bodily harm and aggravated sexual assault (s. 271; 272; and 273 respectively);
3. Harassment, stalking, threats (s. 264);
4. Abduction, manslaughter and murder (s. 283; 234 and 229 respectively).

The reactive and punitive approach of the criminal justice system is not victim-centred because the process is conducted on the principle that the offence is an affront to the state. Therefore, victims are likely to participate only as a witness and remain uninformed on the legal proceedings against the offender.

Section 810 of the *Criminal Code* is an example of a preventative measure taken against domestic violence. The purpose of peace bonds is to provide protection for those who have reasonable grounds to believe that they may become a victim

of a violent crime and/or sex offence in the near foreseeable future, and to restrict the movements and behaviour of the person(s) they have reason to fear.

Section 810 orders, or “sureties to keep the peace”, have existed in Canadian law since the first Canadian Criminal Code in 1892. Initially, this component of the *Criminal Code* only consisted of “*Injury or Damage Feared*”, but over time has been expanded to include “*Fear of a Criminal Organization*” Offence (810.01), “*Fear of a Sexual Offence*” (810.1) and “*Fear of a Serious Personal Injury*” Offence (810.2).

R. v. Budreo, [2000] 46 O.R. (3d) 481 is a key decision in the evolution of peace bonds in Canada. The Ontario Court of Appeal held that Section 810.1 of the *Canadian Criminal Code* did not contravene the rights guaranteed by sections 7, 9, 11 and 15 of the *Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* states that ‘every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’. The appellant, Wray Budreo, a convicted child molester, argued that section 810.1 contravenes the principles of fundamental justice for three reasons: it creates an offence based on status, it is overbroad, and it is void for vagueness. The appellant argued that peace bonds create an offence based on a person’s status alone – for example, a past criminal record – and not based on any current offence. The court found that while peace bonds may be issued to people coming out of prison and re-entering society, it is a

preventative provision and is not meant to be punitive. The appellant also claimed that peace bonds are overbroad. However, the court found that the restrictions imposed on a person's liberty by a peace bond are proportional to important social interests, and therefore are not contrary to the principles of fundamental justice. Finally, the Ontario Court of Appeal found that peace bonds were not void for vagueness, and that there are sufficient procedural safeguards put in place to avoid any injustices. The courts findings are important to partner abuse cases because they stress that peace bonds are preventative provisions and are not meant to be punitive. As well, it highlights that the restrictions imposed on a person's liberty through a peace bond are proportional to societal interests and therefore do not constitute *Charter* violations.

Section 810 provides that "information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property". A provincial court judge conducts a hearing to determine if the complainant had reasonable grounds for fear, based on evidence provided. After the peace bond has been issued, the court may stipulate that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period of time that does not exceed twelve months, and also demand that the defendant comply with any other reasonable conditions prescribed in the recognizance. If the defendant refuses to enter into the recognizance, the court may commit the

defendant to prison for a term not exceeding one year. Conditions of the recognizance may include, but are not limited to;

- Prohibition from possessing any firearm, any ammunition, explosive or other dangerous weapons,
- Surrendering any firearms licenses, registrations or authorizations,
- Prohibiting the defendant from being at, or within a specified distance from, a place where the person on whose behalf the information was laid or that person's spouse or child, is regularly found,
- Prohibiting the defendant from communicating, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or child,
- Refrain from the consumption of alcohol or illegal drugs,
- Notify police twenty-four hours in advance of any changes in employment status, residential address or travel outside a designated geographical area (such information is to include intended destination and intended route of travel),
- That the defendant carry on his/her person, at all times when away from their residence, a copy of their conditions⁴

When conditions are attached to a peace bond, it is important that all parties understand why each of the conditions is required, the specific risk that the defendant poses, and how the additional condition(s) will help reduce that risk. The *Budreo* decision makes it clear that conditions cannot be so broad or restrictive as to contravene the *Charter*. The court made it clear that conditions can only include restrictions that are designed to prevent the commission of another offence, rather than restrictions that serve to punish past behaviour. A breach of the recognizance is an offence that is punishable by imprisonment for a term not exceeding two years.

⁴ These conditions can be found in Sections 810 (3.1–3.2); 810.01 (5); 810.1 (4-5); and 810.2 (5-8) of the *Canadian Criminal Code*.

3.2 Civil Remedies

In Canada, family law and civil law are generally matters of provincial jurisdiction (See Table 1). Family law statutes can govern family relations from divorce, spousal and child support, custody and access to adoption and the protection of children and elders. However, these statutes also address partner abuse by providing intervention options. Provisions for restraining orders contained in family law statutes generally state that a person can apply to the court to make an order restraining their spouse from molesting, annoying, harassing or interfering with the applicant and/or any children they share. This requires the spouse of the applicant to enter into such a recognizance as the court directs. While a restraining order can be applied for as an independent order, it is more commonly sought at the same time as other applications to the court (e.g. for spousal or child support, custody or access and/or marital property).

Table 1: Provincial Family Law Statutes

Province / Territory	Statute	Section
British Columbia	Family Relations Act	S. 37
New Brunswick	Family Services Act	S. 128
Newfoundland	Family Law Act	S. 81
Northwest Territories	Family Law Act	S. 59
Nunavut	Family Law Act	S. 59
Ontario	Family Law Act	S. 46
Prince Edward Island	Family Law Act	S. 45
Quebec**	Civil Code of Procedure	S.33
Yukon	Family Property and Support Act	S. 49

*The provinces excluded from this table all have specialized domestic violence legislation that include protective order provisions and therefore do not provide additional provisions in the context of family law legislation. The specialized domestic violence legislation will be discussed in greater detail later in this chapter.

**In Quebec there is no specific provision for protection orders. A protection order can be ordered under the general powers of the Superior Court to issue an injunction, specified in the *Civil Code of Procedure*, Section 33.

Below (Table 2) is a summary outlining the differences between criminal peace bonds offered through the *Canadian Criminal Code* and provincial civil restraining orders available to abused women in Canada.

Table 2: Differences Between Peace Bonds and Restraining Orders

<u>Peace Bonds</u>	<u>Restraining Orders</u>
1. Peace Bonds can offer protection from anyone, including someone who you've had an intimate relationship with.	For a restraining order, you must have a family connection – i.e. you are (or were) married, common-law spouse or you share children together.
2. Applications for peace bonds are governed under the <i>Canadian Criminal Code</i> .	Applications for restraining orders are made under provincial and/or territorial family law legislation.
3. A peace bond lasts up to one year.	There is no time limit for a restraining order unless the judge includes a specific expiry date.
4. There is no fee to apply for a peace bond.	There is no fee to apply for a restraining order in provincial/territorial court. However, additional fees may be required if applying for an order through the Supreme Court.
5. Peace bonds are guaranteed to be enforceable elsewhere in Canada.	A restraining order is guaranteed to be upheld in the province/territory it was issued, however it may not be considered valid in another province/territory. A new application in another province may be necessary if the applicant relocates to a new location.

*It is important to remember that reports to the police regarding fear for safety creates an obligation to recommend a criminal charge if they hold a reasonable belief that a crime has been committed.

However, in urgent situations neither the *Criminal Code* nor family law legislation provides quick and easily accessible legal relief. Specialized civil domestic violence legislation, available in some provinces and territories, provide alternatives to peace bonds and restraining orders discussed above.

Often, the only practical option for women experiencing domestic violence is to leave their home and possessions, and take refuge with their children at a shelter or the home of a family member or friend. Civil domestic violence legislation creates another option. Civil domestic violence orders provide relief beyond the usual scope of existing criminal and family law available to victims of abuse within the family (Schollenberg & Gibbons, 1992). There are six jurisdictions (Alberta, Manitoba, Nova Scotia, Prince Edward Island, Saskatchewan and the Yukon) that have enacted legislation aimed at the prevention and intervention of domestic violence (See Table 3). In addition to this legislation, one other jurisdiction (Ontario) has drafted legislation that is not yet proclaimed.

Table 3 – Civil Domestic Violence Legislation in Canada

<u>Province or Territory</u>	<u>Title</u>	<u>Date Proclaimed</u>
Saskatchewan	The Victims of Domestic Violence Act	February 1995
Prince Edward Island	The Victims of Family Violence Act	December 1996
Yukon	Family Violence Protection Act	November 1999
Alberta	Protection Against Family Violence Act	June 1999
Nova Scotia	Domestic Violence Intervention Act	April 2003
Manitoba	The Domestic Violence and Stalking Prevention, Protection and Compensation Act	September 1999

The purpose of Civil Domestic Violence legislation is to promote the message that domestic violence is a serious concern of the justice system, and to assist victims in gaining quick access to the justice system in the hopes of early intervention. The definition(s) of domestic violence and/or family violence in the legislation includes:

- Any intentional or reckless act or omission causing bodily harm or damage to property;
- Any act causes a reasonable fear of bodily harm or damage to property is threatened or committed;
- Any person is forcefully confined;
- Depriving the necessities of life, including food, clothing, medical attention, shelter and transportation;
- Actions or threats of sexual abuse, physical abuse or emotional/psychological abuse

In addition to the above, the Manitoba act provides for stalking. Stalking occurs when a person knowingly harasses another person repeatedly so that the conduct causes the other person to reasonably fear for his or her own safety.

Emergency protection orders are one of the primary benefits that domestic violence legislation provides. Applications for emergency protection orders are generally made by telephone with the assistance of police or victim services personnel to Justices of the Peace (JPs), who are available twenty-four hours a day. The following persons may apply for an emergency order: a victim; a member of a category of persons authorized by the regulations to apply on behalf of a victim with the victim's consent, such as a police officer; and any other person on behalf of the victim if the nature of the domestic violence gives reasonable grounds to believe that another person should be allowed to apply on

behalf of the victim. Emergency orders are similar to peace bonds and restraining orders in that they may also have provisions attached to the order. Although such provisions vary, they are much more expansive, and may include the following:

1. Granting the victim and other family member's exclusive occupation of the residence, regardless of ownership.
2. Restraining the respondent from attending at or near or entering any specified place that is attended regularly by the victim or other family members, including the residence, property, business, school or place of employment of the victim and other family members.
3. Restraining the respondent from making any communication likely to cause annoyance or alarm to the victim, including personal, written or telephone contact with the victim and other family members or their employers, employees or co-workers or others with whom communication would likely cause annoyance or alarm to the victim.
4. Directing a peace officer to remove the respondent from the residence.
5. Directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings.
6. Granting the victim temporary possession of specified personal property such as vehicles, credit cards, personal identification etc.
7. Restraining the respondent from taking, damaging or tampering with property or services, such as utilities, that the victim has interests in.
8. Requiring the respondent to post a bond that the court considers appropriate for securing the respondent's compliance with the terms of the order.
9. Banning publication of the name and address of the victim.
10. Ordering the respondent to surrender all weapons and documentation authorizing the respondent to own, possess or control weapons to a peace officer.
11. Restraining the respondent from committing any further acts of violence against the victim.
12. Requiring the respondent to make the rent or mortgage payments arising in respect to the residence.
13. Any other provisions that the court considers appropriate.

In determining whether or not an order should be issued, the JP must consider at least the following:

- Whether an act of domestic violence has been committed according to the definition in the statute;
- The nature of the violence;
- The history of violence by the respondent towards the victim;
- The existence of immediate danger to persons or property;
- The best interests of the victim and any child of the victim or any child who is in the care and custody of the victim

Respondent notification of the order varies according to jurisdiction. While some jurisdictions require that the respondent be notified that an application for an order has been made against them, others allow that the application is heard *ex parte* (in absence of the respondent). In the latter case, the respondent is simply served with the order once it is granted. However, when either party requests that an order be reviewed or altered, both parties are required to attend the hearing. Emergency orders can be valid anywhere from 30 days to an indefinite period of time. Once an order has been granted it is reviewed by a judge, either in chambers or at a hearing, to determine if there was enough evidence laid before the JP to support the granting of the order.

If the judge is not satisfied that the evidence presented was sufficient to warrant an order being granted, they can direct a rehearing of the matter. While both parties are summoned to any rehearing, only the respondent is required to appear. The applicant, however, is not required to attend the proceedings and

may participate through an agent attending on their behalf. Either party is permitted to apply to the court to have the order altered or terminated after it has been confirmed by the court.

