The Annual Review of Interdisciplinary Justice Research

Volume 2, Fall 2011

Edited by
Steven Kohm
The University of Winnipeg
Centre for Interdisciplinary Justice Studies (CIJS)
ISSN 1925-2420

Table of Contents

Othering or Protecting? The Discursive Practice of Saving Youth Prostitutes

Kelly Gorkoff, Criminal Justice, The University of Winnipeg and Sociology and Anthropology, Carleton University

Introduction

In 1987, John Lowman suggested we 'take young prostitutes seriously.' He claimed that there was a need to place an understanding of youth prostitution in the realm of the material and political and understand how age is unique to legal subjectivity. He suggested youth prostitutes not be understood in terms of their 'deviance' alone. Some twenty-four years later, I ask, "Are we serious yet?"

Currently, young people involved in prostitution are most often studied as victims of sexual exploitation and abuse, or as deviant and at-risk. The resulting dialogue is one of victimization by social circumstance such as neglectful families, poor socialization, improper schooling, or by predatory sex offenders. There is very little debate in the literature which offers a different way of understanding youth prostitution. While there is a wealth of policy discussion and theoretical debate about adult prostitution, there is a dearth of debate on youth prostitution. Sex work for adults is a contested discursive field but sex work for youth is dominated by a victimizing discourse. This paper examines what distinctions between adult and youth prostitution reveal and conceal about the lives of young people involved in prostitution, and the way all young people are represented, constructed, understood, and governed. I argue we are not yet serious.

In this article I want to suspend the notion that child saving is automatically productive. I argue that it has taken different historical forms and contend it is productive to think about various child-saving mechanisms as discursive practices. I aim to understand how the protection mechanisms directed toward youth prostitutes are constituted as well as the unintended immediate (punishment and discipline) and long term (denial of agency) consequences of protection.

This paper does three things. First, it examines the construction of the contemporary victim discourse of youth prostitution by examining child development literatures and feminist theorizing of prostitution. Second it examines how this knowledge is taken up in social policy aimed to protect youth prostitutes, highlighting child/youth prostitute saving as a disciplinary practice. The paper concludes with some thoughts on effects of this disciplinary practice and asks questions about how this intersects with other forms of youth governance.

Constructing the Contemporary Discourse of Youth Prostitution

Examining the trajectory of studies on sex work/prostitution gives us context through which to view changing discourse of youth prostitution, how it is linked to broader discourse on child/youth development, and how specific cultural, historical, and political circumstances give rise to differing truths. Discourse on youth prostitution has variously located youth among systems of prostitution: as individually responsible for their behavior, as victims of circumstance, and as victims of sexual abuse that leads to prostitution. The resulting subject (the youth prostitute) is constructed as promiscuous, passive, or risky. I claim the contemporary understanding of youth prostitution as a form of child abuse/victimization emerged through specific constructions of child development and feminist conceptions of sex work and patriarchy.

At the turn of the century, all prostitutes were regarded as immoral and profane. This gave way to mid-century con-

sideration of child/youth prostitution as a form of delinquency. The victimizing discourse took off in the 1980's and was first identified in Canada in the 1984's Badgley Report which considered youth prostitution to be sexual abuse of a young person rather than a case of delinquency by a youth. The victimization discourse has changed and today youth prostitutes are considered sexually exploited youth with the effect of defining the experience of sex work for young people as one of exploitation. I suggest that the discursive struggles leading to this contemporary understanding are part of a broader set of shifts in the meaning of sex work debated in the feminist community and the identification of causes (and effects) of improper child development.

Discourse defined by Foucault (1970; 1972) is the general domain of all statements, sometimes as an individualizable group of statements and sometimes as a regulated practice that accounts for a number of statements. These utterances form a grouping of 'things' such as the discourse of feminism or discourse of child development which are considered by Foucault as sets of structures and rules. We categorize and interpret experience and events according to these structures and by doing so lend the discourse strength or perhaps provoke a discursive struggle. Discourse is not the equivalent of language. It does not translate reality into language rather it is a system which structures the way we perceive reality. The regularities which we perceive in reality should be seen as the result of the anonymous regularities of discourse which we impose on reality (Mills 2003:55). Framing of and shifts in law and policy are not simply reactions to knowledge/information, but instead are grounded in discourse and become discursive practices. As contested definitions of behaviour take a new legitimacy, institutions such as law and social welfare take on these definitions and discourses authoritatively giving them power and constituting their form. Using the concept of discourse, we can ask questions such as how western child development literature structures the action of children and parents and social policy creating juridico-political dimensions of child protection. In examining contem-

porary discourse of youth prostitution and its resulting set of discursive practices, we attend to the idea that defining or judging youth prostitutes as deviant/risky/victims is filtered through the discursive structure of child development. Child development assigns meaning to the acts of youth prostitution. Similarly, feminist discourse provides a set of meanings about sex work.

Foucault (1980a) argues discourse is both an instrument and an effect of power where discourse structures things through its effects, but it is never uniform or stable. An important effect of discourse is what is excluded. In the production of knowledge, the criminological expert or child development expert excludes other ways of knowing. Therefore discourse exerts power by excluding other ways of knowing. However, Foucault cautions us to think more continuously about discourse and power. He says, 'what is said must not be analyzed simply as the surface of projection of power…. Indeed it is in discourse that power and knowledge are joined together…. And for this very reason we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable (1980a:100). To be specific, we should examine the world of discourse as an array of discursive elements that can come into play in various strategies (1980a:101). Thus the victimizing discourse of youth prostitution is not a mere imposition of protective authority utilizing knowledge. Rather Foucault suggests the distribution of discourse must be analyzed with the things said and those concealed, the enunciation required and those forbidden, that it comprises; with the variants and different effects according to who is speaking, his position of power, the institutional context in which he happens to be situated. (1980a:103). This article examines child psychologists, sociologists of child development and lobby groups including experiential youth and radical feminists who make particular claims about youth prostitution and are recognized as expert. It's important to note that alternative discourses are not disqualified but are to be considered building blocks. Foucault's rule of the tactical polyvalence of discourses (1980a:102) asks us to nominally

question discourse on two levels – their tactical productivity (the effects of power and knowledge they ensure) and their strategical integration (i.e. why are they necessary to use in a given moment). This requires us to think about sexual exploitation of young people not as merely something to be controlled or known but rather as a transfer point of relations of power between youth, adults, advocates and protectionists. This article is a foray into identifying the changing discourse of youth prostitution, its discursive struggle, and tactical polyvalence. The discourses examined below are to be thought of as part of a process of power relations that frame the idea of youth prostitution as a recognizable problematic occurrence.

With the rise of professional scholarship and the expansion of the welfare state after World War II, we witness the development of two discourses which I argue co-determine the contemporary dominant discourse of youth prostitution. These include first, the expansion of child development and youth transition studies and its link to deviance, and second, feminist theorizing of sexuality, sexual abuse, and systems of patriarchy.

Child and Youth Development Studies: Solidifying the Proper Way to Grow Up

In this section I'm interested in understanding how age is deployed and in examining how these child development discourses position young people as a group marking them off for regulation and governance, and how political power/knowledge networks facilitate, constrain, and arrange that deployment (Bell 1993). Therefore, instead of thinking of childhood as a naturally existing category, one that is revealed through research that aims to be progressive (i.e. raising better and healthier children) I examine child development literatures as a set of power knowledge networks that are instilled in the historical process of bringing into practice developmental conceptions of childhood and appropriate governmental arrangements that facilitate this. In interro-

gating child development discourses I do not deny there are actual physical differences in a child of six and a child of sixteen, but I am claiming that we know those differences and experience those differences through discourse of development and the structures it imposes on our thinking.

At the turn of the century we witness the beginning of social distinction and social exclusion by age. For example, it is here we see the establishment of compulsory schooling, reformatory schools, youth courts, labour law, and youth delinquency legislation. Much of this distinction was predicated on moral conceptions of children and youth as innocent, sacred, different from adults, and in need of proper guidance. Moral notions of childhood eventually give way to scientific conceptions of childhood. It is here we witness an entrenchment of adolescence as a distinct social stage and child and youth are marked off from adults (Goitleb 1983; Aries 1962; Smandych 2001). Scientific knowledge of children spur the development of a system of relations (legislatively and socially) based on the differences of adults and children. In *Policing the Family* (1980) Donzelot argues a tutelary complex establishes to facilitate, constrain, and arrange childhood. He argues that this complex changes the relationship between children and their parents and the state. No longer is the domain of care and control the patriarchal father, but instead the complex of medical professionals, psy professionals, educators, and social workers that govern children through families. This tutelary complex or network of knowledge and advice given to parents in terms of child development is to enhance or help parents fulfill their 'natural' duties.

Donzelot agues that the discourse of childhood development appears natural but we must think about what might appear as conventional power as political. Developmental ideas like those found in psych and medical professions represent a discursive structure through which we filter experiences of young people and their relationship to families and the state. These relations of power and discourse solidify childhood/adolescence an object of governance. Bell suggests that

child development knowledge/claims is a political way of maintaining normalized social institutions (1993:394). The development and expansion of academic disciplines and the professional discourses of social work and psychology have been responsible for developing a particular power knowledge network housed as a discourse of adolescence.

The discourse of adolescence changes as research into child development burgeons and the development of interest groups and research specifically into age flourishes. Smart (1999) discusses the ongoing heightened sense of concern for the moral welfare of children in philanthropic circles and how medical discourse recognizes sexual abuse as early as 1910. She suggests that early Purity campaigners were concerned with young women who prostituted in purely moral terms. In Victorian times and at the turn of the century, studies of prostitution were not divided by age (Sanger 1869; Walkowitz 1980, 1992; Bell 1984; Agustin 2005). Women of the night were categorized based on where they worked, how they dressed, and if they had disease, but age was rarely a primary concern. Most women[1] who worked were viewed in some way as profane, immoral, and in need of saving. Indeed a large philanthropic movement of middle class women developed to save lower class, misguided women who prostituted (Walkowitz 1992; Mahood 1990; Agustin 2005). There is no specific difference between young people and adults who prostituted and all prostitutes were profane.

Smart (1999) argues that as medical discourse and studies of adolescence develop, newer conceptualizations of 'harm' begin to take root. Harm is conceived not as morality, but as individual physical harm which means harm to proper developmental pathways. This is variously researched as both delinquency and victimization. Adolescents who engage in behaviour that lies outside of the limits of acceptable boundaries are labeled deviant (Tanner 2001). Young women involved in prostitution become located within deviance

1 Research on males involved in systems of prostitution at this time appears non-existent.

studies and their behavior defined as immoral deviance.[2] While discourse on prostitution at this time conceptualized all prostitutes as profane, immoral, and diseased, youth prostitutes were regarded as doubly deviant, first by virtue of exchanging sex for money and second because they openly resisted the proper behaviour of young people. Youth prostitution thus comes under dual discourse – the prostitute as profane and youth as delinquent.

Early studies in delinquency were tightly associated with developmental studies. Developmental psychology is concerned to understand universal stages of development, normal and abnormal pathways of development, identity formation, normative behavior, and the relationship between social and biological maturation (Wyn and White 1997:8). These studies equalize social personage as a biological reality. As brain functioning and the body matures, so does the social person. Children and youth are thus recognized as non-adult, as pre-social, as powerless and vulnerable, and considered deficient compared with adults. If this pre social self exists under adverse or dysfunctional care, children and youth will become rebellious, improperly developed, and irresponsible. The transition time between childhood and adulthood, loosely termed youth-hood, is often recognized as having an inherently problematic nature. The understanding of youth prostitution is vetted through this discursive field/structure of the storm and stress of adolescence. Deviance (including prostitution) is regarded as both an outcome and a cause of improper and disrupted development (see Smandych 2001).

Based on these developmental understandings of youth, prostitution research focused on causes of entry into systems of prostitution such as childhood experiences particularly of neglect and abuse[3] and social environmental factors (such as

2 This is evidenced in such work as W.I. Thompson's 'The Unadjusted Girl' which concluded that female delinquency is a sexual problem and one of lower class marginalized girls who worked to secure consumer goods. See Sangster 2001 for an examination of studies examining regulation of female deviants in Ontario.

3 This typical pathway is debated in the literature. Brannigan, Knafla, and Levy (1989) were inconclusive in their Calgary study, while Hoyt, Ryan and Cauce

lack of education and experiences of poverty) which disrupt proper development. Academic literature on youth prostitution has almost exclusively focused on the types of youth that do it and why and how they get there. Empirical and descriptive studies on age of entry (which tends to range between 14 and 18[4]) and numbers of youth on the street (ranges from 800 to 2000 per year in urban areas[5]) dominate much of the literature. This research variously concludes that childhood experiences of neglect, sexual and physical abuse[6] and lack of education cause prostitution. Research on delinquency tries to establish causal links between running away and youth prostitution (Tyler, Hoyt, Whitbeck and Cauce 2001; Unger, Simon, Newman, Montgomery, Kipke, and Alboronoz 1988; VanBruncshot 1995; Farrington 1990a, 1990b, 1993). Research examining runaways and school dropouts suggest that youth who engage in prostitution experience relative deprivation, relegating youth prostitution is a deviant subsistence strategy (Farrington 1996; Weisberg 1984; Hagan and McCarthy 1997; Sullivan 1988; 1986). The primary discourse tells us that youth prostitution is the result of disrupted and dysfunctional families, mental inferiority, dropping out of school, inclinations to promiscuity, uncontrollable and unregulated sexuality, and running away. Thus, prostituted youth have problems that require intervention at the level of the youth themselves. Scourfield and Welsh (2003) argue that literature on dysfunctional families and neglect promotes a shift away from government of youth through the family as Donzelot claims, to government of the family in the form of child protection services. This literature situates families as

1999; Whitbeck, Hoyt and Yoder 1999, Weisberg 1985 conclude neglect and abuse cause one to prostitute. Gemme et al 1984

4 the Federal/Provincial/Territorial Working Group on Prostitution 1998 found average entry age of 14-15.5 years. McCarthy 1995 found average age of entry 15 and Benoit and Millar (2001) and Caputo et al 1994 found 18 and 17.8 to be the average age of entry.

5 McCarthy 1995. Saskatoon Street Workers Advocacy Project 1996, POWER 1994.

6 Chesney-Lind and Sheldon 1992; Schissel and Fedec 1999; Brannigan, Knafla, and Levy (1989) Hoyt, Ryan and Cauce 1999; Whitbeck, Hoyt and Yoder 1999, Weisberg 1985.

dangerous spaces where members may be in need of support.

Since the 1990s youth prostitutes have been defined in terms of their risk categories (Tyler et al. 2001; Biehal and Wade 1999). Developmental psychology is not replaced, but used as a way to understand risk. Studies of youth prostitutes confirm the risky categories to be dropping out of school, running away from home, a history with child welfare agencies, history of abuse in their home of origin. When these conditions present themselves, the risk of youth prostitution increases. While these are similar to the causes of prostitution noted above, they differ. The difference is representative of a societal shift from social welfare societies to a risk based one (Castel 2001; Rose 1996; Vaughan 2000). Thus there is a subtle shift from studying systems or social structures such as families and sexuality which create problems for proper development of youth (or youth as having problems) to occupying categories of risk (youth as being problems). This is an important shift which does not change the basic content of child development discourse but the techniques of government move from the family to the individual. Individual risk management exerts itself not in a universal fashion (i.e. improving education or support for families), but on the individual herself to correct her behaviour and become a self regulating citizen. Categories of race, class and gender are subsumed under risk. As Kelly argues, discourses of youth at risk are framed by the idea that youth should be a transition from normal childhood to normal adulthood (2001:24).

Coinciding with globalized social relations, the issue of youth prostitution also claimed the global stage beginning in the late 1990s and continuing into the 2000s. Saunders (2005) examines how child/youth prostitution changed from an identity – a youth prostitute – to an acronym – the Commercial Sexual Exploitation of Children (CSEC). This term developed as a result of coalitions, working groups and international non-governmental Organizations (NGO's) curiously similar to the purity and philanthropic movements at the turn of the century. However, they are movements armed with

knowledge of practices that harm proper childhood development. On a global level, youth prostitutes were regarded as victims of pedophiles, sex tourists, local governments, and international economics. Two world congress meetings on commercially sexually exploited youth produced rights documents urging countries to address this concerning issue. *Save the Children Canada* and its *Out of the Shadows and into the Light* project has played a significant role in contributing to a victimizing/risky discourse of those involved in prostitution in Canada. Run by experiential youth, it is dedicated to recognizing that

> The term child or youth prostitute can no longer be used. These children and youth are sexually exploited and any language or reference to them must reflect that belief. We declare that the commercial exploitation of children and youth is a form of child abuse and slavery (Bramly et al 1998:8).

An examination of the trajectory of understanding youth prostitutes through discourses of child development suggest that youth don't exist independently of the power knowledge formations that constitute youth as a subjectivity. Indeed we cannot understand youth prostitution without examining age as a local centre of power knowledge and how power knowledge relations transform social relations. Said otherwise, youth prostitutes are known only through their deviance/victimization and the youth prostitute is brought into being in the structure of child development discourse.

Feminist Discourses of Prostitution: Absent Youth

A primary goal of feminism is to understand gendered power. Although there are various conceptions of gendered power, feminism as a discourse agrees power is gendered. Street prostitution was initially defined as vagrancy: Criminal Code s.175(1)(c) read: "Every one commits a vagrancy who… being a common prostitute or nightwalker is found in a public place and does not, when required, give a good account of herself." The equating of prostitution as a moral offence was strongly rejected by feminism. The majority of feminisms

regard prostitution as coercive, dominant, and restrictive. Vagrancy C was repealed in 1972 because it applied only to women, and thus contravened the 1960 Canadian Bill of Rights. It was replaced by the "soliciting law," which read: "Every person who solicits a person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction" (Criminal Code s.195.1).

Although a step forward in recognizing prostitution was not a moral offence, feminists critiqued solicitation laws arguing they did not reflect the exploitive nature of sex work and had the uneven effect of holding prostitutes, not their clients, responsible for cases of prostitution. On December 20, 1985 the "soliciting law" was repealed and the "communicating law" (Criminal Code s.213) enacted[7]. For the first time, the prostitute's client was explicitly made a party to the street prostitution offence, which prohibited any manner of communication in public for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.

Prostitution is debated among feminists. Radical feminist analytics of prostitution claim that male values dominate society and prostitution is a reflection of masculinist ideology. They regard all women in prostitution, regardless of age and race, as victims of oppressive and objectifying sexuality. Not all feminists agree. There were several heated feminist debates during the 1970s and 1980s. Some firmly locate prostitution as a form of exploitation (MacKinnon 1987 and Dworkin 1988) and others consider sex work as a site of empowerment and agency (Rubin 1984; Bell 1994). Critical feminism (mostly Socialist and Marxist feminists) disrupt the universal radical feminist discourse by addressing the socioeconomic contexts of the prostitution industry (Kempadoo and Doezma 1998; Kempadoo 2001). Pro-sex work feminists examine how women negotiate careers in the sex industry (Brewis and Linstead 2000a & 2000b; Chapkis 2003; Phoenix 1998 & 2002). Most of these critical studies situate prostitution in terms

7 Like the soliciting law before it, the communicating law is a summary offence, and thus subject to a fine of no more than two thousand dollars, up to six months in prison, or both.

of work, how the industry is historically located, what the work entails and produces, who is relegated as most likely to engage in prostitution. They regard the term prostitution as a social construction. Critical pro-sex work feminists cast doubt on universalist victimizing accounts of prostitution seeking instead to legitimate sex work (See also Vanwesenbeeck 2001; Shaver 1996). This orientation suggests that although prostitution may have patriarchal underpinnings, the actual experience of those who work needs to be addressed in a legitimate way and not victimized or pathologized. Examinations of work routines, managing risks, workplace stress, and social stigma come to illuminate a problem with the way the prostitution industry is ordered, not as inherent in the work itself. What is debated is whether it is the work of prostitution itself that is hazardous or the way it is currently structured in terms of lack of workplace regulations and health and safety that places women at risk of experience violence (Brock 1998; Shaver 1996; Vanwesenbeeck 2001; Lowman 2000). Studies in political economy equate sex work as one of many forms of gendered labor which is precarious, unregulated, and potentially unhealthy. Numerous prostitute advocate groups – for example COYOTE – Call off your tired old ethics; PONY – Prostitutes of New York; and CORP – Canadian Organization for Prostitutes Rights – have emerged representing a new form of democratic struggle and producing prostitutes as new political subjects. What is curiously absent in these critical pro-sex work perspectives is an analysis of age. Although pro-sex work feminists advocate for decriminalization of adult work, they are silent about youth work.

Radical feminism does not differentiate prostitution via age. It considers all females to be victims of a dominant male sexuality. In the 1970s radical feminists spearheaded a painstaking interrogation and politicization of the social problem of child sexual abuse and made links between child sexual abuse and prostitution. Radical feminist anti-rape and anti-pornography rhetoric expanded the terrain of sexual abuse and challenged the notion that young people were complicit or knowingly consenting to sexual activities (Angelides 2004:

141-142). In many ways, radical feminist discourse erased distinctions of age and prioritized masculine power. There is an alignment of radical feminism with discourses of child sexual abuse. Radical feminist concerns of child abuse are strengthened by discourses of child development. In fact, they pull on ideas of immaturity and lack of developmental knowledge about sexual relations inherent in children and youth. It is the lack of development that leaves young people in positions of vulnerability to masculine sexuality. Therefore the discourse of child sexual abuse that underpins much of the research on youth prostitution draws significantly on the radical feminist model of power. By virtue of the fact that children are immature, they are in positions of biopsychosocial vulnerability, at the whim of adult power. Exploitation is thus a man capitalizing on his position of dominance to take sexual advantage of a person in a subordinate position (Burgess and Groth 1980).

Different from radical feminism which incorporates all women regardless of age into their analysis, pro-sex work feminists do not account for age. Although it rejects the idea that prostitution can only be understood as male exploitation, it does not provide a critique of youth prostitution on the same theoretical grounds. Therefore, while critical studies of adult prostitution exist, there is a paucity of feminist work which conceptualizes prostitution as a form of work for youth or studies the day to day realities for youth including how youth prostitutes experience violence, stigma, and deal with stresses of work (however, see Montgomery 1998; Gorkoff and Runner 2003; Benoit and Millar 2001). Most studies of youth prostitution remain under radical feminist analyses. There has been very little research that privileges the voices of young people's experiences with youth prostitution. Rather, most theorizing about youth prostitution has been dominated by a combination of liberal and radical protectionist analysis and child development discourse. These conclude that systems of prostitution are harmful, deny women agency, are characterized by abusive relations – brutal and controlling male pimps and abusive, aggressive customers, and are

characterized by violence (Jeffries 2000; Barry 1984). Women who occupy these systems are found to experience low self esteem, poor health, physical and psychological abuse, and addictions thus pathologizing sex workers and conceptualizing prostitution as a form of sexual abuse. The dominant discourse considers acts of prostitution engaged in by young people as profane ones upon the sacred body of the child. Typically, it suggests youth prostitutes are inclined to work due to sexually abusive experiences, are young when they enter street work young, are often put out by pimps or abusive adults, often engage in survival sex and are on the street due to relative deprivation such as inadequate families, lack of education, and victimization. It also suggests young women work the street due to the sexualization and commodification of women's bodies which further victimize them.

There is little research that examines the breadth, nature, and scope of the sex work industry in Canada generally let alone how youth are incorporated into that system. It is known that the sex industry in Canada varies from exotic dancing, to escort work, to street work, to call work. Lowman (2000) suggests the industry exists on a continuum from female sexual slavery (the gorilla pimp) to survival sex (the sale of sexual services by persons such as the homeless who have limited options) through to the more bourgeois styles of sex trade where both parties are fully consenting. In-between is a whole host of different forms of work from casual to full time, self-employed to working in pairs or groups. Information on the age distribution of workers in these various sectors is not known. Most research tends to place youth near the survival sex end of the continuum. It appears that youth are less often found in off street work such as escort services or exotic dancing which are more highly regulated through municipal policies and harsh criminal code sanctions which deter agencies from licensing or hiring underage workers meant to deter and protect young people. Thus, it is not surprising that most youth work in the street trade or in non-regulated off street work such as trick pads[8].

8 Anecdotal and journalistic information however suggest that many youth

Discourse and Power: Youth Prostitution Policy

Early juvenile justice policy in Canada criminalized female sexual behaviour and girls were prosecuted almost exclusively for moral offences, that is, real or suspected sexual behavior (Busby 2003:103). Structured by radical feminist discourse and child and adolescent developmental discourse, the contemporary dialogue of youth prostitution is one of victimization. The victimization status of youth prostitutes relegates them to be in need of protection. Prostitution, the epitome of patriarchal practice, is a system that young people in particular should avoid because they are not fully developed. Worse yet, those at risk of poor development face little chance at successful development if they engage in abusive systems of prostitution. Youth prostitutes are thus victims of a numerous social relations – dysfunctional families, experiences of abuse and neglect, inadequate child welfare systems, inadequate schooling, and existing systems of prostitution.

Given the state's position as *parens patrie*, it utilizes this expert knowledge and dominant discourse to develop protection mechanisms. Improper development, abuse, and victimization are experiences with causes and effects which can be named and identified. This insists on governmental programs to stop the effect. Indeed, based on ethical principles of paternalism and benevolence, governments are required to protect young people.

In the last 100 years we have witnessed an escalation of systems of regulation to control the lives of young people (Smandych 2001). Systems of regulation over youth are numerous and include governmental programs such as compulsory education, establishing and changing juvenile delinquency legislation,[9] the establishment of provincial ministries of youth, numerous governmental and non governmental

make use of the industry through computer networks – chat rooms, online pornography, and pay per view sites. This area has received no critical analysis in Canada.

9 Canada has witnessed 3 major youth criminal legislations within 105 years – JDA, YOA and YCJA – the last two occurring within 20 years of one another.

programs (morality squads, boys and girls clubs, big sisters, big brothers). During the early half of the century, youth prostitution was put into discourse as an individual problem that could be solved through proper socialization or reform and philanthropic effort. In the latter half of the century youth prostitutes were no longer regarded as deviant but as victims of social circumstance requiring the state to provide various mechanisms of social protection and the broad government of children/youth through the family. The 1990s saw Criminal Code changes to prostitution legislation criminalizing those who purchase service from young people, and the establishment of several specialized initiatives to deal with youth prostitutes[10] and countless programs for at risk children and youth. All of these programs establish sets of governmental relationships between adult saviors and child victims. In Canada, there are three general sources of program delivery for youth sex workers: mandated child welfare services, special legislative initiatives, and non-governmental organizations. Generally, the first two are supported by dominant protectionist discourse while the third is less rigid and more open in its approach to deal with this population[11]. Under particular political rationalities (liberal, neo-liberal) mandated child welfare and specialized legislative initiatives use victimizing representations to support new authoritarian governing strategies – secure care, educational standardized testing, sentencing of children in adult courts, safe houses, drop in centers, help lines, and secure care legislation in the name of protecting young people. Together, this youth regulatory regime can be considered a juridical formation

10 Ontario, Nova Scotia, Alberta, Saskatchewan, and British Columbia have actively tried to institute youth prostitution legislation. Alberta succeeded in passing the *Protection of Children Involved in Prostitution Act* in 1998 which was amended in 2001. British Columbia passed the *Secure Care Act* in 2000. Ontario passed their act in 2002. These policies are not unique to Canada, see Phoenix 2002 for a description of the UK policy *Safeguarding Children Involved in Prostitution*.

11 These programs include harms reduction programs that do not aim to protect children and youth but provide support to those who continue to engage in sex work. Gorkoff and Waters (2003) found these programs used more often by young people involved in sex work, but were also the most precariously funded.

of power which uses particularist notions/discourses of age and normative adult sexuality. In an examination of Alberta's Children Involved in Prostitution Act (PCHIP) Bittle (2002) analyzes how victimization discourses were taken up by and inscribed on governmental responses to youth prostitution. He suggests these display characteristics of neo-liberal forms of governance (responsiblization, network nature of helping complexes, prudentialism, and normalization) which casts the net of surveillance and social control of youth quite wide. These strategies although appearing as protection, have a disciplinary and social control function where youth are pushed to the normal standards of behavior for youth and the material conditions that lead to prostitution are unchallenged. Other scholars have argued how neo-liberalist policies have waged a war on all young people as a group which has created obedient subjects and who lack political agency (Giroux 2002, Skelton 2001). This is also apparent on a global level where protection is extended and youth prostitutes are part of an international human rights framework creating children as subjects of rights. The right however, is not one of agency or political identity, but the right to be protected from the experience of commercial sexual exploitation. Saunders (2005: 168) argues that while the move from stigmatized identity (child prostitute), to a protective, neutral acronym (CSEC) has created some possibilities for youth to speak in different modes about their experiences, not all youth perspectives are afforded status as acceptable voices for change. Indeed, it can be argued that the extension of liberal rights to youth prostitutes has little power to change material realities of the lives of youth who do sex work acting instead as a bandaid.

Conclusion

We see that understanding the youth prostitute has shifted from immorality, to deviance, to victimization and exploitation. I attempted to deconstruct the contemporary discourse of youth prostitution in terms of the child development literature and feminist theorizing about patriarchal sexual

relations. Recently, research has questioned the power effects of this discourse on the lived experience of youth prostitutes (see Benoit and Miller 2001, Gorkoff and Runner 2003, Gorkoff and Waters 2003, Montgomery 1998, Angelides 2004). The dominant discourse tells us that young people are victims, all street experiences are abusive, and all young people on the street are victims. This discourse universalizes experiences of sex work as problematic for everyone and suggests young people engage in sex work out of pathological remnants of past abuse and don't take seriously a career in sex work. As such, they are regarded as deviant adolescents or victims of circumstance not as equipped choice makers. A significant corollary of this is that it reifies young people's engagement with prostitution as insignificant and immaterial and perfunctory relegating their needs and experiences as workers irrelevant and extraneous. Victim labels tend to entrench representations of youth as incapable choice makers who need to be disciplined and protected at the same time. People positioned as experts on the subject constantly lobby governments, write and speak at conferences on the subject, with the result that young people who sell sex are pathologized as victims everyday (Agustin 2005:2). There are two specific issues of concern.

First, the dominant victim discourse obscures an analysis of youth which takes into account young people's material and cultural existence. As Phoenix (2002) agues, by casting young people as victims the generalities of their lives are subsumed by the notion of their victimhood. The consequence of the label victim is an erasure of the social and material uniqueness of being a young person involved in society in general and in prostitution in particular. This renders silent all the relevant issues of prostitution such as health and safety, stigma, and working conditions because the victim label has supremacy. It leaves unexamined the similarities between adult and youth prostitution namely the material context in which the decision to prostitute is made and the construction of sex work generally. Issues of economic disparity, of race, class, gender, and the ability to find a job that provides

a living wage are subordinated to issues of pimping, violence, and sex (Lowman 1987; Sullivan 1992). Unintentionally, this gap may harm the health and safety of youth sex workers. By casting them in terms of deviance and victimization one runs the risk of entrenching stigma and pushing youth further and further away from supports. Further, while couching the issue of youth prostitution as a deviant subsistence strategy of street youth is informative in providing a starting point for youth's agency, it is also problematic. Largely absent in these conceptualizations are socio economic forces that shape sex trade work and then implicate youth. Thus, it is not age itself, but sex work and general exclusions of the young paired with youths' relationship with the state that structure young people's engagement and experience of prostitution. Few studies link sex work to other forms of aged labor such as precarious retail work, over representation in poor paying sectors of the labor market, and low rates of unionization. Rather, the relationship with prostitution is located via its relationship to deviant, victimized, or risky behaviors and neglects the importance of age with respect to labor generally and sex work in particular. If the decision to work the street is fueled by economic need or relative deprivation, what comes to define this economic need and how is this particular for youth? It is evident that these issues need to be examined as creating the situation for prostitution to exist and how age impacts the decision to take part.

Second, when these discourses are taken up by helping regimes, there are negative consequences for young people. The hegemonic discourse allows governmental regimes to exert extraordinary regulation and governmental control in the lives of young people. This reinforces the dichotomy of the power of adult saviours and lack of agency of child victims. This is evidenced in an explosion of services directed toward youth prostitutes in the late 1990s and early 2000s allowing the state to intervene if young people are suspected to be involved in prostitution. Representations framing youth sex workers as people in need of saving promote societal control mechanisms that firmly locate them in society in terms of

their social deviance or victimization (Velasco 1994; Phoenix 2002). By adhering to only victimization experiences, youth are understood as passive recipients of whatever happens to them. This renders young people as powerless and lacking agency. Worse yet these discourses sever the capacity for individuals to change their life or their world because it denies them political agency leaving them othered to adults, othered in systems of prostitution, and othered as political subjects. In addition, resistance is seen as problematic, confirming government intervention in the lives of young people rendering silent the actual need to prostitute. The differences between adult and youth prostitution appear to be related to the existence of adolescence as a social category and how this is taken up by regimes of regulation and social practice. It can be argued that if many of the problematics of the issue of prostitution were removed, we would see issues that affect youth sex workers also affect all youth. Gotlieb (1993) suggests that all children are protected by social control mechanisms largely because of their status as children. Therefore, one can argue it is possible that the primary reason for the separation of adult and youth prostitution lays not in the experience of sex work but in the location of children/youth vis-à-vis adults and the state.

This article has been focused on taking young prostitutes seriously by examining the discursive construction of the youth prostitute. To Lowman's question asked 24 years ago, I answer no, we are not yet serious. The dominant discourse prioritizing exploitation and victimization has moved us further away from thinking about the realm of the material and political and understanding how age is unique to legal subjectivity. I conclude that the lack of feminist theorizing of age and young women's involvement in systems of prostitution has continued the modernist project of universalizing, grand narratives and reproduced the hierarchal opposition between adult and youth where adults occupy privilege sites and youth are disprivileged others. Although we have moved away from thinking about youth prostitutes as deviant, it has been replaced by a narrow conception of exploitation and

victimization. The current power/knowledge configuration has excluded various voices. It is necessary to use a theory of age to guide future analyses and discuss age as a transfer point of power relations. We can begin to analyze how the decision to prostitute intersects with power and economic inequity, cultural components, and social constructions of age. Understanding age as a social formation which changes over time and is different in different historical and socio-political times rather than a problematic or pathologized stage of development opens the door to more fruitful analyses of social phenomena. The search for victims of child abuse obscures material and structural issues. Understanding age as a relational process as opposed to a linear and biological one is important. Youth, regardless of involvement in prostitution, experience the social world (as laborer, as citizen, through culture) in ways that are distinct from adults, yet, the social divisions (class and race) that shape the lives of adults are also central to the lives of young people. Hollands (2003: 444) suggests, there is a need to situate young people's economic, political, and cultural position within a historical, materialist, feminist, and cultural analysis and contribute to a perspective that will analyze the relationship between a socially constructed age stage, an economic mode of production and reproduction, and the socio-spatial and cultural forms of life this combination engenders. This allows us to claim that young people do exercise agency to varying degrees and under diverse circumstances but this agency is subject to pressures on and limits of activity arising from their material position and relations in society which are shared among all youth but contingent on space, resources, gender, race, and class (Wyn and White 1997).

References:

Agustin, LM (2005). Helping women who Sell Sex: The Construction of Benevolent Identities. Http://rhizomes.net/issue10/Agustin.htm accessed July 14/2005.

Alberta Task Force on Juvenile Prostitution (The Forsyth Report) (1997). *Children Involved in Prostitution.* Edmonton: Ministry of Alberta Family and Social Services.

Allahar, A and J. Cote. (1998). *Richer and Poorer: The Structure of Inequality in Canada.* Toronto: Lorimer and Company.

Angelides, S. (2004) Feminism, Child sexual abuse, and the erasure of child sexuality. *GLQ* 10:2: 141-177.

Aries, P. (1962). *Centuries of Childhood: A social history of family life.* New York: Vintage Books.

Austin, J. (2005). Youth, Neo-liberalism, Ethics: Some Questions. *Rhizomes.* www.rhizomes.net/issue10 accessed July 14/2005.

Badgley, R. (1984). *Sexual Offences against Children. Volume 1: Report of the committee on Sexual Offences against Children and Youth.* Ottawa: Ministry of Supply Services.

Bagley, C and L Young. (1987). Juvenile Prostitution and Child Sexual Abuse: A Controlled Study. *Canadian Journal of Community Mental Health* 6(1): 5-26.