Most specialized domestic violence legislation contains provisions for Victim Assistance Orders (VAO), which are also called Intervention or Prevention Orders. These orders are similar to emergency orders, except that they are generally valid for a longer period of time, and may contain all of the provisions detailed above as well as several other provisions designed to address longer-term issues. Applications for VAOs often require the assistance of a lawyer, and are made directly to the court (either to a judge or a JP located in a courthouse). Provisions designed to address longer-term issues associated with domestic violence include:

1. Recommending that the respondent receive counseling/therapy.
2. Awarding temporary custody of any children to the victim or another person.
3. Requiring the respondent to pay the victim compensation for monetary losses suffered by the victim and any child of the victim or any child who is in the care and custody of the victim as a direct result of the domestic violence, including loss of earnings or support, medical and dental expenses, moving and accommodation expense and legal expenses.
4. Any other provisions that the court considers appropriate.

Some of the statutes make it a provincial offence to violate an order under the statute itself, while other jurisdictions use section 127 of the *Canadian Criminal Code* (a general provision for disobeying court orders) as a disciplinary measure.

3.3 Discussion

Attaining a protection order is a complicated process. While women do not pursue – or even drop – protection orders for a variety of reasons, the most common reasons are economics related, and include issues such as employment, income and financial dependence, feelings of attachment to the abuser (which is significantly influenced by the length of relationship), whether they share any children and feelings of affection and love, whether they would like to remain in the relationship (Malecha et al., 2003), and finally, the severity of the violence. In some cases, the victim feels that the physical assault was minor in nature, and thus that the order is not worth pursuing. In other cases, the victim has such great fears for their safety that they decide it is in their best interest not to pursue or drop legal proceedings.

Civil domestic violence legislation is in principle an important and potentially empowering tool for women who are victims of partner abuse because the order is immediate, and because their life is not as severely disrupted as it would be if they were forced to leave their home. Furthermore, because the protection order is a “civil rather than a criminal proceeding, a woman may be more willing to take action on the belief that her abusive mate will be less likely to retaliate than with criminal proceedings” (Carlson, Harris, & Holden, 1999: 206). In addition, it does not involve detention for the husband – this is an important consideration if the family is dependent on his income.

Nevertheless, a number of concerns have been raised over civil domestic violence legislation. Firstly, a federal, provincial and territorial working group (2001) found that while emergency orders are being used, longer-term orders – such as Victim Assistance Orders – are not. This difference in utilization has been attributed to the fact that the process requires legal representation, whereas legal aid resources are currently inadequate. In addition, while emergency orders are being used, usage rates are low compared to reported incidents of partner abuse to police (Brown, 2000). The working group attributes low utilization rates to a number of factors, including (1) the interpretation of the act(s) by criminal justice officials (i.e. whether it should be used in conjunction with, or instead of, criminal charges, and confusion over the definition of what constitutes an ‘emergency’); (2) the quality and content of training provided to criminal justice officials, and (3) the degree of awareness among the public and victims.

The critical success factors needed for the effective response and implementation of domestic violence legislation are training and public awareness. Public education is important because it provides a medium through which the public, and thus victims, are made aware of the existence of the legislation and the solutions available. Training must be ongoing and involve multiple community representatives. For example, Saskatchewan cites its selection criteria for JPs as a critical success factor in that candidates were chosen based on their family violence knowledge and expertise. These

candidates were not existing JPs trained in family violence, but rather family violence specialists trained in the legal process and the role of a JP (Brown, 2000).

A Department of Justice study conducted by George Rigakos in 2002 showed breach rates of peace bonds to have a national trend of around five percent. The same study also shows that the major hurdle for battered women who wish to obtain a peace bond is procedural rather than a problem that could be fixed by amendments to the *Canadian Criminal Code*. Obtaining a peace bond is a "time-consuming problem wrought with delays making section 810 recognizances a poor choice for battered women" (Rigakos, 2002). The study also found that section 810 peace bonds applications have been made uncommon by new provincial domestic violence legislation. Perceived benefits of the legislation is the immediacy of the order, the fact that there is often no end-date proscribed and the dimensions of the protective order are far more reaching than that of a peace bond, so more conditions may be included.

From a socialist feminist perspective developments in domestic violence legislation are two-sided. On one hand, because the protection order is a civil rather than a criminal proceeding, a woman may be more willing utilize this type of legislation especially since it does not involve detention for their partner. On the other hand, since domestic violence legislation is in the private realm there is little general deterrent effect in contrast to criminal proceedings. The occurrence of peace bonds being overtaken by civil protection orders may also be an

indication of law's historical treatment of silencing women being carried on. In some instances, women may be persuaded to utilize protection orders available through domestic violence legislation rather than criminal peace bonds in an effort to keep partner abuse a private matter. Formally, all women should have equal access to this form of protection, but as we will see in the following chapter, women rely on the police to inform them of their options and enforce existing protection orders. This proves to be difficult when many police officers respond to partner abuse based on personal assumptions and stereotypes of battered women. In all, the development of specialized domestic violence legislation provides an important alternative and fills a significant gap to battered women in Canada.

3.4 Summary

In this chapter I have provided a detailed overview of protection orders available for battered women in Canada, including peace bonds and civil restraining orders, and provincial/territorial domestic violence legislation. Civil domestic violence legislation is an important and potentially empowering tool for battered women because of the immediacy of the protection order and because it offers an important alternative to a criminal proceeding. However, it is important to ensure that all battered women are given equal access to these new forms of protection. Protection orders can provide a false sense of security and expose battered women to more abuse if they are not enforced properly. Police

enforcement practices, the efficiency of protection orders, and pro-arrest and mandatory charging policies are addressed in the following chapter.

4

Protection Orders, Police Enforcement Practices and Mandatory Charging

Women who experience partner abuse utilize a variety of help-seeking strategies to escape their abusers. These strategies include lawyers, religious clergy, counselors, friends and family networks, and the police. Because women rely on police, the enforcement of protection orders becomes crucial. "While the sense of 'empowerment' given to a victim protected by a court order is an important part of the relief offered, this empowerment must be more than an illusion . . . effective enforcement is an essential aspect of any protection order legislation" (Brown, 1988: 265). The first part of this chapter examines police enforcement practices of protection orders followed by a critical appraisal of mandatory charging policies based on a socialist feminist perspective.

Why do police enforcement practices of protection orders need to be studied? Because police are "on the front lines", a discussion of protection orders would be incomplete without considering police enforcement practices. The police can play a central role in reducing violence against women. This not only includes abuse, but also the number of spousal homicides. Spousal homicides account for a substantial proportion of all homicides in Canada. In 2000, the 67 reported victims of spousal homicide accounted for 17% of the total number of victims in solved homicides and 52% of family homicides. Three in four of these spousal

homicide victims were female (Statistics Canada, 2002). Women who leave or attempt to leave an abusive relationship dramatically increase their likelihood of being killed by an abusive partner⁵. Battered women are 35% more likely to experience increased severity of abuse after separation (Statistics Canada, 1994). “Thus it will also be necessary to assess the police role in relation to protection orders and whether, in the end, these orders can really be expected to fulfill their intended purpose” (Schollenberg & Gibbons, 1992: 3). Despite the central role of police officers, research has been sparse in this area. The following section reviews the most important research conducted on police enforcement practices of protection orders.

4.1 Police Enforcement Practices

As mentioned above, many women choose to utilize the police for their protection against partner abuse. Including (a) the extent of victim injury, (b) the amount of criminal justice system support in carrying through the charges, (c) the perceived risk of police injury, (d) victims wishes, and (e) police attitudes (Hilton, 1993).

Police attitudes and police masculine subculture are the primary factors that have historically affected police decision-making to intervene in domestic disputes and/or arrest batterers. Until recently – and especially during the 1950s and

⁵ For more information see: Gartner, Rosemary, M. Dawson, and M. Crawford (1998/1999). 'Woman killing: Intimate Femicide in Ontario, 1974-1994', *Resources for Feminist Research*, 26, pp.151-173. [Reprinted in R. Silverman et al. (eds.), *Crime in Canadian Society*. Toronto: Harcourt Brace, 2000; in D.E.H. Russell and R. Harmes (eds.) *Femicide in Global Perspective*, New York: Teachers College Press, 2001; and in B. Fox (ed.) *Family Patterns, Gender Relations*, Don Mills: Oxford University Press, 2001.]

1960s when society placed much importance on the concept of the 'nuclear family' – partner abuse was mostly been viewed as a 'private' matter or something that should be 'kept in the family'. Such matters were considered of little importance to the criminal justice system during these decades. As a result, police officers were reluctant to respond to domestic dispute calls, and on the rare occasion that charges were laid, they were rarely pursued to completion.

During these decades, police believed in common stereotypes regarding women and domestic violence situations. For example, a common patriarchal perception was that domestic violence situations more often than not involved an ill-adjusted woman who needed to learn how to be a better wife, or a wife who 'deserved it' (Ginn, 1995). It was also generally believed that people involved in partner violence were 'deviants' who do not work, have loose family structure, are drunk and/or high most of the time, live in run-down homes, are from a lower class and/or have a bad temper (Ferraro, 1989). Characterizations such as these are both a political and social mechanism for enhancing power and defining boundaries. Two other misconceptions held by police were (a) that the abused woman could simply end the violence by leaving the home and ending the relationship, and (b) that if the abused women did not leave, she must enjoy the abuse. Of course, this attitude completely ignores the complexity of personal relationships, which can create very strong emotional, economic and social reasons for an abused woman to stay in an abusive relationship. Within this patriarchal conception, women were seen as the cause of the violence against

themselves, and this violence was viewed as acceptable because it was only 'natural' for men to control 'their' women.

A variety of other factors also contributed towards the reluctance of police to lay charges against abusers during the 1950s and 1960s. First, police departments had yet to develop clear rules and guidelines as to how to deal with domestic disputes. Poor communication networks existed with police officers in the field because these officers often had no way of knowing the exact terms of each protective order. As a result, "rather than risk possible false arrest suits, officers may [have] frequently settle[d] on a more informal intervention that [did] not include arrest" (Kane, 2000: 563). Second, partner abuse had such a low priority in the eyes of the law that police officers were not rewarded for laying charges or pursuing arrests for abuse-related crimes. Third, police received very little and poor training in how to deal with partner abuse (Burris & Jaffe, 1983). As a result, police officers not only failed to appreciate the needs of the victim, but also the characteristics of the offender and their own role in this process. Fourth, officers mentioned that women changed their minds about having called the police and then recanted their statements (Hannah-Moffat, 1995). As a result, police tended to view these women as lacking credibility. Fifth, violence in the home has normally been categorized as a typical male response to stress and frustration, most probably relying on stereotypical views of males' aggression and testosterone. Finally, there was also a belief that an assault against a female by her partner was somehow less serious than an assault between strangers. Some

police officers even believed that partner abuse was “draining valuable police resources and that the biggest problem was that these people do not listen – most people in domestic cases act like children, and don’t relate like adults, they call us [the police] in like a parent to sort things out!” (Hannah-Moffat, 1995: 39).

The implications of the police’s minimal reaction and intervention into partner abuse situations were serious. Battered women became disillusioned by their experiences and began to feel that there were no alternatives. Other women may have learned of the police’s lackluster response and then have decided not to call the police because they were aware that little will be done. In basic criminological terms, there was little general or specific deterrence against battering. Also, by not charging abusers, police were sending a message that the behaviour of the abusers was acceptable, and that the abusers would not be held accountable for their actions. The failure of police to act promptly and decisively at the scene of an assault is a missed opportunity to influence the abuser’s behaviour as it is minimized or rationalized away.

Researchers have identified several other factors that contribute to police non-enforcement of protection orders. For example, Lawrence Sherman cites police limits on arrest powers and the perceived danger to police officers as reasons for under-enforcement of protection orders (Sherman, Schmidt, & Rogan, 1992). Threats to police officers are in fact a major factor in police attitudes towards

domestic disturbances. 'Domestics' are widely believed to be among the most dangerous kinds of police work, and are often cited, incorrectly, as the leading cause of police deaths (Ferraro, 1989 ; Sherman et al., 1992).

Rigakos (1997), through police officer self-report data, found that police officers in Delta British Columbia made arrests in only 21% of cases in which civil protection orders were violated and 35% of cases where a breached peace bond is presented. Ironically, the same set of police officers reported that they would recommend victims obtain civil protection orders in 62% of the cases (Rigakos, 1997). The most important factors precipitating arrest were signs of forced entry, a high-risk offender and evidence of a struggle. Police officers were reluctant to make an arrest if (a) they believed the woman was intoxicated, (b) the offender had already left the residence, (c) the order was obtained *ex parte* and the offender claimed he was unaware of its existence, (d) there was some confusion over the validity of the order, (e) the officers were presented with multiple orders, and (f) they believed the woman originally allowed the offender into the residence. Confronted with such a situation, officers were highly reluctant to enforce protection orders. Thus, it seems that "ignorance of the law is an excuse when *ex parte* protection orders are breached" (Rigakos, 1998: 85). Confusion over which orders are enforceable and which are not is unfounded because *all* orders are enforceable whether civil or criminal. Many officers believe that women complainants who have allowed their abusers into the home are "asking for trouble", and consequently, men were rarely held responsible for accepting an

invitation. "It was considered the woman's responsibility to uphold the injunction, although the order was made against the man and often involved his undertaking" (Rigakos, 1998: 86). Rigakos's finding that civil protection orders were relegated to a less important status than that accorded to criminal court orders corresponds with patriarchal social constructions of public and private dichotomies. Civil protection orders are related to the private sphere and thus non-enforceable, while peace bonds are public matters and an affront to the state. But in either case, the 'private' nature of domestic violence exacted influence over police decisions to not act.

So why is it that police officers are still reluctant to arrest abusers even though clear procedural rules to arrest exist? The attitudes that the police exhibit towards partner abuse and its victims are a result of police masculine subculture. Rigakos describes this relationship as a male institution and a 'cult of masculinity' (Rigakos, 1998). The intertwining of these attitudes certainly affects police decision-making and how they carry out their duties, such as viewing certain female victims as manipulative, cunning, and unreliable as witnesses. Police often point their fingers at the legal system to justify their decisions not to arrest by claiming that cases will not stand up in court because of reluctant witnesses and/or that prosecutors will throw cases out of court. Interwoven with these attitudes are conservative notions of femininity, marriage, family, and specifically, constructs of battered women. This rhetoric translates into the belief that policing private matters is not 'real' police work. Partner abuse calls are not considered to

be heroic arrests compared to catching murderers and robbers. Perceptions such as these influence police officers' decisions whether or not to arrest abusers for breaches of protection orders and peace bonds. Furthermore, Rigakos found that officers who put much time and effort into cases, often felt betrayed by woman complainants who became reluctant witnesses.

"Not only are these women constructed as cunning, calculating, liars who often deserve abusive partners, they are typically ungrateful when 'rescued', fostering an unhealthy ambivalence, even hostility towards battered women's calls for assistance. Rather than contextualizing women's (healthy) cynicism towards a criminal justice system that often fails them . . . these same women are disdained for refusing to play the fairy tale 'damsel in distress'" (Rigakos, 1998).

4.2 The London Family Court Clinic Study

Although now dated, one of the most widely cited studies on police enforcement practices in Canada was the London, Ontario study conducted by Jaffe et al (1986). In this study, the London police department instituted a pro-arrest policy with regards to domestic assault. The study evaluated the number of reported incidents of domestic violence and charges laid. The researchers found there was a 2,500 per cent increase in charges laid by police in 1983, the third year of the policy. In this year, the police laid charges in 298 of the 443 reported cases of spousal assault compared to only 104 arrests out of 444 reported cases in 1979 (Jaffe, Wolfe, Telford, & Austin, 1986). One of the most important results of the study was that when the police, rather than the victim, laid charges, victims reported a reduction in or termination of the violence (Jaffe et al., 1986). Additionally, in London, police laying charges resulted in a significant decrease in charges being withdrawn or dismissed (Jaffe et al., 1986). On the face of it,

therefore, the experiment seems to provide positive support for mandatory charging and pro-arrest policies.

4.3 The Minneapolis Domestic Violence Study

The Minneapolis experiment by Sherman and Berk was conducted in 1980, and is considered the *locus classicus* for assessing police practices in relation to partner abuse. This study was designed to investigate the effects of pro-arrest policies on recidivism rates for domestic violence. For an eighteen-month period, police officers in Minneapolis, Minnesota, applied one of three intervention strategies in partner abuse cases. These strategies were (a) arrest, (b) ordering the offender from the premises or separation, and (c) some form of advice, which could include mediation (Sherman & Berk, 1984). Methods of intervention were assigned randomly to interventions, and the rates of recidivism were compared six months after each intervention. The behaviour of the suspect was tracked for six months after the police intervention to detect the frequency and seriousness of domestic violence incidents. The Minneapolis study showed that of the three treatment options given to police, arrest produced the lowest number of re-offences (as recorded six months after the original police intervention). In comparison, treatments (b) and (c) resulted in 21% more re-offences during the six month period after the original intervention (Sherman et al., 1992). Thus, the authors of the Minneapolis study suggest that the police should use arrest in partner abuse cases.

One consequence of the Minneapolis study, which will be discussed later on in this chapter, was that it had a wide policy impact on police departments in the United States and in Canada. Politicians and police departments began to implement pro-arrest and mandatory charging policies soon after the results of the Minneapolis study were published.

4.4 The Spousal Assault Replication Program (SARP) Studies

The Minneapolis study recommended that future studies aim to identify which types of offenders respond best to pro-arrest policies (Sherman et al., 1992). Thus, by 1996, six duplicate studies had been conducted in Atlanta, Charlotte, Colorado Springs, Dade County, Milwaukee, and Omaha. These experiments came to be known as the Spousal Assault Replication Program (SARP). A synthesis study of the SARP experiments showed that 42.5% of the 3,149 victims interviewed reported at least one new victimization by the suspect by the time of the final victim interview (Maxwell, Garner, & Fagan, 2002). However, it should be noted that the experimental designs of these programs were different to that used in the Minneapolis experiment. First, police officers determined case eligibility in the SARP experiments before the researchers assigned a treatment to be carried out (Maxwell et al., 2002). In the Minneapolis experiment, officers were permitted to know the treatment alternative before they decided case eligibility. Second, the SARP experiments followed up with subjects only twice during a period of six months, while the Minneapolis experiment followed up with subjects every two weeks (Maxwell et al., 2002). The findings of the SARP

experiments offer general support for the continued use of arrests as a legal strategy to combat violence against women (Maxwell et al., 2002). However, these findings also highlight the limitations in the effectiveness of arrest in reducing violence against women. While the threat of arrest may be the best specific deterrent for most suspects, 40% of victims experienced persistent victimizations (Maxwell et al., 2002). This indicates that arrest is not an effective tool for all offenders of partner abuse. These results suggest that further research is needed to identify repeat offenders and for policies to be developed that target these individuals for treatment. In summary, the SARP experiments do not provide sufficient evidence that arrest is an effective deterrent against domestic violence. On the other hand, arrest provides effective intervention with respect to the immediate crisis. Even if the arrest doesn't result in conviction or stop repetition, there is value in giving women an option for intervention when they are facing a severely abusive episode. Even if it happens again, such intervention at least helps her to survive in the short term, until she can figure out how to escape the abuser.

4.5 Evaluation of Pro-Arrest and Mandatory Charging Policies

The battered women's movement began in the 1970s in North America (Ferraro, 1989) with a keen awareness of the legal system's failure to protect abused women. Grassroots organizations worked to build networks, found shelters and housing for abused women, lobby for new laws directed at criminalizing partner abuse, and establish legal support for abused women. In addition, the

Minneapolis Domestic Violence Study, along with pressure exerted by civil suits against police departments, have led many departments to adopt an arrest policy as the preferred response to domestic violence (Brown, 1988). Pro-arrest and mandatory charging policies are a result of these efforts, and attempts to correct the criminal justice system's historical mistreatment of partner abuse as a 'private matter'.

Paralleling the rise of neoconservative 'get-tough' policies, and on the heels of feminist advocacy to take violence against women seriously, partner abuse became a social control issue for the criminal justice system through mandatory charging protocols (Rigakos, 1998). More specifically, Sherman and Berk's findings led directly to the Minneapolis Police Department changing its policies on partner abuse in 1984. However, by 1988, the Minneapolis study and feminist advocacy had been instrumental in persuading 90% of the larger urban police agencies in the United States to either 'encourage' or mandate arrest in partner abuse cases where probable cause existed that a violent incident had occurred.

The current policy of mandatory charging of domestic violence tries to address past indiscretions and oversights by the criminal justice system. The women's movement and some feminist groups began to lobby politicians and encourage the government to take initiatives that would take a firm stand against partner abuse, and strengthen the criminal justice system so that it could deal with perpetrators of violence against women. Liberal feminists wanted partner abuse

to be treated just like any other type of assault – an approach that fell squarely within the dictums of liberal feminist thought. They also wanted police to charge more offenders, rather than just trying to mediate the situation, or leaving the couple to work things out for themselves. In response to this, the Government of Canada –in co-operation with the Solicitor General and local police departments – implemented what is now known as a mandatory charge and ‘no-drop’ policy of partner abuse cases. This response is based on the premise that partner abuse *is* a serious matter, that there should be a clear societal message that partner abuse is unacceptable, and that victims or potential victims need protection from abusive spouses. There is also the notion that part of the solution to partner abuse is the adoption of “strict policies and practices of mandatory arrest” (Neugebauer, 1992). The criminal justice system wanted to make the important distinction between its current treatment of partner abuse as a ‘criminal matter’ and its historical treatment of partner abuse as a ‘private matter’.

The above policy is not unique to Canada. Many US states also employ mandatory arrests for domestic violence, and this approach has become a popular legislative response to partner abuse. Since first enacted in Pennsylvania in 1976, every state and the District of Columbia now provide for the issuance of restraining or protective orders to protect victims of partner abuse (Klein, 1996). Because police are generally reluctant to proceed with arrest unless there is clear, observable evidence of visible physical injury to the victim (Hannah-Moffat, 1995), they are now required to lay charges if they find

'reasonable grounds' to do so. The one aspect of pro-arrest policies that is open to police discretion is the requirement that probable cause be determined. Probable cause is established by the presence of visible injuries, property damage, weapons and/or witnesses. This requirement is designed to protect citizen rights insofar as that they cannot be arrested without reason, nor can they be arrested without evidence that an offence has occurred. However, police officers' interpretations of what constitutes probable cause vary widely. For example, an absence of visible external injury does not necessarily mean that the victim has not been assaulted. Also, other factors taken into account when determining probable cause – such as the demeanor of the individuals, whether there has been any substance abuse involved, whether any witnesses exist, and if the home is disorderly or if there was clear signs of a struggle – are somewhat subjective. You could say that this diminishes the effect of bias in terms of police attitudes about the seriousness of domestic assault and the notion that it is a private matter, but it doesn't remove bias relating to the credibility of complainants. Thus, the removal of discretion from police officers was designed to remove part of this bias at a basic level, which is currently wide spread throughout the entire criminal justice system.

In cases where reasonable and probable grounds exist, and prosecutors or Crowns are discouraged from dropping charges, police discretion in charging is essentially removed. The decision to encourage Crowns not to drop charges was influenced by the desire of the police to have their work 'count' for something

(and not 'wasted', as would be perceived by police if the Crowns were able to drop charges at a later date), and to ensure that appropriate sentences were dispensed. By removing women's influence over charging decisions, this policy attempts to relieve women of the responsibility for criminally prosecuting their abusers. It is generally hoped that such an approach will protect women from further intimidation by their abusers (Flynn & Crawford, 1998; Ginn, 1995). It also, to some extent, seems to place the institutional needs of the criminal justice system officials over those of the victim – battered women may want and need the kind of crisis intervention that police involvement and arrest provides, but for various reasons may not want to pursue a conviction. This is frustrating for police because they will spend a lot of time on a problem without getting the ultimate credit (and enhanced professional status) for a conviction. So the administrative/institutional pressures take precedence.