Barry, K. (1984). *Female Sexual Slavery.* New York NY: Avon.

Bell, S. (1984). *Reading, Writing, and Rewriting the Prostitute Body.* Bloomington Indiana: Indiana University Press.

Bell, V. (1993) Governing Childhood *Economy and Society* 22(3): 390-405.

Benoit, C and A, Miller. (2001) *Dispelling Myths and Understanding Realities: working conditions, health status, and exiting experiences of sex workers.* Victoria: Prostitutes Empowerment Education and Resource Society

Biehal, N., and J. Wade. (1999). Taking a Chance? The Risk Associated with Going Missing from Substitute Care. *Child Abuse Review* 8(6): 366-76.

Bittle, S. (2002) When Protection is Punishment: Neo-Liberalism and Secure Care Approaches to Youth Prostitution. *Canadian Journal of Criminology* 44(3): 317-350.

Bramley, L., M. Tubman, and summit Rapporteurs. (1998). *Final Report – Out of the Shadows, into the Light: International Summit on Sexually Exploited Youth*. The Sexually Exploited Youth Project. Vancouver BC: Save the Children Canada.

Brannigan, A., L. Knafla, and C. Levy. (1989). *Street Prostitution: Assessing the Impact of the Law: Calgary, Regina, and Winnipeg.* Ottawa: Department of Justice.

Brannigan, A and E.G. Van Brunschot (1997). Youthful Prostitution and Child Sexual Trauma. *International Journal of Law and Psychiatry.* 20(3): 337-354.

Brewis, J. and S. Linstead (2000)a. The Worst thing is the Screwing (1): Consumption and the management of identity in sex work. *Gender, Work, and Organization*. 7(2): 84-96.

Brewis, J. and S. Linstead (2000)b. The Worst thing is the Screwing (2): Context and Career in Sex Work. *Gender, Work, and Organization*. 7(3): 168-180.

Brock, D (1998) *Making Work, Making Trouble: Prostitution as a Social Problem* Toronto: University of Toronto Press.

Burgess, AW and N. Groth. 1980. Sexual Victimization of Children.' In R. Volpe, M. Breton and J. Mitton (eds.) *The Maltreatment of the School-Aged Child*. Lexinton MA: Lexinton.

Busby, K. (2003). Protective Confinement of Girls Involved in Prostitution: Potential Problems in Current Regimes in Gorkoff, K and J Runner (eds.) *Being Heard. The experiences of young women involved in prostitution.* Halifax: Fernwood Publishing.

Caputo, R., R. Weiler and K. Kelly (1994). *Phase Two of the Runaways and Street Youth Project: The Ottawa Case Study.* Ottawa: Ministry of Supply and Services Canada.

Castel, R (2001) From Dangerousness to Risk, in Burchell, C., Gordon and P. Miller (eds) *The Foucault Effect: Studies in Governmentality*, Chicago: University of Chicago Press

Chapkis, W. (2003). Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants *Gender and Society* 17(6): 923-937.

Chesney-Lind, M. and R. Sheldon. (1992). *Girls, Delinquency, and Juvenile Justice.* Pacific Grove California: Brooks/Cole.

Cohen, S. (2001) 'Youth Deviance and Moral Panics' *in* Smandych, R (ed) *Youth Justice: History, Legislation, and Reform*_ Toronto: Harcourt Canada, 69-83.

Donzelot, J (1980). *Policing the Family.* Random House: New York.

Downe, P (2003) 'The people we think we are in Gorkoff, K., and J. Runner. *Being Heard*: *The experiences of young women involved in prostitution*. Halifax, NS: Fernwood Publishing

Dworkin, A. (1988). *Pornography: Men Possessing Women.* New York: Penguin Books.

Farrington, D.P. (1990a). Age, Period, Cohort, and Offending' in Gottfredson D and R Clark (eds.) *Policy and Theory in Criminal Justice: Contributions in Honour of Leslie Wiulking,* Aldershot UK: Avebury.

Farrington, D.P. (1990b). Implications of Criminal Career Research for the Prevention of Offending *Journal of Adolescence* 13(2): 93-113.

Farrington, D.P. (1993) Childhood Origins of Teenage Antisocial Behaviour and Adult Social Dysfunction. *Journal of the Royal Society of Medicine* 86(1): 13-17.

Farrington, D.P. (1996). Later Life Outcomes of Truants in the Cambridge Study. In Berg and Nursten (eds.) *Unwilling to School,* 4th edition. London UK: Gaskell.

Federal Provincial-Territorial Working Group on Prostitution. (1998). *Report and Recommendations in respect of Legislation, Policy, and Practices concerning Prostitution and its related activities.* Ottawa: Department of Justice.

Foucault, M. (1970). *The order of things: an archaeology of the human sciences.* London: Tavistock.

Foucault, M. (1972). *The Archaeology of Knowledge.* London: Routledge.

Foucault, M. (1977). *Language, Counter-Memory, Practice*, (ed.) D. F. Bouchard, Trans. D.F. Bouchard and S. Simon. Ithica: Conrnell University Press.

Foucault, M. (1980a). *The History of Sexuality. An Introduction. Vol 1.* trans. R. Hurley. New York NY: Vintage Books.

Foucault, M. (1980b.) *Power/Knowledge*, (ed.) C. Gordon, trans. C.

Gordon, L. Marshall, J. Mepham, K. Soper. New York, NY: Pantheon Books.

Garland, D. (1997). 'Governmentality' and the problem of crime: Foucault, criminology, sociology *Theoretical Criminology* 1(2):137-214.

Gemme, R., A. Murphy; M. Borque; M.A. Nemeh, and N. Payment. (1984). A Report on Prostitution in Quebec. *Working Papers on Prostitution and Pornography: Report No. 11.* Ottawa: Department of Justice.

Giroux, H (2002) The War on the Young: Corporate Culture, Schooling and the Politics of 'Zero Tolerance. In R. Strickland (ed.) *Growing up Post-modern: Neo-liberalism and the war on the young.* Boston MA: Rowman and Littlefield Publishers, 35-46.

Grioux, H. (1996). *Fugitive Cultures: race, violence and youth*. New York, NY: Routledge.

Gorkoff, K., and J. Runner (eds.) (2003). *Being Heard*, *The experiences of young women involved in prostitution*. Halifax, NS: Fernwood Publishing

Gotlieb, B. (1993). *The Family in the Western World: From the Black Death to the Industrial Age*. New York: Oxford University Press.

Hagan J. and B. McCarthy. (1997). *Mean Streets: Youth, Crime, and Homelessness.* Cambridge: Cambridge University Press.

Hollands, R. (2004). Towards a Political Economy of Canadian Youth in W. Clement and L. Vosko (eds.) *Changing Canada: Political Economy of Transformation.* Montreal, McGill Queens University Press.

Hoyt, Ryan, and Cauce. (1999). Personal Victimization in an High Risk Environment. *Journal of Research in Crime and Delinquency* 36: 371-392.

Jeffries, S. (2000). Challenging the child/adult Distinction in Theory and Practice on Prostitution. *International Feminist Journal of Politics* 2(3): 359-379.

Jiwani, Y. (1998). Trafficking and Sexual Explotation of Girls and Young Women. Vancouver BC: FREDA Centre for Research on Violence and Violence againstWomen.

Kelly, P. (2001). Youth at Risk: Processes of Individualization and Responsibilisation in the Risk Society, *Discourse: studies in the cultural politics of education* 22(1): 23-33.

Kempadoo, K and J. Doezma (eds.)(1998). *Global Sex Workers: Rights, Resistance and Redefinition.* London: Routledge.

Kempadoo, K. (2001). Freelancers, Temporary Wives, and Beach-Boys: Researching Sex Work in the Caribbean *Feminist Review* 67: 39-62.

Kingsley, C., and M. Mark. (2000). *Sacred Lives: Canadian Aboriginal Children and Youth Speak Out about Sexual Exploitation.* National Aboriginal Consultation Project. Vancouver, BC: Save the Children Canada.

Lowman, J. (1987). Taking Young Prostitutes Seriously. *Canadian Review of Sociology and Anthropology.* 24:1:99-116.

Lowman, J. (1998). Prostitution Law Reform in Canada. In *Toward Comparative Law in the 21st Century.* Institute of Comparative Law in Japan. Tokyo: Chuo University Press, 919-946.

Lowman, J. (2000). Violence and the Outlaw Status of (Street) Prostitution. *Violence Against Women* 6(9) 987-1101.

Lyotard, J.F. (1988). *The Post-modern Condition: A Report on Knowledge* Trans. G. Bennington and B Massumi. Manchester UK: Manchester University Press.

MacKinnon, C. (1987). *Feminism Unmodified: Discourses on Life and Law.* Cambridge, MA: Harvard University Press.

Mahood, L. (1990). *The Magdalenes: prostitution in the nineteenth century.* New York: Routledge Books.

McCarthy B. (1995). *On The Streets. Youth in Vancouver.* Vancouver BC: Research evaluation and Statistics Branch, Ministry of Social Services.

Mill, S. (2003). *Michel Foucault*. Routledge. New York.

Montgomery, H. (1998). Child sex workers in Thailand in Kempadoo, K and J. Doezma (eds.) *Global Sex Workers: Rights, Resistance and Redefinition.* London UK: Routledge.

Muncie, J. (2004). *Youth and Crime* 2nd edition. London, UK: Sage.

Myers, T. (2006) Do you know where your children are? The

Regulation of Youth in 1940's Canada. Public Lecture, Feb 22nd, (2006). The University of Winnipeg

Parnby, P. (2003) Disaster through dirty windshields: Law, Order, and Toronto's Squeegee Kids. *Canadian Journal of Sociology* 28(3): 281-307.

Phoenix, J. (2002). In the name of protection: Youth Prostitution Policy Reforms in England and Wales. *Critical Social Policy* 22(2): 353-375.

Ridge, D., V. Minichiello and D. Plummer. (1997). Queer Connections: Community, 'the scene' and an epidemic. *Journal of Contemporary Ethnography* 26: 146-181.

Roeters, K. (1987). *From the Other Side: Final Report from the National Juvenile Prostitution Survey.* Ottawa, On: National Youth in Care Network.

Rose, N (1996) The Death of the Social? Re-figuring the Territory of Government. *Economy and Society.* 25(3) p.327-356.

Rubin, G (1984). Thinking Sex: Notes for a radical theory of the politics of sexuality in Vance, C. (ed) *Pleasure and Danger: Exploring Female Sexuality*. London, England: Routledge and Kegan Paul.

Sanger, W (1869). *The History of Prostitution*. New York: Harper and Brothers.

Saunders, P. (2005) From Identity to Acronym: How child prostitution became CSEC. In Bernstein E. and L. Schaffner (eds.) *Regulating Sex: The Politics of Intimacy and Identity.* New York, NY: Routledge.

Schisssel, B. and K. Fedec. (1999). The Selling of Innocence: The Gestalt of Danger in the Lives of Youth Prostitutes. *Canadian Journal of Criminology* 41: 33-56.

Schissel, B. (2001). Youth Crime, Moral Panics, and the news: The conspiracy against the marginalized in Canada in Smandych, R (ed.) *Youth Justice: History, Legislation, and Reform*_Toronto Canada: Harcourt, 84-103.

Scourfield J. and I. Welsh (2003). Risk, reflexivity, and social control in child protection: New times or same old story? *Critical Social Policy* 23: 398-420.

Shaver, F. (2005). Presentation to the House of Commons

Subcommittee on Soliciation Laws, Ottawa. February 7.

Shaver, F. (1996). The Regulation of Prostitution: Avoiding the Morality Traps. *Canadian Journal of Law and Society* 9: 123-145.

Skelton, T. (2002). Research on Youth Transitions: Some Critical Interventions in M. Cieslik and G. Pollack (eds.), *Young People in Risk Society: The Restructuring of Youth Identities and Transitions in Late Modernity.* Burlington, VT: Ashgate.

Smandych, R. (2001). Accounting for Changes in Canadian Youth Justice: From the Invention to the Disappearance of Childhood in Smandych R. (ed.) *Youth Justice: History, Legislation, and Reform.* Toronto. Canada: Harcourt.

Smart, C. (1999). A Hisotry of Ambivalence and conflict in the discursive construction of the child victim of sexual abuse. *Social and Legal Studies* 8(3): 391-409.

Street Workers Advocacy Project. (1996). *Final Report.* Regina SK: The council on Social Development Regina Inc.

Sullivan, T. (1986). The Politics of Juvenile Prostitution in Lowman, J (ed.) *Regulating Sex: An Anthology of commentaries on the Finings and Recommendations of the Badgley and Fraser Reports.* Vancouver: Simon Fraser University Press.

Sullivan, T. (1988). Juvenile Prostitution: A Critical Perspective. In Hagan and Sussman (eds.) *Deviance and the Family.* London: The Haworth Press.

Sullivan, T. (1992). *Sexual Abuse and the Rights of Children: Reforming Canadian Law.* Toronto: University of Toronto Press.

Tanner, J. (2001). *Teenage Troubles: youth and deviance in Canada*. Scarborough, ON: Nelson-Thomson.

Thomas, W.I. (1923) *The Unadjusted Girl.* Boston MA: Brown, Brown.

Tyler, K.A., D.R. Hoyt, L.B. Whitbeck and A.M. Cauce (2001) The Effects of a High Risk Environment on the Sexual Victimization of Homeless and Runaway Youth. *Violence and Victims* 16(4): 441-55.

Unger, J., T. Simon, T. Newman, S. Montgomery, M. Kipke, and M. Alboronoz (1988). Early Adolescent Street Youth: An

Overlooked Population with Unique Problems. *Journal of Early Adolescence* 18(4): 325-48

Van Brunschot, E.G., (1995). Youth Involvement in Prostitution. In J. Creechan and R. A. Silverman (eds.) *Canadian Delinquency*. Scarborough, ON: Prentice Hall.

Vanwesenbeeck, I. (2001). Another decade of social scientific work on sex work: a review of research 1990-2000. *Annual Review of Sex Research* 12: 242-289.

Vaughan, B. (2000) The Government of Youth: Disorder and Dependence? *Social and Legal Studies*, vol 9. 347-366.

Velasco, N. (1994). *A Position paper regarding the issues related to young people working in the sex trade.* Street Survival Project and San Francisco Task Force to Study the Decriminalization of Prostitution. San Francisco.

Walkowitz, J. (1992). *City of dreadful delight: Narratives of sexual danger in late-Victoria London.* Chicago: University of Chicago Press.

Walkowitz, J. (1980) *Prostitution and Victorian Society. Women, Class, and the State.* Cambridge, MA: Cambridge University Press.

Weisberg, DK. (1985). *Children of the Night: A Study of Adolescent Prostitution.* Lexington MA: Lexington Books.

Whitbeck, LB., D. Hoyt, and R. Yoder. (1999). *Nowhere to Grow: Homeless and Runaway Adolescents and their Families.* Hawthorne NY: Aldine de Gruyter.

Whitbeck, LB. And D.Simons. (1990). Life on the Streets: The victimization of Runaway and Homless Adolescents. *Youth and Society* 22: 108-25.

Wyn J and R. White. (1997). *Rethinking Youth.* Sage. London.

Remorse and Reconciliation in the Courtroom: An Exploratory Survey of Judicial Discourse on Apologies

Neil Funk-Unrau, Menno Simons College at
The University of Winnipeg

Introduction

The frequently heard expression "I am sorry…" stands as a prime example of a statement and a process both simple and profound. As noted in Tavuchis' (1991) ground-breaking study of this process and in many subsequent scholarly and analytical works, through a carefully chosen set of words, an apology can provide a basic acknowledgement of a wrongful action and a personal and moral assessment of that action. However, these same words can be perceived as either the beginning of reconciliatory and restorative justice process or as a trite formula designed to place the speaker in the most positive light.

The potential of an apology as the beginning of a powerful restorative process is borne out by the frequent public demands from those wronged in various ways for an apology as one crucial step in achieving justice and undoing the harm that has been done. The reconciliatory potential of this process has also been highlighted by restorative justice advocates as an important and powerful aspect of making amends and restoring relations after the harm is done (Schneider, 2000, Alexander, 2006). However, the other side of this process is perhaps more frequently visible, a communicative action designed also (or perhaps primarily) to restore the apologizer's self-image and demonstrate the apologizer to be a worthy moral agent. Allan (2007) notes the distinction between an

exclusively self focused (what I term here as "rehabilitative") and self-other focused (what I will refer to as "restorative") apology and the confusion in much of the scholarly literature about this distinction[1]. Towner (2009) also distinguishes between two categories of "apologetic rhetoric" – apologia statements designed to restore self-image and reconciliatory apologies designed to facilitate healing.

This distinction has particular significance within a court setting. Whereas an apology is generally understood to be a gesture of remorse and an acknowledgement of responsibility for wrongdoing, the demand for an apology or the offer of an apology in a courtroom setting raises significant issues re assessment of level of sincerity of the apology, future legal liability for this wrongdoing, the potential impact on any financial or other reparation to be offered or demanded in response, etc. Thus the same simple process can show great potential as a step toward conflict reconciliation or be used as a calculated way to mitigate demands for compensation.

How is this distinction understood and managed within actual judicial practice? This paper attempts an introductory answer to this question by examining some of the official judicial discourse around the roles and functions of apology as recorded within a selection of court rulings and judicial decisions made in Canadian national and provincial courts between 1992 and 2005.

Definition of Apology

Before beginning to examine the role of apology in the courtroom, it is important to establish a framework for what exactly an apology is. In its simplest and most basic form as apology is a speech act, a form of oral communication from one party to another designed to carry out several specific simultaneous communicative and moral functions (Tavuchis, 1991). The power of this particular speech act lies in the ex-

1 Most apologies cannot be viewed as exclusively one or the other, but rather emphasize rehabilitation or self or restoration of the other in varying degrees.

tent to which it fulfills its intended role, whether restorative or rehabilitative.

Much of the literature affirming and responding to the Tavuchis analysis of the process assumes this to be communicative action with a restorative role and with the motivation of restoration of relationship of speaker and listener. While the specific list of communicative functions varies from author to author, four specific functions, relevant to the current study, appear very consistently.

First, the apology acknowledges a particular situation of wrongdoing as a violation of the listener. According to Govier and Verwoerd (2002) and Lazare (2004), this aspect of acknowledgement is the most crucial aspect of the process, providing a basis for moving through the rest of the process and toward potential future reconciliation. Second, the event is named in terms that clearly indicate the apologizer's remorse for the action and the apologizer acceptance of responsibility for the damage done to the listener. Third, while naming the wrongdoing and taking responsibility for it, the apologizer offers assurance that the wrongdoing will not be repeated by expressing some form of a commitment to changed behaviour. Fourth, the apology may or may not offer some form of reparation or compensation (Alter, 1999, Cunningham, 1999).

Each of these functions will take on a specific nuance depending on the extent to which the apology is intended as a restorative or rehabilitative process. The acknowledgement of wrongdoing can be viewed as either a courageous effort to reach out to the other side or as an effort to restore one's own self-image as a moral agent. Expressions of regret and remorse can also be viewed from either perspective and the willingness to take responsibility may well be strongly influenced by the focus on self or other. Commitments of changed behaviour can be either an important step of providing security and safety for the wronged listener or another gesture of self-rehabilitation. In the same way, the extent of reparation or compensation offered may depend on either the needs

of the recipient or on the self-interest of limiting the cost to be borne by the one making the offer.

Apology Within a Legal Context

Types of Cases Considered		
Crimes against Personal Status and Security		**21**
Defamation / Libel	14	
Disclosure of Personal Information	7	
Labour Relations / Employment Grievances		**19**
Labour relations / union representation	12	
Ongoing Harassment and Discrimination	5	
Other Wrongful Dismissal	2	
Crimes against Person or Property		**14**
Sexual Assault	5	
Physical Assault	3	
Physical Harassment	4	
Theft	2	
Crimes against the Court		**11**
Contempt of Court	8	
Failure to Appear in Court or Fulfill Conditions	2	
Frivolous Court Action	1	
White Collar Crime		**3**
Professional Misconduct	2	
Fraud	1	
Context of Apology Not Specified		**4**
Total		**72**

During the spring and summer of 2005, the author and a student research assistant surveyed the CanLII legal databases for a representative sample of judicial rulings that included some significant discussion about the use of and meaning of an apology with a specific court cases[2]. While the reli-

2 Special acknowledgements and appreciation are due to Sarah Laing, a conflict resolution student who did most of the legal research for the survey during the spring of 2005, and to Trudy Govier for her encouragement and support for this project.

ance on written documentation did exclude the potential for observation of legal apology discourse within its context, the researchers concluded that a reliance on this specific form of written discourse allowed for analysis of a larger sample of cases spread across a wider span of time and a greater range of the geographical jurisdictions than would have been possible through direct observation[3]. The focus on judicial rulings also provides insight into the judicial justification of use of apology within this setting. Within this survey, 72 rulings were selected for special textual analysis as examples of the judicial discourse about legal apologies. In each of these rulings, the specific paragraphs relevant to apology discussions were subjected to a basic textual analysis, identifying and recording basic themes according to an analytical framework consisting of the specific functions of an apology as noted above.

This list indicates that an apology can be demanded or voluntarily offered in response to a wide variety of legal infractions but some tantalizing trends may be hinted at in this admittedly non-scientific survey. It is significant, for example, that this process appears to be emphasized more greatly in cases where harm to "face" or personal prestige is at least as important as physical or financial damage. Some judicial rulings make this distinction even more clearly by identifying the apology with a non-quantifiable loss of reputation and status and considering financial or physical harm as a separate category. This is particularly significant for cases of defamation or slander, where this loss of reputation or status is specifically emphasized. Hence, various provincial defamation acts emphasize the use of apology as an appropriate response to wrongdoing much more than any other recent Canadian or provincial legal statutes (e.g. Nova Scotia, 1989). In addition to defamation cases, survey results show that apology discourse can arise in a variety of legal settings resulting in intense debate over a range of different aspects of

3 Thanks to an anonymous reviewer for pointing out the potential benefits of a direct observation study. Such a study could be a useful next step for this particular research project.

acknowledgement, remorse, compensation and commitment for change.

Another relevant factor is the growing popularity of use of apology as a response to a wider range of financial and physical harm, especially within medical malpractice cases and the introduction of legislative provisions designed to protect such apologizers from legal liability for implied admission of guilt (Taft, 2005, Wei, 2006, Robbennolt, 2009). Although not deliberately planned as such, the timeframe of the sample also allows for some tentative generalizations to be drawn about court discourse about apology during the decades immediately prior to the adoption of apology protection legislation in several provincial jurisdictions across Canada[4].

Legal Apology as an Acknowledgment of Wrongdoing

As noted above, several writers identify the acknowledgement of wrongdoing, taking responsibility for the harm done, as the most significant aspect of the whole apology process. Thus a major consideration, if not the primary consideration, for many regarding the acceptability of any offer of an apology to potential apology recipients or those sitting in judgment over the apologizer is the question of whether this process provides a full acknowledgement of the wrongdoing as a violation of the recipient (Govier & Verwoerd, 2002, Govier, 2006, Lazare, 2004). Does the offender fully understand the significance of her / his wrongdoing? From a restorative perspective, a particular event is reframed and given meaning to establish a clear record of exactly what happened and to validate the dignity and human worth of the recipient of the apology (Govier, 2006). From a rehabilitative perspective, the acknowledgement becomes the first point at which the perpetrator of the wrong begins to take responsibility for what happened.

4 The British Columbia legislature was the first in Canada to enact apology protection legislation in 2006. In the next three years, apology protection legislation was also passed in Alberta, Saskatchewan Manitoba, Ontario, Nova Scotia and Newfoundland.

In the judicial rulings examined here, the extent of acknowledgement was certainly a factor to be considered. In *Lin vs. Leung*[5], a British Columbia judge and a subsequent Appeal court judge rejected an apology for contempt of court because it included no admission of misconduct. The acknowledgment of wrongdoing also lost its legitimacy if accompanied by statements intended to justify or minimize the wrongdoing. In another British Columbia case[6], plaintiffs rejected an apology from EQUITY magazine partially because the apology was accompanied by a justification of the published reference considered to be defamatory. The judge ruled that the plaintiff's refusal to accept the apology provided the space for the defendant to present further evidence to justify their original defamatory comment. The ruling raises some significant question about the value of an acknowledgement of wrongdoing if this is followed by further efforts to establish that there was no wrongdoing at all or to continue the same actions already legally judged to be misconduct.

In some situations, even a partial apology is deemed to be acceptable as long a it includes some, albeit limited, acknowledgement of wrongdoing. For example, the statement of a young offender, appearing before the Supreme Court of the Yukon Territory, indicating that missing a court date was a "serious thing" was deemed as sufficient acknowledgement to be considered as an apology[7].

However, a partial apology can more frequently be considered as faulty, especially if the apology includes only a partial or vague acknowledgement of wrongdoing. Lazare (2004) notes that a vague, incomplete or conditional acknowledgement of an offense serves only to further aggravate the offense and aggrieve the offended party. Ribbennolt's (2003, 2006) research into the impact of apologies on legal settlement negotiations also supports the contention that a limited or partial acknowledgement of wrongdoing can make the

5 *Lin v. Leung*, 1992 CanLII 1400 (BC S.C.)

6 Dowding v. Pacific West Equities Ltd., 1992 CanLII 1131 (BC S.C.)

7 *R. v. M. (S.)*, 2002 CanLII 56 (YT S.C.)

offended party less amenable to settlement discussions. The importance placed on the explicit acknowledgment of wrongdoing also influences the emphasis placed within the judicial rulings on the next point – the importance of explicit expressions of remorse and the apologizer's willingness to take responsibility for the offence.

Legal Apology as Expression of Remorse and/or Responsibility

In addition to acknowledging the wrongdoing, the apology process is also intended to communicate the apologizer's acknowledgement of responsibility for the action, although in a context that may also implicitly acknowledge and reinforce the impossibility of undoing the harm that has been done (Minow, 1998). This can create a moral asymmetry between the apologizer and recipient heightened by the recognition that no future action can fully remove this asymmetry. In Tavuchis' words, "We are faced, then, with an apparently enigmatic situation in which the offender asks forgiveness as the necessary and symbolic corrective for a harmful action on the flimsiest of grounds: a speech act that is predicated on the impossibility of restitution" (1991, p. 34). By offering the apology without justification or defense, the speaker deliberately takes on the vulnerability of moving the speech encounter toward an unknown endpoint (Schneider, 2000).

From a restorative perspective, in the context of a communication directed from the apologizer to the victim of the wrongdoing, the apology process institutionalizes a symbolic exchange whereby the speaker provides a social legitimation of the pain of the recipient and the social and moral norms held by the recipient in the hope that the recipient will respond in some reciprocal fashion. Some analysts define apology as an exchange of shame and power (Schneider, 2000, Lazare, 1995). Roles are reversed as the apologizer deliberately places her/himself at the mercy of the recipient who may or may not accept the apology. For many restorative justice scholars and practitioners, this aspect of an apology process

can the most significant one because it creates an ambiguity, a deliberate shift of relationship dynamics, that then provides a space for the birth of new understandings and new interactions.

In the courtroom context, however, instead of some form of re-balancing of the moral scale or exchange of shame and power we may see an exacerbation of the asymmetrical power relations already evident as the culprit is dragged before the seat of judgment. The judicial desire for some visible expression of shame and remorse for the wrongdoing being acknowledged becomes perhaps the most tangible demonstration of the apologizer's assent to the degree of shaming foisted on him or her. According to Alexander (2006), however, the courtroom has become, far too often, a place for judges and recipients to attack, demean, ridicule and disparage the apologizer – all antithetical to the intent of a restorative apology. The apology then becomes a necessary performance within a public "ritual of humiliation" (Murphy, 2007, p. 450).

On the other hand, from the perspective of a self-rehabilitative apology, the expression of remorse, as shown through the admission of responsibility and the expression of remorseful feelings, may be viewed as the clearest possible indication that the character of the apologizer is distinctly different than the character of the wrongdoing and that apologizer clearly dissociates him/herself from the wrongdoing in the strongest possible terms (Weisman, 2009). Therefore the expression of remorse justifiably becomes the single most influential lens with which to assess the sincerity of any specific apology.

In most of the rulings considered here, this visible expression became the single most significant indicator of the sincerity of the apology given, so much so that in a significant number of examples of judicial discourse, the expression of remorse was almost equated with the apology as a whole, similar to the conclusion from Weisman's (2009) survey of Canadian judicial rulings between 2002 and 2004. Therefore, the lack of any such visible expression or the inclusion of contrary

expressions could be enough to reject the whole apology. For example, an apology for a sexual assault was rejected on the basis of lack of remorse because it was presented as a very general statement regretting "what happened" and left on a phone answering machine.[8] Another apology was rejected because it was sent to legal counsel accompanied by another more hostile letter "letting off steam," hence leaving the impression that the remorse expressed in apology was insincere[9].

Several judges assessed the sincerity of any expression of remorse by certain clearly defined criteria such as the specific wording of the apology, timing of a public apology, mode of delivery of the apology, etc. In *Kerr vs. Conlogue*[10], an apology for a defamatory article on front page of entertainment section of a local newspaper was rejected because of the wording was viewed as "halfhearted and ineffectual" and the written apology was located on an inside page of a different section of the newspaper. In several other cases, the timing of the apology was severely criticized[11]. The wording and timing of an apology for defamation is particularly critical if the occasion of the apology becomes another vehicle for disseminating the original defamation. In *Ramsey vs. PP*[12], a radio talk show host's apology for defaming a local politician was rejected because it was written and presented on air in such a way as to further publicize the original smear against the politician.

Can a sincere apology with a sincere expression of remorse be demanded by the court or coerced by agents of the judicial system? For some judges a demand for an apology was a reasonable demand. In *VE vs. Weir*[13], the judge ruled that an apology for defamatory remark could be demanded to be part

8 *R v. Popiel*, 1999 CanLII 55 (AB C.A.)

9 *McIntyre v. Rogers Cable T.V. Ltd*., 1996 CanLII 3582 (BC S.C.)

10 *Kerr v. Conologue*, 1992 CanLII 924 (BC S.C.)

11 E.g. *Trooper Technologies Inc. v. Thermo Tech Technologies Inc*., 1999 CanLII 6029 (BC S.C.). *Peters v. Hamilton-Brown*, 2000 CanLII 17209 (NB Q.B.). *Kopeck v. Constantin*, 2003 CanLII 339 (BC S.C.)

12 *Ramsey v. Pacific Press, et.al.,* 2000 CanLII 1551 (BC S.C.)

13 *Vaquero Energy Ltd. v. Weir*, 2004 CanLII 166 (AB Q.B.)

of a pre-trial settlement as a way of demonstrating taking of responsibility for offence. However, the judicial ruling in *Canada vs. Stevenson*[14] stated that an apology couldn't be demanded because coerced remorse is not a genuine expression of remorse. "A grudging so-called apology is plainly no more than a reluctant concession to an opponent possessing, for the time being, and overwhelming advantage of some sort. It is all too likely to be regarded as a form of unjust humiliation and not necessarily as a vindication of what is right." Several other rulings agreed with this approach. In *Obradovic vs. BO*[15], a forced apology was criticized as "self-serving and insincere." In *Ontario vs. Pine*[16], the judge ruled that a demand for apology also could also work against some other more genuine non-coerced expression of remorse. A Saskatchewan court ruled that an apology for rape inadmissible if coerced by police[17].

However, even if the demand for an apology was entertained, it should not be taken to extremes. In one case a plaintiff provided a detailed demand for apology with 6 outlined paragraphs but the judge considered this excessive and rejected the demand[18].

Bibas and Bierschbach (2004) note the difficulty of encouraging and responding adequately to sincere, heartfelt expressions of remorse within the contemporary adversarial North American justice system, hence the call for some legal protection to encourage the expression of sincere full apologies. This difficulty is particularly acute in the context of partial apologies crafted so as to exhibit an appropriate degree of remorse without actually admitting the alleged wrongdoing. Both judges and recipients will frequently view a carefully worded apology that manages to steer clear of any legal liability negatively, perceiving this to be a deliberate evasion

14 *Canada (Attorney General) v. Stevenson*, 2003 CanLII 341 (F.C.C.)

15 *Obradovic v. Bullmoose Operating Corp*., 2005 CanLII 1605 (BC L.R.B.)

16 *R. v. Pine*, 2002 CanLII 16275 (ON C.A.)

17 *R. v. M. (B.),* 2003 CanLII 413 (SK Q.B.)

18 *Fisher v. Richardson*, 2002 CanLII 653 (BC S.C.)

of responsibility and possibly responding more harshly than they would have if no apology had been forthcoming at all (Latif, 2001, Ribbennolt, 2003).

Legal Apology as Commitment of Change

Weisman (2009) includes as one of the criteria for a valid expression of remorse the extent to which this expression is linked with the willingness of the apologizer to change behaviour and transform her/his character so that the wrongdoing will not be repeated. Here, too, there is a clear distinction between an expression of change intended to reconcile with and provide assurance for the recipient, or intended to demonstrate the good character of the apologizer. In many of the judicial rulings studied, the specific and direct articulation of a commitment of changed behaviour provided credibility for the expression of remorse. However, while this may be one criteria, it was not necessarily a sufficient criteria on its own. Therefore in *Lin vs. Leung* (cited above), an apology was rejected because there was no evidence of defendant's change of conduct. In some cases, an apology could be accepted as given in good faith but still insufficient on its own for relevant charges to be dropped. One judge, hearing an appeal about whether an apology should have been considered for a contempt charge in a prior court appearance, ruled that the apology should have been taken into consideration but still did not, on its own negate the charge[19]. Another judge, also responding to an apology for breaching an injunction against practicing dentistry, acknowledged the sincerity of the apology but ruled that a two-year probation period was required in order to assess change of conduct before a charge of contempt of court could be purged[20].

In several of the rulings studied, the anticipated change of behaviour could also be viewed as something more than proof of the sincerity of remorse; the apology could become the catalyst for the consequential change of behaviour within

19 *R. v. Glasner*, 1994 CanLII 3444 (ON C.A.)

20 *Alberta Dental Association v. Unrau*, 2001 CanLII 315 (AB Q.B.)

and beyond an offending institution. For example, in *Robichaud vs. Brennan*[21], an apology from the Department of National Defense for discrimination against one of its employees was considered appropriate because it "serves a broad educative function … it tells every employee throughout the country and abroad that a prominent institution and employer in our society stands firmly for equality in the workplace."

Legal Apology as Compensation

From a restorative perspective, the act of offering an apology can be seen as a moral act which re-establishes some common understanding of right and wrong between the apologizer and the listener, facilitates the exchange of the power of the victimizer for the shame of the victim, and creates a space for forgiveness and healing to take place. However, within a courtroom context, any attempt to demonstrate goodwill and to make recompense for the harm done is constrained by the need to consider the implications of legal liability and potential demands for compensation.

Taft (2000) decries the "commodification" of apologies, which he defines as the subversion of a moral expression into something to be traded for personal material benefit within a legal context. He cites an example of a Missouri criminal defense lawyer suspended from practice for six months due to contempt of court, but under the condition that a public apology could result in a less severe sentence. The lawyer promptly apologized and the court decision was changed to a public reprimand. When an apology can be used as a market item, it has become something to be bought and sold for a price rather than a significant moral action.

Should apologies be viewed as something distinct from or integrally connected to offers of material compensation for wrongdoing? Taft's concern about treating an apology as a moral act or as a marketable commodity highlights the ambiguity of the relationship between apologies and reparations in other public settings outside the local courtroom.

21 *Robichaud v. Brennan*, 1989 CanLII 145 (C.H.R.T.)

Other researchers disagree about the necessity of linking the apology process to compensation. Alter (1999) includes some concrete form of compensation as one of the essential elements of an apology process. On the other hand, Cunningham (1999) defines the sincerity of an apology in terms of the rebuilding of relationships, concluding that compensation may follow from this but can occur independently.

In the sample of judicial rulings studied here, the offer of an apology had a significant influence on the level of compensation to be awarded but the specific degree of influence varied greatly. The significance of an offer of apology is highlighted by one case where a plaintiff demanded $100,000 in compensation but, upon receiving a counter-offer of $27,500, indicated that this would have been sufficient if accompanied with an apology. Frequently, the apology was only one of several factors used by a specific judge to indicate the apologizer's level of remorse and / or commitment of changed behaviour and therefore the actual influence of the apology on its own is difficult to measure. This influence would also be affected by the context of apology offered to mitigate compensation vs. apology demanded as part of the compensation.

The range of judicial responses is revealing. In *Carter vs. Gair*[22], the defendant offered an apology which was rejected by the plaintiff but the judge responded by dropping the compensation awarded by $500 – from $5000 to $4500. On the other hand, a newspaper's initial refusal to print an apology for a libelous statement resulted in a $5000 increase to a $25,000 compensation award[23]. In another case, the defendant offered what the judge considered a partial apology, retracting a specific libelous statement but ignoring intimidation and hostility that occurred subsequent to the harmful statement. In response, the judge dropped the amount of compensation to be awarded from $12, 000 to $6000[24].

22 *Carter v. Gair*, 1999 CanLII (BC C.A.). This case was an appeal of *Carter v. Gair*, 1997 CanLII 4151 (BC S.C.)

23 *Bains v. Indo-Canadian Times, Inc.*, 1995 CanLII 2180 (BC C.A.)

24 *Kathlow v. Olsen*, 1994 CanLII 934 (BC S.C.)

The demand for partial compensation in response to a partial apology also highlights the dilemma of what Lazare (2004) refers to as a "negotiated apology". While much of the current apology literature treats an apology as a one-time communication which demands a particular type of response, Lazare notes that most of the content of an apology is negotiable and that the negotiation of these points may be the only way for all sides affected by a serious dispute to feel that they can gain something out of it. This is particularly crucial if the parties to the case expect to maintain or re-establish some sort of relationship after the court case ends.

Several judicial rulings provide some intriguing glimpses into the negotiation of compensation in relation to an offered or demanded apology. In *Hodgson vs. CN*[25], the judge explicitly affirmed the negotiation of an apology by stating that the offer of an apology would have a significant impact on the level of compensation to be awarded even if the actual language and wording of the apology still remain to be negotiated. Another libel case was settled after both sides presented their preferred apology wording and demanded this be signed. Eventually the defendant retracted one version and apologized according to the plaintiff's terms; no further costs were awarded to the plaintiff[26]. The negotiation over which version to use had become a crucial aspect of the final settlement decision.

Reconciliatory Process in Adversarial Context

Despite the common public assumption of an apology as the first step toward forgiveness and reconciliation, the nature of the North American adversarial justice system works against the establishment of the kind of setting that could allow this type of apology to be offered and heard (Schneider, 2000, Alexander, 2006). Adversarial legal processes require both sides of any dispute to defend their interests and state their position in the strongest way possible. Any sign of vulner-

25 *Hodgson v. Canadian Newspapers Co.*, 2003 CanLII 44877 (ON S.C.)

26 *Tatum v. Limbrick*, 1994 CanLII 1086 (BC S.C.)

ability in this context is a sign of weakness to be exploited by the opposing side. So the apology, rather than standing on its own as an admission of an irreparable debt, becomes one more tool in the debate about the appropriate amount of punishment and compensation. At the same time, judicial oversight of this adversarial process requires that this process also be geared to portraying the apologizer in the most morally positive terms in the eyes of the judge, hence the imperative for a self-focused rather than self-other-focused process.

Bibas and Biersbach (2004) reinforce this tension in an extensive review of the role of remorse and apology in the criminal justice system, concluding that the emphasis on procedural values such as fairness, efficiency and accuracy sets up direct procedural and indirect contextual barriers to full expressions of remorse and offers of a restorative apology. For example, while legal counsel may be encouraged to negotiate with each other and seek out informal settlements, the defendant's only significant contact with any court actor other than their counsel is within a highly formal semi-public context that does not encourage spontaneous expressions of heart-felt feeling. When an opportunity to apologize is provided, defendants are not able to interact directly with the individuals to whom the apology should be directed. Instead, the apology becomes a stilted formal statement addressed to the judge who must then evaluate the defendant's words and demeanor. Petrucci (2002) also notes that that apology processes appear to have no formal place in criminal law, but strongly advocates that these be used as an effective way of empowering victims and reducing the recidivism of offenders.

One of the judicial rulings reviewed here indirectly addressed this tension by directly comparing the role of an apology offered within a mediation session with the role of a court-ordered apology. "Solutions may be examined in mediation that might only be possible in a confidential environment with the assurance that an offer, proposal or suggestion may not subsequently be used by the other party if the matter returns to litigation. An apology or expression of remorse is

a particularly good example. Because of the law concerning admissions against interest, the adversarial system is often felt to inhibit that kind of communication"[27].

Within civil litigation, however, policy-makers and litigators have begun to encourage the use of restorative apologies by attempting to provide statutory protection for full-fledged comprehensive expressions of remorse and apology. Such legislation in still fairly recent and more research is required to determine the reaction to such apologies by judges and recipients and the degree to which the existence of perceived protection from liability enhances or detracts from the perceived value of the process. According to Robbennolt (2003), a full apology, irregardless of whether it is protected from legal liability through evidentiary rules, does significantly more to defuse disputes and enhance the possibilities of satisfactory settlements than partial apologies deliberately-worded so as to evade expressions of remorse and acknowledgment of responsibility which can be construed as legal liability. Taft (2005), however, is more critical of the value of a protected apology, indicating that the existence of the protection means that the apologizer really displays no moral courage and takes no personal risk in what then becomes another impersonal formulaic legal statement.

Conclusion

The struggle to define and articulate the significance of an apology process in court proceedings indicates the tension between a restorative vs. rehabilitative process within an adversarial context. The restorative potential of this process must be translated into a setting where a judge must evaluate and balance actions, words and motivations of all parties to determine winners and losers.

The judicial evaluation must take into consideration some of the primary aspects of an apology process, including the acknowledgement of wrongdoing, the expression of remorse and responsibility for the wrongdoing, commitment of be-

27 *Marshall v. Ensil Canada Ltd.,* 2005 CanLII 5355 (ON S.C.)

havioural change so that the wrongdoing is not repeated and degree of compensation for the damage done. As indicated in the limited sample of judicial rulings reviewed here, each of these aspects brings its own ambiguities and problems. How explicit and comprehensive must the acknowledgement be in order to make the apology valid? Is an apology sincere if an expression of remorse is demanded rather than spontaneously offered? How can the apology be used most effectively to ensure the wrongdoing is not repeated? How should it be used to respond to demands for compensation?

These issues highlight the deeper issues of the interface between restorative justice processes and retributive justice systems, something that has implications for the evolving relationships of civil and criminal justice systems with mediation programs, circle processes and the like. Much more research on this interface should be done and certainly will be done as this relationship moves forward. As the concept of a legally protected apology continues to gain political and legal currency, the need for such research will only increase.

References

Alexander, R., Jr. (2006). Restorative Justice: Misunderstood and Misapplied. *Journal of Policy Practice 5(1),* 67-81.

Allan, A. (2007). Apology In Civil Law: A Psycho-Legal Perspective. *Psychiatry, Psychology and Law 14(1),* 5-16.

Alter, S. (1999). *Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations.* Ottawa ON: Law Commission of Canada

Bibas, S., and Bierschbach, R. A. (2004). Integrating Remorse and Apology into Criminal Procedure. *Yale Law Journal 114,* 85-148.

Cunningham, M. (1999). Saying Sorry: The Politics of Apology. *Political Quarterly 70*, 285-293.

Govier, T. (2006). *Taking Wrongs Seriously: Acknowledgement, Reconciliation and the Politics of Sustainable Peace.* Amherst NY: Humanity Books.

Govier, T., and Verwoerd, W. (2002). The Promise and Pitfalls of Apology. *Journal of Social Philosophy 33,* 67-82.

Latif, E. (2001). Apologetic Justice: Evaluating Apologies Tailored Toward Legal

Solutions. *Boston University Law Review 81,* 289-320.

Lazare, A. (1995). Go Ahead, Say You're Sorry. *Psychology Today 28(1)*, 40-42.

Lazare, A. (2004). *On Apology.* New York NY: Oxford University Press.

Minow, M. (1998). *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence.* Boston MA: Beacon Press.

Murphy, J. G. (2007). Remorse, Apology, and Mercy. *Ohio State Journal of Criminal Law 4,* 423-53.

Petrucci, C. J. (2002). Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System. *Behavioral Sciences and the Law 20*, 337-362

Robbennolt, J. K. (2003). Apologies and Legal Settlement: An Empirical Examination. *Michigan Law Review 102*, 460-516

Robbennolt, J. K. (2006). Apologies and Settlement Levers. *Journal of Empirical Legal Studies 3*, 333-373.

Robbennolt, J. K. (2009). Apologies and Medical Error. *Clinical Orthopeadics and Related Research 467*, 376-82.

Schneider, C. D. (2000). What it Means to be Sorry: The Power of Apology in Mediation. *Mediation Quarterly 17*, 265-280.

Taft, L. (2000). Apology Subverted: The Commodification of Apology. *Yale Law Journal 109*, 1135-1160.

Taft, L. (2005). Apology Within a Moral Dialectic: A Reply to Professor Robbennolt. *Michigan Law Review 103*, 1010-7.

Tavuchis, N. (1991). *Mea Culpa: A Sociology of Apology and Reconciliation*. Stanford CA: Stanford University Press.

Towner, E. B. (2009). Apologia, Image Repair, and Reconciliation: The Application, Limitations, and Future Directions of Apologetic Rhetoric. *Communication Yearbook 33*, 431-68.

Wei, M. (2006). Doctors, Apologies and the Law: An Analysis and Critique of Apology Laws. *Student Scholarship Papers,* Yale Law School.

Weisman, R. (2009). Being and Doing: The Judicial Use of Remorse to Construct Character and Community. *Social and Legal Studies 18*, 47-69.

Finding a Theory of Justice for Canada's Truth and Reconciliation Commission

Amanda Nelund, Sociology, University of Manitoba

Introduction

In 2008 the Prime Minister of Canada, Stephen Harper, apologized for the Indian Residential School (IRS) system saying that "the government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language" (Harper, 2008). The apology was a part of the Residential School Settlement Agreement signed by the government of Canada. Another key component of the settlement was the establishment of the Truth and Reconciliation Commission (TRC). Reconciliation and truth building are clearly goals for the commission but both are left undefined in the commission's mandate. In this paper I bracket the issue of what these terms mean in order to examine an issue I think must be dealt with first. In order to move closer to truth and reconciliation, whatever those consist of, the TRC must be able to make intelligible the harms that Aboriginal people experience(d). Aboriginal authors have identified multiple harms that must be addressed by the TRC. The commission must operate from a broad theory of justice that conceptualizes these harms as unjust.

Indian Residential School System and its Harm

From the mid 19th century onward the government of Canada operated residential schools for Aboriginal children[1],

1 The history of the IRS system is long, complex and not fully known. In recognition of the fact that I cannot provide a full account of the schools and the injury they caused I offer a very brief outline here. I only provide the facts that are necessary to situate the theoretical discussion which comprises the bulk of this

in partnership with the Roman Catholic Church, the United Church and the Anglican Church (Walker, 2009). Attendance at the schools became mandatory for all "Indian"[2] children in 1920. The children lived at the schools many of which were located too far away from their homes to allow for family visits (Walker, 2009). These schools were instituted in order to teach and train but primarily to "civilize" Aboriginal children (Walker, 2009). Students at the schools were forbidden from speaking their languages and practicing any aspects of their culture (Walker, 2009). Physical and sexual abuses and rampant neglect of children took place in schools across the country (Walker, 2009).

The first type of harm includes those that took place *at* the residential schools. Scholars (see for example Kusugak, 2009; Angeconeb, 2008) have documented instances of sexual and physical abuse that took place at the hands of the teachers and administrators. The second type of harm is the inherent harm of the residential schools. The assimilationist theory on which the schools were premised meant that students were stripped of their language, culture and identity as Aboriginal peoples (Rice & Snider, 2008). The third type of harm is the larger harm of colonization, of which the IRS system was only one part. Examples of these harms are the dispossession of land and resources from Aboriginal communities, the underfunding of contemporary child welfare services for Aboriginal families living on reserves and the widespread poverty of Aboriginal communities as a result of colonialism. Dussault (2009) argues that in order for reconciliation to take place state-political-legal systems must be redesigned to address the lack of political access and self government that exists for Aboriginal peoples in Canada. Rice & Snyder (2008) argue that the "TRC must be used to publicly identify systematic changes that will address the unequal relationship

paper.

2 I use the word Indian here only to designate the legal status of those under the jurisdiction of the Indian Act. I in no way use it as a racial or cultural designation and I use it in quotation marks to highlight the highly problematic nature of the term.

between Aboriginal and Non-Aboriginal people" (56).

The TRC is a process which has been established in order to document the history of the IRS system more fully and assist Canadians in moving forward. The introduction to the TRC's mandate outlines these goals in more detail:

> There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation (Indian Residential Schools Settlement Agreement, 2006).

Though the mandate includes responding to harms and injustices and reconciling those who have harmed and those who have been harmed it includes no description of how it will do so. In order to deal with the harms of the schools, to heal those who have suffered and build future relationships the TRC must work from a clear theory of justice. As the mandate does not offer such a theory I analyze two theories of justice here that have potential relevance for the TRC's work.

A Theory for the TRC: Jennifer Llewellyn's Relational Restorative Justice

Jennifer Llewellyn has offered, both in print (Llewellyn, 2008) and public lecture, her theory of relational restorative justice (RJ) as a theory of justice capable of supporting the TRC and its work (Llewellyn, 2008; 2006; Llewellyn & Archibald, 2006; Llewellyn & Howse, 1998).

Llewellyn begins her description of restorative justice by

contrasting it with three other justice theories: justice as restitution, corrective justice and retributive justice. She argues that restorative justice draws on the positive aspects of these theories while at the same time correcting some of their weaknesses (Llewellyn & Howse, 1998). Restitution can be a part of RJ theory as restorative justice focuses on the harm that was done to a victim and strives to rectify that harm. Restitution focuses only on quantifiable reparations, such as monetary compensation or the return of property. Llewellyn argues that restitution assumes the possibility of returning to the status quo. Restorative justice differs on both of these issues. RJ focuses on all types of harm, not just the quantifiable, and does not strive to restore people to the way they were before the harm.

Corrective justice moves past the quantifiable harms and repairs that restitution focuses on. Under corrective justice theory, and restorative justice, a harm is an assault on the rights of the victims. Thus it will not be enough to compensate only the material losses of the victim, there must also be some symbolic balancing of the scales. While corrective and restorative justice share this starting point, they differ in their solutions to harm. RJ does not share corrective justice's assumption that responding only to the wrongdoer will right the wrong done to the victim (Llewellyn & Howse, 1998).

Finally, Llewellyn argues that both retributive and restorative justice are alike in their assertion that social equality must be established to right wrongs. Where these two theories depart is in the method for achieving that equality. Retributive justice "names punishment as the necessary mechanism through which such equality is to be achieved" (Llewellyn & Howse, 1998: 32). RJ leaves the identification of the mechanism to those injured, to be found through a dialogue process. The comparison of RJ with other justice theories begins to reveal some of the key features of restorative justice in relation to other forms of justice. It does not, however, provide a clear enough account of what RJ is. It is to that task that I now turn.

For Llewellyn, justice is done when social equality is estab-

lished between the affected parties of a harm. Social equality can be said to be reached when "each party has their rights to dignity, equal concern and respect satisfied" (Llewellyn & Howse, 1998: 39). These rights are interpreted by Llewellyn in a relational sense. Social equality consists of relationships that are characterized by equal dignity, concern and respect. Llewellyn argues that justice must not be an abstract concept; instead it must be grounded in the realities of social life. For Llewellyn a primary feature of that reality is the fact that human beings are relational beings, that "selves exist in and through (are constituted by) relationships with other selves" (Llewellyn & Howse, 1998: 39). The self is neither wholly independent nor wholly dependent but must always be located in relationships. This means that justice, too, must be located in relationships.

Justice is achieved in this theory when relationships between those who are harmed and those who have harmed are restored. The idea of restoration "implies the existence of a state of wrong that disrupts the relationship in society between those implicated in the doing and the suffering of a wrong" (Llewellyn & Howse, 1998: 2). RJ takes the connection or repair of that relationship as its goal. This does not imply, however, a return of the relationship to the state it was in before the harm. Instead, once a wrong occurs RJ dictates that we examine the relationships between those involved and examine whether they are characterized by equal dignity, concern and respect. If the relationships between those involved in a harm "are not ones of equality, justice must identify what is necessary to restore them to this ideal" (Llewellyn & Howse, 1998: 41). Llewellyn is extremely adamant on this point and so it bears repeating; restorative justice does not look to return relationships to their original state it looks to restore them to the ideal relationship of equal dignity, concern and respect.

Each set of relationships may look different and may require different solutions to bring them to the ideal socially equal relationship. This means that the justice process must be

context specific. Restorative justice brings together those involved in a harm, victims, offenders and the community, and engages them in dialogue in order to determine what must be done to restore their relationships. The focus of RJ theory is on the process of justice rather than any set outcomes. This theory "is flexible in terms of what must be done in response to a wrong with the one proviso that whatever is done must achieve the goal of restoration" (Llewellyn & Howse, 1998: 36). The focus on process gives agency to the participants and ensures a justice response that is embedded in relationships.

Conceptualizing justice in this way offers many advantages. RJ broadens the focus from a legal crime to a more flexible "wrong" or "harm". This acknowledges that not all harm is criminalized and that justice may still be necessary even when criminal justice does not apply. Focusing on harm and the restoration of relationships includes victims in the justice process in a meaningful way. This theory rightly addresses the fact that we exist in relationships. Conceptualizing justice as relational seems necessary in light of the fact that harms take place through relationships and not in some isolated sense. Restorative justice's flexibility is another strength, allowing it to respond differently to different situations.

These strengths allow this theory to take seriously many of the harms that have been identified by Aboriginal people in relation to residential schools. This theory can clearly conceptualize the physical and sexual abuses of students as serious and demanding of attention. It can also provide a strong justice response to these harms because of its focus on victims and dialogue. The TRC, if based on restorative justice, would focus on giving victims a voice with which to tell the various stories of abuse and harm that occurred at the schools. This theory would allow a range of harms to be voiced by victims because of its flexible nature. The focus on dialogue and victims voices would also provide a much more complete historical record than a narrow legal process would be able to construct.

Restorative justice can also be an adequate frame for the second group of harm; the inherent harm of residential schools. Because RJ's focus goes beyond legal crimes it could include residential schools as a harm even though they were legal entities at the time. An institution dedicated to forced assimilation quite clearly assaults relationships of equal concern, dignity and respect. Despite allowing the TRC to respond to the first two groups of harm identified by Aboriginal peoples, RJ has a variety of weaknesses that prevent it from being an ideal theory of justice for the TRC.

The first problem with this theory is that it is conceptually vague. The definition of key concepts such as "equal", "concern" and "respect" are left as self-evident when they are highly contested terms. This opens the possibility of an overly narrow interpretation of these terms being applied by those using the theory. This is especially true because of Llewellyn's introduction of the notion of rights. She argues that "social equality exists when relationships are such that each party has *their rights* to dignity, equal concern and respect satisfied" (Llewellyn & Howse, 1998: 39, emphasis added). This immediately brings the conception of Charter rights into the theory and pulls the theory in its entirety back into the narrow legalist framework from which Llewellyn is attempting to offer an alternative. Once this legal terminology is reintroduced it makes the rest of RJ's concepts vulnerable to the same legalistic interpretation.

A lack of normative grounding is a second weakness in this theory. Llewellyn offers no norm against which things can be found to be right or wrong. She, in fact, consciously argues against such a standard and states that "a society has to work out in moral and political argument the boundaries of wrongfulness" (Llewellyn & Howse, 1998: 17). There is an assumption in RJ that the community is capable of coming to a just consensus on issues such as what constitutes a wrong and what is necessary to right that wrong. This ignores structural power arrangements that leave some in society with a louder voice than others. These are the exact arrangements that led

to the Indian Residential School system in the first place. At the time "moral and political argument" in Canadian society concluded that the IRS was well within the bounds of what was right. While the theory focuses on social relationships, Llewellyn seems to ignore systemic power relations in society.

Relational restorative justice's focus on discrete harms and its affirmative dimension are two final problems with this theory. Even though RJ broadens its gaze to harms, a discrete harm must still occur in order to engage the justice process. The necessity of identifying a harm seems to preclude the idea that relationships may simply be, in and of themselves, unjust. This idea is linked to the notion that harms can be righted in an unjust social context. The goal of restorative justice is to restore relationships to an "ideal that survives at least *qua* ideal when basic rights such as security of the person are respected even within a basically unjust context of social equality" (Llewellyn & Howse, 1998: 3, emphasis in original). Justice can be accomplished even in an unjust context. This leads RJ to address only the symptoms of injustice, the discrete harms, while keeping the causal unjust social relations firmly in place.

These weaknesses mean that RJ is severely limited in its ability to adequately address the third category of harm that has been identified, the structural harms. Perhaps in moral and political argument Canadian society has come to the consensus that the IRS system was wrong. This consensus has not been reached on the unjustness of the colonial project in its totality. Building the TRC on a restorative justice theory that focuses solely on discrete harms would lead the commission to focus only on those harms which the broader society has identified as wrong. This would silence Aboriginal peoples yet again and would lead to the continuation of structural harms that they have clearly identified but which remain "right" in the eyes of the broader society.

Not only would the TRC be able to ignore harms that were identified by Aboriginal peoples it could also declare success with very little actual change in the relationship between Ab-

original peoples and non-Aboriginal Canadians. The process would be successful by RJ's definition as long as individual victims of the IRS system felt that the specific harm they suffered had been addressed and that they felt restored as a result. This is true even if the larger political, structural systems are left unequal and unjust. A TRC based on restorative justice theory would be unable to conceptualize the third category of harms and it could potentially mask them further by declaring the Aboriginal and non-Aboriginal people restored based on the experiences of individual survivors.

Nancy Fraser's Tri-Partite Theory of Justice

For Fraser justice is done when participatory parity is present. Participatory parity is present when "social arrangements permit all (adult) members of society to interact with one another as peers" (Fraser, 2003: 36). There are two conditions that must be met in order to ensure participatory parity: the objective and intersubjective conditions. The distribution of material resources in society must be sufficient to allow all members to equally participate in order for the objective condition to be met. Social arrangements that institutionalize deprivation and vast inequities in wealth and income do not meet this condition and are thus unjust. In order for the intersubjective condition of participatory parity to be met the patterns of cultural value in a society must give all participants equal respect (Fraser, 2003). Ideologies and norms that classify some groups of people as worth less respect than others are unjust. Doing justice, for Fraser (2009), means "dismantling institutionalized obstacles that prevent some people from participation on par with others" (16). There are three axes on which this must be done: recognition, redistribution and representation.

Recognition refers to the cultural sphere of social life. Injustices, here, are cultural and "rooted in social patterns of representation, interpretation, and communication" (Fraser, 2003: 13). Injustices include cultural domination, nonrecognition and disrespect. This theory is a relational theory of

justice but it is not concerned with individual relationships in which misrecognition or disrespect leads to injury. Disrespect only becomes a matter of justice when it is constituted by social institutions. Misrecognition occurs when "institutions structure interaction according to cultural norms that impede parity of participation" (Fraser, 2003: 29). A situation is unjust when social institutions and structures create classes of individuals who are devalued. The aim of justice on this axis is to dismantle these cultural patterns and replace them with norms that provide equal recognition and respect for all members of society thereby allowing them to engage with each other as peers (Fraser, 2003).

Redistribution refers to the economic sphere of social life. Injustices here are socio-economic. Any economic structure that allows the economic exploitation of some by others is unjust (Fraser, 2003). So too are structures that allow economic marginalization or deprivation. Like recognition this axis is concerned with economic structures that create deprivation not just individual work relations. Economic restructuring is the only remedy to these injustices (Fraser, 2003).

Most justice claims can not easily be classified as ones of pure recognition or pure distribution. Most claims can be seen to involve both of these axes "in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original" (Fraser, 2003: 19). Fraser illustrates this with the example of race. Injustice, lack of participatory parity, for racialized groups is rooted simultaneously in both the economic structure and the status order (Fraser, 2003). The work of racialized groups is devalued in the economic structure. In Western societies there is a concentration of racialized groups in low paying jobs and consequently high levels of poverty within such groups. Culturally, racialized groups are constantly set against the White norm and thus found lacking. This leads to cultural devaluation and exclusion. While injustice is found on both axes neither can be said to be the sole result of or fully reducible to the other

(Fraser, 2003).

The third axis of justice, one Fraser added onto her original two dimensional theory, is representation. This axis involves the political sphere of social life. Fraser (2003) is concerned here with who gets let in and left out when we construct our political structures. Injustices here are representational. When examining whether representational systems are just we must ascertain whether anyone is improperly excluded and ask if "the community's decision rules accord equal voice in public deliberations and fair representations in public decision making to all members" (Fraser, 2009: 18).

There are two issues in this sphere of justice. The first is ordinary political representation. This is what we address when we debate the merits of various electoral systems in ensuring a fair and equal voice for everyone (Fraser, 2009). The second issue is that of misframing; "here the injustice arises when the community's boundaries are drawn in such a way as to wrongly exclude some people from the chance to participate at all in its authorized contests over justice" (Fraser, 2009: 19). Fraser (2009) is primarily concerned with the distinction between national and global concerns. She argues that in many cases we are still making decisions in national political contexts which influence and impact people on a global scale. The national frame for political decision-making is wrong; instead we need a global frame. This is a crucial injustice because it disqualifies members from making recognition or distributive justice claims.

Fraser's theory shares a number of strengths with Llewellyn's. It is context specific. There is no set solution for any one justice claim; instead each claim must be resolved through public discussion and debate (Fraser, 2003). The process for creating just outcomes is dialogic. There is a recognition that it is only through dialogue that the local effects of claims and remedies can be determined (Fraser, 2003).

Fraser's theory can conceptualize the two groups of harms that Llewellyn's theory addresses. The harms at the schools were inflicted on an entire group of young people, based on

their status as Aboriginal. The harms impeded their participatory parity. The second group of harms, the inherent harm of the schools, can also be easily conceptualized as unjust in this theory. They would be seen as unjust acts on the recognition axis. The status order of Canadian society devalued Aboriginal identity so completely that residential schools were established to destroy that identity. The fact that it was social institutions through which this took place meets Fraser's criteria that the injustice be structural in nature. Fraser's (2003) theory contains the same strengths that Llewellyn's theory does and can conceptualize the same harms as unjust.

Fraser's theory is superior because it remedies the weaknesses of Llewellyn's theory and can contain the third group of harms. Fraser provides a clear normative basis for justice in the concept of participatory parity. The definition of this term is clearly set out as the presence of cultural, economic and political "patterns [which] constitute actors as *peers*, capable of participating on par with one another in social life" (Fraser, 2003: 29 emphasis in original). It is a flexible enough principle to be a normative basis even in communities which hold no shared moral framework (Fraser, 2003). Anything which violates this principle is wrong and unjust, even if the majority group does not think so (Fraser, 2003). Participatory parity is the normative basis for justice, injustice and the remedies. Claimants must show, through dialogue, that the current structures impede their ability to participate and they must show that the solution allows them parity (Fraser, 2003). This addresses the lack of normative judgements in Llewellyn's theory and centres Aboriginal concerns for the TRC. Rather than requiring consensus from the wider Canadian society on whether an act or structure was/is unjust or not, claimants would only have to demonstrate how their participatory parity was violated.

Fraser understands justice to be inherently structural, which is a similar but more robust conceptualization than Llewellyn's argument that justice is relational. Fraser's theory is relational. She does not conceptualize individuals as existing in isolation. For Fraser, however, justice is not the

realm for harms that take place in relationships between individuals; "to be misrecognized, accordingly, is not to suffer distorted identity or impaired subjectivity as a result of being depreciated by other. It is rather to be constituted by institutionalized patterns of cultural value" as inferior (Fraser, 2003: 29). Fraser (2003) concentrates on the social structures that shape our individual relationships. This focus solves two of the problems with Llewellyn's theory. Firstly, it negates the necessity of a specific wrong act occurring. An inherently harmful structure is enough to invoke the need for justice. Secondly, if harms cannot be reduced to individual people it follows that remedies cannot either. This enables Fraser's theory to be inherently transformative.

Affirmative remedies to harm address the unjust symptoms of a society, which manifest themselves in individual relationships, but leave the unjust cause, the social structure, in tact (Fraser, 2003). Llewellyn's restorative justice theory is an affirmative theory of justice in that it consciously allows for these types of remedies and labels them just. While Llewellyn recognizes larger unjust structures, for her justice is satisfied if individual relationships are restored. Fraser's theory is transformative. Transformative strategies "aim to correct unjust outcomes precisely by restructuring the underlying generative framework" (Fraser, 2003: 74). Justice is accomplished in Fraser's theory only when economic, socio-cultural or political changes are made in a way that strengthens participatory parity. If the TRC were based on this theory of justice it could only declare success if institutional changes were made which created participatory parity for all Aboriginal peoples in Canada.

Fraser's theory is a superior theory for the TRC because it contains a normative principle, is a transformative theory and because it can bring all three groups of claims that are being made by Aboriginal people into the frame of justice. A criminal justice frame could only hold the harms suffered at the schools in its horizon of understanding. A restorative justice frame could expand to contain the harms suffered at the schools and the inherent harm of the schools but only

with Fraser's theory can the larger structural harms be seen as a matter for justice. I have outlined above how Fraser can include and address the first two, here I explain how her theory can deal with the third group of harms.

The axes of distribution and representation could address and remedy the structural harms identified by Aboriginal people. If the TRC were based in Fraser's theory, land and resource claims would have to be considered because "distributive questions must be central to all deliberations about institutionalizing justice" (Fraser, 2003: 87). The economic position of Aboriginal peoples in Canada would be recognized as unjust and requiring of a remedy.

The axis of representation would highlight the political position of Aboriginal people in Canada. Both the axis's components could be useful. The focus on ordinary representation issues would address two aspects of Aboriginal political rights. This focus would contribute to the historical record as it would highlight the representational issues that existed at the time of the Indian Residential School system. Aboriginal scholars have described the continuous stripping of political rights which took place in order to thwart Aboriginal resistance to the IRS system (Sinclair, 2010). Fraser's theory would emphasize the injustice of this theft of political rights. A focus on participatory parity in the political sphere would also have to tackle Canada's electoral system and the presence or lack of Aboriginal members of parliament.

The concept of misframing would also have application for the TRC. The issue of self government or nationhood for Aboriginal people could be addressed by examining how it is an issue of misframing. Fraser (2009) argues that injustice exists "even when those excluded from one political community are included as subjects of justice in another – as long as the effect of the political division is to put some relevant aspect of justice beyond their reach" (19). Though Aboriginal people do have rights and responsibilities as members of the Canadian political community they are excluded from a nation to nation relationship with Canada. In the case of Aborig-

inal people in Canada, and other settler societies, it may be that the national frame is insufficient and instead the frame should be that of nation to nation.

While Fraser's theory could lend support to the TRC's work, it has one aspect that may not be applicable for Aboriginal people's struggle for justice. For Fraser recognition, in its transformative form, involves the eventual deconstruction of master identities (Fraser, 2003). As an interim affirmative step recognition involves raising all identities to a position of equal worth but in its ultimate transformative form "far from simply raising the self-esteem of the misrecognized, it would destabilize existing status differentiations and change everyone's self identity" (Fraser, 2003: 75). This would mean eventually breaking down the binary "Aboriginal vs. Non-Aboriginal" so that neither identity existed. Fraser comes out of a tradition of feminist theorizing that has, in the main, come to the conclusion that this is the most useful approach for sex/gender identities. I'm not sure that it is an approach that moves comfortably from the context of feminist justice claims to Aboriginal claims for justice. Despite this one weakness I am comfortable concluding that Fraser's theory is a good one on which to build the TRC.

The TRC must address all of the harms related to the Indian Residential School system if we are to move towards any sort of reconciliation. A strong theory of justice is necessary to conceptualize these harms as unjust and also to provide a definition of and standards for reconciliation. If the TRC worked from Fraser's theory, reconciliation would be accomplished when participatory parity was present. Only when the cultural, economic and political structures are such that Aboriginal peoples and non-Aboriginal Canadians can interact as peers in social life will reconciliation take place.

References

Angeconeb, G. (2008). Speaking my truth: The journey to reconciliation. In M. Brant- Castellano, L. Archibald, M. DeGagne (eds.), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools.* Ottawa: Aboriginal Healing Foundation, 297-314.

Dussault, R. (2009). Reconciliation: The only way forward to fair and enduring coexistence. In G. Younging, J. Dewar, M. DeGagné (eds.), *Response, responsibility, and renewal: Canada's truth and reconciliation journey.* Ottawa: Aboriginal Healing Foundation, 29-38.

Fraser, N. (2003). Social justice in the age of identity politics: Redistribution, recognition and participation. In N. Fraser & A. Honneth (eds.), *Redistribution or recognition? A political-philosophical exchange*. London: Verso, 7-109.

Fraser, N. (2009). *Scales of justice: Reimagining political space in a globalizing world*. New York: Columbia University Press.

Harper, S. (2008). Indian Residential Schools statement of apology. http://www.aincinac. gc.ca/ai/rqpi/apo/pmsh-eng.asp. Last accessed April 13, 2011.

Indian Residential School Settlement Agreement. (2006). Schedule "N": Mandate for the Truth and Reconciliation Commission. http://www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf. Last accessed October 31, 2011.

Kusugak, J. (2009). On the side of angels. In G. Younging, J. Dewar, M. DeGagné (eds.), *Response, responsibility, and renewal: Canada's truth and reconciliation journey.* Ottawa: Aboriginal Healing Foundation, 13-28.

Llewellyn, J. & Archibald, B. (2006). The challenges of institutionalizing comprehensive restorative justice: Theory and practice in Nova Scotia. *Dalhousie Law Journal*, 29: 297-343.

Llewellyn, J. & Howse, R. (1998). Restorative justice: A conceptual framework. Ottawa: Law Commission of Canada.

Llewellyn, J. (2006). Restorative justice in transitions and beyond: The justice potential of truth Telling mechanisms for post-peace accord societies. In T. Borer (ed.), *Telling the truths: Truth telling and peace building in post-conflict societies*.

Notre Dame, IN: Notre Dame Press, 83- 114.

Llewellyn, J. (2008). Bridging the gap between truth and reconciliation: Restorative justice and the Indian Residential School Truth and Reconciliation Commission. In M. Brant-Castellano, L. Archibald, M. DeGagne (eds.), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*. Ottawa: Aboriginal Healing Foundation, 183-204.

Rice, B. & Snyder, A. (2008). Reconciliation in the context of a settler society: Healing the legacy of colonialism in Canada. In M. Brant-Castellano, L. Archibald, M. DeGagne (eds.), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*. Ottawa: Aboriginal Healing Foundation, 43-63.

Sinclair, M. (Nov 15, 2010) The rule of law: The role of law and Indian Residential Schools. Lecture conducted at University of Manitoba, Winnipeg, MB.

Walker, J. (2009). The Indian Residential School Truth and Reconciliation Commission. Ottawa: Library of Parliament.

Barriers to Leaving the Gang: An Exploratory Analysis

Caitlyn Cassell and Michael Weinrath,
Criminal Justice, The University of Winnipeg

Background and Context of Research

Gangs are not a new phenomenon; however their increasing presence in Canada has generated concern (Criminal Intelligence Service Saskatchewan, 2005). Winnipeg has acquired a reputation for being one of Canada's gang capitals, along with Edmonton, Saskatoon, Vancouver, Toronto, and Montreal. Across Canada there are an estimated 7,000 gang members, with an estimated 434 youth gangs established (Public Safety Canada, 2007). Despite the efforts of criminal justice agencies to combat it, gangs have continued to grow over the past 20 years in provinces such as Manitoba, Saskatchewan, and Alberta, (Goff, 2005). Statistics Canada reports that gang-related homicides have generally been increasing since the early 1990s, with one in five 5 homicides being gang-related in 2009 (Beattie and Cotter, 2010). Over-representation of Aboriginals in Canadian prisons has been well established, particularly on the Prairies (Nafehk 2004; Grekul, LaBoucane-Benson and Erickson, 2009). Aboriginal gangs such as the Manitoba Warriors, the Indian Posse, and the Native Syndicate, pose an increasing problem specifically in urban centres such as Winnipeg, Manitoba. With Aboriginal gang numbers highest in the Canadian Prairies, it is important to develop a more thorough understanding of their process of gang membership and how it is subjectively experienced by the individuals themselves. Most of the gang research to date has been concerned with the risk factors that lead to

gang membership, the victimization of gang members and has focused predominantly on gangs in the United States (Taylor, 2008; Taylor, Freng, Esbensen, and Peterson, 2008). It is important to expand our understanding of not only gang activities, but also of the possible exit strategies available to gang members.