Some view current feminist criminal law reform initiatives, the retributive goals achieved by arrest and mandatory charging, as dangerous and short-sighted. This view is based on the argument that these strategies are too focused on retribution – that is, getting the issue of partner abuse onto the social agenda and being tough on crime – rather than being focused on women's needs and material realities. The strategies currently employed are mainly symbolic; the labelling of domestic violence as 'bad' stigmatizes the behaviour and pushes politicians and the public to take violence against women seriously. The intention of policy initiatives such as mandatory charging and increased jail time is an

example of symbolic disapproval against partner abuse. However, these strategies have unintended outcomes and effects on battered women. This is particularly true for battered women who use criminal law as a tool to assist them. Diane Martin (1998) found that many women who call police for immediate protection and support were dissatisfied with the police response that they received. Specifically, women reported that police officers did not keep a record of the incident of violence when charges were not laid, thus weakening the women's credibility in future incidents. Additionally, women felt that the police downplayed the seriousness of violence by attributing it as a "domestic dispute" rather than an assault in progress. In addition, a pattern of dual arrests emerged where both the aggressor and the victim are arrested. The police use this as a tactic to discourage victims from reporting partner abuse and forcing the police to arrest the batterer. In addition, dual arrests have been used to impeach the testimony of victims at trial (Humphries, 2002). A pattern of dual arrests creates a disincentive for battered women seeking future police intervention (Chesney-Lind, 2002).

The criminal justice policy response assumes that all abused women share the same experiences. A woman may have very good reasons for not wanting to testify or proceed with charges. For example, many argue that couples facing various emotional and financial problems – which are often compounded by alcohol and drug abuse – do not need legal problems as well. Negative consequences of the criminal justice intervention on women include the loss of

economic security, increased institutional surveillance, and the intervention and the destruction of their family and community. Additionally, many women also acknowledge that there is a greater need to protect their children and to keep the family together, which they may only be able to do if the abuser remains in the home. Remarkably, many women have an incredible amount of faith that the violence will stop and that the relationship will normalize, even after repeated incidents. Women may feel that taking their husbands to court may undermine any chance of working the relationship out (McGillivray, 1987; Pratt, 1995). Women may prefer to seek out other alternatives, such as counselling and support from their family, church or community. While many feminists have supported law enforcement in the adoption of mandatory arrest, this “policy however, chafes against the desire of communities of colour to reduce the level of police intrusion into a community that already feels under siege” (Jacobs & Dowd, 2003: 1). Minority women are put in the impossible situation of facing a higher likelihood of abuse while being less likely to call on the police because of pro-arrest and mandatory charging policies.

Mandatory charging policies have a particular impact on minority and immigrant women and their families (Currie, 1998; Flynn & Crawford, 1998; Landau, 1998; Salvaggio, 2002; Sheppard, 2000). Many immigrant women fear that calling the police will have negative consequences for her or her children’s immigration status. They may also be concerned that their partner is at risk of deportation if he is in the process of becoming a landed immigrant. These fears are well

founded because spousal sponsorship provisions mean that many women do risk being deported if they do not have landed status. "Immigration policies, which too often subsume a wife's identity to her husband, require and reinforce economic dependency within the family unit, remain inaccessible and discretionary and create systemic obstacles to leaving an abusive family situation for many immigrant women" (Sheppard, 2000: 2). Furthermore, the woman's partner, who is the person most likely to be their sponsor, may wield their sponsorship as a form of control over the abused woman. Male abusers have also been known to maintain control over abused women by keeping them 'in the dark' regarding their immigration status in Canada. Because many immigrant women have limited work experience, a limited skill set, and a poor knowledge of English, they often feel that their only option is to remain with their abusive partner. As a result, these women find themselves dependent on their partner for financial resources. The fear of loss of economic support is great because a prison sentence of even a few months is enough for the abuser to lose his job, and would impose harsh financial penalties on the whole family. As a result, families would be at risk of losing their house or eviction from a rented property, not being able to pay their bills and not being able to feed their children.

Another reason why assaulted women may not want to proceed with charging their abuser is that they fear disproportionate punishment towards their partners, especially if their partners are men of colour or belong to a visible minority group. For example, Flynn and Crawford (1998) found that the main reason black

women refuse to request or accept police intervention in domestic disputes is their belief that their partners will be subjected to racial violence from police officers. While such women may want their partners to be punished, they fear that their partners may be discriminated against, and subject to more severe punishments than white men. Many women also express a concern about the possibility of their entire community being unfairly stigmatized as 'savage' or brutal. Flynn and Crawford found that a woman will experience strong feelings of guilt and betrayal if she is forced to call the police in order to stop a violent incident and is "tantamount to committing 'race treason'" (Flynn and Crawford, 1998: 96).

A person's culture could also be a mitigating factor in a women's decision to report abuse to police. In many cultures the "involvement of the police or the courts for incidents of wife assault, may be 'totally unthinkable' in the experience of assaulted women in their homeland. These people (police or other agents of the criminal justice system) are often regarded as agents of corruption and oppression . . . [and] the notion of calling the police for 'help', particularly in the context of such a 'private' matter" is unthinkable" (Pratt, 1995). Additionally, many patriarchal cultures consider it shameful to air their 'dirty laundry' in public. For instance, preservation of the family unit may be of utmost importance, and any concerns that the woman may have about themselves become secondary. Typically these abused women are primarily concerned with the removal of their children's father from the home, rather than the removal of their partners from the

home. As a result, women who invoke the criminal justice system are likely to face criticism and isolation from their friends and family (Sheppard, 2000).

Many women also fear for their own personal safety, and worry that their abusive partner may come after them out of retaliation. This fear is well founded, since women are at greatest risk for violence when they try to leave a relationship or when they try to establish some sort of self-independence. Therefore, some women are reluctant to even speak to police officers when they arrive at the scene of a domestic dispute. In addition, the prosecutorial directive of mandatory charging is sometimes used as a weapon against battered women, forcing them to testify or risk being found in contempt of court (Ginn, 1995). Thus, these feminist legal strategies can act as a deterrent for women, rather than as a deterrent for men.

Proponents of pro-arrest and mandatory charging policies argue that these policy mechanisms are an important first step in bringing chronic abusers into the criminal justice system and referring them to support services (Humphries, 2002). A Federal, Provincial and Territorial Working Group found that “despite the unintended negative consequences of the adoption of the pro-charging policy, the majority of victims strongly support the policy” (Department of Justice Canada, 2001: vi). Based on reports, Landau (1998) found that mandatory charging had been successful in increasing the number of charges laid in partner abuse cases, promoting more rigorous prosecution of partner abuse cases,

reducing the attrition of cases as they proceed further along the system, and increasing the use of protection and incarceration.

4.6 Conclusions

While partner abuse has always been technically illegal for quite some time, “the actual protection afforded to women has been minimal” (Ferraro, 1989: 155). We have seen discriminatory practices with regards to other forms of violence against women such as sexual assault, incest, sexual harassment and sexual abuse of children. The changes of arrest, prosecution and punishment for partner abuse also depends on the nature of the relationship between the victim and the offender: “Violence that receives the most severe state sanctions is that which is committed by a subordinate against a superordinate in the social hierarchy, or by a subversive group against the dominant political order” (Ferraro, 1989: 156). For example, sexual assault is more likely to result in harsher sentences when the woman is white and the man is black, while they are least likely to occur when the assault occurs within a marriage. In addition, these practices have been reproduced in the context of partner violence where notions of family privacy and male supremacy have clouded the legal response to partner abuse. We can see that male violence against women is viewed through a lens of racism, classism and patriarchal hierarchies.

Many women who experience partner abuse contact the police to stop the violent incident and ensure their immediate safety (Ursel, 1998; Valverde, MacLeod, &

Johnson, 1995). Criminal sanctions associated with partner abuse have less effect on this violent behaviour than we hoped. Furthermore, police enforcement practices are critical because there is a fear that orders give victims a false sense of security. Police research has taught us that discretion is an inherent component of police work and “at the intervention stage [of partner abuse], the role of the police is pivotal” (Schollenberg & Gibbons, 1992: 2).

We need to question if criminal justice reforms secure safety for all women or simply provide protection for certain women against some forms of men’s violence. If reforms are geared only to curbing the more obvious forms of male violence and to protecting women the police define as deserving of protection, then women’s demands will only build up more tension between men and women rather than secure the feminist aim of autonomy for all women irrespective of class, race, ability, religion and sexuality (Hanmer, Radford, & Stanko, 1989). Police decision-making in how to respond to women who report partner abuse distinguishes between women who ‘deserve’ protection and those who do not, and evaluates whether the circumstances of the incident meet their definition of ‘crime’. All of these notions are informed by racism, sexism and particularly classism. Hutchison and Hirschel (1998) found that women in the lowest socioeconomic status (poverty level) are more likely to obtain legal help, such as contacting the police, while those with higher incomes, were most likely to seek professional advice from a lawyer. Talking to a lawyer is more common at higher socioeconomic levels because of economic privilege. And of course, this

approach is more likely to preserve the victim's freedom of choice in terms of how she wants to deal with the matter – lawyers have to follow their client's instructions, but police don't have to comply with the wishes of complainants. In addition, there is a link between economic dependence and women's decision to leave abusive relationships since women risk becoming poor or poorer upon separation and divorce (Langer, 1994; Valverde et al., 1995). The growing number of women who are living and/or raising children in poverty indicates a feminization of poverty:

“Despite the new emphasis on achieving economic self-sufficiency, legal discourse continues to recognize marriage as a primary source of support for women. Thus it is up to a woman to ensure her support by a former spouse by remaining celibate; if the former spouse remarries it is up to her to seek out a new source of support in the form of a new husband. The popular observation is that a woman is only one man away from poverty” (Langer, 1994: 11).

In addition, “women's economic need upon divorce [and separation], however, is still seen as a personal failure rather than a systemically produced hardship” (Langer, 1994: 5). It is not my contention that eliminating police discretion will eradicate the application of patriarchal values, but rather, to point out that these discretionary practices occupy a crucial site where male domination is reproduced in a legal context. Regardless of how impartial the individual police might be, the application of criminal law to domestic abuse does not address the underlying social inequalities that make women especially vulnerable to abuse. This is an important point in terms of the viability of protection orders, which seem to offer an alternative to the retributive/punishment orientation of the criminal law.

Some critics believe that public interests tend to supercede the interests of victims, but more interesting is what puts women in the position of vulnerability for abuse and makes them feel that they cannot rely on the police for protection. "Understanding the complexity of the interactions around these power structures" (Hanmer et al., 1989: 7) is a central project for socialist feminist theory.

The criminal justice process is held out as a promise of safety and security for battered women. This is one of the main problems with protection orders. Battered women who obtain protection orders believe that they are safe from their abusers. Protection orders may foster a false sense of security. Women believe that the law binds their abusers to stay away from them, but many abusers feel that protection orders are "just a piece of paper". Some violent men feel that the protection order will not protect the women they abused, and think that there are no real consequences for violating the order.

Officers continue to respond to partner abuse based on their implicit assumptions, and decision-making criteria are not eliminated by the adoption of pro-arrest and mandatory charging policies. The persistence of discretionary decision-making does not necessarily represent disdain for abused women, but may reflect disregard for administrative policy and the limitations of the criminal justice system in response to partner abuse. "In order to be effective, protection orders must have as much bite as they do bark" (Brown, 1988: 265) so police

enforcement practices are central. From a socialist feminist perspective, a general mandatory charging policy should be viewed with suspicion because implicit in this directive is a notion of a 'universal woman with universal needs'. Moreover, it would come as no surprise to find that certain men (i.e. visible minorities; men from lower socioeconomic levels; unemployed men) were being arrested more often than others.⁶ When police refuse to intervene to assist women, they are effectively implementing two forms of social control; they are legitimizing men's use of violence against women and power over the underclass to ensure male supremacy in a capitalist society. The re-affirmation of criminal justice intervention that addresses only a retributive logic does not come to terms with many women's basic social needs. A paternalistic criminal justice system is, in the end, still merely the benevolent face of patriarchy if mandatory charging is used as an insular response.

4.7 Summary

In this chapter I have discussed police enforcement practices of protection orders and conducted a critical appraisal of mandatory charging policies. We have seen that the police response to partner abuse has been minimal and is quite often clouded by notions of male supremacy and stereotypes regarding battered women. On the one hand, battered women contact the police to stop the violent incident and ensure their immediate safety, while on the other hand they are met

⁶ Snider (1994) describes a Manitoba study conducted by Jane Ursel (1991) where she found that most offenders arrested through mandatory charging were from working or 'lower class' groups and 70% of those arrested had prior police records. Overall, they had little education and, if employed at all, they had low-level jobs.

with sexism, classism and racism. A general mandatory charging policy is often inadequate to many women because it is based on the assumption that all women share the same experiences. The following chapter investigates the possibility of civil remedies to police non-enforcement of protection orders such as tort law in achieving police liability and accountability.

5

Tort Law and Police Liability

“Every form of activity carries with it the possibility of harm to others” (Weinrib, 2003: 111). Tort is derived from the Latin word *tortus*, which means crooked or twisted. “The expression found its way into the early English language as a synonym for the word ‘wrong’” (Linden, 2001: 1). A tort is a wrongful act for which relief may be acquired in the form of damages⁷ or an injunction. The function of the law of tort is to discourage wrongful behaviour and to compensate those who are harmed by such conduct. The ordinary citizen, doctors, lawyers, and even government officials such as the police may be required to pay damages if someone is hurt as a result of their conduct. A useful definition of tort law is “a tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages” (Linden, 2001: 2). When one does cause injury to others, either intentionally or by negligence, he or she can be required by a court to pay money to the injured party so that, ultimately, he or she will be held to the standard of ‘the reasonable person’⁸ and to be made accountable for the pain

⁷ Damages may be compensatory, aggravated or punitive. Compensatory damages is designed to place the plaintiff in the position he/she would have been in if the negligent conduct had not taken place. Aggravated damages are awarded for the humiliation, embarrassment and/or distress, which was caused by the wrongdoing. In addition, punitive damages are awarded when a defendant’s conduct is so severe, malicious or despicable that it warrants reprimand and punishment. In addition, there are special and general damages. Special damages compensate the plaintiff for all pre-trial losses, such as loss of income, medical expenses and travel costs. General damages are designed to compensate for future losses including future care costs, loss of earnings and pain and suffering. (Linden, 2001; Osborne, 2000b).

⁸ The standard of care of the reasonable person is an objective standard. It focuses on the defendant’s conduct and its sufficiency with reference to that of a reasonable person. No

caused by the tortious action. In tort litigation, the court must decide whether to shift the loss suffered by one person to another (i.e. to the defendant). The plaintiff must show on a balance of probabilities (i.e. 51% likelihood or greater) that the facts of the case are true. The focus of tort law is primarily on those who have suffered the injury or damage. This is in contrast to criminal proceedings, where the focus is on the offender and his/her actions. Tort law focuses on compensating victims for harm caused by wrongdoing, while the criminal law focuses on punishing wrongdoers. Criminal law, with a few exceptions, is primarily concerned with intentional wrongs, while tort law focuses on both intentional and unintentional wrongs. Tort law, in contrast to criminal proceedings, allows the victim to maintain significant control over the process and the burden of proof is less onerous. One advantage of tort law is that it is triggered by ordinary citizens. One does not have to wait until public servants decide to act; any person injured by another may commence civil proceedings.

Tort law has two primary objectives. First, the moralist view perceives tort law primarily as an ethical system promoting the personal responsibility of wrongdoers for the harm that they have caused to others.

“It is a repository of societal values that speak to us about how to live in a crowded community with mutual respect for the interests of others. It protects individual liberty by defining our rights against the wrongful interference of others

consideration is given to the defendant's thought process or his subjective awareness of the danger that his conduct poses to others. The test of the reasonable person excludes all the psychological and physical traits that make each person different (Osborne, 2000b). For more information on the 'reasonable person standard' refer to (1) Bender, Leslie, *A Lawyer's Primer on Feminist Theory and Tort* in the Journal of Legal Education; (2) Jacob, Assaf, *Feminist Approaches to Tort Law Revisited* in Theoretical Inquires in Law, January 2001, Vol. 2, No. 1; and (3) Finley, Lucinda M., *A Break in the Silence: Including Women's Issues in a Torts Course* in Yale Journal of Law and Feminism, Vol. 1, 1989.

with our person, property, and other recognized interests. That is enough to explain its appeal, its strength, and its importance to Canadian society” (Osborne, 2000b: 13).

The second objective, the instrumentalist view, is the multiplicity of desirable functions of tort law, such as compensation, deterrence and education. Tort law is primarily a compensator, and the award of damages or compensation is one of its most important social roles. A successful action may achieve two objectives. It may reimburse the plaintiff for both the economic losses and psychological damages associated with the tortuous action. One of the elements of justice is for the reparation of wrongs and tort law satisfies this requirement. In Canada, there are three ways in which compensation is dispensed for those who are injured: (1) social insurance measures including medical care and income replacement through disability and employment insurance offered by the state; (2) private insurance available through employers and/or retail insurance companies; and (3) tort law, which provides reparation for those who can prove that they were harmed through the fault of another person. In addition, tort law may also perform certain psychological functions by providing some appeasement to those who are injured because of wrongful conduct.

While this may be a legalized way of obtaining ‘revenge’, battered women are most certainly more concerned with changing and/or correcting police behaviour to protect women. Since the non-enforcement of protection orders leaves abused women with a feeling of helplessness, successful tort judgments reassures women that they *should* have been given protection and *should* have been able

to count on the police. Tort law can thus be used to apply pressure on the 'powers that be'. Through actions against the police and government, tort law forces the police to act more responsibly in their dealings with citizens. We have seen this already with false imprisonment, malicious prosecution, excessive use of force and negligence lawsuits (Linden, 2001: 22). In this respect, tort law can be a tool for social reform within a model of liberal capitalism.

The second function of tort law is the deterrence of future harms. It could also be argued that the purpose of tort law is not much different from that of criminal law – that is, it punishes the guilty (specific deterrence) and deters future misbehaviour. Individuals who are required to pay damages because of their substandard conduct will presumably try to avoid a recurrence.

The last beneficial effect of tort law is education (Linden, 2001; Osborne, 2000b). This is accomplished through public education and a more general form of deterrence to prevent harms (general deterrence). The notion of individual responsibility is pivotal in tort law. In the case of protection orders, individual police officers could be held accountable, but at the same time, such decisions also sends a message to all public officials concerning their conduct. Tort judgments are meant to warn others, while at the same time, condemning anti-social behaviour and providing public disapproval. Media and publicity play a large part in education, and by creating a public outcry to stimulate change. Certainly though, there are impediments to achieving successful deterrence

through tort law with respect to public authorities. First, the public may begin to lose confidence in and respect for public authorities such as the police. Hopefully, this negative publicity will induce government intervention to revise and/or strengthen policies on enforcement of protection orders for battered women. Second, there will always be some individuals who are unwilling to conform to the proper conduct prescribed by tort judgments. For instance, some police officers still choose to follow their own preconceptions regarding battered women, and not enforce orders properly as mandated. All that can be done with these willful offenders is to impose appropriate legal sanctions on them to minimize future risks (Priest, 1990), and hope that their attitude does not become the general attitude. Third, there may be occasions where people are willing to conform to the standard of care expected of them but they are unable to do so. This may arise where financial resources limit police departments and municipalities. Fourth, some people may be willing to comply with the standards of care set out by courts, but may be totally ignorant of them. In our case, this is not a likely occurrence since enforcement of protection orders has been clearly set out for police officers by police department regulations, provincial governments and the courts.

5.1 Negligence

The law of negligence is a central component of the law of tort. A person is negligent if they omitted to do that which a reasonable person would have done, or they did something, which a person taking reasonable precautions would not

have done. There are three core elements to negligence: the negligent act, causation, and damage. The negligent act is determined by identifying the appropriate standard of care and applying it to the facts of the case. Causation is established by showing a link between the defendant's negligent act and the plaintiff's damage. Damage is the vital element that triggers the claim and launches the litigation process (Osborne, 2000b). Negligence liability cannot be established unless the judge recognizes that the defendant owes the plaintiff a duty of care. The fundamental principle of negligence law is known as the 'neighbour principle' (Fridman, 2002). The neighbour principle was first espoused by Lord Atkin in the seminal United Kingdom decision of *Donoghue v. Stevenson*, [1932] ALL E.R. Rep. 1, in order to outline a "general conception of relations giving rise to a duty of care ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question". *Donoghue v. Stevenson* made two critical contributions to the future development of the law of negligence (Klar, 2003). First, it released the law of negligence from the doctrine of 'privity of contract' – that a contract must have been in place and violated to establish negligence. Second, it established the proposition that the duty of care owed in negligence actions "is not confined to a specific set of relationships, but it is based upon an open-ended and general concept of a relationship of proximity which is capable of extension to new situations" (Klar, 2003: 154).

The Supreme Court of Canada has refined the test of duty into a two-step approach in the case of *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2,

- (1) Is there a sufficiently close relationship between the parties . . . so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to that person. If so,
- (2) Are there any considerations which ought to negate or limit
 - a. The scope of the duty and
 - b. The class of persons to whom the duty is owed or
 - c. The damages to which a breach of it may give rise?

The law of negligence states that a person who causes harm to another person by failing to adhere to a reasonable standard of care will be liable to the plaintiff for the damages incurred, assuming that it is determined that the defendant owed the plaintiff a duty of care. Generally, in order to recover damages, a plaintiff must demonstrate that the defendant was negligent.

In order to establish negligence, the criteria listed below must be present to show cause of action for negligence (Clayton & Tomlinson, 1987; Klar, 2003; Klar, Linden, Cherniak, & Kryworuk, 1995; Linden, 2001; Weinrib, 2003; Weir, 2002).

- (1) The claimant must have suffered some damage;
- (2) The damage suffered must be caused by the conduct of the defendant;
- (3) The conduct of the defendant must be negligent – i.e. in breach of the standard of care as established by the law;
- (4) There must be a duty recognized by law;
- (5) The conduct of the defendant must be proximate to the loss of the plaintiff
- (6) The conduct of the plaintiff must not of directly contributed to the loss and/or they must have not voluntarily assumed the risk.

In police cases, the criteria that there must be a duty recognized by law, is often the most difficult to establish. Negligent defendants are not held liable unless they owe a duty to be careful. Out of *Anns v. Merton London Borough Council*, [1977] 2 W.L.R. 1024 (H.L.), came a two-step approach. The first stage of the *Anns* test is to question the circumstances surrounding the situation and determine if the harm could have reasonably been foreseen and if the proximity is sufficient to establish a *prima facie*⁹ duty of care. The plaintiff must show that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care. The second stage, if duty has been established, is to consider the policy implications of enshrining such a duty. In effect, the court must consider the effect of imposing liability on society in general (for instance the impact on the legal system and if the duty is of benefit to citizens). It is important to note that while foresight of the risk is important, the risk(s) must be within the scope of the duty owed to the victim. For instance, in the case of partner abuse, the risk(s) to battered women must be within the scope of police duties – i.e. the enforcement of protection orders, arrest etc. The duty in tort for police to enforce protection orders etc. arises from the position they hold. One must ask whether the plaintiff's damage would have occurred but for the defendant's negligence?

Commonly known as the 'but for' test, this test relates to the question of proximate cause, a plaintiff bears the onus of proving, on a balance of

⁹ Prima Facie is Latin for "at first look," or "on its face". It refers to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial.

probabilities, that if a defendant had not acted wrongfully, no loss would have occurred (McInnes, 2000). While if the police had correctly arrested the offender, the women's immediate safety would have been maintained, "it is not necessary to prove that the defendant's negligence was the sole cause or the predominant cause of the plaintiff's damage" (Osborne, 2000b: 52). The abuser's violent actions would be considered an intervening act that arose after the defendant's negligent act, which worsened the plaintiff's damages. However police who act negligently contribute to the harm suffered. The police's failure to act has created an opportunity for the abuser to carry out violent criminal acts against the plaintiff. Joint tortfeasors are subject to joint and several liability – which means that each may be liable for all the damages suffered.

Another contributing factor to establishing negligence is by showing that police officers violated an established custom and approved practice, such as mandatory charging. If there is an established normal practice, negligence can be found if it can be shown that the defendant deviated from it. Courts may be inclined to believe that a police officer's decision not to arrest may involve a policy choice as to the best means of resolving a particular dispute, and is therefore a discretionary act. This defence can be overcome if the jurisdiction has a pro-arrest policy in place that the police officer did not follow these directives. The defendant may assert any of four defences to a claim of negligence.

1. Contributory negligence – is a partial defence leading to a reduction in the amount of compensation by arguing that the plaintiff contributed to their own damages.