The crime desistance literature has stressed the need to focus on within-individual changes that occur during the desistance process, rather than focusing solely on between-individual comparisons (Farrington, 2007; Kazemian, 2007; Savolainen, 2009). Typically, studies have examined the impact of factors such as employment, family, and social exclusion on arrest, conviction, and incarceration. It has been suggested that researchers must place more emphasis on what these factors mean to the individual (Gadd and Farrall, 2004; Massoglia and Uggen, 2007). Despite these recommendations, research addressing crime desistance remains relatively limited, and research specifically addressing gang desistance and gang exit strategies is notably absent. The current study attempts to partially address this gap in the literature by examining specifically gang desistance while considering individuals' subjective experiences throughout the desistance process.

Literature Review

Crime desistance literature has portrayed desistance as a process rather than a single event or end point (Kazemian, 2007). Research has identified the success of a multi-modal approach to desistance, which includes therapeutic relationships with probation officers, pro-social modelling, positive reinforcement of non-criminal behaviour and attitudes, self-efficacy, and social support during the post-release reintegration process (Burnett and McNeill, 2005; Gunnison and Mazerolle, 2007; Kazemian, 2007). The strength of this approach lies in its ability to meet diverse offender needs. However, research has found that more serious offenders are less impacted by such attempts at social control and deterrence (Gunnison and Mazerolle, 2007).

The extant literature provides few studies that explore gang desistance, and those that do exist are primarily American. Two possible routes of desistance have been identified; for some desistance includes quitting the gang abruptly and entirely, while for others it is a gradual process of drifting away from the group (Decker and Lauitsen, 2002; Pyrooz, Decker, and Webb 2010). Previous interviews with American gang members and ex-gang members have revealed that it is not uncommon for young adults to "fade out" of gang activity after an average of one year (Del Carmen et al., 2009; Taylor, 2008). It is not known if this trend is similarly found in Canadian gangs. For those considering leaving the gang either in drastic or prolonged fashion, what sorts of circumstances discourage this? Unfortunately, very little research has been done examining the barriers to exiting a gang (Kazemian, 2007). Pyrooz and colleagues use the life-course perspective to theorize that individuals who gradually leave the gang find themselves in a gray area, where transitioning into a different lifestyle is hampered by the social and emotional ties to their friends and family who are still involved in the gang. True or total desistance is difficult.

In Winnipeg, many gang members are completely surrounded by family and individuals in their neighbourhoods who retain their gang allegiance. Is it possible for these individuals to safely 'leave' the gang? This brings up the distinction between primary and secondary desistance that has been made in the desistance literature (Burnett and McNeill, 2005). Primary desistance refers to the achievement of an offence-free period, whereas secondary desistance refers to an underlying change in identity and the acceptance of an ex-offender label by the individual. Conceptually, researchers need to weigh the issues of identifying a state or condition of desistance; does such a state prevent lingering ties to the gang? Such ties might include seemingly innocuous relations such as any "hanging out," playing sports, watching television with a cousin (who is a gang member), to more serious activities such as drinking alcohol and doing illicit drugs (Pyrooz, et al., 2010).

Some research exists that suggests that there may be different exit strategies. Some members are beaten out of the gang, called "taking your minutes" or "getting a d-board", while others must commit a crime for the gang (Taylor, 2008; Taylor, Freng, Esbensen, and Peterson, 2008). Some avenues consist of exploring traditional Aboriginal culture, referred to as "taking the Red Road" (Nimmo, 2001). A community based program in Winnipeg's North End, Ogijita Pimatiswin Kinamatwin (OPK), employs Aboriginal street gang members, focusing on skill building and employment in skilled trades such as carpentry for gang members. Gang members involved with OPK do not renounce membership but try to redirect their gang activities into spiritual and cultural healing, as well as the work and training aspects of the program (Bracken, Deane, and Morrissette, 2009; Deane, Bracken and Morrissette, 2007).

Manitoba Corrections and the GRASP Program

Manitoba has initiated a number of programs in an attempt to manage gangs, including Spotlight for youth gangs (Weinrath, Donatelli, Murchison, and Cattini, 2009), the Good Life (Minobimasdiziwin) adult prison gang program (Weinrath, Murchison, and Markesteyn, 2009) and the Criminal Organization High Risk Offender Unit (COHROU) (Circular Manitoba Justice, n.d., Weinrath and Doerksen 2011). The Winnipeg Auto Theft Suppression Strategy (WATTS) has targeted young offenders, many of whom are gang members, and it has resulted in a huge decrease in auto theft (MPI, 2011). The Gang Response and Suppression Plan (GRASP) program is modelled after the Spotlight and WATTS programs, in that it targets high risk gang members, involves intensive probation supervision, probation counselling, and provides client specific community programming and rehabilitation services (LaFontaine, 2010). While Spotlight and WATTS focus on young offenders, GRASP targets adult offenders and mimics the multi-modal approach previously outlined. By multi-modal, we refer to the use of a varied set of strategies to promote behaviour change.

The GRASP program is focused on a high risk group of which we know little: Prairie gang members, most of whom are Indigenous Canadians. The current research seeks to address the lack of research by examining barriers to leaving a gang. We used interviews conducted with GRASP offenders to investigate the challenges that gang members face when trying to leave the gang. From a policy perspective, we also inquired as to what probation services or other justice agencies can do to facilitate the exit process. A better understanding of the barriers faced by gang members would enable justice agencies to develop strategies to help them successfully desist from gangs and crime. The current research also has the potential to inform policy aimed at improving the reintegration process for gang members contemplating an exit from their gang. This study also seeks to address two gaps in the research by examining the desistance process from gangs specifically, as well as by adding to the sparse literature concerning Canadian gangs.

Methodology

Procedure

This research is qualitative and exploratory in nature, using in-depth interviews as the main source of data. The procedure was approved by The University of Winnipeg Institutional Ethics Review Board. Interviews with active GRASP members took place at the Adult Probation Services COHROU (Criminal Organization High Risk Offenders Unit) office. Interviews with GRASP members that have returned to custody took place at the Winnipeg Remand Centre. Participants were greeted by the interviewer who provided them with an informed consent to sign, as well as a copy of the debriefing statement, which outlined the purpose of the research and the intended use of the data, and a copy of the interview questions (these item may be obtained by contacting the authors). Participants were informed that they were not required to answer any questions they did not feel comfortable answering, that they could chose to end the interview at any point without repercussions, and that their answers would

be kept confidential and anonymous. An audio-recorder was used to tape-record the interviews. Participants were encouraged to elaborate freely and to explain or clarify where necessary.

Although confidentiality and anonymity were ensured, participants were informed prior to interviews that any information divulged on their behalf regarding child abuse, homicide, or suicide must be reported. Participants were advised that the results of the study would be made available to them should they so wish.

The current research was delayed by some unforeseen challenges. Some participants had returned to custody and had to be interviewed at the Winnipeg Remand Centre. To gain access to the specific population the researcher had to undergo security clearance by the Manitoba Department of Justice. This was a drawn out process beset with obstacles and significantly delayed the start of the interviews. However, interviews that took place in the community brought with them some unique challenges. The voluntary nature of the research resulted in many appointments being made to conduct interviews that were ultimately fruitless.

Participants

Participants consisted of 8 individuals who are currently members of GRASP category A (actively participating in the program). Participants were entirely male between the ages of 18 and 27 years. Seven of eight were Aboriginal and the other was a visible minority. Four individuals were interviewed out in the community at their probation officer's office, and the remaining participants were interviewed at the Winnipeg Remand Centre.

Limitations

This study was exploratory in nature. Findings reflect the experiences and opinions of a small group of gang offenders with unique histories, who are involved in a program

with a strong emphasis on surveillance. While interview methods do provide rich detail and subjective accounts, our small sample warrants caution when generalizing (Massoglia and Uggen, 2007). Another limitation to the current research is the reliance on the self-report of offenders. While participants were more than willing to share their gang exit experiences, it is difficult to confirm that those who claim to have left a gang have actually done so. As with any desistance research, it is impossible to be sure these individuals actually left the gang or merely have eluded the police's detection (Gadd and Farrall, 2004).

Results

Interviews were analyzed using the constant comparative method (Brown 2006; Glaser and Strauss, 1967) in which participants' responses are constantly compared with others' responses to determine themes or trends in statements. The main purpose of this research was to explore the issues faced by gang members in Manitoba when they exit a gang. This research was intended to address a gap in the existing desistance literature by examining gang-specific desistance, and further to address Canadian gang desistance issues. Participants answered the interview questions based on their personal experience with exiting a gang. Most participants had first-hand experience of leaving a gang. Some had left and remained out of the gang, while others had left but had since joined another gang. Although there was one participant who had never left his gang, he answered questions based on his perception of his friends' experiences of leaving a gang. The following sections will outline themes and trends from subject responses, using quotes from the interviews to highlight the issues from perspectives of the participants, and giving voice to gang members themselves.

The length of time spent contemplating leaving the gang

The question posed to participants was "How long had you thought about leaving your gang before you actually left?"

Responses from the majority ranged from a relatively brief period of 6 months to a lengthy 5 years. Most participants indicated that they had contemplated leaving for a significant period of time before acting on the idea. Even those participants who considered leaving for a short period still indicated that they had put serious thought into the decision.

> I thought about it 'cause I was in the hole for a bit. When you're in the hole you got a lot of time to think, you know, you're locked up 23 and a half hours a day in your cell, nothing to do. I thought about it for a couple weeks.

For most, wanting to exit the gang does not easily translate into physically leaving. Decker and Lauitsen (2002) describe the pathway out of the gang as a gradual departure. Furthermore, for some participants this was not their first time exiting, or attempting to exit, the gang. More than half the participants reported having left gangs in the past, but had fallen back in with the same gang or a new one. The on-and-off again membership of these individuals shows primary desistance: the achievement of an offence-free period, or in this case, a period of no membership (Burnett and McNeill, 2005). The fact that so many of the participants have left and returned to gangs demonstrates the difficulty of accomplishing secondary desistance from a gang. Pyrooz and colleagues (2010) suggested a life-course perspective of desistance which depicts gang desistance as a process rather than a single act. The lengthy periods of contemplation coupled with the in-and-out pattern of gang membership underscores the procedural nature desistance can take on.

Unlike the majority, one participant expressed that his decision to leave his gang was a sudden one and that he acted on it quickly.

> Uh well, very short period I guess, I just thought of it and it happened shortly after I guess. Probably with all three gangs, very short, abruptly came to an end (….) Nothing really made it hard to leave, right, you just leave.

Although for this subject leaving the gang was a straightforward endeavour, the majority of participants found it was a much more thought-out process. It should be noted, however, that other investigators have found that some individuals take a more sudden approach to leaving the gang (Pyrooz, Decker and Webb, 2010).

Pivotal life events

Given the time spent contemplating leaving the gang, we were interested to know what eventually motivated them to transition from thought to action. Participants were asked to discuss any significant events that may have acted as a pivotal point in making the decision to leave. Most participants identified a turning point, or a personally significant event that motivated them to act on their previous thoughts of leaving. For some, this event was violence-related and prompted by the behaviour of others around them.

> The way they're treating their own people… telling them to go beat some guy for nothing (….) I seen too much violence and I was thinking this is not how it's supposed to be. They're like robbing each other.

For another individual, the violence was aimed at those who were close to him.

> I thought about it for a couple weeks [while in jail], 'cause those guys were doing stuff on the streets to my friends and that. It was pissing me off (….) They were like jacking them and shit, and they know that they're my brothers. They were just pulling some really messed up stuff on the streets. They jacked my brother (….) They kept telling me if I keep talking about it I'm gonna get punched out.

These participants expressed that the violence they had experienced within the gang ran contrary to the reasons they had originally joined, such as friendship and support. After much consideration, they realized that what they had originally sought in gang membership was either no longer there

or was being overshadowed by the violence. This realization acted as their pivotal point. This mimics findings from previous research that once an individual accepts that the gang's identity no longer complements them as an individual, they are more likely to act on previous thoughts of leaving the gang (Decker and Lauritsen, 2002; Vigil, 1988).

Along similar lines, two other participants expressed that for them, it was the politics of the gang that were interfering and overshadowing more appealing aspects of gang membership.

> No violence, no. There's probably, out of the three gangs I left there's probably two events towards the end that made me leave (…) one was over drugs and the other was over just some in jail politic-type stuff I wasn't really too happy with and, uh, that was that.

> It's about respect and loyalty. I'm sick of the bull, and the politics. The politics now is different. Four years ago it was the shit, it was good. It was all about making money and respect, right (….) They gain the position of power and then they start acting stupidly.

Both these participants expressed that it had been comaraderie that initially attracted them to the gang. For them, the politics were detracting from the camaraderie and rendering the gang less appealing.

For the remaining participants their turning points were internally motivated. One was brought on by a personal achievement that held great significance to him.

> When I graduated [from high school]. None of my family members have ever graduated before, I was the first. And maybe I can maybe help my sister or help my brother change their life too (….) I just kind of wanna look at myself like as a working person and somebody that can be supportive to other people, like my girlfriend and my godchild.

This individual was motivated by his high school graduation to leave the gang and change the way himself and others per-

ceive him. Two other participants also alluded to a desire to better themselves as the turning point that finally made them leave the gang. One individual showed particular insight when he expressed that the way he was looked at by others had harmed the way he perceived himself.

> I changed myself 'cause I think one day when I asked myself what I'm doing, why I'm involving myself with people that are going somewhere that is not ok to be there, you know, while I could be doing something, proving to people that, you know, I'm a great person, you know. While I'm doing all this stuff I'm not great, you know. I'm making other people have fear, I'm giving them fear. So how can I think about other people and think about myself? So I'll pull myself out and then gotta do the best I can and do it to impress other people, my family (…) try to impress them so they can talk good about me. 'Cause when you look back nobody say hi to you, you know. They scared of you, you know (…) As a person you gotta feel good for yourself.

Another participant claimed that a desire to be a better father had motivated him to leave the gang. He himself had never had a father figure in his life and he wanted his children to be able to turn to him and rely on him. This awareness and concern for others' perceptions may come as a surprise from a group of individuals who are perceived to not care what others think of them. Curiously, on the one hand sensitivity to the approval of others is an external motivator, but only at such time as an individual internally decides to care about the opinions of the community at large.

Other findings from the current research do not align with findings from previous studies. Laub and Sampson (1993) found that structural turning points, such as employment, marriage, or parenthood, are the primary influences that act as turning points. However, in the current sample this was the case for only 2 participants. The participant who had recently graduated from high school and the participant who

wished to be a better father were motivated by structural changes in their lives to finally leave the gang. Others have suggested that research must consider what these structural turning points mean to the individual in order to appreciate their subjective importance in the desistance process (Savolainen, 2009). The majority of participants in the current study, however, did not allocate great importance to such structural issues.

Autonomy in decision-making

A number of participants brought up the issue of autonomy when discussing their decision to leave the gang. All but two participants reported having family members or close friends try to convince them to stay out of gangs. For some, these attempts persisted throughout their gang membership. It stands to reason that the pleas of those close to them had some impact on their decision to leave the gang. However, half the participants reported that this was not the case. Although not directly asked whether or not they made the decision to leave autonomously, half of the participants mentioned that the decision was one they had made on their own, of their own free will, and for their own reasons.

> It was my own decision in my own head (….) Nobody can convince you, nobody who wants you to do it except yourself.

> I had to make my own decision to leave, whatever I gotta do I gotta do myself. I not trying to tell nobody, 'Hey, I'm gonna leave this, I'm gonna leave that.' Because I make my own decision in the first place and I do my own decision by getting anywhere my own way.

Research in the probation field has pointed to the need for intrinsic motivation (Burnett and McNeill, 2005). The fact that participants brought up the issue of autonomy without being asked or prompted to suggests that this was an essential aspect of the transition out of gangs for them.

The role of employment in leaving the gang

The issue of money and income had arisen in almost every interview before any questions were asked. It was clear that this issue was one that was at the forefront of many participants' minds. Subjects were asked whether or not they had held a legitimate job in the past, whether or not they held one when making the decision to leave the gang, and how important they felt steady income was for the desistance process.

Responses for this section were evenly mixed. Half the participants had never had a legitimate job in the past. The other half of participants had held jobs in the past, with two of them reporting having held a job at the time they left the gang. Participants who did have a job acknowledged that they took pride in their work.

> I don't really have people skills with the real world. But, uh, I prefer to work 'cause I find it more motivating for myself. Plus, you know, it gives me time to think too while I'm working you know, 'hey this is honest money', and to be honest I felt good about it. I actually felt about that there a few years ago. I felt good about it, you know, come home, slowly fixing that place up again, getting back your t.v. and couches. I used to feel really good about it coming home from work and started looking around my place and like, 'Wow this place is starting to look nice again'. It's all this hard work you know, finally paid off. Feels good.
>
> There were times I went to work. I just left selling drugs and went back to work, try to do something different (….) It keeps you from the gang 'cause they're like 'Oh what are you doing? How come you don't come chillin?' And it's like 'Because I'm working, doing my job.' And they can't say nothing.

This last response underscores the shift in routine that comes with employment. Not only does employment ease the financial challenges of leaving a gang, it also alters the daily ac-

tivities and routines of individuals (Savolainen, 2009). Gang members who obtain employment must now modify the way they allocate their time; spending more time at work results in less time spent with the gang.

Participants who did not hold a job while leaving the gang stated that they felt having a source of steady, legitimate income would have made the transition easier for them. One participant articulated the income predicament very accurately:

> I've never had a job in my life. The only job I had is selling drugs (….) Its hard to leave a gang if you don't have employment too. 'Cause those drugs are your source of income. So what are you supposed to do? You're gonna sit there and wait for your welfare check every two friggin weeks. What the hell is a hundred bucks gonna do for you for two weeks? Obviously when you leave a crew you go on welfare. I bet you a majority of the people who left a gang who go on welfare still sell drugs on the side. I bet you they do, I bet you anything they do. 'Cause they need to get by. Like, I used to do it to survive. I didn't have my own home, I couldn't feed myself. People think I did it because I thought it was cool. No. I had to do it to survive. I had to do what I had to do.

A similar concern was voiced across all participants: there needs to be more supports available to individuals considering leaving the gang. Participants argued that many needed employment to make leaving the gang possible, but that the process of finding a job was intimidating one. More support is needed to help them through it.

The role of family in the decision to leave the gang

Many participants stressed that leaving the gang was a decision they had made on their own, without being convinced or persuaded by anyone else. While family was not cited as the sole motivation to leave the gang, all but one participant acknowledged that family was a factor.

Children

All participants reported having children of their own, although there were two participants who identified as fathers under special circumstances. One of these individuals had experienced a miscarriage with his partner, and the other had a god-child. Both were able to relate to parenthood in a unique way. Previous research has examined the role that parenthood plays in gang desistance (Moloney, Hunt, Joe-Laidler, and MacKenzie, 2011; Moloney, MacKenzie, Hunt, and Joe-Laidler, 2009). Findings have shown that with parenthood comes a shift in priorities, responsibilities, activities, and identity. These changes can act as catalysts to the desistance process (Savolainen, 2009). However, it is unclear as to whether this trend was observed in the current sample. When asked what the turning point had been for them, none of the participants mentioned their children. However, when asked explicitly if their children had factored into their decision to leave the gang, all but two participants expressed that they had.

> I didn't like them knowing what I was doing. I don't want them acting like that, right. They try to act like that and I tell 'em not to.

> Ya, there was my kids, my kids really. You know I kinda wanna be there for them to have all the answers, and try to be there for them every step of the way. 'Cause you know like I was raised without a father, or father figure and that's what I want, to kinda wanna play that role towards them as a father figure (….) I didn't like the drugs around, you know like, I didn't like having any of that stuff around like drugs and drug money you know, and plus I didn't wanna get the kids apprehended by CFS too. It feels good to come home and see your kids smiling at you.

It is clear from these remarks that the participants' children did play a role in their decision to leave the gang. Improved relations with their children were perceived as one of the benefits of leaving the gang. In spite of this, children were not

cited as a pivotal event or influence in the participants' transition from contemplation to action. Unfortunately, the current research cannot speak to why this discrepancy occurred.

Although most participants acknowledged that their children did give them motivation to leave the gang, not all participants felt this way. Two participants reported that their children had not factored into their decision to leave the gang at all. Their comments suggested that they did not perceive gang membership to be a detriment to fatherhood. It is important to stress that only a small minority of participants expressed this view.

Spouse

Participants were asked to comment on the role any girlfriend or wife played in their decision to leave the gang. All but two participants reported having either a girlfriend or common-law wife. One of the participants'girlfriend, who was also the mother of his child, had recently passed away. However, he was still able to comment on the role she played in his decision to leave the gang. In most cases participants expressed that their spouses had encouraged them to leave the gang prior to their decision to exit.

> She [girlfriend] always talk to you, she always cry to me. I never try to hurt somebody close to me. I don't like seeing them cry, cuz I've been hurt and I've seen a lot of people cry (….) So I made my decision, you know, looking at my girlfriend crying every day. Why's she crying? She's crying for me, you know, to help me out, to try to make me a right [good] person. She knows that there's something in me, a good part of me. She try to bring it back.

One participant reported that his girlfriend had not urged him to leave, but stated that he knew she would support any decision he made.

> She [girlfriend] was behind me (….) No she didn't try and urge me to leave but she just supported what I was

> thinking. One day I thought I wanted to leave, she supported that, if I wanted to stay she supported that.

The issue of support came up repeatedly when discussing this question. All but one participant stated they knew their spouse would support them in their decision to leave.

> She [common-law girlfriend] is actually like 'Why do you need something like that, you're better than that. You've got kids to think about now, you know, you're becoming a family man. You're not the same person you once were before when I first met you. And it kinda gave me something to think about at night when I was alone or when I was incarcerated too. I'd sit in my cell sometimes you know and think, I don't really need this.

Responses indicate that girlfriends and spouses did not necessarily convince participants to leave the gang, but their support for that decision was felt. Knowing that they had the support of their girlfriends or spouses seems to have made it easier for the participants to move from 'thinking about leaving' to acting on those thoughts.

Parents

Participants were asked whether or not their parents had played a role in their decision to leave the gang. Participants reported having limited contact with their parents, if any contact at all. Explanations for the weak bonds with parents varied, some had parents who had passed away when they were young, and some had histories of abuse at home. Many participants had been raised by their grandparents. Due to the weak relationships with parents, it was not surprising that all participants indicated their parents had played no role in their decision to leave the gang.

There was a common sentiment that certain reasons to leave the gang were perceived as more legitimate than others by gang members. Gang business or gang disputes spilling over into member's families were seen as a legitimate reason to consider leaving the gang.

> Violence never really scared me to be honest with you. People have made so many threats against my life before… if you're gonna threaten my family, or any one of my friends, if you're gonna try to do something to them just to try to get to me, of course its gonna hurt me and its really gonna affect me in a way, you know. Especially if its my family member or my kids.

In these cases, the sentiment expressed was that if the gang mistreated their family members who were also members of the gang, then this was grounds to consider leaving. However, some participants stated that their family was extensively involved in gangs as well. For these participants it was quite normal for gang business to overlap with family business.

Exit rituals

When participants were asked about the consequences of leaving the gang, responses revealed the subjective severity of exit rituals as perceived by the gang members themselves. Previous literature has repeatedly reported that exit rituals for gang members are violent (Taylor, 2008). It has been suggested that the threat of these violent rituals is sufficient to deter members from leaving. In the current research, all but one participant reported violent beatings as their gang's exit rite. Referred to locally in Winnipeg as 'd-boards', these rituals consists of 2 or 3 minutes of beating from 2-6 gang members. While this appears barbaric on the surface, to the individuals involved it is perceived as more normative and less severe. The present findings suggest that gang members themselves, while acknowledging the existence of such rituals, do not view them as significant enough to deter one from leaving the gang if they have already decided to leave. Instead, they are seen as an inevitability that needs to be accepted.

> I said 'I'll take a beating man. I'm done with your shit man. And I took a beating. I took like 2 minutes and 30 seconds with 6 guys (….) I wasn't worried about the beating they were gonna give me, 'cause I've done that stuff. I'm used to that, you get used to that stuff.

> Ya you do get a beating, probably pretty badly for some people. I've been through a few of them already and I just got up walked away and laughed about it.

In addition to the diminished subjective severity of exit rituals, the current findings also suggest that these rituals may not be as inevitable as previously thought. Two participants reported that not everyone goes through these violent exit proceedings and that they themselves did not experience any.

> There were expectations like that like uh you have to get beat up for a minute straight, but I always see them downtown and nobody does nothing to me. A lot of people are scared to get one [a d-board].

> There is but no, not me. Well there's supposed to be, see things are changing. There was definitely in the early and mid 90s, you know but, there's supposed to be, but you hear of hardly of anybody now.

It was suggested that the traditionally violent 'beat-outs' are becoming less common with the newer and younger gang members. While the certainty of exit rituals may be starting to wane, the type of exit ritual appears to have remained very consistent over time and across gangs.

Challenges faced while/after leaving the gang

Participants were asked to discuss specific challenges they, or their friends, faced when they decided to leave the gang. It was then further explained that we were interested in any obstacles that may have stood in their way, whether those be financial, social, or physical. Upon clarification, social challenges were most frequently reported with over half of participants claiming to have lost friends. This loss of friends lead to the loss of protection, increased harassment, and the loss of their reputation.

> I gotta watch my back, everywhere I go, I gotta. I already got punched out for leaving. Its hard to leave a gang and you're still in the city of where that gang is. You're gonna meet people in that gang.

> Friends not talking to me no more, I lost a lot a lot of friends. And, that's about it. Besides some hater messages on facebook and stuff.
>
> The bad rep name I guess, and being a roll-out. When you're considered a roll-out its pretty much being called a bitch.

Despite these social challenges, a common response to this question was that there are few challenges faced when leaving a gang that are insurmountable.

> It's really hard to try to get out but, like, if you got a good head on your shoulders and everything you can talk for yourself try to reason with them you know, like. That's the best thing I think to do is try to reason with them (….) Like I said if we can just be two reasonable men and just sit down and try talk about it, you know, instead of escalating to violence (…).

Two participants described their experience of leaving the gang as quite straightforward. According to them, if you wish to leave the gang you simply leave.

> Nothing really made it hard to leave, right, you just leave. You know, uh things are a little different nowadays then they were back in like the early-mid 90's I guess. But now it's a little different, nothing really was hard, it wasn't really hard to leave.

These responses portray gang membership as more informal and optional, suggesting that most do have the choice to leave if they wish to. Considering this with the sentiment that "no barrier is insurmountable", it raises an important question: why is gang desistance perceived as so difficult? It may simply be that more people do not exit the gang because they do not wish to leave. One cannot rule out that for some, gang violence and making money are exciting and pleasurable activities. For others with limited education, job experience, family support and a small social network, gangs provide income, friendship, and protection; these are powerful inducements to remain in the gang.

The role of probation services in their decision to leave

All the participants in the current study were on probation at the time of the interviews. For most, this was not their first time on probation. Participants were asked to discuss the role of their probation officer in their decision to leave, as well as discuss what they think probation services in general could do, or could have done, to help them leave the gang. It is important to keep in mind the intensive supervision experienced by our subjects and aggressive nature of the GRASP program. Very few had anything positive to say about either probation in general or their specific probation officer. None of the participants reported having sought help from their probation officer. Furthermore, none of the participants reported that their probation officer, current or past, had ever discussed the issue of exiting the gang with them.

An interesting theme emerged from these discussions. Most participants shared the sentiment that even if they had felt comfortable enough with their probation officer, they would not have gone to them for help. Furthermore, when asked what they thought probation services could do to change this, most participants simply said there was likely nothing they could have done.

> A lot of people, a lot of gang members are hard-headed and they don't like their POs, they wouldn't talk to their POs. A lot of people aren't cooperative. I bet you a lot of people won't actually sit down and talk like we're doing here.

> Probation officers are helpful because they sit there and they chat with you and that (…) But I don't think they can help you leave a gang. They can talk to you about it, like any other person you know, they can. But I don't think they can help you leave.

Some participants expressed that they would not take help offered by probation officers because they preferred to take care of things on their own.

> Not really, I like to do my stuff myself. I don't like asking people and boring people with my problems.

Similar to the discussions on autonomy earlier, it seems that making the decision to leave the gang was something they needed to do on their own.

Summary and Discussion

The current research aims to fill a gap in gang literature by examining the Manitoban gang situation and gang desistance. Our participants belong to a highly specialized probation program targeting high risk gang offenders. Despite the assumptions that this population would be resistant to desistance discussions, there was a great willingness of these individuals to share their personal experiences.

The majority of participants indicated they had spent a significant length of time contemplating leaving their gang before they acted on it. Participants were asked if they had experienced a turning point, or a pivotal event, that motivated them to finally act on their previous thoughts of leaving. Contrary to previous research (Savolainen, 2009), very few of the participants referenced structural changes in their life, such as marriage, parenthood or employment when recounting their personal turning points. The issue of autonomy proved to be very important to these participants. While not explicitly asked about the topic, participants raised the issue on their own and were adamant that the decision to leave the gang was one they had made on their own terms, for their own reasons, and without being convinced by anyone else.

Participants spoke about the role their families had played in their decision to leave the gang. In general, having children had not been a pivotal life event for participants, but their children had acted a source of motivation to leave the gang; They anticipated leaving the gang would be good for their relationships with their children. Most participants reported that their girlfriends and spouses had given them a great

deal of support in their decision to leave. Participants made it clear they had been reassured knowing that they would support them in their decision to leave. Most participants reported either damaged or non-existent relations with parents, and hence not a single participant credited their parents for having influenced their decision to leave the gang.

Participants were evenly split when it came to employment. Those that had held a job described the sense of pride they had achieved from their jobs. Also, they reported that holding a job made it easier to spend time away from the gang if they so wished. Those that had not held jobs stated that it was not for lack of wanting, but an intimidation with the job searching process that had prevented them from gaining legitimate employment in the past. It was agreed that more supports are needed for those wishing to find work. Further discussion revealed that for these individuals probation officers played a marginal role in the exit process, with most participants preferring to act independently.

When asked about any rituals that are forced upon exiting gang members, a majority of the participants in this study minimized the importance of these rituals. Many revealed that these rituals were not inevitable and that they had personally eluded this aspect of desistance. More importantly, most participants revealed that the violent exit rituals that do occur are not subjectively severe enough to deter one from leaving the gang if they sincerely wish to leave. While the 'beat-outs' and 'd-boards' may seem barbaric to outsiders, they are relatively normative to the individuals in the gang culture. Finally, most participants stated that the primary challenges they faced upon leaving the gang had been social, being either the loss of friends or their prior reputation. However, there was a unanimous sentiment that no challenges had been sufficiently significant to deter them from their decision to leave.

In this qualitative study we have sought to examine possible pathways out of the gang. In doing so we focused on the influence of external others and employment, and possible bar-

riers to offenders leaving. From a criminal organization perspective, it was evident that leaving could well be influenced by poor treatment within the gang, and tiring of the gang life. Punishments such as d-boards did not deter those interested in leaving. Gang leaders, like any business men, would likely do better in keeping their members if they provided consistently fair and well compensated treatment. Contrary to some of the desistance literature, there was an absence of specific pivotal turning points recounted by our subjects. They placed considerable emphasis on their own personal autonomy in the desistance process and, while the decision to leave a gang might be related to a multitude of factors, singular life events were not identified. Thus, the positive influence of parents, spouses or children, might be correlated to gang leaving, but this support might not always lead to a decision to exit. Employment was definitely a factor, and the ability to support oneself was considered key to leaving successfully. In summary, there were few barriers perceived by gang members in successfully exiting; they viewed leaving the gang as relatively easy to achieve if the individual will was there.

A surprising finding was the view of most subjects that their probation officers neither talked to them about leaving nor did they think they could assist them in doing so. In fact, there was a fair bit of negativity towards probation officers. This may reflect that the subjects were serious offenders and enrolled in GRASP, a program heavily directed towards surveillance and suppression. This certainly sets up a potentially antagonistic dynamic. Given that GRASP includes programming intended to assist offenders, the evident lack of therapeutic engagement may well be something that could be worked upon. Ideally, a unit with diverse goals such as GRASP does need its subjects to perceive some balance between treatment and enforcement. Discussing the negatives of gang life might be appropriate in counselling sessions.

Further research with larger sample sizes and gang members in different programs will help ensure that no trends or common issues have been overlooked. A larger sample will lend

itself to greater generalizability within the Canadian gang population and, more specifically, gangs in Manitoba and the prairie provinces. There is a need for continued research within this population. The Canadian Aboriginal gang situation is severely underrepresented in the gang literature. Given the thriving state of Aboriginal gangs in Manitoba and other Canadian prairie provinces, there is a great need for a better understanding of exit possibilities. Understanding why gang members leave and how best to facilitate this is vital information for correctional services.

References

Beattie, S., and Cotter, A. (2010). *Homicide in Canada, 2009.* (Catalogue No. 85-002-X). Retrieved November 15, 2010 from Statistics Canada website: http://www.statcan.gc.ca/pub/85-002-x/2010003/article/11352-eng.pdf.

Bracken, D., Deane, L., and Morrissette, L. (2009). Desistance and Social Marginalization. *Theoretical Criminology*, 13(1): 61-78.

Brown, J. (2006). Interviewer as instrument: Accounting for human factors in evaluation research. *Evaluation Review,* 30(2): 188-208.

Burnett, R., and McNeill, F. (2005). The place of the officer-offender relationship in assisting offenders to desist from crime. *Probation Journal,* 52(3): 221-242.

Circular Manitoba Justice, n.d. Provided by COHROU, Manitoba Corrections, Winnipeg Manitoba.

Deane, L., Bracken, D., and Morrissette, L. (2007). Desistance Within an Urban Aboriginal Gang. *Probation Journal,* 54: 125-141.

Decker, S., and Lauritsen, J. (2002). Leaving the Gangs. In R. Huff (Ed.), *Gangs in America - 3rd edition*. Thousand Oaks, CA: Sage.

Del Carmen, A., Rodriguez, J., Dobbs, R., Smith, R., Butler, R., and Sarver, R. (2009). In their own words: A study of gang

members through their own perspective. *Journal of Gang Research,* 16(2): 57-76.

Farrington, D. P. (2007). Advancing knowledge about desistance. *Journal of Contemporary Criminal Justice,* 23(1): 125-134.

Gadd, D., and Farrall, S. (2004). Criminal careers, desistance and subjectivity: Interpreting men's narratives of change. *Theoretical Criminology,* 8(2): 123-156.

Glaser, B. and Strauss, A. (1967). *The Discovery of Grounded Theory.* Chicago: Aldine.

Goff, C. (2005). *First Nations and Organized Crime.* Retrieved from RCMP, Research and Evaluation Branch website: http://cpc.phippsinc.com/cpclib/pdf/59769e.pdf.

Grekul, J., LaBoucane-Benson, P., and Erickson, K. (2009). "By working together we can support youth": Observations from a preliminary evaluation of the Community Solution to Gang Violence. *Journal of Gang Research,* 17(1): 45-72.

Gunnson, E., and Mazerolle, P. (2007). Desistance from serious and not so serious crime: A comparison of psychosocial risk factors. *Criminal Justice Studies,* 20(3): 231-253.

Kazemian, L. (2007). Desistance from crime: Theoretical, empirical, methodological, and policy considerations. *Journal of Contemporary Criminal Justice,* 23(1): 5-27.

LaFontaine, L. (2010). Gang Response and Suppression Plan (G.R.A.S.P): Executive summary. Manitoba Corrections, Winnipeg MB.

Manitoba Public Insurance. (2011) Winnipeg Auto Theft Suppression Strategy. Retrieved from MPI website August 9th, 2011 http://www.mpi.mb.ca/english/autotheft/ATWATSS.html.

Massoglia, M., and Uggen, C. (2007). Subjective desistance and the transition to adulthood. *Journal of Contemporary Criminal Justice*, 23(1): 90-103.

Moloney, M., Hunt, G., Joe-Laidler, K., and MacKenzie, K. (2011). Young mother (in the) hood: Gang girls' negotiation of new identities. *Journal of Youth Studies,* 14(1): 1-19.