2. Voluntary assumption of risk – is a defence that arises where the plaintiff consents to the defendant's negligence and its consequences (such as signing a waiver to participate in sky diving).
3. Illegality – operates to deny a claim based on illegal activity and a positive judgment would subvert the integrity of the legal system (i.e. a drug dealer can't sue because their drugs were stolen).
4. Inevitable accident – is a defence arguing that the loss was caused, not by their fault, but by an accident, which could not have been prevented (Osborne, 2000b).

Furthermore, contributory negligence could also be seen as the failure of the plaintiff to take reasonable care for her own safety. In the case of battered women, this is not necessarily true since these women have gone through the process of obtaining protection orders against their abusers.

5.2 Foreseeable Risk

Since only certain individuals may claim protection from tort law, not all plaintiffs may recover damages. The adoption of the foreseeability test is one important way of determining if the defendant is liable for the loss triggered or worsened by the intervening act. The 'unforeseeable plaintiff' is the person who is so far removed from the tort action that the defendant could have had no way of foreseeing their injury. For example, in *Palsgraf v. Long Island Railroad Co.*, (1928) 162 N.E. 99, the defendant's guard, in trying to assist a man who was rushing for a departing train, accidentally pushed him, thereby knocking from his arms a package of fireworks which sparked an explosion and knocked over a nearby scale, which, in turn, hit a woman standing some distance away. The court ruled that she was beyond the range of foreseeable danger and was therefore denied an award of damages. In deciding that the defendant owed no

duty of care to the plaintiff, the judge stated that: "if no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else". In the case of battered women who have obtained protection orders, the argument of the 'unforeseeable plaintiff' is irrelevant because these women are already a known quantity and are deemed an at-risk population. This is so because these women have already obtained a protection order from the court, and, by doing so, their immediate and heightened danger has already been legally established. It is my argument that these women should be afforded special protection because of their sensitive situations, and because the police and the courts have already legally acknowledged their situation. Such extended protection has already been accorded to groups of people who have been deemed in need of special attention and/or are viewed as targets of ridicule and abuse. Such groups include blind people, developmentally delayed individuals, and gays and lesbians.

The courts have consistently held that a defendant is not liable for every consequence of a breach of a duty of care if the damage is so remote or disproportionate to the risk posed, that it would be unfair to hold the defendant legally responsible for it (Osborne, 2000b). However, in the case of battered women, this is not the case. Police know, or ought to know, that they are leaving women in vulnerable positions by acting negligently. "The essence of negligent conduct is foreseeability of some damage. The essence of a duty of care is

foreseeability of damage to the plaintiff" (Osborne, 2000a: 65). This is an important distinction. It is owed only to those whom the defendant might reasonably foresee as being adversely affected by his/her failure to take care. It is reasonable to assume that police know that not acting positively will negatively affect women especially in light of women's heightened danger when separating from an abusive partner. Relevant factors include whether some harm is likely as well as how serious the foreseeable harm is. Even if the harm is not likely to occur, but would be extremely serious in the unlikely event that it did occur, the duty may require one to take precautions to avoid it (Weir, 2002).

5.3 Fiduciary Doctrine and Breach of Duty

Traditionally, fiduciary relationships have been defined according to categories. These include parent/child, doctor/patient, teacher/student, custodian/prisoner and employer/employee, and are recognized for the purposes of establishing a duty of affirmative action. Relationships of professional rescuers, such as firefighters, police and emergency personnel, and citizens in danger, can also be included in this category because of their special expertise. The use of categories to determine the fiduciary nature of a relationship may run counter to the very foundation of fiduciary doctrine.

"Fiduciary law has its origins in public policy, specifically the desire to protect certain types of relationships that are deemed to be socially valuable or necessary. The common elements to the relationships which come under its protection are the trust and confidence placed by one person in another within a given context. This reposing of trust by one person in the honesty, integrity, and fidelity of another, as well as the former's reliance upon the latter's care of that trust, is the basis for the creation of legal mechanisms such as fiduciary law and the law of trusts" (Rotman, 1996: 6).

The law of fiduciaries arises from human interdependency. Without individuals' need to rely upon others, there would be no need for fiduciary law. The Supreme Court of Canada declared that the categories of fiduciary relationships are not closed (Des Rosiers, 2002), indicating that fiduciary doctrine not only requires due attention to be paid to the unique requirements of particular relationships (Rotman, 1996), but that it can also be expanded.

In Canada, it is clear that foreseeability does not automatically lead to a fiduciary duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. The following categories in which a duty to assist is imposed (Linden & Klar, 1999):

- (a) Relationships of economic benefit;
- (b) Relationships of control or supervision;
- (c) Creators of dangerous situations;
- (d) Reliance relationships;
- (e) Statutory duties.

The relationships of control and supervision, and reliance relationships, require dominant parties to take affirmative steps to either prevent injury or assist others in vulnerable positions. "The hallmark of these relationships is that those who enter into them do so willingly, knowing that situations may develop which will require them to act in order to assist others" (Linden & Klar, 1999: 307). Police knowingly and willingly, by virtue of the position they hold, enter into reliance relationship where people rely on them for protection and relationships of control and supervision which require them to take steps to prevent injury and/or assist others who are in vulnerable positions.

A fiduciary relationship is a concept that arises where a person (the beneficiary) has placed reliance, confidence and trust in the hands of another (the fiduciary), so that the fiduciary may reasonably be expected to act with the utmost care towards the beneficiary. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, the Supreme Court recognized that the concept of fiduciary care can arise in any relationship where one person relies on another. In this situation, the fiduciary must act selflessly in the interests of the beneficiary. In this sense, a fiduciary position exists for the benefit of others; it is a position that requires him/her to act for or on behalf of that other person in some particular matter (Finn, 1977). It is important to note that a fiduciary is someone in a position of *legally* condoned power who can affect the *legal* position of someone else by legal means, and who, for those reasons, is obliged to consider the best interests of that other person before doing so (Des Rosiers, 2002). Fiduciary obligations cannot be applied to criminal actions such as a kidnapper/captive relationship. They also incorporate obligations where trust and/or discretion arises. "The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion" (Des Rosiers, 2002: 101). Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics outlined in *Frame v. Smith* [1987] 2 S.C.R. 99:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

"Fiduciary Duty is a juridical recognition of the fact that trust and loyalty between individuals can also be an essential component of a smoothly running society" (Young, 1994). The increasing failure of police to arrest and/or enforce protection orders, has resulted in a growing number of battered women bringing lawsuits against individual police officers, police departments and municipalities. The duty to protect those who are not able to protect themselves is one that everyone, morally if not legally, owes to society, but this duty is greater to those sworn as police officers. Their failure to act is particularly repugnant. A police/citizen relationship would involve a higher sense of duty since police officers already assume a greater risk threshold with respect to their employment. Police officers called in partner abuse occurrences have knowledge of the seriousness of the situation – i.e. threatening great bodily harm – which might be avoided with relatively little inconvenience to them (since it is part of their job). In addition, police officers also realize that they are more often than not the only line of defence for battered women, and that women who call the police (especially those with protection orders) obviously rely heavily on the police for their protection against violence. So is this sufficient enough to create a relationship to impose a duty of action on part of the police? Given that it is unclear where the law stands on this I'm not so sure. On the one hand someone "who hold[s] themselves out to the public as being prepared to give service, are subject to this responsibility" (Linden, 2001: 285). In addition, a higher standard of care is applied to those persons (such as the police) who represent themselves as having special skill and knowledge that allow them to perform tasks that are

normally beyond the capacity of the ordinary person (Osborne, 2000b). The public (and the courts) may reasonably expect such people to exercise a degree of behaviour commensurate with that representation. On the other hand, courts have been reluctant to impose such a duty.

In *DeShaney v. Winnebago County Department of Social Services*, [1989] 489 U.S. 189, the Court limited the state's responsibility to protect only those who are in the state's custody. This ruling was in line with most jurisdictions at the time and that did not provide any means of suing the state for failure to protect one person from harm by another. In *DeShaney*, a mother, on behalf of her son, brought an action against the Winnebago Department of Social Services after they had received numerous complaints from hospital personnel that her child had been abused by his father. As a result of his father's continual beatings, the child sustained brain damage so severe that he fell into a coma and is now profoundly developmentally delayed. The child's mother contended that the Department, because it was aware of the danger to the child, had an obligation to intervene and protect the child from his father. The United States Supreme Court, however, emphasized that the father, not the Department of Social Services, had harmed the child and held that since the child was not in the state's custody (i.e. not in foster care), the Department had no affirmative duty to protect the child – "a state has no positive duty to ensure that the individual's life, liberty, or property do not come to harm through other [than state] means". One positive thing that came out of the *DeShaney* case was that the Court recognized that the state

cannot selectively deny protective services to certain classes of people, because such a failure to protect may violate equal protection laws. "Thus, for example, where it has successfully been alleged that a police department has a policy that intentionally discriminates against domestic violence victims so as to afford them less police protection than other citizens, municipal liability may be found" (Esposito Eaton, 2001: 2a).

In a seminal case, *Thurman v. City of Torrington*, [1984] 595 F. Supp. 1521, Tracey Thurman brought an action against the City of Torrington, alleging that police officers failed to take appropriate actions in regard to repeated threats and assaults committed by her estranged husband in violation of a restraining order. According to the plaintiff, the officer's failures culminated in her estranged husband appearing and demanding to speak with her, in contravention of the order, and finally repeatedly stabbing her while she was waiting for the police. It was also alleged that when a single police officer did arrive, the husband, who was holding a bloody knife, was allowed to kick the wife in the head several times, drop their son on his wounded mother, and continue to wander around the crowd and threaten the wife. It was further alleged that it was not until the husband approached the wife while she was on a stretcher that he was arrested, and that the husband worked as a cook at a diner frequented by police officers, where he boasted his intentions to 'get' his wife and to kill her. The court awarded Tracy Thurman 2.5 million dollars finding that the city's police consistently afforded less protection to (1) a woman abused or assaulted by a

spouse or boyfriend, or (2) a child abused by a father or stepfather, than to other abuse victims and held that officials "having notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Failure to perform this duty would constitute a denial of equal protection of the laws".

In *Nearing v. Weaver* [1983] 295 Ore. 702, the plaintiff alleged that after being repeatedly stalked and assaulted by her violent husband, the responding police officers knowingly failed to obey Oregon's mandatory arrest provisions. The plaintiff further alleged that as a result of this, she sustained severe emotional distress and physical injuries. The court found that the statute (mandatory arrest provisions) "was intended to protect a specific class of beneficiaries" and that police officers were mandated to arrest as soon as there was probable cause. In addition, the court held that although the officers exercised judgment in evaluating complaints, they had "no true discretion as to whether to arrest". In effect, a duty towards the plaintiff arises from the statute coupled with the court order.

The issue of whether the police owe a duty to an individual, and not only the general public, was not directly dealt with in *Nearing v. Weaver*. One common obstacle to imposing tort liability on police for failure to enforce protection orders is the 'public duty doctrine'. This doctrine provides that if a duty is imposed on

state agencies and public officials, it is a duty that is only owed to the public generally. The duty owed by the police is to the public at large, and not to any specific individual. In the United States, for instance in *Ford v. Town of Grafton*, 44 Mass. App. Ct. 715, the court held that “while the town might have prevented the injuries, the town’s failure to do so was excluded from liability”. In addition, the court held that “Massachusetts General Laws specifically barred claims based on the failure to provide adequate police protection”. The court rejected the victims’ contention that “the act of the court, in issuing a protective order, constituted an assurance of safety” because no personal promises were made. In *Ellsworth v. County of Orange*, 2001 Cal. App., a case on appeal, the plaintiffs claim that the officers responding to a 911 call of suicidal threats by Ellsworth’s estranged husband (Slinger), owed no duty to the plaintiff with regards to her safety. A few hours after being dropped off at a motel, Slinger, who was quite obviously intoxicated, returned to Ellsworth’s home, where he stabbed her to death and then committed suicide. The court stated that generally there is no legal duty to protect, unless there is a special relationship, and indicated that they found no evidence that the police made promises to Ellsworth. Furthermore, the court found no evidence that “the risk of harm as the result of police negligence [was] something more than that to which the victim was already exposed”. One key aspect of this case, was the judge’s finding that it would have been impossible for the officers to foresee Slinger’s return to Ellsworth’s home, and thus, her murder. This is particularly shocking because Slinger was intoxicated, had already been to the house twice that evening, and because he had already

threatened suicide. In addition, Ellsworth had described her husband's persistent harassment and stalking, and that the police officers should have known that many abusers return to the victim's residences. Moreover, if there were no grounds for arrest (i.e. signs of a physical altercation), it would have been perfectly reasonable to take the offender into custody for his own protection because he was intoxicated and suicidal. If this option was impossible, then the police should have at the very least warned Ellsworth that Slinger was not in custody so that she could have chosen to leave her residence for the night, instead of lulling her into a false sense of security.

In Canada, in *Mooney v. British Columbia (Attorney General)*, [2001] B.C.J. No. 1160, Bonnie Mooney went to an RCMP office and complained about the threatening behaviour of her estranged common-law husband, Ronald Kruska. Constable Andrichuk received the complaint and after conferring with his supervising officer he informed Ms. Mooney that police intervention was not warranted. Shortly after, Kruska broke into Ms. Mooney's home, shot and killed Ms. Mooney's best friend, wounded one of Ms. Mooney's daughters, then killed himself. While the judge admitted that the police officer in question had fulfilled his duty to Bonnie Mooney, the court still held that "there can be no absolute immunity from risk or danger in this world, and no one can be expected to provide such immunity". Therefore, it was commonly held that there was no cause of action in negligence for police failure to arrest.

However, there is a major exception to this general rule. Where there is a special relationship between an individual and agents of a public body, a duty of care is owed to the individual. For instance, in the United States, *Souza v. City of Antioch*, 54 Cal. App. 4th 1009; *Roy v. The City of Everett*, 118 Wm. 2d 352,; and *Campbell v. Campbell, City of Plainfield et al.*, 294 N.J. Super. 18, were all cases where police were found not to be immune from liability because either they were aware of an existing protection order or because they were mandated to arrest through domestic violence legislation. In addition, in *Barillari v. City of Milwaukee*, 186 Wis. 2d 415, the court found that a promise to arrest, and subsequent failure to do so, results in “an assumption of the duty to act”. Other examples showing this is are in *Parrotino v. City of Jacksonville and the Office of the State Attorney*, 612 So. 2d 586, where the court found that a prosecutor’s office promise to a victim of a protection order, and the office’s subsequent failure to provide one, constitutes a breach in duty to care to the victim. The court also found that the prosecutor’s office was not entitled to immunity just because the decision to obtain a protection order is policy oriented, while the actual act of obtaining a protection order is operational. In *Baker v. City of New York*, 25 A.D. 2d 770, the plaintiff alleged that she called the police to her home and asked that her husband be arrested for his violent behaviour after an order of protection was given. The police refused, stating that the certificate was ‘no good’ and ‘only a piece of paper’. Shortly after, the plaintiff and her husband were scheduled for a family court appearance. She asked to wait in the probation officer’s office because she was afraid to be in the same room with her husband and the

probation officer denied her request. The plaintiff's husband shot and seriously injured her in the waiting room. The *Baker* court found that the plaintiff was a person identified by the order of protection as one to whom a special duty was owed and that a cause of action in negligence is justified. A special relationship is created by the mandatory arrest regulations and the issuance of a protection order. The relationship between the state and the woman is special because the police officer has a specific duty to arrest dictated by domestic violence legislation and a protection order which is court ordered and designed to protect the abused woman from the kind of harm which occurred. More specifically, "it is not a duty to *ensure* safety, but a duty to *try*" (Weir, 2002: 56). Thus, someone would be in breach of his/her personal duty if they did not take all reasonable steps for the protection others. While the duty is constant, the steps to be taken will vary enormously depending on the situation. In our case, the most important first step would be to conscientiously follow mandatory arrest policies.

Granting police immunity for their failure to arrest batterers where arrest is mandatory is counterproductive. Police immunity will not make officers follow pro-arrest policies, nor will it adequately contribute towards reducing violence against women. Without the enforcement mechanism of civil liability for failure to arrest, protective orders are not worth the paper they are written on (Edwards, 1989; Forell, 1991). If immunity is imposed, battered women will have the abstract right to have their abusers arrested, but no recourse when this right is not enforced. One final factor leading to a preference for arrest is the financial risk that failure

to arrest poses for police departments (Worrall & Marenin, 1998). On the other hand, the police have nothing to lose by following the regulations. Mandatory arrest policies backed by the threat of liability for failure to arrest result in positive police enforcement practices and sends a message to batterers that violations of protection orders will have serious consequences.

Consideration is to be given not only to the foreseeability of damage but also to the likelihood of it occurring. The reasonable person takes greater care where there is a strong likelihood of damage (Osborne, 2000b). Given the severity of the threatened harm to battered women, an officer's prudent conduct could mean the difference between life and death.

While critics argue that a deliberate act of a third party, even if foreseeable, may insulate the defendant from liability for what might otherwise be seen as the consequences of his behaviour, one may also ask whether it was negligent of the defendant not to take steps to avoid such intervention (Weir, 2002). On the other hand, if the deliberate act was 'the very thing' that the duty was imposed to prevent, liability may be established. By failing to act on behalf of battered women, the police themselves create a risk of injury, even if a third party (such as the abuser) is the person who actually commits a crime. While failure to act may amount to a crime, such as witnesses leaving the scene of an accident, holding the police criminally liable would be much more serious than a tort action.

Civil liability achieves a greater general deterrent affect compared to a criminal conviction, which achieves a greater specific deterrence.

In Canada, the courts have rendered the police subject to affirmative duties of action. For example, in *O'Rourke v. Schacht*, [1976] 1 S.C.R. 53, police failed to take steps to warn oncoming traffic about highway construction on the road and an automobile driver was injured. The court found that the officers were under a duty to take appropriate measures to warn approaching traffic of potential danger. More recently, in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Police* [1998] 39 O.R. (3d) 487, the police were held accountable in private law for discriminatory attitudes and practices leading to the negligent performance of a duty of care. *Jane Doe* also succeeded as a constitutional tort case – the police failure to adequately warn women was a result of discriminatory attitudes about women and sexual assault and therefore was a violation of s.15 of the *Charter*. *Jane Doe* was the fifth victim attacked at knifepoint and raped by the 'balcony rapist'. The serial rapes took place within an eight-month period and within a narrow geographical area – the Church-Wellesley neighbourhood of Toronto. By the time *Jane Doe* was attacked, the police had gathered considerable information about the pattern of sexual assaults including the specific type of women targeted: white women with dark hair, living alone in apartment buildings with second or third floor balconies. In *Jane Doe*, the court held that the police owed a duty of care to the plaintiff since she was one of a specific group of women who, to the knowledge of the police,

were at specific risk of harm and they failed to warn her or protect her in some way. In addition, the trial judge noted that the decision was consistent with the statutory obligation of the police to protect citizens. Police officers are subject to duties imposed by the Police Act and by common law. By section 2 of the *Police Services Act*, R.S.O. 1990, c. P.15, the core police services are: crime prevention; law enforcement; assistance to victims of crime; public order maintenance and emergency response. “Jane Doe’s lawyers further argued that the first duty of a constable is to prevent the commission of a crime. This is not merely a social obligation, but also a legal one, and non-feasance¹⁰ in this regard amounts to misfeasance¹¹” (Randall, 2001: 30). *Jane Doe* marks an important change development in the tort liability of public authorities and signals a different judicial attitude to the accountability of the police. It is an attitude that is probably more attuned to the views of Canadian citizens about the accountability of public authorities and to the public’s interest in effective policing.

Historically, groups such as judicial decision-making bodies, professional bodies acting in quasi-judicial capacities and government institutions such as the cabinet and the Prime Minister have been immune from tort liability. In *Anns v. Merton*, Lord Wilberforce contrasted ‘operational’ functions, for which there could be liability, and ‘policy’ functions, which would be immune from negligence liability. The groups listed above are considered to be policy-oriented and assumed to be operating under larger policy concerns. “The exclusion of liability is better viewed

¹⁰ Non-feasance is the failure to act.

¹¹ Misfeasance is performing an act poorly.

as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters” (Linden, 2001: 626).

“While many have urged that governments should be liable in tort the same way as anyone else, others have contended that government business is different from ordinary business and therefore must, in many cases, be judged differently. It will be seen that, as usual, a compromise has been reached: some types of activities, policy functions, have been rendered immune from negligence law whereas others, operational functions, have been subjected to it” (Linden & Klar, 1999).

While general liability is to be imposed on the Crown ‘as if it were a person’, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability. However, on the other hand, every government decision should not be designated as a policy decision resulting in full immunity. The duty of care should apply to all public authorities unless there is a valid basis for its exclusion. In addition, Lord Wilberforce indicated that there was a distinction since many ‘operational’ powers had in them some elements of discretion. The more ‘operational’ a power may be, the easier it is to impose a duty of care. Under this reasoning, police officers would be considered to have ‘operational’ powers because they exercise discretion routinely.

It is my argument to make public authorities, in particular police departments, liable as if they were a person. While it is practical to not impose a strict liability on police officers to protect every person from crime, we know that the police cannot be in every place at all times. It is reasonable to impose a duty on police to protect those who are in known dangerous situations. As found in the *Jane Doe* case, one basis for the finding of liability was there was a specific danger

posed, not to a specific person but a specific group of people. So if a court is willingly to impose liability with reference to a group of people, it is not too remote to see the imposition of liability with regards to known individuals. What we are seeing here is that some courts are still reluctant to impose a duty of care on public authorities such as the police. The question of immunity seems to have worked itself out in the U.S. cases presented here. The distinction between policy and operational decisions is becoming clearer. We see that American case law seems to dominate in this area as it has been difficult to find relevant Canadian case material. In Canada, courts would most likely continue to follow the policy/operational distinction that stems from *Anns*. The question still remains if courts are likely to recognize a 'special relationship' to impose a duty on police departments to protect battered women. Affirmative cases presented here, especially *Jane Doe*, are encouraging.

There are two significant limitations to tort law. First, the substantive law may be incapable of producing the desired outcome. For instance, there is the hurdle of overcoming the existing standard that police only owe a duty to protect society at large, and do not owe a specific duty to any particular individuals. Second, there are economic restraints with litigation. Tort trials are costly, and many women do not have enough money to pursue litigation. While plaintiffs may be able to recover court costs through a successful litigation, a court trial still must be financed until the end of the trial. Hopefully, claimants who cannot afford lengthy litigation may be assisted by legal aid, advocates and legal services.

5.4 Conclusions

Like the United States, Canada is becoming more litigious, and is seeing a trend towards increasing liability for government institutions (Lowi, 1993). The concept of fault-based liability has “been expanded to cover the widest range of societal activities, and virtually every citizen is subject to a duty of care to prevent foreseeable injuries to others” (Osborne, 2000b: 18). Police officers are no exception. A police officer stands in a special position to the public and may have a duty to take affirmative steps for the protection of battered women. The danger to women who have obtained protection orders is foreseeable. A pattern of abuse has already been established. A court has issued a protection order because a woman is especially vulnerable now and has demonstrated a higher risk by the abusers’ conduct.

Legislation and regulations do not normally impose a duty to carry out certain tasks or services. They are usually written in terms of what the government of public authority may do, not what they *must* do. However, mandatory charging policies and domestic violence legislation have gone to great lengths to make it explicitly clear what is expected of police officers to protect abused women. Successful tort claims in this area may lead to a legal environment that encourages and facilitates the liability of third parties, such as police officers, who are in a significant position to prevent crime before it is committed and protect abused women.

Tort law offers a specific educational role. Litigation arising from police non-enforcement of protection orders and/or not following mandatory charging policies is of particular interest to a small group – police departments and individual officers. This type of litigation may profoundly affect conduct – that protection orders must be enforced – and have an impact on the public's well-being and safety. "One of the strengths of tort law, as with other common law subjects, is its ability to be flexible and fluid, to represent societal concerns and values as they change" (Klar, 2003: 2).

There has been concern that expanding the doctrine of duty of care to include public authorities such as the police would open up the 'floodgates of litigation'. However, the courts have already been cautious to allow only those claims that have shown characteristics of negligence will be found to be liable. In addition, the dissenting opinion in *Nearing v. Weaver* warned that "imposition of personal liability upon officers and upon their employers for failure to arrest could result in an inefficient use of scarce police resources in a period of social crisis or high crime". There is no evidence that these fears have materialized and today mandatory arrest should be considered routine.