Moloney, M., MacKenzie, K., Hunt, G., and Joe-Laidler, K. (2009). The path and promise of fatherhood for gang members.

British Journal of Criminology, 49(3): 305-325.

Nimmo, M. (2001). *The 'Invisible' Gang Members: A Report on Female Gang Association in Winnipeg.* Winnipeg, Manitoba: Canadian Centre for Policy Alternatives.

Public Safety Canada. (2007). *Youth gangs in Canada: What do we know?* Retrieved from National Crime Prevention Centre (NCPC) website: http://www.publicsafety.gc.ca/prg/cp/bldngevd/2007-yg-1-eng.aspx.

Pyrooz, D., Decker, S., and Webb, V. (2010). *The Ties that Bind: Desistance from Gangs*. *Crime and Delinquency* On-Line First, XX, 1-26.

Sampson, R., and Laub, J. (1993). *Crime in the making: Pathways and turning points through life.* Cambridge, Mass. Harvard University Press

Savolainen, J. (2009). Work, family and criminal desistance. *British Journal of Criminology,* 49(6): 285-304.

Taylor, S. (2009). How street gangs recruit and socialize members. *Journal of Gang Research,* 17(1): 1-27.

Taylor, T. (2008). The boulevard ain't safe for kids…: Youth gang membership and violent victimization. *Journal of Contemporary Criminal Justice,* 24(2): 125-136.

Taylor, T., Freng, A., Esbensen, F., and Peterson, D. (2008). Youth gang membership and serious violent victimization: The importance of lifestyles and routine activities. *Journal of Interpersonal Violence,* 23(10): 1441-1464.

Totten, M. (2001). Legal, ethical and clinical implications of doing field work with youth gang members who engage in serious violence. *Journal of Gang Research,* 8(4): 35-56.

Vigil, J. D. (1988). Group processes and street identity: Adolescent Chicano gang members. *Ethos,* 16(4): 421-445.

Weinrath, M. & Doerksen, M. (2011) Evaluation of the COHROU Intensive Supervision Project. Winnipeg, MB. Report prepared for Justice Canada and Manitoba Corrections.

Weinrath, M., Donatelli, G., Murchison M. and Cattini M. (2009) *Impact Evaluation of the Spotlight Program* Manitoba Corrections, Winnipeg, MB.

Weinrath, M., Murchison M. and Markesteyn T. (in press). Justice

as method: the evaluation of the Minobimasdiziwin gang intervention program. In K.Gorkoff and R. Jochelson (eds.), Thinking about Justice: A Reader. Halifax and Winnipeg: Fernwood Press.

Colliding Intersections in Law: Culture, Race and Mental Health

Ruby Dhand, Osgood Hall Law School [1]

As the colliding intersections of culture, race, mental health disability and other identities infuse the legal and mental health system, the conceptual and practical challenges of dealing with these intersections must be analyzed. Mental health law is a complex area of law to explore these colliding intersections, since the exact reasons for the inequities faced by racialized psychiatric consumer/survivors is contested by practitioners in both law and psychiatry, making them difficult to prove in a legal forum (McKenzie and Bhui 2007: 397). Consequently, as practitioners grapple with the predominance of culture and race-based inequities in the mental health system, they continue striving to provide safeguards against these deprivations of liberty (Dhir 2008: 104).

This paper will explore the following questions: To what extent can a conception of justice address these colliding intersections without essentializing and stereotyping the identities of racialized psychiatric consumer/survivors? What theoretical approaches are necessary to understand the complexities of these intersections, while taking into account the context, systemic racism and multiple power hierarchies inherent in both law and psychiatry?

In Part I of the paper, I examine the inherent dangers with using cultural factors and cultural evidence/ information in the legal and mental health system. In order to address these

1 As a lawyer of South Asian descent, my desire to pursue research in mental health law stems from my legal work and involvement with Hiltz Szigeti LLP, ARCH Disability Law Centre, the University of Ottawa Community Legal Clinic and the Mental Health Legal Committee (MHLC), and life experiences with family and friends who are psychiatric consumer / survivors.

dangers, I suggest practitioners in mental health law consider theoretical approaches such as intersectionality combined with the institutional racism paradigm and the social model of disability theory. Drawing from interdisciplinary literature and theories, the analysis in Part II of this paper will articulate the tenets of these approaches, their applicability to mental health law and the larger fields of law and psychiatry in particular, and their strengths and weaknesses in regard to the issues at play. Lastly, I examine various interdisciplinary strategies and guidelines that practitioners can use to put these theoretical approaches into practice.

The terminology for this research is academically and politically contested. Within disability and mental health discourse, the terms and language being referenced are contextual and socially constructed (Barham and Barnes 1999: 138). I will adopt the following meanings of the terms, given their relevance to the research and their common use amongst mental health and legal researchers. I use the term "psychiatric consumer/survivors" to refer to those who are recipients or former recipients of psychiatric and/or addiction services. I refer to "intersectionality" as an analytical approach to highlight the intersections between aspects of identity and differences such as disability, race, class, gender and ethnicity, and various forms of systemic oppression (Dhamoon and Hankivsky 2011: 16). The "social model of disability" refers to the model of disablement, which suggests that the social environment creates barriers for people with disabilities to participate in society (Pothier 1992; Wendell 1996; Davis 1996; Bickenbach 1993). A "color-blind approach" refers to a legal approach which "ignores the fact that [racialized people] and Whites have not been and are not similarly situated with regard to legal doctrines, rules, principles and practices" (Alyward 1999: 34). Lastly, I use the term "racialized" to refer to those who come from an immigrant, refugee, ethno-racial or ethno-cultural community with diverse and unique social realities (Mental Health Commission of Canada and CAMH 2009: 4). The term is socially constructed "to view persons or groups who share (or are perceived to share) a given ancestry

as different and unequal in ways that matter to economic, political and social life…" (Manitoba Human Rights Commission 2007; Report on the Commission on Systemic Racism in the Ontario Justice System 1995: 40-41).

Part I: Fear of Essentialization: An Interdisciplinary Quandary

The legal and mental health systems' treatment of culture, and other colliding intersections of race, mental health disability and class has been problematic, resulting in differential outcomes and inequities for racialized psychiatric consumer/survivors. The challenge is immense for practitioners in both law and psychiatry, since psychiatric symptoms can present themselves differently amongst racialized psychiatric consumer/survivors; and in the event lawyers do present cultural evidence/ information, they may risk creating unjust stereotypes based on culture, race, class, gender, etc. (Hicks 2004: 21). For example, the subjective bias inherent in the field of psychiatry and cultural misunderstandings may result in inaccurate capacity assessments and diagnoses for racialized psychiatric consumer/survivors (Jarvis, Toniolo, Ryder, Sessa, Cremonese 2010: 247). Misdiagnosis may jeopardize the validity of one's capacity assessment in the legal system and legal outcomes for him or her (Hicks 2004: 22). Consequently, according to Suman Fernando, "black/ethnic minorities are more often diagnosed as schizophrenic, compulsorily detained under the *Mental Health Act*, admitted as offender patients, held by police under Section 136 of the *Mental Health Act*, transferred to locked wards, not referred to for psychotherapy, given high doses of medication and sent to psychiatrists by courts" (Fernando and Keating 2009: 47).

In light of these challenges, legal scholars have debated the extent to which culture, and other intersections can infuse the legal system without inculcating stereotypes. Specifically, Sonia Lawrence explores the problematic nature of infusing culture into the legal process. She argues,

What goes on in courtrooms can be seen as a modern project

of racialization, namely a more 'sophisticated' version of the blunt attribution of inferior traits to non-Whites that thereby attaches the inferiority label not to the individuals but rather to their culture. In belittling the content of other cultures and depicting the members of these cultures as either ignorant victims or zealous followers of deviant norms, legal processes are assigning traits to people. Of course, these 'traits' are ostensibly based on cultural, rather than racial affiliations. However, given the often simplistic or confused reading that courts give to cultural material, can they be absolved because they are relying on cultural labels rather than on skin colour? (Lawrence 2001: 112)

Lawrence suggests that judges are often not equipped and in some cases "unwilling" to understand the complexities of cultural evidence/ information (Lawrence 2001: 112). By only identifying differences between the non-mainstream, "Other" culture, and a construction of Canadian norms, the practice of adopting "cultural sensitivity" in courtrooms has created "an essentialized view of culture" giving deference to the constructed view of Canadian norms (Lawrence 2001: 116). In Canadian courtrooms, Lawrence indicates that judges are often unable to glean through and interpret the nuances within the cultural evidence/ information being presented by lawyers. There is little attempt to see similarities between the "Other" cultures and the majority culture, and distinguish differences within cultures themselves. In this vein, stereotypes can occur by reducing cultures to certain identifiable elements, practices, traditions, customs and traits without accounting for the contextual complexities of such information and a consideration of culture as non-static and changing (Lawrence 2001: 117-118). Accordingly, Lawrence questions whether cultural evidence/ information should even be presented in legal cases, if it continues to perpetuate such stereotypes and create unjust legal outcomes it is intended to avoid (Lawrence 2001: 135). This further raises the following questions: Who is putting the cultural evidence/ information forth and what power/control/expertise does he or she have to do so? Within legal and quasi-judicial legal

processes, are those from minority cultures given the opportunity to present this cultural evidence/ information in light of the rules of evidence and the type of forum in which cases are heard? How are expert witnesses able to respond to these issues at hand?

Despite these unresolved tensions, it is also evident that altogether ignoring culture, and other intersecting identities can perpetuate further inequities. In this regard, Razack describes that in certain legal cases, "we see the violent underpinnings of universality- how the very language fairness, sameness, rationality, equal treatment and neutrality can be used to expel racialized bodies from personhood" (Razack 2000: 7; Goldberg 1993: 149). Similarly, Alyward points to the dangerous consequences of adopting a "color-blind" approach. Theorists such as Alyward and Razack, therefore, emphasize the importance of deconstructing the impact that power hierarchies, history and systemic racism can have within the legal context (Alyward 1999; Razack 1998).

The problems with a "color-blind" approach are particularly relevant in a mental health law context where racialized psychiatric consumer/survivors may have unique needs such as those in regard to communication, culturally appropriate treatment options, and assessment procedures that take into account cultural context and beliefs (Tseng and Matthews 2004: 25). According to Suman Fernando, a "color-blind" approach in psychiatry is a "denial both of individual perceptions in a racist society, and, more importantly, the fact that race matters because of the way most-or all-societies function" (Fernando 2002: 132).

Part II: Considering Alternative Conceptual and Theoretical Frameworks

In addressing the underlying debate surrounding issues of "universalism vs. cultural relativism," the challenge for practitioners and scholars remains in attempting to find a balance between accommodating cultural and other colliding differences without creating varying standards for those

from diverse cultures and those from the dominant culture, while maintaining an efficient legal and mental health system (Tseng and Matthews 2004: 24). To account for the colliding intersections of culture, race, mental health disability, class and other identities, I suggest practitioners consider adopting theoretical approaches, which are grounded in social constructivism. The following discussion will explore and examine the relevance of using an intersectional approach in tandem with tenets of the institutional racism paradigm and the social model of disability. Lastly, I articulate a few interdisciplinary strategies and guidelines that have been proposed in law and psychiatry, which attempt to put the theoretical underpinnings of these frameworks into practice.

2.1 Intersectionality

Intersectionality recognizes the multi-dimensional (Crenshaw 1990-91: 1265) and fluid construction of an individual's identity (Yuval-Davis 2006: 194). The approach is "concerned with simultaneous intersections between aspects of social differences and identity (as related to meanings of race, ethnicity, indigeneity, gender, class, sexuality, geography, age, disability/ability, migration status, religion) and forms of systemic oppression (racism, classism, sexism, ableism, homophobia) at macro and micro levels" (Dhamoon and Hankivsky 2011: 16). According to Nitya Duclos (Iyer), an individual's distinctive experiences of oppression are caused by complex socio-economic and psychological factors, which occur within the system and the individual. (Duclos [Iyer] 1993: 29). Through an analysis of 299 reported Canadian human rights cases, Duclos (Iyer) found that the cases rarely mentioned racial affiliation, and there was little recognition of the intersection of religion, culture, ethnicity, class, and other social complexities (Duclos [Iyer] 1993: 29). In later research, (Duclos) Iyer (1993: 180) suggests that anti-discrimination laws create mutually exclusive categories, which result in individuals having to reinvent and deny their identity in order to fit into the rigid categorization being subscribed to them by the law. Adjudicators may treat "race,

colour, ethnic origin, ancestry, and place of origin as a single category" (Ontario Human Rights Commission 2001: 3). This is problematic because these social categories must be seen to operate relationally and they cannot stand alone as additive categories (Stienstra 2002: 3).

In a legal context, intersectional approach enables one to consider the historical, social, political, economic and cultural context, which contributes to the experiences and barriers an individual may face. An intersectional approach highlights the intersection between these grounds, which may adversely impact an individual who is identified with more than one ground. (*Canada v. Mossop*). To avoid essentalization, the intersectional approach "shifts the gaze from the othered identity and/or category of otherness to the relational processes of othering and normalization, and their pertinent contexts of power" (Dhamoon and Hankivsky 2011: 25).

As Justice Claire L'Heureux-Dubé argued in Mossop:

> It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex …categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect. On a practical level, where both forms of discrimination are prohibited, one can ignore the complexity of the interaction, and characterize the discrimination as of one type or the other. The person is protected from discrimination in either event (*Canada v. Mossop*: para 152).

Courts and tribunals have attempted to use an intersectional approach in human rights jurisprudence to understand the complexities of the intersecting oppressions and identities that result in discrimination. In *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch*), Justice Laskin of the Ontario Court of Appeal accepted that the definition of spouse is impacted by various socio-economic and familial factors (Falkiner: para 72). In his analysis, he reasoned that "multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged" (Falkiner: para 72). Similarly, in *Radek v. Henderson Development* (Canada) *Ltd*., the British Columbia Human Rights Tribunal used an intersectional approach to examine the intersections between the grounds of race, gender, disability and class (*Radek*). In its decision, the Tribunal stated: "I find it difficult to imagine that events would have unfolded in the same way if Ms. Radek had been white" (Radek: para. 471). Thus, the tribunal recognized that Radek's experience of discrimination was complex and unique because of the "multiple facets" of her identity (*Radek*; HIV/AIDS Policy and Law Review 2005: 2).

In law, despite the impact that the intersectional approach has had upon certain courts and tribunals, there has not been an explicit analytical legal framework developed for its implementation (Marchetti 2008; Gilbert and Majury 2006: 124; Sampson 2006: 269). Scholars have suggested that the approach has not been fully understood and endorsed in law because it is challenging for judges and adjudicators to simultaneously understand and discuss the intersections between identities such as disability, gender, sex, race, ethnicity and class (Marchetti 2008; Gilbert and Majury 2006: 124; Sampson 2006: 269). When applying the analysis, there is a danger of misunderstanding individual identities and perpetuating stereotypes. In this regard, intersectionality is often critical of the notion that identities are uncomplicated. For instance, race, sex, gender, disability and other socially constructed categories are not fixed and cannot be oversimplified. As Mary Coombs highlights, "identity is not fixed or absolute;

rather, it is determined by particular persons for particular purposes at particular times in a process in which the person identified participates with varying degrees of freedom" (Coombs 1996: 223). Accordingly, these critiques can inform an understanding of the "contextuality and complexity of identity" when applying an intersectional approach to a legal case and its underlying legal processes (Coombs 1996: 224).

In this vein, other scholars such as Maneesha Deckha and Rosemary Coombe suggest intersectionality should also be used to recognize the inherent hierarchies within law and culture. They suggest that the relationship between law and culture is dynamic, and cultural claims must be made within a context that recognizes social location and the "continually emergent differentiation, contestation, negotiation and agency" within cultures (Deckha 2004: 26; citing Coombe 1998: 21). To accomplish this, Marchetti suggests that legal processes "require adequate resources and a sufficient amount of time for the collection and analysis of the different narratives" (Marchetti 2008: 170).

In the mental health context, an intersectional approach is key to addressing how the colliding intersections and factors such as culture, race, ethnicity, gender, age, disability, class and sexuality affect racialized psychiatric consumer/survivors interacting with the law. For instance, Dossa's research emphasizes how an intersectionality paradigm can be used to highlight the interface between disability and culture (Dossa 2008: 83). Using this approach for cultural claims "gives weight to the politics of recognition," by "reversing the medical and rehabilitation model with its emphasis on normalizing the individual body" (Dossa 2008: 83).

When adopting an intersectional approach, mental health practitioners and mental health researchers must be cautious to ensure that findings are not generalized and negative stereotypes are not perpetuated. There must be a constant analysis and understanding of the power dynamics at play between those who are in the mental health system and practitioners such as lawyers, service providers, psychiatrists and

adjudicators working with them. Further, the lived experiences of racialized psychiatric consumer/survivors should underlie the analysis within a context that highlights how systemic racism and other forms of social exclusion may have affected their experiences. Accordingly, practitioners and researchers themselves must be self-reflective about their own biases, lived experiences and prejudices when adopting the approach.

2.2 Institutional Racism Paradigm

By acknowledging the existence of institutional racism within mental health services, mental heath researchers use the institutional racism paradigm in tandem with an intersectional approach to understand and develop solutions aimed at "systems," rather than "individuals" (McKenzie 1999: 616-617). "Institutional racism" is defined as "the collective failure of an organization to provide an appropriate and professional service to people because of their colour, or ethnic origin. This can be seen or detected in processes, attitudes, and behaviour that amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantages people in ethnic minority groups" (McKenzie and Bhui 2007: 650 citing Macpherson: 1999). For instance, McKenzie and Bhui suggest that the higher rates of involuntary admission and treatment by coercion amongst some minority ethnic groups in the United Kingdom can be attributed to institutional racism within the mental health care system (McKenzie and Bhui 2007: 649). It appears that "these disparities reflect the way health services offer specific treatment and care pathways according to racial groups, and therefore seem to satisfy the well established and widely known definition of institutional racism" (McKenzie and Bhui 2007: 649).

In the mental health law context, the institutional racism paradigm can be used to examine the relationships and interaction between mental health care services, mental health laws and racialized psychiatric consumer/survivors. Accord-

ing to Gary King and further articulated by Kwame McKenzie, mental health researchers should use this paradigm to 1) focus on the practices perpetuating inequities within institutions instead of upon the practices amongst individuals, 2) focus on reducing health inequities, 3) examine the connections between medicine and discrimination, 4) recognize how colonization and history affect racialized psychiatric consumer/survivors, 5) understand how other intersections of race, class, gender and sexual orientation affect mental health disability, 6) acknowledge the changing effects of racism through time and within institutions, and 7) emphasize the social factors that have contributed to the inequities instead of the biomedical ones (McKenzie 1999: 616-617; King 1996) .

Critics of this paradigm suggest that clinicians and researchers need to be cautious about placing an inappropriate emphasis on culture and ethnicity at the "expense of sound clinical judgment" (Singh 2007: 366). To address such issues, practitioners, regardless of the differing political views, need to make a commitment to using multi-disciplinary approaches within law and psychiatry and collaborate with all of the participants in the mental health system (McKenzie and Bhui 2007: 369).

2.3 Social Model of Disability

In conjunction with intersectionality and the institutional racism paradigm, one can draw from disability scholarship to explain how disability is influenced by the complex circumstances surrounding one's health condition, personal and external social factors (Hartley and Muhit 2003: 104). Contemporary disability theorists such as Dianne Pothier, Susan Wendell, Lennard Davis and Jerome Bickenbach argue that people with disabilities experience inequality as a result of social factors (Pothier 1992; Wendell 1996; Davis 1996; Bickenbach 1993).

Social constructionists argue that society has perceived a negative attitude about disability using essentialist assumptions about what a normal body or mind should constitute.

As Dianne Pothier argues:

> The social construction of disability assesses and deals with disability from an able- bodied perspective. It includes erroneous assumptions about capacity to perform that come from an able bodied frame of reference. It encompasses the failure to make possible or accept different ways of doing things (Pothier 1992: 526).

However, within mental health disability, the model rejects the deference given to psychiatry and the focus on using anti-psychotic drugs. For instance, the social model's "elimination of the false dichotomy between mind and body" can be used to emphasize how an individual experiences mental illness by acknowledging the effects of stigma, discrimination and institutional barriers in society (Andersen-Watts 2008: 155).

The social model has been critiqued and debated amongst scholars. As Susan Wendell suggests, strictly adhering to the social constructionist approach and outright rejection of the biomedical model may ignore the multi-dimensionality of disablement. In this regard, one of the main critiques of the social model of disability is that changing the environment does not eradicate all disability. This critique is particularly relevant to psychiatric consumer/survivors, who face serious psychiatric issues and may need medication to address them. Therefore, Wendell suggests that an understanding of disability must balance the "uncontrollable and immutable" reality of an individual's limitations along with social factors that continue to put people with disabilities at a disadvantage (Wendell 1996: 45). Secondly, it is important to note that the relationship between the psychiatric consumer/survivor movement and the disability movement is complex and contested. There are differences between the philosophical underpinnings of the disability movement and the psychiatric consumer/survivor movement (Campbell and Oliver 1996). The social model has been critiqued within the consumer/survivor movement since it was historically created for persons with physical and sensory impairments, and there is

a fear that such a theory will marginalize psychiatric consumer/survivors similar to those within psychiatry (Beresford 2004: 218).

Intersectionality is also relevant to a critique of disability discourse because the unmarked disability identity is often modeled on a white Euro-American disability experience, disregarding history, colonization, and social exclusion. As Fellows and Razack suggest, "the systems of domination that position white, middle-class, heterosexual, nondisabled men at the centre continue to operate among all other groups, limiting in various ways what [marginal groups] know and feel about one another" (Fellows and Razack 1998: 358). Although the intersections of identities such as race, culture, class, and mental health disability have not been readily explored, parallels can be drawn. As contemporary theorists of disability and race suggest, what constitutes a disability and a racial category are social constructions (Asch 2001: 6).

Similarly, the social model has provoked interest amongst mental health researchers. The model has the potential to examine the experiences of psychiatric consumer/survivors in a framework that focuses on eliminating societal stigma regarding mental health issues.

As Plumb argues,

> Such a model would also have to take into account of the strong sense that many survivors have that their processing in the psychiatric system is related not only to them being seen as defective but also frequently dissident, non-conformist and different in their values from dominant societal values (Plumb 1999: 467).

In mental health law, practitioners adopting this model are committed to critically evaluating laws, policies, processes, health inequalities, and social exclusion impacting psychiatric consumer/survivors (Duggan, Cooper and Foster 2002: 19). According to Perlin, to combat the sanism within mental health law, this model can help create a framework where individuals are given respect, dignity and ownership of their

condition and treatment (Perlin 2006: 74). He describes "sanism" as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry..."Sanism is primarily based upon "stereotype, myth, deindividualization, and is sustained and perpetuated by our use of alleged 'ordinary common sense' (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process" (Perlin 2006: 74). In this regard, as Kathleen Anderson-Watts suggests, an understanding and adopting of the social model can enable practitioners to analyze the social factors such as poverty, unemployment, and access to health care that impact psychiatric consumer/survivors. The model itself can envision alternative psychiatric treatment options, high standards for mental health lawyers and the involvement of non-medical consultants in involuntary admission hearings (Anderson-Watts 2008: 159).

2.4 Strategies for Change: From Theory to Practice

The challenge for practitioners and scholars alike lies in transforming the theoretical and conceptual underpinnings of the intersectional approach combined with tenets of the institutional racism paradigm and the social model of disability into practice. In order to embrace such a framework, I draw from interdisciplinary research and literature to examine the various strategies and guidelines that have been put forth in law and psychiatry. For instance, Leti Volp recognizes that people may have a "negotiated relationship with their culture" and, therefore, she proposes that the following guidelines be set in order to deal with the emerging problems of cultural evidence/information within legal processes (Volpp 1994: 65). When presenting cultural evidence/information, there should be a focus on understanding the individual's testimony instead of attempting to create a generalization of a certain ethnic group's behavior and then trying to mold the behavior of the accused to fit this generalization (Volpp 1994: 85). Secondly, transcultural psychology and

psychiatry should be used to ensure that cultural differences are properly understood (Volpp 1994: 85). Thirdly, courts [and tribunals] should consider using consultants with the same cultural background (or perhaps even gender) as the individual (Volpp 1994: 85). Fourthly, dominant norms should not be construed to be neutral (Volpp 1994: 85). And lastly, the information should not be constructed in a manner, which subordinates certain groups such as women within the culture (Volpp 1994: 100-101).

Lawrence suggests that practitioners should use cultural evidence/information cautiously. The inner multi-faceted and complex nature of culture requires "testimony about practices be taken as a guide and not as a strict template of behavior" (Lawrence 2001: 129). There must be a recognition of the "intra-cultural dissent and power struggles" inherent within any culture when such testimony is used (Lawrence 2001: 129). Practitioners should strive to include alternative narratives to explain cultural practices within legal processes, and they should attempt to compare the dominant culture's practices with those of the minority culture (Lawrence 2001: 129). Community members should also try to be involved in cases where cultural evidence/ information is an issue by submitting *amicus* briefs and highlighting the facts that legal rules, doctrines and conventions are "cultural and contested" (Lawrence 2001: 129).

In psychiatry, the DSM–IV–TR (2000) includes an outline for psychiatrists to include a "Cultural Formulation" in capacity assessments, diagnosis, and general care (Diagnostic and Statistical Manual of Mental Disorders 2000). To accomplish this, psychiatrists have recently proposed specific recommendations and guidelines. For instance, a clinician is expected to be self-reflective about his or her own cultural context and beliefs. This may include "1) cultural influences of the dominant society; 2) the cultural identity and background of the practitioner; 3) the institutional culture of the hospital, clinic, or other setting where diagnosis and treatment are delivered; and 4) the professional cultures of biomedicine

and psychiatry" (Mezzich, Caracci, Fabrega, Kirmayer 2009: 392). Drawing from tenets of intersectionality, Mezzich et al. encourage clinicians to understand the lived experiences and context of patients in a compassionate, open and emphathetic manner (Mezzich et al. 2009: 394).

Education and on-going awareness training should occur for all stakeholders in the mental health system. This includes: psychiatric consumer/survivors, mental health lawyers, adjudicators, psychiatrists, health care professionals, and service providers.

In this respect, health inequity literature suggests that intersectional training and workshops can be used to teach practitioners how to avoid a cookie cutter approach to culture, debunk the universalism, color-blind approach and to emphasize the impact of power hierarchies, institutions of oppression and structural racism upon racialized psychiatric consumer/survivors (Dhamoon and Hankivsky 2011: 25). These training workshops should be organized in collaboration with racialized psychiatric consumer/survivors. Specifically, institutions should consider implementing a consultation-liason model, to ensure that service providers who specialize in providing care for racialized communities can provide education, training and support to staff within the hospitals. Further, lawyers and adjudicators should be trained on how to recognize if cultural, racial and other social issues are relevant to an ethno-racial psychiatric consumer/survivor's case, and how to incorporate these issues into their arguments before the courtrooms or tribunals.

Conclusion:

As the interplay of race, culture, mental health disability and other intersectional identities infuse the legal and mental health system, these intersecting identities must be understood and appropriately addressed. Psychiatrists, lawyers and all practitioners should strive to understand the impact

of race and ethnicity on diagnosis, capacity assessments and treatment incapacity decisions. However, as Part I of this paper illustrates, there are inherent challenges when cultural evidence/information is presented in the legal and mental health system. There is a danger of misunderstanding individual identities and perpetuating stereotypes without accounting for the contextual complexities of such information. On the other hand, it appears that using a "color-blind approach," is similarly problematic because it ignores the impact of systemic racism, cultural context and beliefs, along with other social factors within the practice of law or psychiatry.

To achieve an inclusive conception of justice for racialized psychiatric consumer/survivors, as I described in Part II of this paper, I suggest practitioners consider adopting a theoretical framework embracing an intersectional approach, combined with tenets from the institutional racism paradigm and the social model of disability. These theoretical approaches can be used by practitioners in mental health law to question their own positions of power and cultural biases, to question the power hierarchies embedded within the institutions of the legal and mental health system, and to create practical strategies which reflect a contextualized understanding of the colliding intersections of race, culture and mental health disability.

References:

Andersen-Watts, Rachael. (2008). Recognizing Our Dangerous Gifts: Applying the Social Model to Individuals with Mental Illness. *Michigan State University Journal of Medicine and Law* 12: 141-162.

Asch, Adrienne . (2001). Critical Race Theory, Feminism and Disability: Reflections on Social Justice and Personal Identity. Ohio State Law Journal 62: 1-17.

Aylward, Carol. (1999). *Canadian Critical Race Theory: Racism and the Law.* Halifax: Fernwood Publishing, 1999.

Barham, Peter and Marian Barnes. (1999). The Citizen Mental Patient. In Jill Peay and Nigel Eastman, (eds), *Law Without Enforcement: Integrating Mental Health and Justice*. Oxford: Hart Publishing, 128-138.

Beresford, Peter. (2004). Madness, Distress, Research and a Social Model. In Colin Barnes and Geof Mercer (eds.) *Implementing the Social Model of Disability: Theory and Research*. Leeds: The Disability Press, 208-222.

Betteridge, G. (2005) Vancouver Shopping Mall Liable for Discrimination Against Aboriginal and Disabled People. HIV/AIDS Policy and Law Review 10(3): 34-36.

Bickenbach, Jerome E. (1993). Physical Disability and Social Policy. Toronto: University of Toronto Press.

Cambell, Jane and Mike Oliver. (1996). Disability Politics: Understanding our past, Changing our Future. London: Routledge.

Coombe, Rosemary. (1999). Contingent Articulations: A Critical Cultural Studies of Law. In Austin Sarat and Thomas R. Kearns (eds.) *Law in the Domains of Culture*. Ann Arbor: University of Michigan Press, 21-64.

Coombs, Mary. (1996). Interrogating Identity. *Berkeley Women's Law Journal* 11: 222-240.

Crenshaw, Kimberly. (1990-1991). Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color. *Stanford Law Review* 43: 1241-1299.

Davis, Lennard. (ed.) (1997). *The Disability Studies Reader.* New York: Routledge.

Deckha, Maneesha. (2004). Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law. *Canadian Journal of Women and the Law* 16: 14-53.

Dhamoon, Rita Kaur and Olena Hankivsky. (2011). Why the Theory and Practice of Intersectionality Matter to Health Research and Policy. In Olena Hankivsky et al. (eds.) *Health Inequities in Canada: Intersectional Frameworks and Practices*. Vancouver: UBC Press, 16-53.

Dhir, Aaron. (2008). Relationships of Force: Reflections on Law, Psychiatry and Human Rights. *Windsor Review of Legal and*

Social Issues 25: 103-113.

Diagnostic and Statistical Manual of Mental Disorders. (2000). DSM–IV–TR. (4th ed.). Washington: American Psychiatric Association.

Dossa. Parin. (2008). Creating Alternative and Demedicalized Spaces: Testimonial Narrative on Disability, Culture and Racialization. *Journal of International Women's Studies* 9 (3): 79-98.

Duclos (Iyer), Nitya. (1993). Disappearing Women: Racial Minority Women in Human Rights Cases. *Canadian Journal of Women in Law* 6: 25-51.

Duggan, Maria, Andrew Cooper and Judy Foster. (2002). Modernising the Social Model in Mental Health: A Discussion Paper. Leeds: Training Organisation for the Personal Social Services England, 1-22.

Fellows, Mary Louise and Sherene Razack. (1998). The Race To Innocence: Confronting Hierarchial Relations Among Women. The Journal of Gender, Race and Justice 1(2): 335-352.

Fernando, Suman and Frank Keating. (2009). *Mental Health in a Multi-Ethnic Society: A Multidiscplinary Handbook*. New York: Routledge.

Gilbert, Daphne and Diana Majury. (2006). Critical Comparisons: The Supreme Court Dooms Section 15. *Windsor Yearbook of Access to Justice* 24: 111-143.

Goldberg, D. (1993). *Racist Culture*. Oxford: Blackwell.

Hartley, Sarah and Mohammad Muhit. (2003) Using Qualitative Research Methods for Disability Research in Majority World Countries. Asia Pacific Disability Rehabilitation Journal 14 (2): 103-114.

Hicks, J.W. (2004). Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind? *Journal of the American Academy of Psychiatry and the Law* 32 (1): 21-33.

Iyer (Duclos), Nitya. (1993). Categorical Denials: Equality Rights and the Shaping of Social Identity. *Queen's Law Journal* 19: 179-207.

Jarvis, G. Eric, Irene Toniolo, Andrew G. Ryder, Francesco Sessa,

Carla Cremonese. (2011). High Rates of Psychosis for Black Inpatients in Padua and Montreal: Different Contexts, Similar Findings. *Social Psychiatry and Psychiatric Epidemiology* 46(3): 247-253.

King , Gary. (1996). Institutional Racism and the Medical Health Complex: A Conceptual Analysis. *Ethnicity and Disease* 6: 30-46.

Lawrence, Sonia. (2001). Culture (in) Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom. *Canadian Journal of Women and the Law* 13: 107-136.

Macpherson, William. (1999). *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*. London: Stationery Office.

Marchetti, Elena. (2008). Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It. *Social and Legal Studies* 17(2): 155-176.

McKenzie, Kwame and Kamaldeep Bhui. (2007). Better Mental Healthcare for Minority Ethnic Groups – Moving Away from the Blame Game and Putting Patients First: Commentary on… Institutional Racism in Psychiatry. *The Psychiatrist* 31: 368-370.

McKenzie, Kwame and Kamaldeep Bhui. (2007). Institutional Racism in Psychiatry. *The Psychiatrist* 31: 397-398.

McKenzie, Kwame and Kamaldeep Bhui. (2007). Institutional Racism in Mental Health Care. *British Medical Journal* 334: 649-651.

McKenzie, Kwame. (1999). Something Borrowed From the Blues? We Can Use the Lawrence Inquiry Findings to Help Eradicate Racial Discrimination in the NHS. *British Medical Journal* 318: 616-617.

Manitoba Human Rights Commission. (2007). The Racialized Communities and Police Services Project. Manitoba Human Rights Commission http://www.manitobahumanrights.ca/publications/rcaps.html; accessed 6 August 2011.

Mental Health Commission of Canada and CAMH (2009) Improving Mental Health Services for Immigrant, Refugee,

Ethno-Cultural and Racialized Groups: Issues and Options for Service Improvement. Mental Health Commission of Canada <http://www.mentalhealthcommission.ca/SiteCollectionDocuments/Key_ Documents/en/2010/Issues_Options_FINAL_English%2012Nov09.pdf>; accessed 7 April 2010.

Mezzich, Juan, Giovanni Caracci, Horacio Fabrega, Jr. and Laurence J. Kirmayer. (2006). Cultural Formulation Guidelines. *Transcultural Psychiatry* 36 (2): 383-405.

Ontario Human Rights Commission. (2011). An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Discrimination. Ontario Human Rights Commission http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts/view>; accessed 1 July 2011.

Perlin, Michael . (2006). International Human Rights and Comparative Mental Disability Law: The Use of Institutional Psychiatry as a Means of Suppressing Political Dissent. Israel Law Review 39: 70-97.

Plumb, Anne E. (1999). New Mental Health Legislation: A Lifesaver? Changing Paradigm and Practice. *Social Work Education* 18 (4): 459-478.

Pothier, Dianne. (1992). Miles to Go: Some Personal Reflections on the Social Construction of Disability. Dalhousie Law Journal 14: 526-544.

Razack, Sherene. (2000). Law, Race and Space. *Canadian Journal of Law and Society* 15: 1-8.

Razack, Sherene. (1998). *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms.* Toronto: University of Toronto Press.

Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995). Toronto: Queen's Printer for Ontario.

Sampson, Fiona. (2006). Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law. In Dianne Pothier and Richard Devlin (eds.) *Critical Disability Theory: Essays in Philosophy, Policy and Law.* Vancouver: UCB Press, 267-285.

Singh, Swaran P. (2007). Institutional Racism in Psychiatry: Lessons from Inquiries. *The Psychiatrist* 31: 365-366.

Stienstra, Deborah. (2002). The Intersection of Disability and Race/Ethnicity/Official Language/Religion. (Paper presented to the "Intersections of diversity" seminar held at Canadian Centre for Disability Studies, March 8, 2002) [unpublished], online: Canadian Centre on Disability Studies <http://canada.metropolis.net/events/Diversity/Disability_stienstra_e.pd> accessed 15 June 2011.