Having limited access to criminal law remedies that are inherently patriarchal and have not taken into consideration the material and social realities of women's lives, battered women have been historically pushed into or chosen to deal with

their concerns through other legal means such as civil restraining orders and now new remedies such as emergency protection orders. Has this trend, at best been 'special handling' or at worst 'legal ghettoization' of women's concerns resulted in any special judicial understanding of women's predicament as a group? As in the case of most of feminism's long history of engagement with the law, the victories have been few and far between. While a police-citizen fiduciary relationship may be useful in establishing a cause of action, what should the fiduciary responsibility be? Should it be between police and all battered women? Should it be between police and battered women who have obtained protection orders? Or should it be between police and all women generally? Since an undertaking of a responsibility may already result in a duty in tort establishing a police-citizen fiduciary relationship may not be necessary.

Does establishing a police-citizen fiduciary create a dependent or infantilizing relationship? There is a strong argument that relying so heavily on the police reduces women's agency and engages a patriarchal legal system that quite obviously does not want to deal with them. Alternatively, such a relationship does not necessarily single out women as a special population in need of protection. Successful tort judgment reaffirms the courts and legislatures' intentions to denounce and prevent partner abuse. It also demonstrates that we expect the police to do their jobs properly while at the same time showing abusive men that their actions have consequences. Moreover, at some point everyone depends on someone else. Many women who call the police as a last

resort do so after having tried many avenues to resolve the situation on their own.

“There are no ready or easy solutions to the issue of public authority tort liability. A too rigid and restrictive approach that precludes negligence suits against public authorities justifiably will be seen as a regressive step, back to the days ‘when the King could do no wrong’” (Klar, 2003: 283). This would be especially unfair to those who suffer serious injury as a result of clear cases of public authority negligence. “The open-ended nature of fiduciary doctrine holds that no relationship may be precluded from being classified as fiduciary because it does not fit into established classes of fiduciary relationships or because the actors involved are not traditionally associated with fiduciary relations” (Rotman, 1996: 11).

The crucial question is whether the defendant behaved reasonably in the light of all the factors. The non-enforcement of protection orders by police officers is unreasonable behaviour. In protection order violation cases, abused women have acted to separate themselves from their abusers and their decision must be enforced. A decision to provide civil liability is justified as implementing the legislature’s purpose of protecting abused women through specialized domestic violence legislation and mandatory charging. This creates a duty to benefit a special class of persons – abused women. The imposition of civil liability on police officers for failing to properly enforce protection orders demonstrates how

the law can change and grow in response to evolving understandings of problems such as partner abuse. Battered women are part of a particularly targeted group, and therefore, known to be at risk. The systemic problems associated with the enforcement of protection orders, mandatory arrest, and the inadequate resources that police allocate to partner abuse results in the police creating the opportunity for and contributing to the harm suffered by battered women. Civil liability is a necessary mechanism for the accountability of public authorities. Tort actions, are one way for battered women to “force external public scrutiny of insular and self-protective institutions such as the police” (Randall, 2001: 79).

Relying on the legal system, from a socialist feminist perspective, is a necessary evil. On the one hand, the police are obviously necessary as an institution of last resort to help women who are in need of protection and on the other hand, by advocating recourse to the courts in order to compel police officers to act in these cases feminists are reaffirming established patriarchal relations. As a result, engagement with tort law may correctly be characterized as a liberal feminist program, but it may also be portrayed as a socialist feminist approach. Tort law has potential ability for investigating systemic issues regarding discrimination against women. While criminal liability is very individualized, tort law could interrogate the criminal justice system and its’ officials by moving attention toward the more broad and systemic discrimination that police officials exhibit. Successful tort judgments involving awards of damages benefits all women by

compelling police officers to enforce protection orders and in particular women who are marginalized, by ensuring they receive equal protection as more privileged women have historically received. Perhaps this is an irony – that the punitive sums being awarded to an individual woman reinforces liberal legal practices and makes it seem as if this is a success for women whereas that money could have been better used to assist women in shelters and protect them from abusive partners in the first place. The lack of police enforcement and then the subsequent lack of legal sanctioning for failing to act on these directives is more evidence that the patriarchal system in law is alive and well and that gains by women through tort actions are actually the exception rather than the rule.

5.5 Summary

In this chapter I have given an overview of tort law, including concepts of negligence and foreseeable risk. Tort law, through civil liability, allows for the police to be held accountable for non-enforcement of protection orders. Successful tort claims against police officers has the potential to compel officers to fulfill their mandate and enforce protection orders properly. In addition, I have explored the possibility of establishing a police-citizen fiduciary relationship. While such a relationship would contribute to establishing a breach of duty, it may not be necessary given that an undertaking of responsibility may already be sufficient to result in a duty in tort. Moreover, the establishment of a police-citizen fiduciary relationship should be approached cautiously in light of the potential of creating an infantilizing or dependent relationship between battered

women and the police. The following chapter summarizes the findings from each chapter, reiterates the most important points of this thesis and gives some concluding thoughts.

6

Conclusions

As feminists, lawmakers and policy makers struggle to develop effective strategies to combat the problem of partner abuse, they encounter strong debate about the extent to which law, law enforcement, and the criminal justice system should play in attempting to solve the problem of partner abuse. The law is an important focus for feminist efforts, both in terms of its potential for reforms and its ability to challenge masculine power.

The institution of the family has long been treated as a separate sphere, and thus, considered immune from societal interest and intervention. We also know that viewed from the victims' perspective, women may choose to stay in an abusive relationship for a variety of reasons. These include: lack of money, transportation, housing and childcare; responsibility of children; fear of being killed; inability to speak English and inadequate job skills; social isolation; religious prohibitions; cultural pressures; and denial, self-blame and shame are all factors that influence women's decisions.

"Whatever the issue, feminists have gained a great deal by saying, 'we are women', and this is what 'women' want. This belief in some ground of shared experience is the social basis from which any sustained political struggle must

come” (Snitow, 1990). Collective political action is necessary for any social movement. Civil law has the potential for mobilizing women as a category through mechanisms such as ‘class-action’ lawsuits in contrast to criminal law which cannot deal with the issue of group claims of harm or punishing en masse. From a socialist feminist perspective, this offers more potential for reviewing the group affinity that women share. Male violence against women is encouraged through race, sex, and class inequality and media glamorization of violence. In addition, women are constrained by the structure of household labour and economic oppression. Enhanced police protection is one limited way to assist women in gaining independence – however, it will not change the structural conditions that perpetuate male violence against women and women’s economic oppression.

From a socialist feminist perspective, reducing economic inequality is key to preventing partner abuse. Economic disparities fuel inequality in relationships, which contributes to abuse. Women who are abused and who also face financial hardships face many more barriers than women who are abused but who are financially independent. They experience inadequate resources, the fear of stigma based on class position, severed relationships with the criminal justice system and being forced to stay in the home – where they are most vulnerable. Giving women economic tools such as social programs that focus on housing, education, and health care to boost economic development of abused women will affect the differing power structures that abused women experience. Women need financial independence from men to secure their own safety, thus services

such as free daycare, training and education programs, increased social assistance funding and additional resources such as shelters, legal aid and counseling are essential.

Mandatory charging policies and domestic violence legislation have gone to great lengths to make it explicitly clear what is expected of police officers to protect abused women. The statute coupled with the issuance of a protection order creates a duty owed to battered women. In protection order violation cases, abused women have acted to separate themselves from their abusers and their decision must be enforced.

“Only the police have the mandate and resources to provide personal security twenty-four hours-a-day, seven days-a-week” (Ursel, 1998: 74). Mandatory arrest and enforcement of protection orders accomplishes two significant objectives – it temporarily incapacitates abusive men and it denounces partner abuse. Civil domestic violence legislation is also an important and potentially empowering tool for women who are victims of partner abuse. Moreover, stopping the immediate risk of violence and seeking protection orders is an essential first step in combating partner abuse. A paternalistic attitude would argue that since stopping partner violence is a societal goal and pro-arrest aids in achieving this goal, arresting the abuser, while it may be contrary to some women’s true wishes, is appropriate (Forell, 1991). However, as discussed in chapter four, when arrest goes against poor and minority women’s wishes, pro-

arrest and mandatory charging policies become problematic. This is why every effort should be made to accommodate these women by assisting them with financial resources, housing, counseling, translators and medical attention.

Protection orders by their very nature are concerned with matters of urgency. My assumption has been that women who take steps to obtain a protection order and who call the police when an order has been violated desire formal intervention and police protection. As part of their crime prevention role, police are accorded a formal responsibility for citizen safety that includes offering protection from violent crime. It is important to find a way for women to be free of violence without compromising women's independence. From a socialist feminist perspective, increased police surveillance of women with protection orders would increase state intervention in women's lives. Conversely, there is an argument that respecting battered women's calls for help is consistent and respectful for their autonomy. The suggestion that the police should give the protection of women a central priority may be criticized for overturning their 'neutral' or objective approach. We have seen that the police objective approach supports the status quo of gender inequality. Further, providing women with appropriate protection and making them a priority need not compromise the legal rights of abusive men.

Feminist-inspired litigation offers potential for success. It provides an educational role by holding individual police officers accountable and affects conduct more

generally by setting a standard of professional conduct. Moreover, it has positive and practical financial implications for women. Tort law offers a viable alternative in contrast to strengthening the criminal justice system which is quite often contrary to women who are already disadvantaged by other structural forces such as race and class.

Civil liability is a necessary mechanism for the accountability of the police. Judgments against police officers will compel officers to fulfill their mandate and enforce protection orders and domestic violence legislation properly. To further encourage officers to fulfill this duty, police officers are relieved of civil liability for arrests, i.e. suits alleging malicious prosecution, but officers can still be sued for non-arrests (Brown, 1988). So it would be logical then, that police would try to shield themselves from civil suits and disciplinary measures by enforcing protection orders as mandated. In principle, tort law offers a remedy to police non-enforcement of protection orders and mandatory arrest. Successful tort claims should ensure uniform police decision-making with regards to these matters and secure women's safety. However, we know that there are economic restraints to litigation, so advocacy and legal aid provisions are necessary. Tort law cannot be expected to compensate everyone for all the losses generated by the intentional or negligent conduct of others. That would exceed the financial capacity of defendants. This is why courts have limited tort actions by creating thresholds which must be met to bring tort actions. One of these thresholds is that tort law draws a line between compensable and non-compensable damage.

For instance, claims for damages in which a physical injury was never sustained is very difficult to win. Awarding compensation for personal injury is more easily justified than awarding compensation for a person's public embarrassment or humiliation. On the other hand, compensation and awards resulting from successful tort judgments provides symbolic importance against police minimal efforts to protect battered women and will assist in combating against the feminization of poverty after women separate from abusive relationships.

There is a valid argument if whether the resources used to run the tort system i.e. court costs, would be more wisely spent if they were distributed through the welfare system. While this may be an ultimate goal, it may not be realistic. This would require widespread social reforms which is unlikely to happen for political reasons. It is much more likely for the courts to expand intervention and provide compensation and relief to women through prescribed 'legalistic' terms, such as tort law. It seems like a less drastic and more acceptable even though it will be a short-term solution. "Legal change tends to be evolutionary rather than revolutionary" (Cain, 2003: 18).

Despite some welcome change in police conduct towards partner abuse, many battered women's calls for help still do not result in arrest. These women need means of both making police departments do the right thing and receiving compensation when they do not. Making it expensive for the police not to arrest

remains an effective way of forcing police departments to adopt a policy and practice of routinely arresting abusers (Forell, 1991).

The very act of producing knowledge about partner abuse is an intrinsically political process. Partner abuse occurs throughout the world because we live in societies that tolerate and sometimes encourages the battering of women by men (Hyman, 1999). The eradication of the violation of women will require a radical change in societal behaviours and attitudes in respect of women (MacDonald, 1992). There is no single response to partner abuse and this paper offers no insightful ways of eradicating violence against women. Instead it offers a more practical mechanism to establish police accountability and reforms in police enforcement practices through tort law. It is my hope, that despite the historical bias the law has shown women, it can now afford some protection and reparation for abused women. "Law is not a pre-existing, natural, given phenomenon, but that it is socially constructed, and that we can change our laws and the assumptions upon which they are based. As law changes, it can, in turn, alter social practices and policies that may have adversely affected a disempowered group such as women" (Finley, 1989: 42). Successful tort claims against the non-enforcement of protection orders demonstrates how the law can change and grow in response to evolving understandings of problems such as partner abuse.

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