Tseng, Wen-Shing, Daryl Matthews, Todd. S. Elwyn. (2004). *Cultural Comptence in Forensic Mental Health: A Guide for Psychiatrists, Psychologists, and Attorneys*. New York: Brunner – Routledge.

Volpp, Leti. (1994). (Mis) Identifying Culture: Asian Women and the 'Cultural Defense' *Harvard Women's Law Journal* 17: 57-101.

Wendell, Susan. (1996). The Rejected Body: Feminist Philosophical Reflections on Disability. New York: Routledge.

Yuval-Davis, Nira. (2006). Intersectionality and Feminist Politics. *European Journal of Women's Studies* 13 (3): 193-209.

Case Law:

Canada v. Mossop [1993] 1 S.C.R. 554 at para 152.

Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch) (2002) 212 D.L.R. (4th) 633, 59 O.R. (3d) 481

Radek v. Henderson Development (Canada) *Ltd*., 2005 B.C.H.R.T. 302.

Multidimensional Analysis of Judicial Decision-Making: Reframing Judicial Activism as the Study of Judicial Discourse (or taking the judgment out of the Judgment)

Richard Jochelson and Micheal Weinrath,
Criminal Justice, The University of Winnipeg
Melanie Murchison, Legal Studies, Carleton University

Abstract

This paper reviews the development of a multidimensional approach to the study of judicial activism as conceived by Cohn and Kremnitzer in 2005. The paper explores the meaning of judicial activism briefly before exploring the development of the Cohn/Kremnitzer model. The authors propose a methodological shift that repositions the activism analysis more broadly as an analysis of judicial discourse. The authors contend that this methodological shift would allow for more rigorous empiricism in the literature and for an analysis that would open up the activist project to all constitutional court cases, whether impugned legislation is under scrutiny or not. The authors conclude that the Cohn/Kremnitzer model provides the requisite indicia to inspire a new descriptive language in judicial activism studies, and to pave the way for empirical theorizing of justice in the context of judicial activism.

Introduction

In 2005, Margit Cohn and Mordechai Kremnitzer articulated a multidimensional model of judicial analysis that attempted to measure the decision-making of constitutional

courts by developing multiple indicia of measurement. The development of the model occurred in a controversial context because judicial activism (the focus of the Cohn/Kremnitzer model), though a popular topic of socio-legal scholarship[1], remains a highly contested term.

The definition of judicial activism is itself often the subject of debate in the literature. Russell (2009, 295) writes that the term is "vague", often used in a "pejorative" sense, and implies "abuse" on the part of the judiciary. Indeed, charges of judicial activism belie a description of judicial decision-making that occurs outside the "acceptable range" of the exercise of judicial competence. The range of decision-making is the matter most contested in the extant literature (Cohn and Kremnitzer 2005).

Certainly, even a relatively simplistic exploration of judicial activism yields confounding questions about the nature of this judicial range of conduct. For example, has the judiciary exceeded its bounds, and thus behaved as an activist court, when it reverses legislative edict? Is a court being activist when it protects the liberty interests of an accused in the face of legislative persecution? What about when legislative edict and constitutional values clash – which interest supersedes the other?

This confusing constellation of inquiries is often ignored in the political context in which charges of activism inure. For instance, those most invested in the notion of legislative fidelity might charge the court ascribes to a leftist activist project (as the court becomes a "political party" or a "court party") when it strikes legislation in favour of its own understandings of the constitution (Morton and Knopff 1990, 2000). Others might argue that what appears to be derogation of this fidelity is wholly justified in the context of a court that is protecting the constitutional rights of an accused (Kelly and Murphy 2001). Others still may argue that any time the court lacks the expertise necessary to adjudicate it behaves

1 Muttart (2011: 1) writes that the term originated in the 1950s and has resulted in over 350 peer-reviewed studies.

in an activist fashion (Manfredi 1993, 2004). In the activism debate, indeterminacy flows.

What unites these diverse approaches to inquiries of activism, including the Cohn/Kreminitzer multidimensional model, is a tendency to seek to judge the judges, and occasionally a tendency to cast aspersions on the judiciary. As a result, the study of judicial activism itself (and the development of salient models) has come under attack by some scholars as an inquiry beginning with a value-laden question in order to produce a value confirming answer (Jochelson 2009). For instance, asking whether the court exceeded its powers by overturning the legislature, especially when the researcher answers the question on the basis of her own judgment, may be something of a leading question.

Some critical scholars have problematized the "court party" assertion made by some activism scholars. Gotell writes that "court party" scholars argue that "organized special interests, most notably feminists and 'homosexual activists' have circumvented the democratic parliamentary process" but "this analysis tends to be overly focused on normative questions and lacking in systematic evidence" (Gotell 2005: 883; see also Smith 2002). This critique castigates an analysis of judicial activism as an inherently social conservative project destined to delight the political right.

In this short paper, we explore whether the Cohn/Kremnitzer analysis has the potential to depoliticize the judicial activism debate. The model developed by Cohn and Kremnitzer is more comprehensive than previously articulated models and allows for an examination of a "fuller spectrum of activism indicia" (Jochelson 2009: 231). However, the model is still "value laden" in that the researcher is still required to make a value judgment in each indicia about whether the court has behaved in an activist fashion. We argue that steps can be taken on a methodological level to reduce this value judgment to a judgment of coding by reorienting the analysis to an assessment of a court's discourse – what the court says about its own reasoning can be measured along the activ-

ist scale (instead of an investigator's belief about the activist orientations of a court). Here we imagine the creation of scales to determine the degree to which a Court speaks about its own activism along a series of activism dimensions.

Of course this methodological move renders the multidimensional model of activism as something new and somewhat mutated because the Court's own voice is positioned as the main locus of analysis rather than the political judgment of the academic reading the decision. The posited methodological shift is the development of a multidimensional model of judicial discourse. The empirical results of such an investigation may provide interesting primary data for future theorizing, and thus reduce the lobbing of value judgments for another day. This is not a move that Cohn and Kremnitzer anticipated in their original study, but we endeavour to make a persuasive case for this alteration in the coming pages.

This paper is divided into three parts. Part I explores the development of the Cohn and Kremnitzer model and explores the literature that inspired their model. Part II reviews the model in more detail. Part III discusses the critiques of the model and our responses to these critiques, including the impetus for our modifications. Ultimately, we conclude that the adapted model may provide a new language of empirical exploration of legal decisions in Canada that moves the investigation beyond the usual concerns of precedential effects of decision-making. In other words, we argue that the study of judicial activism is value laden and therefore its empirical measurement could result in tautological responses to value-driven questions. In this paper we argue that a reorientation of the model could produce an empiricism for undertaking a "rich and textured discussion" of judicial analytics in a variety of issue specific and temporal contexts (Jochelson 2009: 233).

The initial orientation of the Cohn/Kremnitzer model was a more nuanced approach to a struggle that ultimately pitted political rivals in an academic contest to determine which

interpretive values ought be most important in a liberal democracy. Shifting the discussion to a discourse analysis instead asks us to elucidate what interpretive values the court sees as pivotal in its approach to adjudication. We may ultimately find ourselves, at the cessation of the empirical project, grappling with the same contest over interpretive values, but we would be doing so in response to a new set of data, instead of positing the values as the starting and ending point of analyses. Even if one were to fail in elucidating any empirical significance, the coding exercise we envision would at least provide a new language of description for constitutional decision-making beyond measuring success or failure rates of a court. The development of this new language would do justice to the long line of activism investigations that have emerged since the middle of the twentieth century, while simultaneously deferring the political discussion to a different point in the analysis. This might encourage something of an agnostic approach to the study of judicial activism (which we prefer to reframe as a study of judicial discourse). It would, at the least, reorient the starting point of inquiry in a less value driven direction.

Part I: The Development of the Model

In this section, we endeavour to review the activism literature that aided in the formulation of the Cohn/Kremnitzer model. A complete review of theory that underpins activist literature in general is beyond the scope of this paper. For our purposes, we merely seek to inform the reader of a brief history of the knowledges that informed the originators of the multidimensional model of analysis.

Certainly, a uniform definition of judicial activism is absent in the literature. Undoubtedly, the term has been marshaled on all sides of a particular argument in order to critique court jurisprudence, often in the constitutional realm. Regardless of who makes the activist claim against a court, the label of "activist" usually connotes a disapprobation of the decision made. Cohn writes:

> ''Judicial activism'' has received its share of bad press in all systems that allow judicial intervention in contested areas. In some cases, the object of the criticism is the content of the decision, rather than the loftier, theoretical question of the role assumed by the judiciary. The example of the United States reveals the flaws of this attitude. Its changed ideological climate in the 1990s, with the rise of ''conservative activism'', required both liberals, who had earlier applauded activism, and conservatives, who considered judicial activism as a threat to the integrity of American society, to reconsider their positions" (2007:115).

In the North American context we have seen arguments making the claim that a court has essentially derogated from the will of the legislature, thereby flouting the constitutional balance of governance powers established by constitutions (Morton and Knopff 2000: 34-53; Schubert 1972: 17, Posner 2006: 314, 318). At a more microscopic level, such claims often take aim at the mechanics of judicial decision-making and charge that a court has departed in its decision from the original intent of the legislature, a matter evidenced by the written legislation or constitutional text (Manfredi 1993: 46). Yet even such minutiae are often contested. For instance, some argue that original intent is a fiction, and that any such contention is plagued by indeterminacy (Kelly and Murphy 2001: 8). Others merely argue that such apparent incongruities can be met by appealing to so-called "natural" delineations of constitutional text; these arguments are often apprised by "moral" readings of a constitution that situate the values of a constitutional democracy as being founded on universal values (Kelly and Murphy 2001: 10-11; Morton and Knopff 1990: 545-6).

This conception of values is subject to its own indeterminacy and thus other attempts to describe activism have emerged. Hence, scholars began to scrutinize the concepts of judicial discretion, and a court could be described as activist under such accounts where it has exceeded the scope of its author-

ity. Here, a court is affixed with possessing particular "expertise" and is activist when it supersedes the margins of this expertise (Manfredi and Kelly 2004: 744). Often, these critiques chastise a court for its activism when it relies on non-traditional, weak and limited, or under-theorized social science evidence (Manfredi and Kelly 2004: 744).

To answer such concerns, scholars problematize the notion that a court is a final site of debate in these areas of contested social science evidence. Some scholars posit that a court is only a first site in a dialogue about constitutional issues between legislatures and courts (Hogg and Bushell 1997:75; Manfredi 2004: 122-29; Schneiderman, 2002: 633). The dialogue here is apprised of players with different constitutional roles – legislatures wish to efficiently legislate, and courts are charged with guarding constitutional liberties. Each may thus have important contributions to the dialogue and the constitutional outcome of a particular constitutional issue (Waluchow 2007; Kavanagh 2003: 55; Sager 1990: 893). Of this agonistic relationship is borne the notion that rather than dialogue between institutional adversaries, the relationship between legislatures and courts is more akin to partnership, or even less simplistically, as one partnership in a network of complex institutional relationships involving numerous other government agencies, political partisans and society (Cohn and Kremnitzer 2005: 340).

The notion of dialogue is further seated in conceptions of the court as guardians or custodians of constitutional values. Perhaps when a court issues a decision emboldening constitutional values, it is behaving less activist and simply as a capable constitutional custodian (Cohn and Kremnitzer 2005: 339; Roach 2001). Others would argue that constitutional fastidiousness in the context of such values would be more appropriate where the decision aligns with populist sentiment (Tushnet 1999: 11-14). Yet others argue that a court must be placed so as to guard constitutional values especially when constitutional fastidiousness means that vulnerable groups are being protected from majoritarian tyranny (Mc-

Lachlin 2001: 117). Under such constructions, guardianship of the constitution must hold fast, even in the face of accusations of deviation from the legislative agenda.

In the development of the multidimensional model of analysis Cohn and Kremnitzer recognized the importance of the above arguments. Cohn argues for her composite model of activism:

> The judiciary's role is multi-faceted; the effect and impact of any one decision are contingent on extraneous conditions just as much as they can be extrapolated from the decision itself. The model thus supports a composite view of judicial decision-making, which draws together the variety of ways that judges can impact on society. Once judicial involvement is considered as potentially balanced by other powers, its contribution can be considered against the potential threat of over-intervention and under-representation. On balance, the potential benefits of a participating judiciary have sustained and reinforced constitutionalist frameworks (Cohn 2007: 115).

Cohn and Kremnitzer used Canon's model of activism to elaborate upon their approach. Canon had articulated six indicia of activism, which recognized that the import of a decision was more than its disposition – that other political stories are being told in a particular decision (Canon 1982).[2] Cohn and Kremnitzer argued that while the Canon factors were useful indicia of analysis, other factors which speak to socio-legal reactions to decision making and explorations of constitutional values would further elucidate a court's activist leanings. Cohn makes clear that she is arguing for a "justificatory" theory of judicial decision-making – she

2 At 386, Canon developed six species of activism: majoritarianism (the usurpation of the legislative role by courts), interpretive stability (deviation from earlier doctrine), interpretive fidelity (degree of deviation from original intent), substance-democratic process distinction (substantive policy making rather than democratic preservation), specificity of policy (the making of policy at the expense of the discretion of other institutions), and alternate policy makers (the availability of other institutions to properly exercise the requisite discretion).

defines judicial activism as "as action that extends beyond the role or function of the courts in liberal constitutional polities" (Cohn 2007: 96). Thus Cohn makes clear that she is less concerned with accounts of constitutional courts as inappropriate actors, but rather in the analytics of courts as agents of liberal political theory. Hence Cohn and Kremnitzer develop an account apprised of three dimensions of analysis, some of which move beyond a textual analysis of decision-making.

Part II: The Cohn/Kremnitzer Model

Cohn and Kremintzer identify seventeen indicia of activism in their model. The indicia are divided into three dimensions of analysis: *traditional visions* of activism, *socio-legal deviation* activism and *core value* activism (Cohn and Kremnitzer 2005: 341,343, 346, 347, 352). Each dimension of activism represents a different paradigm for envisioning the activism of a particular court.

Traditional visions of activism are a measure of judicial output as compared to previous legal norms or rules. The deviation from such norms is what establishes these dimensions as activist. This dimension consists of twelve indicia. *Judicial stability* measures whether a court deviates from its past decisions, or decisions of lower courts. *Interpretation* analyzes whether a court interprets legal text in light of the original meaning (often held to be the intent of the drafters of the document) of the constitutional text. *Majoritarianism and autonomy* asks whether a court "interferes with policies set by democratic legislation" (Cohn and Kremnitzer 2005: paras. 26-7). *Judicial reasoning* explores whether a court expresses fidelity to legal procedures or whether the court uses reasonableness-based calculi to explain the reach of its decision. *Threshold activism* asks whether a court jumps threshold hoops in order to hear the substance of a case in spite of legal barriers to its jurisdiction. *Judicial remit* explores whether a decision expands the court's jurisdiction beyond previous understandings. *Rhetoric* seeks to explore the court's allegiance to broader positions of values beyond

those required to solve a legal problem. *Obiter dicta* asks how far a court is willing to expand its arguments beyond the legal issues raised in a given case. *Comparative source reliance* examines the extent to which a court will use extra-jurisdictional sources to reach a decision. *Judicial voices* situates activism as a function of the amount of dissenting opinions in the decision. *Extent of decision* asks about the implications of a decision in a particular area, with decisions of broad scope being more activist than narrowly tailored decision making. Finally, *legal background* asks whether clear legal tests precede the case and suggests that when courts need to use creative reasoning in the face of vague rules, activism is higher (Cohn and Kremnitzer 2005: paras. 26-7). Each of these indicia represents well-worn political theory of judicial activism and asks whether the court has exceeded the traditional limits of its authority.

Socio-legal deviation activism, the second dimension of analysis is based on post-decision dynamics, and is inspired by the dialogue model discussed in the previous section. Here the court's output is measured against subsequent responses, rejections or acceptance by the *legislature*, *administrative apparati,* other *courts* and the *public*. Cohn and Kremnitzer explain that "social and political response in the wake of a decision can reflect the degree of deviance of the court from the emerging consensus or equilibrium, and thus bears, ipso facto, on the nature of judicial output… the lowest level of activism pertains to a court that follows and reinforces existing law, with no contrary post-decision response" (Cohn and Kremnitzer 2005: para. 40).

The last dimension of analysis, *core value* activism*,* posits that where courts align with core values of the constitution they are behaving in a less activist fashion. The only factor developed by Cohn and Kremnitzer under this dimension is *intervention and value content*. Here Cohn and Kremnitzer make their most controversial claim – that "highly subjective content disputes, involving important rights based dilemmas, that are resolved by reference to 'thin' core values" are not

activist (Jochelson 2009: 244). Cohn and Kremnitzer explain that:

> Our third vision of activism considers the protection of core values as a relatively non-activist exercise, as it is a constitutional role of the judiciary. We join those who accept that judicial output is inherently value-based, and normatively argue that in a constitutionalist climate, the judiciary is an active participant in a broad social effort to promote and maintain 'core' or 'thin' constitutional principles. The utilities of this participation outweigh the potential dangers - dangers that are essentially tempered, in constitutional democratic frameworks, by an effective power of the legislature over the judiciary and other societal restraining mechanisms embedded in the constitutional network. We thus adhere to the argument that purely value free judicial decision-making is not only impossible, but also untenable.

Hence, Cohn and Kremnitzer develop an understanding of activism in the third dimension that justifies the role of the judiciary as custodians of constitutions. The development of this third category places its authors as subscribing to the prudence of constitutional stewardship.

The development of the multidimensional model was an important moment in activism scholarship. Its benefits are derived from its nuance. It provides more variables than previous accounts. It also represents an interest in post-decision dynamics as an empirical endeavour. It equips us with a vision of activism that allows for guardianship of the constitution to militate against activism charges in the *traditional visions* of activism. Thus the dimensions provide multivalent political descriptions of a court's action in a given case. Perhaps most importantly, the model provides a lens for critique of constitutional decision-making and for the development of empirical lenses to code for, or measure (qualitatively and/or quantitatively), this decision-making. Despite these possibilities, neither Cohn nor Kremnitzer has attempted to

operationalize an empirical version of the model, and indeed, Cohn in her recent work has only utilized the model as a qualitative critique of a particular legal case (Cohn 2007; see also Khosla 2009).

Part III: Towards Operationalizing the Model

Despite the apparent benefits of the Cohn/Kremnitzer model, few academics have taken up the clarion calls of its authors to use the "analytical framework for the study of the judiciary that expands from the legal to the social and political spheres" (Cohn and Kremnitzer 2005: 354). Certainly there have been attempts to empiricize activism indicia in Canada (for recent examples see Muttart 2011, 2007; Ostber and Wetstein 2007).

The literature reveals a willingness to interrogate the criteria qualitatively in singular case contexts but a reluctance to apply the model more broadly (Muttart 2011; Khosla 2009). The reluctance to operationalize the model appears to stem from methodological concerns including the "relative weight of each parameter", the suggestion that the second dimension may be controversial because it suggests that "that the judiciary has a participatory role in society", the contested notion that the judiciary ought to have a guardianship "duty to preserve certain constitutional goals" (Khosla 2009: 59), the unwieldiness of the amount of indicia posited, the difficulty in coding the "unwieldy" quantum of indicia, and the overly wide reach of the indicia beyond more narrow expositions of activism (Muttart 2011: 13).

The issue of "unwieldiness" is one that can be largely dismissed by various strategies of empirical analysis. That the first dimension of analysis contains the lion's share of indicia may be solved by relatively mundane statistical practices such as weighting and ought not prevent the development of a Cohn/Kremnitzer analysis. The critiques relating to the dimensions countenancing controversial and contested judicial functions, or as distraction from more commonly understood narrow expositions of activism are potentially more damn-

ing critiques. Cohn and Kremnitzer's model is, by their own admission, justificatory, and hence, is subject to the critique that some of the indicia developed attempt to provide legitimacy to the court functioning, where none (on some readings) may exist. Hence, the model as developed by Cohn and Kremnitzer may be criticized as a reimagining of democratic court function in a manner which disrupts the *traditional visions*. This reimagining also has methodological implications in an empirical analysis because a researcher is implored by the model to make a "judgment call" about the degree of a court's activism under the second dimension (*socio-legal* deviation) and the third dimension (*core value* activism). This degree of latitude would undoubtedly trouble those who have a more traditional understanding of judicial activism scholarship. Yet, the "judgment call" critique would also apply to the first dimension of analysis: for instance who would determine whether a court is subscribing to the legislature's initial intent? Would one use the judgment of the researcher, a notable constitutional scholar, or some other luminary?

We contend that these more critical concerns about the model can be rectified by employing a discourse-based analysis of court decision-making. A researcher, rather than measuring the activism of a court along each indicia by virtue of a judgment call can attempt to surmise what the court appears to be deciding based on its own account. The voice of the court then provides its own account of how it has made the decision along each indicia and the researcher is tasked with coding these accounts and measuring them in order to yield data. Utilizing the court as the empirical source of primary research would require that the second dimension of activism be set aside for different socio-legal projects since societal and institutional reaction would largely require measurement outside of the "in their own words" methodology. Once the data is identified and subsequently coded, one can attempt to interpret the data yielded.

This approach to measurement is certainly subject to the familiar critique that the analysis would lose the core meas-

urements of activism. Rather than prognosticating about the proper role of the court, this proposed methodological shift would instead create an account of judicial decision-making, largely apprised of the court's own justifications and analytical building blocks. How could one then argue that a court has been activist or restrained? Indeed the question begs the answer (that discourse analysis is less politically charged endeavor than desperately seeking activism), but we will elaborate on this point further. The Cohn/Kremnitzer model is ideally situated to provide a means of analyzing judicial discourse rather than seeking to justify judicial decision making as activist or restrained. This reorientation of the model would also satisfy Cohn and Kremnitzer's closing salvo that:

> The model proposed … contributes to this constantly evolving but always pressing debate, by questioning and expanding the discourse… It could thus serve as basis for further analyses, theoretical and socio-legal alike (2005: 356).

Indeed, even those who have dismissed the Cohn/Kremnitzer model as losing sight of the core of activism scholarship attempt to expound the virtues of robust quantitative analysis. Muttart argues that quantitative analysis "due to their [Cohn and Kremnitzer's] requirement of large sample sizes", stimulates "comprehensive and systematic study", promotes "comparison between types of cases and between temporal and administrative eras" and uncovers "interesting, but previously overlooked phenomena" (Muttart 2011: 66). Muttart describes an appeal to a quantitative analysis of activism as the missing "leg" of judicial analytics:

> The employment of qualitative methodologies to the exclusion of quantitative ones is comparable to attempting to describe how humans walk by focusing on their right legs and, except to acknowledge their existence, ignoring their left legs. It is now time to expand the analysis of the Court's activism and restraint to encompass both legs. (2011: 66)

If indeed these virtues are worthwhile, it surely is also worthwhile to sublimate the necessity to protect the core of activist research until the cessation of primary research analysis. This militates robust discourse analysis as a first step prior to engaging in qualitative discussions of the legitimacy or illegitimacy of judicial decision making. We imagine the development of scales to measure the Cohn/Kremnitzer indicia of activism as a first step in creating empirical data for such an analysis. Following this primary research phase the groundwork will be laid for critical discourse analysis. The primary research will represent the analysis of written text (i.e case law) which can then be analyzed in the context of the distribution and consumption of legal knowledges with an eye to extrapolating discursive events in socio-legal practice.

Reorienting the Cohn/ Kremnitzer model towards discourse also reveals other advantages. Most judicial activism research occurs in response to judicial consideration of the constitutionality of legislation. However, many court decisions involving constitutional principles occur in the absence of legislation save for the constitution itself. For example, improper police conduct in Canada is analysed in many circumstances quite apart from legislation. This is in part because wide-ranging police powers legislation has not been enacted in Canada (Jochelson 2009; 2008; 2007). Thus, in such cases, a court may be left analyzing the constitutional propriety of police misconduct against constitutional law alone. For example, a warrantless search may be analyzed solely against the constitutional standard of protections against unreasonable searches. In these situations, traditional activist researchers might be unwilling to interrogate the analysis as no impugned legislation is implicated.

However, *traditional visions* of analysis, such as determining the original intention of legislation may still be relevant in this stark constitutional context. For example, a court may claim to interrogate the meaning of the term "reasonable" in the constitutional context of unreasonable search and seizure and in doing so would create an empirically measurable

statistic under *traditional visions* of activism. This reoriented lens of discourse analysis (as opposed to activism analysis) would open up all court cases to empirical rigour. In particular, decisions relating to the criminal justice system, or the discretion of administrative or other governmental apparati could thus be subject to measurement. Further, this would then allow for analytical discourse comparisons between and within areas of law. In the criminal justice context one could cross compare the discourse measures of cases across different constitutional protections: search and seizure discourse could be cross compared to developments in the law of arrest; criminal procedure discourse could be cross compared to administrative law discourse; the court's discourse in assessing legislation could be cross compared to its discourse in the analysis of the exercise of discretion of governmental players and so on. In short, a reorientation of the Cohn/Kremnitzer model as a measure of discourse expands the empirical measure of judicial decision-making across legal areas, legal participants and beyond precedent.

In large order, the tendencies of empirical activism scholars have fetishized precedent, by giving exclusive primacy to the results of cases and their legal effect on future jurisprudence.. Since the Charter came into force, there has been a "surge of interest in quantifying activism" (Jochelson 2009: 246) . These studies have attempted to label "a series of cases or jurisprudence, a period of the court's time, or a type of constitutional analysis as highly activist, modestly activist or restrained, or they otherwise attempt to quantify the activism of the court" (Jochelson 2009: 246; see for examples Muttart 2011, 2007; Manfredi and Kelly 2004; Choudhry and Hunter 2003; Monahan 2000). Why have the bulk of empirical analyses focused on the precedential aspects of court cases in Canada? Largely, the answer lies in the contested lability of the meaning of judicial activism itself. Carver (2008 para. 26) provides an excellent summation of empirical studies of judicial activism:

> Debates about judicial activism often frustrate because

> those who argue that judges are 'activist' or 'too activist' do so without describing what they mean by the term. It is, of course, easy to say that any judicial decision that does not accord with one's personal view of what the law should be is "activist" because it represents an unwarranted departure from the law. In that way, many criticisms of judicial activism are mere synonyms for saying "I disagree with that decision." To be more meaningful than this, 'activism' must be able to be described as a type of legal reasoning or outcome or institutional understanding that is 'out of bounds' for a court acting appropriately.

These critiques provide the impetus for reorienting the activist analysis towards a measurement of discourse. Others have attempted to empiricise judicial activism by focusing instead on indicia such judicial attitudes, and using factors such as a judge's pre-appointment political party affiliation as predictive of attitudes on the bench (Ostberg and Wetstein 2008). We do not dismiss the validity of such research but rather suggest that a study of judicial discourse, along the lines of an adapted Cohn/Kremnitzer model, may add to an empirical understanding of judicial reasoning and provide further data for theorizing judicial decision-making. An adapted Cohn/Kreminitzer discourse scale would remove its "justificatory" predilections, take the court's "own words" more seriously, and provide rich possibilities in assessing judicial analytics apart from measuring precedential effects.

Conclusion

Cohn and Kremnitzer's multidimensional analysis draws on a rich array of socio-legal jurisprudential philosophy that interrogates the decision-making of high courts in liberal democracies. Their model proposes the largest and most diverse array of parameters in describing judicial decision-making to be proposed in the literature. Cohn and Kremnitzer never operationalized the model, and suggested that the parameters were a starting point for analysis. Few activism studies

have evoked such a broad sweep of parameters; further, the broad array of parameters mined by Cohn and Kremnitzer, at the least, provides for an interesting way to describe judicial decision-making in a more textured and nuanced sense.

Furthermore, in describing judicial activism, most Canadian scholars have attempted to describe the conduct of a Court across numerous broad legal classifications and subject matters – for example, little academic work on specific issues in criminal justice as they relate to activism has been undertaken (for example, the court's activism in criminal law has been examined, but not on an issue by issue basis – such as an exploration of search and seizure law). We believe that the nuance of the Cohn/Kremnitzer model combined with an analysis of Supreme Court decisions since the advent of a Charter, provides an interesting experimental zone in which to further develop the model and to enrich our understanding of the way the Court has adjudicated.

Empirical analysis of jurisprudence, in general, is a poorly mined terrain. We wish to cautiously navigate this terrain while remaining apprised of the context and discretionary pitfalls that might inure in reducing jurisprudence to dimensions of analysis. This is a new language that we are excited to explore, although we maintain some agnostic distance from the promise of providing a purely empirical answer to questions of the appropriate intermingling of legal adjudication and social policy-making. The ultimate result of the project will help determine whether judicial activism is a useful phrase in an increasingly late modern era. Modestly, we believe the new dimensions may at least amount to a description of judicial analytics which will inform not only legal practice, but socio-political knowledge more broadly. The results will allow a study of the judiciary to expand from the legal to other disciplines and open up new language by which to mobilize knowledge of an area that has traditionally been inaccessible to non-legal scholars and policy analysts.

References

Carver, P. J. (2008). "Critical Notice" Review of Ostberg, C., Wetstein, M. and Muttart D. (2008). "Reality Check: On the Uses of Empiricism Critical Notice: Attitudinal Decision Making in the Supreme Court of Canada; The Empirical Gap in Jurisprudence a Comprehensive Study of the Supreme Court of Canada". *Canadian Journal of Law and Jurisprudence*. In *21 Canadian Journal of Law & Jurisprudence*. 447 – 457.

Choudhry, S. and Hunter, C. E. (2003). "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE". *48 McGill Law Journal.* 525.

Cohn, M. (2007). "Judicial Activism in the House of Lords: A Composite Constitutionalist Approach". *Public Law*, Vol. 1, Available at SSRN: http://ssrn.com/abstract=942487 95-115.

Cohn, M., and Kremnitzer, M. (2005). "Judicial Activism: A Multidimensional Model" *18 Canadian Journal of Law & Jurisprudence*. 333

Gotell, L. (2005). Review of Manfredi, C.P. (2004). "Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund". Vancouver: University of British Columbia Press. In *Queen's Law Journal 30.* 883 – 899.

Hogg P. W, and Bushell, A. (1997). "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't a Bad Thing After All)" *35 Osgoode Hall Law Journal.* 75.

Jochelson, R. (2009). "Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs". 24 *(2) Canadian Journal of Law and Society* 231.

Jochelson, R. (2008). "Crossing the Rubicon: of Sniffer Dogs, Justifications, and Preemptive Deference". 13*(2) Review of Constitutional Studies.* 209.

Jochelson, R. (2009). "Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of Patrick". *72 Saskatchewan. Law Review* 199.

Kavanagh, A. (2003). "The Idea of a Living Constitution". *XVI:1 Canadian Journal of Law & Jurisprudence*. 55

Kelly, J. B. (1999). "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada 1982-1997". *37 Osgoode Hall Law Journal*. 625.

Kelly J. B and Murphy, M. (2001). "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" 16 *(1) Canadian Journal of Law and Society*. 3.

Khosla, M. (2009). "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate Winter". *32 Hastings International & Comparative Law Review*. 55

Manfredi, C. P. (1993). *Judicial Power and the Charter : Canada and the Paradox of Liberal Constitutionalism*. Toronto: McClelland and Stewart.

Manfredi, C. P. (2004). "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" .23 *Supreme Court Law Review*. 105-131.

Manfredi C. P. and Kelly, J. B. (2004). "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada." *49 McGill Law Journal*. 741-764.

McLachlin, B. (2001). "The Role of the Courts in the New Democracy" in Magnet, J. E, *Constitutional Law of Canada: Cases, Notes and Materials*. Volume 2, 8th Edition. Edmonton: Jurilber.

Monahan, P. J. (2001). "Constitutional Cases 2000: An Overview". *14 Supreme Court Law Review* (2d).

Morton F. L., and Knopff, R (2000). *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.

Morton F. L., and Knopff, R. (1990). "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights". *1 Supreme Court Law Review*. 531

Morton, F. L., Russell, P.H., & Withey, M. J. (1992). "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis". *30 Osgoode Hall Law Journal*. 1.

Muttart, D. M (2007). *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada*. Toronto: University of Toronto Press.

Muttart, D. M., (2011). "One Step Forward, One Step Back: Measuring Activism in the Supreme Court of Canada". Available at SSRN: http://ssrn.com/abstract=1470709

Ostberg C. L and Wetstein, M. E. (2007). *Attitudinal Decision Making in the Supreme Court of Canada.* Vancouver; UBC Press.

Posner, R. (2006). *The Federal Courts: Challenge and Reform.* Cambridge, MA: Harvard University Press.

Roach, K. (2001). *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law Books.

Russell, P. H. (2009). "The Charter and Canadian Democracy", in James B. Kelly and Christopher P. Manfredi, eds. *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*. Vancouver: UBC Press.

Sager, L. (1990). "The Incorrigible Constitution". *65 New York University Law Review* 893.

Schneiderman, D. (2002). "Kent Roach, the Supreme Court on Trial: Judicial Activism or Democratic Dialogue". *21 Windsor Year Book of Access to Justice*. 633.

Schubert, G. (1972). "A Functional Interpretation" in Forte, D. ed., *The Supreme Court: Judicial Activism vs. Judicial Restraint*. Lexington, MA: Heath.

Smith, M. (2002). "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" *35 Canadian. Journal of Political Science* 3

Tushnet, M. (1999). *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press.

Waluchow, W. J. (2007). *A Common Law Theory of Judicial Review: The Living Tree.* Cambridge: Cambridge University Press.

Ward, K. D. (2003). "The Politics of Disagreement: Recent Work in Constitutional Theory". 65*(4). The Review of Politics* 425.

An Evaluation of the Truth and Reconciliation Commission of Canada (TRC) through the Lens of Restorative Justice

Konstantin Petoukhov, Department of Sociology,
University of Manitoba

Abstract

As one of the strategies to assimilate Aboriginal people into Euro-Canadian society, the Indian residential school system was established in the 19th century. Its main goal was to teach Aboriginal children English or French and to provide them with the necessary education in order for them to become self-sufficient, successful individuals. Many Aboriginal children encountered abuse, neglect and racism when attending residential schools. In 2006, the Indian Residential School Settlement Agreement was created as a mechanism of redress for residential school experiences and consists of a government apology, monetary compensation payments, and the Indian Residential School TRC. Restorative justice – which operates on principles of restoring respect and dignity of victims, empowering victims, listening to their stories of how wrongdoings have affected them, and establishing an accurate record of past harms – may have the potential to address the abuse and neglect which occurred in residential schools. The goal of this paper is to examine the extent to which principles of restorative justice have been built into the design of Canada's TRC. The presence of restorative justice elements in the TRC may serve as one of the early indicators of the TRC's successes or failures in its long-term goals of healing of Aboriginal peoples and reconciliation of nations.

Introduction

In the past, truth commissions have been established to address human rights violations and political violence, such as South Africa's apartheid and Chile's and Argentina's disappearances and mass murder (Hayner 2001). Truth commissions, which are non-judicial bodies that are created with the goal of resolving conflicts arising from historical injustices, have often been described as institutions of restorative justice (Minow 2000; Kiss 2000). Justice scholars such as Gibbs (2009) and Guest (1999a; 1999b), in turn, argue that restorative justice bears resemblance to traditional Aboriginal justice practices and presents a useful framework for conflict resolution for the historical injustices experienced by Aboriginal peoples. Although certain truth commissions appear to incorporate several restorative justice principles into their practices, closer assessment of the design and implementation of the Canadian TRC is required in order to ascertain whether or not it does, in fact, possesses the potential to deliver restorative justice to redress wrongs inflicted by residential schools. I begin by first considering restorative justice and its overlap with Aboriginal justice practices, followed by a discussion of "restorativeness" of the TRC's design and activities.

Restorative Justice

Restorative justice scholars such as Johnstone and Van Ness (2007), Marshall (2003), and Pranis (2007) argue that there is no single, all-encompassing definition of restorative justice, but only an "eclectic accretion of cultures, practices and experiences" (Pawlychka 2010:4). However, there have been various attempts to create a working definition of restorative justice. Tony Marshall (2003:28), for example, argues that restorative justice is a "process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future." One method to conceptualize restorative justice is through a three-pronged definition of key restorative justice principles.

First, restorative justice views a wrongdoing as a cause of harm that needs to be repaired. The second principle, in turn, relates to the admission of the responsibility by the offender and empowers the victim to express how the harm could be addressed. Thirdly, restorative justice seeks "to build and maintain peace" through healing and righting wrongs (Van Ness 2009). A second method of conceptualizing restorative justice that Strang and Braithwaite (2001) and Van Ness (2009) offer is rooted in the argument that restorative justice's values and principles stand in opposition to those of retributive justice. More specifically, restorative justice employs non-punitive measures to resolve conflicts.

In addition to challenges associated with defining restorative justice, questions arise with respect to the degree that restorative justice does and does not resemble traditional Indigenous ways of doing justice. While not all Aboriginal justice practices are restorative, justice scholars such as Griffiths (1996) and Nielsen (1995) view restorative justice as a process that emerged from Aboriginal justice traditions. As Zion explains, for example, "[American] Indian law is based on healing" (2005:70; see also Sullivan and Tifft 2006). Ross (2006:12) argues that one of the points of overlap between restorative and Aboriginal justice values is that instead of punishing the wrongdoer, the focus is on "teaching and healing of all parties involved." Sawatsky (2009), in turn, argues that Aboriginal justice has recently focused on restoring Aboriginal identities damaged through historical injustices such as assimilation. Some of the means of restoring Aboriginal identities are through decolonizing Western justice and healing Aboriginal communities (Smith 1999). Henderson and McCaslin (2005:5) explain that Aboriginal peoples have been attempting to move away from Eurocentric notions "about the good and the just," such as conceptualizations of crime and how to address it.

Aboriginal justice practices, much like restorative justice, are mainly characterized by the participation of victims, offenders, community members, and a mediator, while the harm

is viewed as an injury done to a person by another person. Gibbs (2009:54) elaborates that one connection between Aboriginal and restorative justice paradigms is evident in the "recognition of the interdependence of victims, offenders and their communities." Accordingly, the relationships between the offender, victim, and the community may be harmed as a result of the wrongdoing and rebuilding those relationships is crucial in the process of making the community whole again. Diane LeResche refers to this outlook on healing and restoration as "sacred justice," which signifies the "way of handling disagreements that helps mend relationships and provides solutions. It deals with the underlying causes of the disagreement… *[S]acred justice is found when the importance of restoring understanding and balance to relationships has been acknowledged*" (quoted in Ross 2006:27, emphasis original). While the victim's needs guide the restorative processes, the perpetrator takes the responsibility for his or her behaviour and once the harm is repaired, the perpetrator is welcomed to rejoin the community.

Taking into account the overlap between restorative and Aboriginal justice practices, the former is not always the preferred mode of Aboriginal dispute resolution processes. As Nielsen (1992) and Milward (2008) argue, Aboriginal responses to wrongdoings range from banishment and exile to torture, which stand in opposition to restorative justice practices. As Cunneen points out, for example, certain Indigenous tribes in Australia employ methods of "sanctioning and punishment [that] may involve inflicting serious physical injury" (2007:126). Given this caveat, however, the reviewed literature suggests that Aboriginal peoples in Canada employ mainly non-retributive approaches to the dispute resolution, such as community-based strategies that have goals of restoring relationships between the victim, perpetrator, and the community members.

Based on a review of the literature on restorative justice and Aboriginal justice, at least six main themes have emerged. The remainder of this section focuses on the discussion of

the key themes of restorative justice, which I have selected to include based on their overlap with Aboriginal justice practices and relevance to the work of truth commissions. Consequently, these themes form the basis for my analysis of the restorativeness of the Canadian TRC.

Victim-centeredness

Restorative justice scholars such as Llewellyn and Howse (1999), Roche (2006), Woolford (2009), and Zehr (1985) agree that restorative justice practices usually tend to have the goal of empowering victims by paying special attention to their needs. Restorative justice practitioners such as Robert Yazzie (2005) posit that in order to repair the damage inflicted by a wrongdoing, the needs of affected parties must be taken into consideration, and victims need to be provided with supports to address power imbalances during restorative encounters. Providing victims with a safe environment that includes the presence of supportive individuals such as victims' families, relatives, and friends, may help them share their experiences without feeling intimidated by the presence of the perpetrators.

Inclusiveness and engagement

Various definitions of restorative justice (see, for example, Braithwaite 2003) state that it is fundamentally inclusive and involves the participation and engagement of all the affected parties during restorative encounters. As Llewellyn (2002) argues, for example, restorative processes should "ensure that the individuals and institutions responsible for the abuse have an opportunity to participate in repairing the harm they caused" (p. 299). Inclusiveness is also said to be one of the key principles of many Aboriginal justice practices (Sawatsky 2009; Ross 2006). Restorative encounters, such as healing circles, also allow all parties to express the ways in which they have been affected by a wrongdoing.

Participation and inclusion of all parties

Restorative processes are inherently negotiated and agreed-upon phenomena in that the parties affected by a wrongdoing participate in charting the course of how justice is to be carried out for their specific case (Huculak 2005). More specifically, the goal is to come to the consensus, through a collective decision-making, on how to resolve an injustice (Zehr and Mika 1997). This negotiative quality can contribute to victim empowerment by giving them an opportunity to take control and ownership of the justice process. Therefore, in order to gain insight into negotiative quality, it is necessary to examine the extent of victim consultations, which typically take place prior to the commencement of restorative processes.

Reparations for the harm done

One of the key elements of restorative and Aboriginal justice practices includes encouraging perpetrators to take responsibility to repair the harm done by a wrongdoing (Yazzie, 2005). As Valandra (2005) suggests, in the process of righting the wrong, reparations must be borne by the perpetrator. By accepting responsibility for a wrongdoing, perpetrators acknowledge wrongs of the past, recognize their duty to repair the damage, and admit their guilt or complicity in the commission of the offence.

Truth-seeking and overcoming the denial of injustice

At its core, restorative justice is concerned with discovering the truth about the past (Zehr 2002). The healing power of truth told by victims and perpetrators, according to Hayner (2001), stems from the disclosure of narratives and facts about the injustice. Similarly, Llewellyn and Howse (1999) argue that truth-telling is closely tied to an admission of guilt by the wrongdoer, without which the restoration and reparation of the harm cannot occur. Truth told by perpetrators is an important component of restorative justice because it helps prevent vengeance on the part of victims and thus has been associated with long-term goals of fostering

peace and harmony. This, according to Joseph (2005:263), is linked to the recognition of injustices, reconciliation, and "reconstructi[on] of a society based on peaceful coexistence."

The Canadian TRC and Restorative Justice

Through treaty settlements reached with Aboriginal groups beginning in the 1800s, the government of Canada was invested with responsibility for the education of Aboriginal children. During the residential school era, 1830s to 1990s, First Nations, Métis, and Inuit children, along with their relatives and communities, suffered wrongs committed against them by the Canadian government and the churches. These wrongs include but are not limited to: widespread sexual, physical, emotional, and spiritual abuse; student-on-student abuse; the aggressive assimilation of Aboriginal children into Euro-Canadian culture; substandard living conditions at Indian residential schools; and neglect resulting in death and disease. Various mechanisms such as class action lawsuits, the Alternative Dispute Resolution process, apologies and compensation packages by the government and churches have been introduced in attempts to redress residential school experiences. The heretofore lack of conflict resolution success demonstrates the complexity and seriousness of the legacy of residential schools, as well as the unsuitability of the previous processes to heal the resulting damage.

The Truth and Reconciliation Commission (TRC), which was established as a truth-seeking mechanism with the purpose of promoting reconciliation, therefore needs to be examined for its potential to address injustices which were committed during the residential school era. The TRC mandate states that through discovering the truth about the past, the TRC may help heal Survivors, communities, and future generations of Aboriginal people (TRC 2011). To fulfill its mandate, the TRC will host national and community events, which are intended to provide space for all those affected by residential school experiences to share their stories and to educate the broader public about the past. Upon completion of the TRC's

mandate, the National Research Centre will be established to house Survivors' stories, which will be accessible to the public. Finally, the TRC is set to produce a report with recommendations to the Canadian government.

To begin the discussion about TRC's restorativeness, it is first useful to consider the extent to which it is a negotiated institution.

TRC as a Negotiated Institution

This section discusses the ways in which parties affected by residential schooling had fair opportunities to participate in the negotiations that created the TRC. Applying this restorative justice philosophy to the TRC, it would seek to give voice to all those who have a stake in repairing the harm and "involve the parties concerned in designing the processes so that they reflect and meet their needs and circumstances" (Llewellyn 2008 193). Throughout this section, I maintain that Survivors are the primary stakeholders in the process of resolving residential school experiences. In my view, Survivors have the moral right to guide the process of reconciliation and that this process should be created on their terms. In other words, Survivors should be given the full control and ownership of how justice is to be carried out.

According to the IRSSA, parties to the Agreement include Survivors (as represented by the National Consortium and the Merchant Law Group), the federal government and its counsel, the churches, the Assembly of First Nations (AFN), Métis, and Inuit representatives. The TRC's mandate states that it was built upon principles developed by the Working Group on Truth and Reconciliation and the Exploratory Dialogues (1998-1999):

> Accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair;

> respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians (TRC mandate, "Principles").

The Working Group, which published a report titled *Healing and Reconciliation: Alternative Strategies for Dealing with Residential School Claims* (2000:v), conducted extensive consultation with Survivors, Aboriginal and non-Aboriginal governments, the churches, Aboriginal healers and leaders, and legal counsel. In this sense, the guidelines and principles that the Working Group developed, and upon which the TRC was later designed, are based upon a degree of dialogue between various parties about how to address residential school experiences.

In addition to the Working Group, the establishment and design of the TRC was influenced by the Canadian Bar Association's (CBA) report *The Logical Next Step* (2005) and the AFN's *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (2004). The CBA's report emphasizes the use of restorative justice principles in the TRC's work, such as truth-telling, the acknowledgement of the harm done and the provision of reparations, and extensive consultations with Aboriginal leaders in establishing a truth and reconciliation process. Recommendations of the AFN report, in turn, are somewhat similar in substance to those of the CBA Report and underline the importance of developing a new system for monetary compensation payments for Survivors alongside "truth-telling, healing, and public education" (2005:3). The AFN Report, however, seems to incorporate more diverse perspectives than the CBA Report, and includes the work of experts such as university professors, judges, AFN representatives, Survivors, and lawyers, whereas the CBA Report includes predominantly legal perspectives. Overall, recommendations of both reports were used in designing the TRC and represented voices from a somewhat diverse cross-section of groups.

Limitations of the TRC's negotiations

Ellen[1] (expert on truth commissions and restorative justice) suggests that there are limitations with regards to participation of groups who were included in the process of negotiating the IRSSA and more specifically – the TRC (interview, 2011). Because the IRSSA is an agreement to settle the claims made by residential school Survivors, who were primarily First Nations, the negotiations "were largely not about day schools, not about Métis, not about Inuit, but about First Nations' list of schools, [and therefore] lots of those folks [Métis and Inuit] weren't at the table" when negotiations took place. For Ellen, the process of negotiations was also too government-controlled and too restricted in scope and, as a result, the TRC's design was not fully restorative and not "reflective of the very principles that [the parties originally] wanted." Furthermore, according to Ellen, the Settlement mediator, Frank Iacobucci, who was supposed to be a neutral party, was instead representing the interests of the federal government and failed to serve as an impartial mediator to the Agreement, which may have had a negative impact on the balance of power during the negotiations.

The negotiations have also failed to engage perpetrators of residential school abuses, despite the presence of high-level church and government officials at these negotiations. Therefore, there may still be denial of guilt among individual perpetrators, which runs contrary to the element of acknowledgement and admission of responsibility. This is an obstacle that the negotiations would not likely be able to overcome due to various factors. First, there may be fear of prosecution on the part of perpetrators, since they may not have been formally charged with a criminal offence prior to the TRC negotiations. Secondly, many perpetrators have passed away since the residential school system closed. Despite the above limitations, TRC negotiations make attempts to empower Survivors and to solicit input from Survivor

[1] I have created aliases for the three interview participants with whom I spoke during the course of writing this paper. They are hereby referred to as Ellen, Monica, and Jane.

groups with regards to what the TRC's design should consist of, and therefore bear a degree of restorativeness.

TRC as an Inclusive Process

Whereas the previous section considered establishment and negotiations of the TRC, this section examines TRC national and community events, through which it intends to carry out its mandate. TRC events have the goal of educating the Canadian public about residential schools and their impact on Aboriginal people. Jane (legal expert involved in negotiating the TRC), suggests that it creates opportunities for coming together and opens the space for "listening, learning, and recognitions [of the harm done]" (interview, 2010). However, she notes that there will be challenges in its work associated with engaging all parties, Aboriginal and non-Aboriginal alike.

Inclusiveness of TRC events

TRC events seek to include community members such as Survivors' relatives, friends, and the general public, including non-Aboriginal and new Canadian peoples. Monica (legal expert) emphasizes the importance of including the general public in TRC events: "awareness [among the general public serves as the best] defense against future violations [towards] marginalized groups" (interview, 2010). The impetus of public participation in TRC's processes also results from the inaction of the public, which allowed residential schools to continue for generations. Despite this fact, many Canadians do not perceive themselves to be perpetrators of wrongs committed against Aboriginal people. Taiaiake Alfred (2008), however, argues that all non-Aboriginal Canadians, old and new alike, have somehow benefitted from injustices inflicted on Aboriginal people during colonialism, which include the residential school era.

The TRC national event in Winnipeg in June 2010 attracted four church entities that were in charge of running residential schools. Church members participated in various ac-

tivities during the event, some of which include listening to Survivors' stories about residential school experiences, running Interfaith and Listening Tents that provide information to the public on current reconciliation efforts of churches in communities, and issuing apologies-on-request to Survivors (TRC National Event brochure). Thomas Novak of Roman Catholic dioceses in Manitoba says that the main role of the churches during the TRC national event "was [to] show up and show their support to the survivors," challenge racism and celebrate Aboriginal cultures (quoted in Suderman 2010). This goal seems to be in line with that of the federal government, which is to promote healing and reconciliation. It is unclear, however, whether the churches' definition of reconciliation is similar to those of the TRC and the federal government, since none of the three entities define it in their mandates (Standing Senate Committee on Aboriginal Peoples 2010). For the churches, the meaning of reconciliation seems to be synonymous with forgiveness – something for which many Survivors are not ready (Smith 2010).

The harm done by residential schools is unique because perpetrators include not only government and church staff, but also students who inflicted abused on other students. This is often referred to as "student-on-student abuse" (AFN 2004). The AFN argues that the government should take responsibility for this type of abuse because the residential schools promoted conditions of neglect that made possible "the creation of violent and sexualized environments at [the schools that] materially and foreseeably increased the risk of abuse of the students in its care" (ibid: 27). However, even though the IRSSA implemented the AFN's recommendation to recognize the issue of student-on-student abuse and to consider them eligible to apply for monetary compensation, Murray Sinclair explains in a CJOB (2010) interview that "'student on student abuse' went unspoken during the deliberations behind the negotiations that led to [the IRSSA]," and therefore excluded student perpetrators from the TRC mandate (see also INAC 2010).

Despite the initial exclusion of student perpetrators, Sinclair urges these individuals to participate in TRC events, because "many [Survivors] have to live near their abusers in small communities. […] Some alleged abusers [former students] are elders, work for band councils, are community leaders or even family members" (Puxley 2009). For student abusers to keep silent about the past would likely "*perpetuate* the inter-family antagonisms that plague community politics, hiring, education, welfare, housing – and healing" (Ross 2008:6, original emphasis). However, given the dual role of these students as both victims and perpetrators of residential school abuse and neglect, it is unclear how the TRC intends to address this dilemma.

Challenges to the inclusiveness of TRC events

One of the obstacles to the public and Survivor participation in TRC events is limited knowledge and awareness about the existence of the TRC. The Environics Research Group's National Benchmark Survey (2008:ii) shows that only one in five Aboriginal people in Canada is likely to be aware of the TRC. Figures seem to be identical for non-Aboriginal people's level of awareness about the TRC. What is alarming about these limited levels of awareness is that they point to the potential to generate relatively low levels of participation of individuals who lack knowledge of the TRC. In contrast, a relatively high proportion (over 80%) of Survivors seem to be aware of the Common Experience Payment, for which the TRC is intended to provide a "context and meaning" (TRC Mandate). The lack of participation in TRC processes may lead to a lack of understanding about monetary compensation for residential school experiences. To overcome this challenge, the TRC would need to promote public knowledge about the importance of the TRC. High participation rates of the broader Canadian public serve both as an essential component and an indicator of the TRC's success: "there has to be a huge buy-in and the TRC is the framework that would allow for that" (Ellen interview, 2011).

One of the serious issues with regards to the inclusion, or more correctly, exclusion, of Survivors is the federal government's reluctance to recognize experiences of Survivors who attended certain residential and federal day schools which did not meet the criteria outlined in the IRSSA. In order to be considered an eligible school, it must meet the following criteria: children attending the school must have been removed from their community and the government must have been "jointly or solely responsible for the operation of the residence and care of the children resident there" (INAC 2010:7). These criteria ignore experiences of many First Nation, Métis, and Inuit children, who suffered abuse and neglect in non-recognized government- and church-run educational institutions (Standing Senate Committee on Aboriginal Peoples 2010). Chartrand et al. (2006:16) argue that the abuse, neglect, and assimilation experienced by Métis children "did not differ materially from those suffered by Indian or Inuit students" and even though Inuit children attended day schools (as opposed to off-reserve boarding schools), they often suffered conditions similar to those existing in government-recognized residential schools.

The issue of Survivor logistics initially came up before the first national event was set to take place in Winnipeg in June 2010. Many Survivors are too old to travel great distances to tell their stories at TRC events. Others indicated that they "[did not] have the means to participate due to costs associated with transportation and accommodations" (CBC 2010a). Furthermore, many Aboriginal communities are accessible only by air and winter roads, and as a result, Survivors residing there were unable to make the trip to Winnipeg. The TRC was able to provide only limited funding for Survivors to cover costs associated with travel and even though band councils, the churches, the general public, bus companies and airlines, and local school board combined their efforts in assisting Survivors with travel arrangements, these efforts made possible the accommodation of only a small fraction of Survivors.

Exclusion of perpetrators from TRC events

Llewellyn (2008:197) warns that the TRC will inevitably encounter challenges with respect to including "individual and institutional wrongdoers." More specifically, the voluntary nature of participation in TRC's processes results in an unavoidable obstacle to the TRC's work. This obstacle is represented by the legal framework under which the TRC operates. The TRC is limited by institutions such as the Canadian criminal justice system, which discourages perpetrator participation by threat of punishment. As a result, TRC national events encourage participation of only "high level government and church officials," and exclude ordinary workers and residential school staff (TRC Mandate).

The community events, on the other hand, are more flexible and encourage the involvement of "church, former school employees and government officials in the reconciliation process," but even in this case the language in the TRC mandate falls short of encouraging participation of perpetrators. At this point, it is not known how well the community events are attended by former staff, but in his letter to Presbyterian Church of Canada, dated January 27, 2011, Murray Sinclair writes to encourage "former residential school staff to share their memories with the TRC." The issue with the participation of former staff is that they may not fully understand that the TRC is not a public inquiry, nor does it serve to determine guilt.

Victim-Centredness and Empowerment in the TRC's Context

Victims' empowerment, according to Braithwaite (2003:87), is "especially important [in the cases] where the victim suffers structurally systematic domination," and may lead to a greater degree of control by Survivors over justice processes. In the case of Indian residential schools, Survivors have been disadvantaged and disempowered through colonial domination and perpetrators have maintained unequal power relations between the Canadian government and Aboriginal peoples. Empowerment in the context of restorative justice

could also be understood in another, more macro sense. According to Shearing (2001), it could mean investing communities with the responsibility to resolve injustices. However, one must be cautious of the rhetoric of "empowerment," because it does not always work to serve to better communities. More specifically, empowerment sometimes entails neo-liberal notions of "responsibilization without resources," which does not necessarily produce positive change (Shearing 2001:32).

Individual empowerment

To assess the ability of the TRC to empower Survivors, I examine TRC's Commissioners' Sharing Circles, which took place during the TRC national event in Winnipeg and focus on the TRC, and were designed to provide Survivors with opportunities to express their accounts of residential school experiences. These Circles are chaired by a mediator, usually a commissioner, who facilitates the process of truth-telling by Survivors. During the Winnipeg event, Survivor empowerment was evident in the presence of support systems, which included Survivor families and friends, and also fellow Survivors who were able to attend the event. In my observations of the event, the space created for Survivors seemed respectful and supportive, and allowed for the emotional expression and release of Survivors' negative feelings and memories.

Many Survivors became distressed during and after their stories. To alleviate their negative emotions, health supports and counseling, provided by Health Canada's First Nations and Inuit Health Branch and led by led by the Indian Residential Schools Resolution Health Support Program, was readily available at the event and Sharing Circles in particular (NNAPF 2010). The goal of support workers and counselors, many of whom "are employed in aboriginal communities where they work with residential school survivors," was to attend to Survivors who were experiencing difficulties (CBC News 2010a). At the same time, the TRC made attempts to ensure that Sharing Circles were designed to serve Surviv-

ors as a "culturally appropriate setting to provide statement[s] of their IRS experiences" (NationTalk 2010). Sharing Circles began with opening ceremonies led by an Elder and "traditional spiritual supports such as smudge, eagle feathers and water that had been blessed with prayers were also offered to [Survivors]" (Sison 2010). As well, dreamcatchers were hung from the tent's ceilings and a sacred fire was lit for the duration of the national event with the purpose of providing Survivors with a comforting setting.

Community empowerment

TRC events comprise only part of the trauma that Indian residential school Survivors go through in telling their stories and re-experiencing the past. Because Sharing Circles and private statement-taking are emotionally demanding processes, they may serve to exacerbate residential school trauma and produce negative mental health consequences when Survivors return to their communities after disclosing accounts of residential school experiences. In fact, it is in their everyday lives that Survivors are constantly haunted by the memories of residential school abuse and neglect. Therefore, community empowerment strategies are necessary for Survivors to deal with residential school trauma, regardless of whether they participate in TRC events.

The Aboriginal Healing Foundation (AHF), which was established in 1998 with a $350 million grant and the purpose of creating "Aboriginal directed healing initiatives which address the legacy of physical and sexual abuse suffered in Canada's Indian Residential School System, including intergenerational impacts" (AHF FAQs). The AHF received additional funding of $125 million through the IRSSA, which was intended to last until 2012. Mike DeGagné, AHF's executive director, argues that the AHF is a unique response to residential school abuse because the affected individuals "are dealt with best by community-based healing services like the ones we're offering" (CBC 2009). Many Survivors acknowledge the help of the AHF and "the supports provided by the funding

will be even more important as they start to tell their emotional stories at the TRC" (ibid). Because the federal government chose not to renew AHF funding, this will inevitably bring an end to the many of the programs that the AHF offered. Survivors and Aboriginal leaders, along with the TRC staff, express discontent and concern about the abrupt end of AHF funding. Survivor Ben Pratt is "facing the prospect of testifying before the commission without support of the AHF" and points to the importance of Survivor testimonies in a CBC interview: "There is a lot of fear in [telling my story, but] … The more I talk about it, the better I feel inside" (CBC 2010b). Allowing the AHF to run at least until the TRC completes its work would provide Survivors with critical resources while facing their difficult past. Upon termination of AHF funding, Health Canada is charged with the responsibility to provide support to Survivors in their communities.

Although Health Canada has been given the responsibility to take over some of the AHF's programs, Charlene Belleau, manager of the Indian residential schools unit of the AFN, argues that "[The Health Canada plan is] a government-driven process where they determine the criteria" (Pemberton 2010). NDP Aboriginal Affairs Critic, Jane Crowder, argues that First Nations, Inuit and Métis leaders expressed concern that the government, who was complicit in perpetrating residential school abuse, is now in charge of disbursing healing money and that "[the leaders] cannot accept that government will now be in charge of deciding when and where healing should happen" (Crowder 2010).

The shifting of the responsibility for healing the legacy of residential schools from the AHF to Health Canada reflects concerns of Shearing (2001) regarding the responsibilization of communities to repair the harm, while lacking adequate resources. Even though during TRC events Survivors are often able to obtain support, such as spiritual services and counseling, while sharing their memories and experiences, this support is often unavailable in their home communities after TRC events are concluded, leaving Survivors to deal

with consequences of truth-telling on their own. The withdrawal of AHF funds, combined with the increase in communities' responsibility for healing residential school trauma, works to disempower communities and leaves them vulnerable to dysfunctions resulting from residential schools. More specifically, the lack of resources creates dangerous conditions that could re-victimize Survivors through continuing trauma and denial of support services that would help Survivors heal.

TRC and Truth-Seeking

One of the elements that the TRC consistently emphasizes is the need to discover the truth about the past. Its mandate refers to the healing power of truth and its importance in overcoming the denial of residential school harms. Telling stories may help create spaces in which these stories are not only heard, but are also understood (Ellen interview, 2011).

Survivors' opportunities for truth-sharing in the TRC occur mainly during the national and community events. The TRC emphasizes that both public and private disclosure of truth are equally important in creating an accurate representation of Canada's history and to educate the broader Canadian public about residential school abuse and neglect. Many Survivors agree that TRC events "give [them] a voice, an opportunity to be heard," and a space for respectful listening and uncovering years of abuse faced in residential schools (Survivor, TRC Sharing Circles June 17, 2010). Ed Martin, one of the Survivors who attended a residential school for nine years, explains that his experience during the TRC community event was very positive. He was able to tell stories about his time in the residential school to all who attended the event without the fear of being punished or hiding his feelings. To him, truth-telling carries healing power and, as he says, "it's better [to tell the truth] than having that hang over us and pains in the morning and better than all that anger and hatred you have there" (Cilliers 2009). Through sharing their stories, Survivors such as Judy Bayha note that they

come to understand many of their current troubles, such as the lack of parenting skills and rampant family violence, as results of residential school experiences, as opposed to individual failure (May 2010).

Another method through which the TRC is attempting to document the abuse and neglect is by obtaining church records. According to John Milloy, this has, so far, proved to be a challenging task for the TRC. One of the reasons why the churches have been slow and reluctant in disclosing their records is because the records are protected by privacy legislation. If disclosed, church records may incriminate individuals who perpetrated abuses in residential schools, but have not been criminally charged, as Catholic Church's lawyer Pierre Baribeau argues. The churches' unwillingness to disclose records presents an obstacle to truth-seeking and contributes to the denial of their culpability in residential school injustices. The Roman Catholic Church has been the most uncooperative of all churches in releasing its records, which, it states, is due to its fear of being extensively sued over new evidence of abuse and neglect. The United Church, on the other hand, is more concerned about the reputation of brothers and sisters who live in the community than about widespread lawsuits. However, entities such as the Presbyterian and Anglican churches have been, for the most part, cooperative in providing the TRC with access to their records (Curry 2010).

Perpetrators' acknowledgement of wrongful acts

In the context of residential schools, one of the ways through which perpetrators can aid the restoration of Survivors' self-respect and dignity is by acknowledging the harm done. This would involve the perpetrators of abuse telling the truth about the past and admitting their role in carrying out abusive acts. During Sharing Circles at the TRC national event in Winnipeg, Survivors expressed the desire to hear truth from the perpetrators. Also, Survivors wanted the perpetrators to hear Survivors' stories and how they felt after they have been abused. This, however, was impossible to achieve

because the perpetrators were not included in TRC events and the admission of criminal acts would have resulted in their being criminally charged. According to Emma Paris, without perpetrators, truth-telling by victims resembles a "group therapy session, [where victims are] telling stories to each other" (Baute 2010). This poses a serious challenge to the prospects of acknowledging the past and bringing justice, healing, and closure to Survivors.

Challenges for truth-telling

In their paper, Corntassel et al. (2009) argue that Indigenous methodologies of truth-telling in the context of the TRC are missing. The TRC, in their view, is allowing Survivors to tell only part of the story, which includes only their residential school experiences and the ways in which they have been affected by residential schools. In doing so, the TRC runs the risk of

> Framing these questions in a narrow way that doesn't fully appreciate the ongoing impacts of residential schools on communities, families and individuals and the lived experiences of resilience and resurgence that need to be shared with intergenerational survivors and other Indigenous peoples (ibid: 140)

The TRC, in their view, is too reconciliation-driven and is too state-controlled to permit a thorough understanding of the continuing legacy of residential schools. Reconciliation is not an Indigenous term, they argue, and the rhetoric of reconciliation has been imposed upon Aboriginal people through asymmetrical power relations. The process of reconciliation in this sense is dangerous because it overemphasizes closure and coerces individuals to move on and forget, an outcome for which many Survivors and their families are not ready.

One of TRC's limitations relates to the inability of Survivors to share their experiences in the English language or their refusal to translate them into English, which led to at least two problems with truth-telling. First, there was an apparent

expectation that Survivors would speak English while telling their stories to all those gathered in a Sharing Circle. This expectation impedes decolonization of Survivors' experiences, because truth-telling in this respect would be in the language of colonizers. Secondly, a large part of the audience, while listening respectfully to Survivors' stories, was unable to understand the meaning of their experiences, except for the universal meaning of tears streaming down these Survivors' faces. No translators were available to interpret stories and some Survivors expressed their discontent with this, for their stories seemed to continue to be locked away behind the language barrier. To complicate the issue of language, Survivors were given a time limit at Sharing Circles, usually ten minutes, though many Survivors refused to comply with this rule.[2]

A serious challenge to truth-telling is the inability of the TRC to allow Survivors to name perpetrators during its truth-telling opportunities. This is caused mainly by privacy legislation that limits the TRC's scope. The TRC came under heavy criticism from both Survivors and Aboriginal leaders for disallowing Survivors to identify perpetrators during Sharing Circles. According to the TRC, Survivors are allowed to identify the perpetrators by name only in private statement taking sessions, but their names will not be made public (CBC 2010c). This places constraints on "the ways and extent to which Indigenous peoples can make their stories heard" (Henderson and Wakeham 2009:12). Prior to TRC events, Survivors are "trained" and briefed on the types of truth that are acceptable for public disclosure, which excludes perpetrators' names. Without naming names, many Survivors are unable to tell complete stories of abuse and direct anger toward abusers and release their pain. As a result, perpetrators are rendered invisible and this makes it seem as though Survivors are telling stories about unknown, faceless individuals. To counter this limitation of the TRC, some Survivors in Sharing Circles chose to name names despite having

[2] No time limit was imposed on Survivors' stories during private statement-taking sessions.

been instructed against it. Other Survivors, such as Peter Yellowquill, former chief of Long Plain First Nation, and Chantelle Devillier, protested during the TRC national event in Winnipeg and accused the TRC of censorship.

TRC and Symbolic Reparations[3]

Truth commissions are often able to make recommendations to provide reparations to victims of human rights violations. These may include monetary compensation, such as direct payments to the victims and returning confiscated possessions. Reparations may also come in the form of symbolic acts, such as apologies, reburials, commemorative activities, and memorials for those who have perished. Symbolic reparations are most often coupled with monetary compensation, as demonstrated in the cases of South Africa and Chile. In terms of reparations, the Canadian context is unique because the material compensation measures were negotiated through the IRSSA and separately from the TRC. On the other hand, symbolic reparations, such as commemoration initiatives, are the TRC's responsibility.

TRC and commemoration initiatives

One of the mechanisms through which the TRC is designed to provide symbolic reparations to Survivors is outlined in Commemoration Policy Directive of the IRSSA. According to this directive, commemoration activities must have the goals of:

> Honouring, educating, remembering, memorializing and/or paying tribute to residential school former students, their families and their communities, and acknowledging their experiences and the broad and systemic impacts of the residential school system. Commemoration may involve the creation of, or improve-

[3] In June 2010, the Government of Canada released a statement that promised to repeal sections 114-122 of the Indian Act, which allowed government agents to remove Aboriginal children from their communities and place them in residential schools. Although the removal of these sections of the Indian Act could be considered a form of symbolic reparations, it is unclear when, if ever, these sections will be repealed.

> ments to existing, permanent memorials and commemorative structures, or ceremonies or other projects.

The IRSSA allocates $20 million to commemoration activities, and the TRC is charged with the responsibility of reviewing commemoration research proposals and administering funding to the successful applicants. According to the TRC's *Commemoration Initiative Call for Proposals Guide*, commemoration processes are Survivor-driven and are based around Survivors' needs, thereby ensuring that their needs are represented in commemoration activities. The TRC is designed to accommodate three types of commemorative activities: (a) *Lasting Legacies Initiative*, which includes permanent physical structures such as "monuments, plaques, cairns, and traditional structures;" (b) *One Time Events*, which are designed to acknowledge students who passed away and to bring closure to their families, and may include activities such as "banquets, memorials, talking circles, potlatches, and pow-wows"; and (c) *Cultural Components*, which are intended to revive and maintain Aboriginal cultures and languages.

One of the initiatives that the TRC is undertaking that could be considered a symbolic action seeking to repair the harm is the *Missing Children* research project, which is based upon the Missing Children and Unmarked Burial Working Group's (2007/2008) recommendations and is intended to locate the records of children who died or disappeared while attending residential schools. The *Missing Children* research initiative is comprised of "representatives from major national Aboriginal organizations, a national organization representing former students of Indian Residential Schools, the churches, and the federal government" (MCUBWG 2008:3). It was created in response to the needs of Survivors and their families to learn about what happened to the missing children. The initiative may help bring closure and certainty, as well as promote "the healing and the psychological well-being of families of children" (CBC 2010d).

One of the problems that the *Missing Children* project faces is access to information. Because religious entities such as the

Catholic and United Churches are reluctant to release student records, this may impede the search for missing children. Milloy also argues that another complication in carrying out this project is that the records held by the churches are incomplete, which will make it impossible to compile the complete list of graves. Another challenge for the *Missing Children* project is time and resources. Unlike the *Commemoration Initiative*, it is financed by the already-strained $60 million TRC budget, and the costs associated with it were estimated to be millions of dollars. In addition, the project is likely to take a significant amount of time to complete and could stretch beyond the TRC's mandate. If the TRC fails to locate the missing children within five years, until 2014, there is a possibility that they will never be found.

Conclusion

This paper assessed the restorative potential of the TRC in the early stages of its work, with much of it still lying ahead. Overall, TRC's design and processes incorporate a number of restorative justice elements to varying degrees of success. Based on the restorative justice framework employed in this paper, I conclude that the TRC does not closely approximate the restorative justice ideal. Despite demonstrating many restorative justice values, principles, and practices, it falls short of being fully restorative. In order to increase its restorative potential, the TRC must be able to overcome multiple challenges in its work, including limitations imposed by the exterior legislative framework, namely privacy and criminal justice legislation. Also, the success of the TRC greatly depends on the general public's willingness to take part in the journey with Aboriginal people on the path of healing and coming to terms with past injustices, while looking to the future and renewing relationships based on mutual respect and recognition. As Ellen notes, TRC's success, to a great degree, will depend on the government's willingness to follow the TRC's recommendations and the public's desire to learn about, understand, and accept the truth about the past (interview, 2011).

References

Aboriginal Healing Foundation. 2011. "Frequently Asked Questions." www.ahf.ca/faqs. Accessed May 4, 2011.

Alfred, Taiaiake. 2009. "Restitution is the Real Pathway to Justice for Indigenous Peoples." Pp. 179-187 in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, edited by G. Younging, J. Dewar, and M. DeGagné. Ottawa: Aboriginal Healing Foundation.

Assembly of First Nations. 2004. *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. Ottawa: AFN.

Baute, Nicole. 2010. "ideaCity: Reconciliation Commission is not Enough, Says Author." *Toronto Star*. June 17.

Braithwaite, John. 2003. "Restorative Justice and a Better Future." Pp. 83-97 in *A Restorative Justice Reader: Texts, Sources, Context*, edited by G. Johnstone. Portland, Oregon: Willan Publishing.

Canadian Bar Association. 2005. *The Logical Next Step: Reconciliation Payments for All*

Indian Residential School Survivors. Ottawa: Canadian Bar Association.

Chartrand, Larry, Tricia Logan, and Judy Daniels, eds. 2006. *Métis History and Experience and Residential Schools in Canada*. Ottawa: Aboriginal Healing Foundation.

CBC. 2010a. "Truth Commission Attendees Struggle with Travel." *CBC News*. June 10.

–. 2010b. "Residential School Survivors Fear Network End." *CBC News*. March 19.

–. 2010c. "Truth commission protester calls process 'fraudulent'." *CBC News*. June 17.

–. 2010d. "Residential School Graves Research a Daunting Task." *CBC News*. March 2.

–. 2009. "First Nations Rally to Save Healing Program." *CBC News*. October 1.

Cilliers, Roland. 2009. "Truth and Reconciliation Gathering Tries to Help Heal Wounds." *Fort McMurray Today*. October 30.

CJOB. 2010. "TRC Hearing About Student on Student Abuse." *CJOB Team*. June 15.

Corntassel, Jeff, Chaw-win-is, and T'lakwadzi. 2009. "The Politics of Indigenous Truth-Telling: Challenges for the Canadian Truth and Reconciliation Commission." *English Studies in Canada* 35(1).

Crowder, Jane. 2010. "Aboriginal Healing Foundation." Email to the Press. April 15.

Cunneen, Chris. 2007. "Reviving Restorative Justice Traditions." Pp. 113-131 in *Handbook of Restorative Justice*, edited by G. Johnstone and D. W. Van Ness. Cullompton: Willan Publishing.

Curry, Bill. 2010. "Catholic Church Reluctant to Release Residential Schools Records." *The Globe and Mail*. April 6.

Environics Research Group. (2008). *National Benchmark Survey Prepared for: Indian Residential Schools Resolution Canada and the Truth and Reconciliation Commission*. Ottawa: Environics Research Group.

Gibbs, Meredith. 2009. "Using Restorative Justice to Resolve Historical Injustices of Indigenous Peoples." *Contemporary Justice Review* 12(1):45-57.

Griffiths, Curt Taylor. 1996. "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities." *International Journal of Comparative and Applied Criminal Justice* 20(1 & 2): 195-208.

Guest, James. 1999a,b. "Aboriginal Legal Theory and Restorative Justice." *Native Law Centre* 4(1 & 2).

Hayner, Priscilla. 2001. *Unspeakable Truth: Facing the Challenge of Truth Commissions*. New York: Routledge.

Henderson, James and Pauline Wakeham. 2009. "Colonial Reckoning, National Reconciliation? Aboriginal Peoples and the Culture of Redress in Canada." *English Studies in Canada* 35(1):1-26.

Henderson, James Sa'ke'j Youngblood and Wanda McCaslin. 2005. "Exploring Justice as Healing." Pp. 3-9 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Huculak, Bria. 2005. "From the Power to Punish to the Power to Heal." Pp. 161-166 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Indian and Northern Affairs Canada. 2010. Presentation on the Indian Residential Schools Settlement Agreement (IRSSA). January 2010 Draft.

Indian Residential School Settlement Agreement. 2006. Commemoration Policy Directive.

Johnstone, Gerry and Daniel W. Van Ness. 2007. *Handbook of Restorative Justice*. Portland, Oregon: Willan Publishing.

Joseph, Robert. 2005. "Denial, Acknowledgement, and Peace-Building through Reconciliatory Justice." Pp. 253-274 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Kiss, Elizabeth. 2000. "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice." Pp. 68-98 in *Truth v. Justice: The Morality of Truth Commissions* edited by R. I. Rotberg and D. Thompson. Princeton: Princeton University Press.

Llewellyn, J. 2008. "Bridging the Gap between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission." Pp. 183-201 in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, edited by M. Castellano, L. Archibald, and M. DeGagné. Ottawa: Aboriginal Healing Foundation.

Llewellyn, Jennifer. 2002. "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice." *The University of Toronto Law Journal* 52(3):253-300.

Llewellyn, Jennifer and Robert Howse. 1999. "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission." *The University of Toronto Law Journal* 49(3):355-388.

Marshall, Tony. 2003. "Restorative Justice: An Overview." Pp. 28-45 in *A Restorative Justice Reader: Texts, Sources, Context*, edited by G. Johnstone. Portland, Oregon: Willan Publishing.

May, Katie. 2010. "Journey Home Inspiring for Residential School

Survivors." *Northern News Services*. March 15.

Milward, David. 2008. "Making the Circle Stronger: an Effort to Buttress Aboriginal Use of Restorative Justice in Canada Against Recent Criticisms." *International Journal of Punishment and Sentencing* 4(3):124-158.

Minow, Martha. 2000. "Hope for Healing: What Can Truth Commissions Do?" Pp. 235-260 in *Truth v. Justice: The Morality of Truth Commissions,* edited by R. I. Rotberg and D. Thompson. Princeton: Princeton University Press.

NationTalk. 2010. "Truth and Reconciliation Commission of Canada to hold First National Event in Winnipeg." *NationTalk News*. May 28.

National Native Addictions Partnership Foundation. 2010. "Truth and Reconciliation Commission - National Event in Winnipeg, June 16-19th." *NNAPF Newsletter*. Undated.

Nielsen, M. O. 1995. "Canadian Native Youth Justice Committees and the Navajo Peacemaker Courts: A Comparison of Developmental Issues and Organizational Structures." Paper presented at the American Society of Criminology Annual Meeting, Boston, Nov. 14-18.

–. 1992. "Criminal Justice and Native Self-Government." Pp. 243-256 in *Aboriginal Peoples and Canadian Criminal Justice*, edited by R. Silverman and M. Nielsen. Toronto: Harcourt.

Pawlychka, Colleen. 2010. "Redefining Justice: The Framing of Contemporary Restorative Justice in Film." M.A. Thesis, Department of Sociology, University of Manitoba.

Pemberton, Kim. 2010. "Cuts Fly in the Face of Apology, B.C. First Nations Leaders Say

Aboriginal Healing Foundation Will Lose Funding Next Year for Last 2 Treatment Centres on Island." *Vancouver Sun*. April 8.

Pranis, Kay. 2007. "Restorative Values." Pp. 59-74 131 in *Handbook of Restorative Justice*, edited by G. Johnstone and D. W. Van Ness. Cullompton: Willan Publishing.

Puxley, Chinta. 2009. "Truth Commission to Deal with Student-on-Student Abuse in Residential Schools." *The Canadian Press*. September 21.

Roche, Declan. 2006. "Dimensions of Restorative Justice." *Journal of Social Issues* 62(2):217-238.

Ross, Rupert. 2008. "Telling Truths and Seeking Reconciliation: Exploring the Challenges." Pp. 143-159 in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, edited by M. Castellano, L. Archibald, and M. DeGagné. Ottawa: AHF.

Ross, Rupert. 2006. *Returning to the Teachings: Exploring Aboriginal Justice*. Toronto: Penguin.

Sawatsky, Jarem. 2009. *The Ethic of Traditional Communities and the Spirit of Healing Justice*. London: Jessica Kingsley Publishers.

Shearing, Clifford. 2001. "Transforming Security: A South African Experiment." Pp. 14-34 in *Restorative Justice and Civil Society*, edited by H. Strang and J. Braithwaite. Cambridge: Cambridge University Press.

Sinclair, Murray. 2011. Letter to Rev. Stephen Kendall. January 27.

Sison, Marites. 2010. "School Survivors Share Stories of Pain, Abuse." *Anglican Journal*. June 18.

Smith, Linda T. 1999. *Decolonizing Methodologies: Research and Indigenous Peoples*. Dunedin: University of Otago Press.

Smith, Jamie. 2010. "Stories Shared at Day 1 of Truth and Reconciliation Conference." *TB News Watch*. November 24.

Standing Senate Committee on Aboriginal Peoples. 2010. *The Journey Ahead: Report on Progress since the Government of Canada' Apology to Former Students of Indian Residential Schools*. Ottawa: Senate Canada.

Strang, Heather and John Braithwaite. 2001. *Restorative Justice and Civil Society*. Cambridge: Cambridge University Press.

Suderman, Brenda. 2010. "Of faith and Reconciliation: Churches to Offer Support, Apologies to Residential School Survivors." *Winnipeg Free Press*. June 12.

Sullivan, Dennis and L. Tifft, eds. 2006. *Handbook of Restorative Justice*. New York: Routledge.

Truth and Reconciliation Commission of Canada. 2007/2008. Missing Children and Unmarked Burial Working Group. Ottawa: TRC.

Valandra, Edward C. 2005. "Decolonizing 'Truth:' Restoring More than Justice." Pp. 29-53 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Van Ness, Daniel W. 2009. "What is RJ? Slide Show." *Restorative Justice Online*. www.restorativejustice.org/whatisslide. Accessed November 6, 2010.

Woolford, Andrew. 2009. *The Politics of Restorative Justice: A Critical Introduction*. Halifax: Fernwood Publishing.

Working Group on Truth and Reconciliation and through the Exploratory Dialogues. 2000. *Healing and Reconciliation: Alternative Strategies for Dealing with Residential School Claims*. Ottawa: Indian and Northern Affairs Canada.

Yazzie, Robert. 2005. "Healing as Justice: The Navajo Response to Crime." Pp. 121-133 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Zehr, Howard 2002. The Little Book of Restorative Justice. Intercourse, PA: Good Books.

Zehr, Howard and Harry Mika. 1997. "Fundamental Concepts of Restorative Justice." *Contemporary Justice Review* 1(1):47-55.

Zehr, Howard. 1985. "Retributive Justice, Restorative Justice. New Perspectives on Crime and Justice." Occasional Papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice.

Zion, James W. 2005. Punishment vs. Healing: How Does Traditional Indian Law Work? Pp. 68-72 in *Justice as Healing: Indigenous Ways*, edited by W. McCaslin. St. Paul, MN: Living Justice Press.

Juvenile Detention Reform in the United States: From a Punitive Measure to Helping Youth

Courtney A. Waid-Lindberg,
Department of Criminal Justice and Political Science,
North Dakota State University

Abstract

Historically, American juvenile justice has been defined by rehabilitative functions that aim to serve the treatment needs of youth. However, in recent years, juvenile justice practices have come in line with the Crime Control Era that has defined adult criminal justice. Juvenile detention, which is the physical holding of youth in secure settings prior to juvenile court hearings, is an example of a juvenile justice entity that is reflective of the Crime Control Era and its punitive nature. The present commentary seeks to understand how detention, as currently defined, supports a punitive ideology within the system of juvenile justice. The history of juvenile justice in the United States is traced, and the Rehabilitative Ideal as a philosophy for the system to follow is questioned. Secure detention as a policy is utilized as an example of the shift to punitive juvenile justice practice in the past 30 years. Furthermore, attention is given to the reform of secure detention, and how such reform can help juvenile justice recapture elements of a rehabilitative focus.

Introduction

Prior to the mid-1800s, criminal justice in the United States – while not characterized as extremely punitive at the time – was also not unified by a distinct rehabilitative goal in all

segments of the criminal justice system. As the 1900s approached, criminal justice system components – both adult and youth – began to embrace rehabilitative goals and functions. The formal system of juvenile justice that came into spirited development as the 20th century approached has often been considered by many commentators as the epitome of the Rehabilitative Ideal, a movement that swept criminal justice in the United States during the early 1900s (Blomberg and Lucken, 2010). The goal of this paper is to trace the development of juvenile justice in the United States in brief, and question whether rehabilitation of youth is possible given the nature of the juvenile justice system today. With this questioning of the initial rehabilitative function in recent years comes the description of the current state of juvenile justice and its departure from the original key goals of the Rehabilitative Ideal. This commentary concludes with a narrower focus by contextualizing the practice of juvenile detention as a punitive measure within the current juvenile justice system. For the purpose of this commentary, detention is defined as the temporary custody of a youth in a physically secure setting. Questions to be addressed include the following: (1) Can the current state of detention practices be used to understand the goals of the American juvenile justice in the 21st century?, and (2) If detention in its current state is in fact too punitive a policy for youth in the system, could detention reform allow progressive juvenile justice practitioners the opportunity to realign detention with the initial goals of juvenile justice? In other words, can detention reform aid in bringing rehabilitation back as the central goal of the American juvenile justice system, and if so, is this the course of action most appropriate for serving our youth in the system?

A Brief History of Juvenile Justice in the United States

Early prohibitions of child misbehavior and crime were regularly observed, and the punishment of youth for this behavior was a regular occurrence. During the early Greek, Roman, and Chinese Empires, children could be sentenced to death for offenses that their parents committed. Centuries

later, in 1800s England, children worked long hours in coal mills. As Postman (1994) has noted, the concept of childhood is one that was not even considered prior to the 19th century. Thus, it comes as no surprise that children worked long hours and were likely to be punished severely for minor transgressions against the community/society. At this time, cruelty to animals was a punishable offense, whereas cruelty to children was not a punishable offense. Clearly, for many centuries, with the exception of the labor they provided, children were a powerless group that held little value to the community at large. In Colonial America, children's behavior was strictly enforced by the Stubborn Child Laws, which prescribed that children obey their parents. Colonial American communities also utilized the English common law principle of responsibility to determine which individuals were capable of understanding the repercussions of their behavior. The common law principle of responsibility stated that children under 7 were not capable of harboring criminal intent, children between the ages of 8-13 were possibly capable of harboring intent, and individuals aged 14 and older were definitely capable of harboring criminal intent, and thus should be treated in the same manner as adults. This would, at times, result in harsh, public punishments of youth (Blomberg and Lucken, 2010; Rendleman, 1971; Shelden, 2008). Additionally, there were differences in which the children of each social class were handled. Children from the lower classes often were sentenced, irrespective of their offense, to perform hard labor or serve as apprentices to individuals that owned land or businesses, whereas children of the wealthy may have been punished by a small fine to be paid by their parents. It should also be noted that many of the punishments were handled informally; yet, children were often abused sexually and physically as well as housed with adult offenders when they were incarcerated for punishment (Bremner, 1970; deMause, 1974; Empey, 1979; Kett, 1977).

American juvenile justice developed its foundations as a response to the extreme and disparate treatment of youth prior to the 1800s. With the onset of the 1800s, juvenile justice

programs targeting intervention and treatment developed with much promise and enthusiasm. Juvenile delinquency was conceptualized as a different entity than adult crime, as young offenders were viewed as more amenable to treatment than their adult counterparts. As Shelden (2008) notes "the term juvenile delinquent originated around early 1800s and had two different meanings that correspond to the two words being used: (1) *delinquent*, which means 'failure to do something that is required' (as in a person being delinquent in paying taxes) and, (2) *juvenile*, meaning someone who is 'malleable, and not yet fixed in their ways,' and subject to change and being molded (i.e., redeemable)" (p. 199). States adopted the concept of *parens patriae* in the early 1800s, which was based on the English common law principle defining the state as guardian of every child.

The House of Refuge movement came shortly after the concept of juvenile delinquency was coined with the goal of separating young offenders from adult offenders, and removing children from homes without proper supervision and slum communities in an effort to place rehabilitation as the foremost goal of handling youth. The Society for the Reformation of Juvenile Delinquents (SRJD), which was comprised of wealthy business owners, established the New York House of Refuge in the 1825. This institution was the first institution built exclusively for youth in the United States, and it set the stage in terms of philosophy and design for all youth detention and residential commitment institutions built in the years following its opening. Other houses of refuge opened in other populous cities along the Eastern coast of the United States shortly after the New York House of Refuge opened. During this time, adverse social conditions were considered to be the chief cause of delinquency in many urban settings (Shelden, 2008). While the House of Refuge movement clearly embraced the humanitarian goal of removing delinquent and wayward children from ill-fated communities and thus seemed to be a humane approach to handling delinquency in theory, children serving time in these institutions were often subject to corporal punishments and solitary confinement

(Pisciotta, 1982). With the advent of the Industrial Revolution in the late 1800s, many delinquent youth found themselves working in factory settings instead of benefitting from services that initially defined the House of Refuge movement (Shelden, 2008). While this was not an ideal way of handling delinquent youth, criminologists began to conceptualize delinquency in accord with the positivist theories of criminology that dominated the field at that time. In turn, this attempt to understand delinquency and criminal behavior gave rise to the Rehabilitative Ideal that developed and gained steam at the end of the 1800s.

The dawn of the 20th century brought about a similar initiative to the House of Refuge – the Child Savers movement. The Child Savers movement stressed the removal of wayward and troubled youth from poor environments in an effort to prevent the proliferation of delinquency via contact with delinquent and criminal family members and/or peer groups in rapidly developing urban areas. These children were placed in orphanages and refuge homes in urban locales, or transported to rural farms. While the goal of these programs was to assimilate youth to the elements of conforming society, the practices often were quite similar to those of the mid 1800s as they were marked by rigid regimes, inhumane conditions, and physical abuse of the youth. While initiatives and programs were marked by unintended consequences and problems, the ideology surrounding 19th century juvenile justice continued to gain momentum as the 20th century approached (Platt, 1969). The first juvenile court was established under the advisement of lawyers, penologists, and social workers in Chicago, Illinois in the year 1899. The proceedings of juvenile court were to be entirely different than those of the adult criminal court. All activity was anonymous in an effort protect the youth. Furthermore, judges acted in the best interests of the children, tending to their individual needs without presuming guilt, and stressing treatment over punishment. With the onset of the 20th century, the juvenile court was considered the gold standard of the Rehabilitative Ideal, which also included the proliferation of indeterminate

sentences, the reformatory regime, probation, and parole for adult offenders (Bernard and Kurlychek, 2010; Blomberg and Lucken, 2010).

The juvenile court and its rehabilitative standards were in place in the majority of the states by 1925; thus, it was no surprise that there was a proliferation of rehabilitative services for youth during the first half of the 20th century. The placement of youth in detention facilities has a long history in the United States, and the initial, expressed goals of these facilities were no different than that of the juvenile court. As stated above, early youth detention facilities in America borrowed heavily from the physical plant design and daily regime of the refuge homes that dominated programming for youth in the 1800s. While the primary goal of the facilities was rehabilitation, practices were often marked by sub-standard programming and corporal punishment due to lack of treatment personnel and overcrowding. Strict schedules of activities and corporal punishment for disobedience were commonplace in these facilities. Many juveniles were sent to adult jail facilities after the Great Depression for the purpose of detention when facilities for youth were not readily available. Reasons for this included a concern over the lack of education, recreation, and social service programs available in juvenile facilities. As the 20th century progressed, problems relating to the physical plant of facilities and a lack of medical and psychological services continued to be problematic (Frazier and Bishop, 1985). During the 1960s, there was a boom in juvenile detention facility construction; however, many of these facilities still resembled adult jails in appearance, which would lead to the conclusion that detention facilities had abandoned the central, established goal of juvenile justice – that of rehabilitation.

As the 1980s approached, policy recommendations included increasing the provision of social services, the elimination of the potential for the misplacement of youth in detention, and strengthening community resources to eliminate the need for some youth to enter detention facilities (Waid, 2011). How-

ever, the due process rights extended to youth in the 1960s and the current Crime Control era which served to bring juvenile justice in line with adult criminal justice impeded widespread adoption of these principles. In turn, overcrowding, understaffing, and underfunding have been problematic in facilities since the late 20th century. However, questions of how "just" the treatment of delinquent youth actually was at the height of the Rehabilitative Ideal in the middle of the 20th century have been raised, as these youth were without due process rights and other protections, and perhaps most importantly, many youth experienced corporal punishment at the hands of a system that espoused treating youth as a central goal. In fact, some commentators have called for the dissolution of the juvenile justice system all together as it resembles the criminal justice system in so many aspects (Authur, 2000). In order to address these concerns, a general overview of rehabilitative goals and elements are necessary. After these are presented, juvenile detention will be considered, with a special emphasis on considering the reformation of juvenile detention to provide a continuum of services to youth that are detained.

Is Rehabilitation the Answer?

The question of what works in rehabilitating offenders – both adult and juvenile – has been at the forefront of correctional inquiry since the early 1970s, with commentators disagreeing on what elements, if any, comprise effective treatment for offenders. Clearly, as demonstrated above, questions regarding the effectiveness of various treatment modalities have stimulated criminological discussions since the turn of the 19th century, with what works to rehabilitate youth often generating spirited discussion. Until the 1960s, questions regarding the impact of reform in reducing recidivism were, for the most part, straightforward; specifically, the goal was to find a treatment modality that could be implemented throughout the adult and juvenile correctional systems, and most importantly, show effectiveness in decreasing recidivism among offenders participating in these programs. Many of the pro-

grams evaluated in the mid-20th century showed that several treatment programs worked for some offenders, depending on their characteristics and needs, and under certain conditions. (Andrews et al., 1990; Cullen and Gendreau, 1989, 2001; Gendreau, 1996a, 1996b; Gendreau and Ross, 1979, 1987; Gottfredson, 1979; Martinson, 1974; Ross and McKay, 1978; Waid, 2010).

The question of "what works" in offender reform has remained a key issue in corrections research since the 1970s. This leading question, coupled with the increasing political interest in offender rehabilitation led Robert Martinson (1974) to engage in a research synthesis of 231 varied, separate evaluations of correctional programs, both adult and youth, conducted between 1945-1967 (Sarre, 1999). Martinson's summary of the synthesized research provided an outlook that was quite bleak, as he stated that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism" (1974, p. 25). More specifically, no one particular treatment modality that he analyzed as part of his synthesis worked to substantively reduce criminal and delinquent activity. Perhaps more defeating than Martinson's pessimistic statement of rehabilitative endeavors and lack of encouragement for the future of offender treatment was the dawn of the "get-tough" movement in American criminal justice at the end of the 1970s (Waid, 2010). It is possible that the lack of confidence in rehabilitation as a primary mission of the juvenile justice system led to policy and procedural changes that intended to protect the due process rights of youth, and thus intended to be more just in application, yet instead were more punitive in reality.

Juvenile justice in the United States had, until the mid-20th century, been a front-runner in the Rehabilitative Ideal, and had in turn embraced many of the movement's recommendations such as individualized treatment and assessment for each youth prior to the receipt of services. Elements of effective offender reform uncovered in the past 30 years has

centered on a series of treatment principles, and the program modalities in which these principles are based. Although the Martinson Report has been noted a key publication that led to policy makers retracting their support for rehabilitation, a select few researchers have continued to advocate for offender treatment, calling for rigorous evaluations of existing programs (Cullen and Gendreau, 1989, 2001; Gendreau and Andrews, 1990; Gendreau and Ross, 1983-1984; Miller, 1989; Van Voorhis, 1987; Waid, 2010). The importance of matching offender risk, need and responsivity to treatment became the focus of program development, delivery, and evaluation during the early 1990s with great confidence and success (Andrews et al., 1990). These elements continue to drive treatment programming implementation and delivery for all types of juvenile offenders with the hopes that the past pattern of goals unrealized will not be encountered again. However, juvenile justice has been influenced by the get-tough philosophy in the past 30 years. The current state of juvenile detention provides an excellent example of this shift to a get-tough stance in juvenile justice. This analysis will allow for a questioning of the rehabilitation of youth and whether it is possible given the nature of the juvenile justice system today.

Today's Secure Detention: A Punitive Measure

During the last two decades of the 20th century, the rehabilitation of youth, while still stressed as the central goal of juvenile justice, was not all encompassing as it had been in years past with the onset of what has been considered the juvenile rights period in the 1960s. With the case of *In re Gault* (1967), juveniles were extended due process rights, such as the right to an attorney and the right to trial by jury. Specifically, questions of whether justice could be served in the juvenile justice system when youth were not afforded due process rights were raised, and it was not uncommon for criminologists that had once advocated for the clinical model of treatment for youth to retract their views and advocate for youths rights, especially since it was often difficult to determine if the goals of treatment were met. The use of secure

detention of youth increased and became widespread as a practice during the latter half of the 20th century.

It has been noted that secure detention of alleged delinquents should primarily be restricted to cases where youth are at risk of harming themselves and/or residents of the communities in which they reside, as well as youth who are at risk of not returning to the juvenile court for hearings. The complexity of the juvenile justice process, the adversarial nature the juvenile justice system has come to embrace since the due process movement of the 1960s, the lack of assessment tools, as well as a myriad of extra-legal factors (i.e., the socioeconomic status of a child) contribute to the fact that many juveniles posing little to no risk of harm to themselves or residents of their communities and/or flight risk are detained in secure facilities in many jurisdictions. This practice has resulted in case backlog in the juvenile courts and overcrowding in institutional settings. In fact, these adverse conditions of confinement are considered by some criminologists to be far below the necessary standards for the protection of youth. Specifically, many programmatic elements (i.e., educational and vocational programs and psychological services) are deficient in most secure youth detention facilities throughout the United States (Waid, 2011).

Because secure detention is relied upon so heavily today, many juvenile courts deny access to youth that could benefit from alternative services such as foster care. In many instances, juvenile justice officials are not aware of services available to youth in their jurisdiction (Cannon, Warner, Waid, and Knowles, 2008). Even if officials are aware of options beyond secure detention, the planning, implementation, and monitoring of alternatives would require extra staff time as well as the skills of qualified juvenile justice specialists and researchers – which, important to note, was something that was problematic in the delivery of treatment options during the height of the Rehabilitative Ideal. The Annie E. Casey Foundation advocates jurisdictions develop a continuum of alternatives for youth in need of detention services; how-

ever, this too would require resources – resources that many jurisdictions may not have. Home/community detention and day and/or evening reporting are considered to be the most optimal choices for the majority youth in need of services, not secure detention. These methods have shown that effective monitoring of youth can be achieved, and they can reduce further involvement in the formal juvenile justice system (Waid, 2011).

Conclusion

While secure detention moves juvenile justice away from the initial focus of the system as it was conceptualized almost 200 years ago, demands for detention reform bring the possibility of humane treatment and attention to the needs of youth back to the forefront. Juvenile justice policy makers have made the point that although juvenile justice practices have become more punitive in the latter half of the 20th century, the system still embraces the rehabilitative elements and language of the original juvenile court, and thus has, at its heart, the treatment needs of youth at the forefront (Authur, 2000; Sanborn and Salerno, 2005). Others have argued that adolescents treated as adults are likely to become chronic offenders, which will cost the criminal justice system in the long term (Fagan, 2010; Frazier and Cochran, 1986).

Practices such as the attempted reform of secure detention are indicative of the retention of treatment and serving the individual needs of youth, which the general public supports (Schwartz, Guo, and Kerbs, 1996). With the implementation of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, alternatives to secure detention settings and residential confinement as described above were encouraged. As the new millennium approached, the continued over-reliance on secure detention for youthful offenders led to proactive reform initiatives in several jurisdictions across the country (Lubow, 1999; Roush, 2004). In keeping with the spirit of detention reform, the Juvenile Detention Alternatives Initiative (JDAI), implemented in pilot jurisdictions in the 1990s,

sought to reform secure detention practices. The reform efforts at these sites, which placed a heavy emphasis on the strategic development, implementation, and comprehensive evaluation of alternatives to secure detention, were evaluated so that successful components could be shared with both urban and rural jurisdictions frustrated with existing secure practices (Annie E. Casey Foundation, 1999). It is possible that in doing this, the cycle of previous juvenile justice initiatives as detailed above can be curtailed and the goal of helping youth can be attained. Whether the decision is intentional or not, juvenile court personnel deny access to youth that could benefit from age-appropriate and culturally-relevant alternative services such as after-school reporting and foster care. Clearly, detention alternatives are ripe for matching the risks, needs, and responsivity of youth to appropriate programs when applicable. Much of the time, placement is a function of those involved in the decision making process (i.e., prosecutors, juvenile court judges, and juvenile probation officers) being unaware of these services in the jurisdiction, or not having the personnel to implement initiatives, supervise youth, and evaluate alternative programs (Waid, 2011). Thus, communication and information-sharing is critical to the future of juvenile justice. Considering this, embracing the initial rehabilitative goals of the juvenile justice system for years to come will not only be cost effective, but can serve youth based on the principles for which the system was founded almost two centuries ago (Fritz, 2008; Schwartz, Fishman, Hatfield, and Krisberg, 1987). This undoubtedly is just in the minds of juvenile justice system personnel.

System stakeholders interested in detention reform have the ability to serve as a catalyst for the system, and realign this major component of the juvenile justice system with its initial goal of rehabilitation. With careful implementation and evaluation, mistakes from the past should not be revisited, and perhaps the rehabilitative functions of serving youth can be kept while juvenile justice operates within a framework of protection of youth rights. , If this path is followed, other parts of the system may then have a blueprint – specifically

in terms of the resources available and personnel needed – to follow suit. As Garland (2001) notes, older treatment oriented practices are often reconfigured to emphasize the control of offenders (i.e., solitary confinement, once used as a crude form of rehabilitation, is now used a punishment). Detention reform does advocate for new methods and many of the key principles advocated by treatment professionals, which would lead to a break in the cycle detailed above, and thus the just treatment of youth.

References

Andrews, D.A., Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau, and Francis T. Cullen. (1990). *Does correctional treatment really work?: A clinically relevant and psychologically informed meta-analysis. Criminology* 28(3): 369-404.

Annie E. Casey Foundation. (1999). *Pathways to Juvenile Detention Reform.* Baltimore, MD: Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative.

Authur, Lindsey G. (2000). Abolish the juvenile court? In R.A. Weisheit and R.G. Culbertson (eds.). *Juvenile Delinquency (4th Ed.).* Prospect Heights, IL: Waveland Press Inc.

Blomberg, Thomas G., and Karol Lucken. (2010). *American Penology: A History of Control (2nd Ed.).* New York, NY: Aldine de Gruyter Press.

Bernard, Thomas J., and Megan C. Kurlychek. (2010). *The Cycle of Juvenile Justice (2nd Ed.).* New York, NY: Oxford University Press.

Bremner, R.H. (Ed.). (1970). *Children and Youth in America.* Cambridge, MA: Harvard University Press.

Cannon, Joanna Bruni, Kate Warner, Courtney A. Waid, and F. E. Knowles. (2008). Pathways to Detention in South Georgia: Perceptions About the Avenues to Commitment, Alternatives to Detention, Prevention, and Gaps in Resources. *The Journal of Juvenile Justice Services* 22(1): 7-22.

Cullen, Francis T. (2002). Rehabilitation and treatment programs. In J.Q. Wilson and J. Petersilia (eds.). *Crime: Public Policies for Crime Control.* Oakland, CA: ICS Press.

Cullen, Francis T., and Paul Gendreau. (1989). The effectiveness of correctional rehabilitation: Reconsidering the "nothing works" debate. In L. Goodstein and D.L. MacKenzie, (eds.). *The American Prison: Issues in Research Policy.* New York: Plenum Press.

Cullen, Francis T., and Paul Gendreau. (2001). From nothing works to what works: Changing professional ideology in the 21st century. *The Prison Journal* 81(3): 313-338.

deMause, Lloyd. (Ed.). (1974). *The History of Childhood.* New York, NY: Psychohistory Press.

Empey, L.T. (1982). *American Delinquency.* Homewood, IL: Dorsey Press.

Fagan, Jeffrey. (2010, Summer). The contradictions of juvenile crime and punishment. *Daedalus.*

Frazier, Charles E., and Donna M. Bishop. (1985). The pretrial detention of juveniles and its impact on case dispositions. *Journal of Criminal Law and Criminology* 76(4): 1132-1152.

Fritz, Gregory K. (2008, May). Juvenile detention reform is needed. *The Brown University Child and Adolescent Behavior Letter.*

Frazier, Charles. E., and Cochran, John C. (1986). Detention of juveniles: Its effects on subsequent juvenile court processing decisions. *Youth and Society* 17(3): 286-305.

Gendreau, Paul (1996a). Offender rehabilitation: What we know and what needs to be done. *Criminal Justice and Behavior* 23(1): 144-161.

Gendreau, Paul (1996b). The principles of effective intervention with offenders. In A.T. Harland (ed.). *Choosing Correctional Options That Work: Defining the Demand and Evaluating the Supply.* Thousand Oaks, CA: Sage Publications.

Gendreau, Paul and Robert R. Ross (1979). Effective correctional treatment: Bibliotherapy for cynics. *Crime and Delinquency* 25: 463-489.

Gendreau, Paul and Robert R. Ross (1987). Revivification of rehabilitation: Evidence from the 1980s. *Justice Quarterly* 4(3): 349-407.

Gottfredson, Michael R. (1979). Treatment destruction techniques. *Journal of Research in Crime and Delinquency* 16: 39-54.

In re Gault (1967).

Kett, JosephF. (1977). *Rites of Passage: Adolescence in America, 1790 to the Present.* New York, NY: Basic Books.

Lubow, Bart. (1999). Successful strategies for reforming juvenile detention. *Federal Probation* 63: 16-24.

Martinson, Robert (1974). What works?: Questions and answers about prison reform. *The Public Interest* 35: 22-54.

Platt, A. (1969). The rise of the child saving movement: A study in social policy and correctional reform. *Annals of the American Academy of Political and Social Science* 381: 21-38.

Postman, Neil. (1994). *The Disappearance of Childhood.* New York, NY: Vintage Books.

Pisciotta, Alexander. (1982). Saving the children: The promise and practice of parens patriae, 1839-98. *Crime and Delinquency* 28: 410-425.

Rendleman, Douglas R. (1971). *Parens patriae*: From Chancery to the juvenile court. *South Carolina Law Review* 23: 205-259.

Roush, David W. (2004). Juvenile detention: Issues for the 21st century. In A.R. Roberts (ed.) *Juvenile Justice Sourcebook: Past, Present, and Future.* New York, NY: Oxford University Press.

Ross, Robert R. and H. Brian McKay (1978). Behavioral approaches to treatment in corrections: Requiem for a panacea. *Canadian Journal of Criminology* 20: 279-295.

Sanborn, Joseph B. and Anthony W. Salerno. (2005). *The juvenile justice system: Law and process.* Los Angeles, CA: Roxbury Press.

Sarre, Rick. (1999). *Beyond "what works?" A 25 year jubilee retrospective of Robert Martinson.* Paper presented at the History of Crime, Policing and Punishment Conference, Canberra, Australia, December 9-10.

Schwartz, Ira, Gideon Fishman, Radene R. Hatfield, and Barry Krisberg. (1987). Juvenile detention: The hidden costs revisited. *Justice Quarterly* 4(2): 219-235.

Schwartz, Ira, Shenyang Guo, and John J. Kerbs. (1996). Public attitudes toward juvenile crime and juvenile justice: Implications for public policy. In Dean G. Rojek and Gary F. Jensen (eds.). *Exploring delinquency: Causes and control.* Los Angeles, CA: Roxbury Publishing Company.

Shelden, Randall G. (2008). *Controlling the Dangerous Classes: A History of Criminal Justice in America (2nd Ed.).* Boston, MA: Allyn and Bacon.

Waid, Courtney A. (2010). *An Assessment of Substance Abuse Treatment Programs in Florida's Correctional Institutions for Women.* Unpublished Doctoral Dissertation: The Florida State University, Tallahassee, FL.

Waid, Courtney A. (2011). Juvenile detention facilities. In W. J. Chambliss (ed.). *Juvenile Crime and Justice.* Los Angeles, CA: Sage Publications.

The Construction of Risk and Need in Community Classification Schemes

Christina Reinke, The University of Winnipeg

Introduction

The risk-need-responsivity principle (RNR) has guided the development of community correctional programs in recent decades (Bonta et al, 2010). This principle guides rehabilitation and supervision efforts by targeting factors related to risk (to the public), along with offender needs (to be rehabilitated). Ideally, the risk and need principles account for the individual's responsivity (intensity of needs) to treatment. Although RNR principles are prevalent within offender classification schemes, Bonta (1997) has suggested that a more fully operational theoretical framework is needed in order to better identify and target dynamic risk factors and criminogenic needs. However, classifying and categorizing risk from a need has been found to be problematic within correctional strategies (Hannah-Moffat, 2005; Ward & Stewart, 2003). Some scholars suggest that risk and need are framed in correctional risk assessments through a normative and value-laden lens (Hannah-Moffat, 2005; Avruch & Black, 1997). Accordingly, the concepts of risk and need tend to be conflated and unclear (Ward & Stewart, 2003). This paper further investigates these arguments. As such, the origins and development of the ideology of risk are briefly examined within a political and historical context. This is aided by a description of the 'generational' development within federal and provincial actuarial instruments. Particular emphasis is placed on the development and implementation of actuarial instruments within a community correctional context. Next, the conflated nature

of risk and need is outlined, with attention placed on how the concept of risk correlates with constructions of responsibility. While the conflation of the risk/need hybrid is discussed through Ward and Stewart's (2003b) g*ood lives model,* several limitations of this model are also identified. Lastly, the necessity of identifying the raced, classed and gendered ideology underlying the labeling of criminogenic needs /dynamic risk factors is presented.

The Emergence of Risk in Criminal Justice

O'Malley (2004: 326) maintains that "actuarial justice is the ascendant strategy of risk-based criminal justice". Similarly, Feeley and Simon (1992: 449) argue that the evolution of criminal justice discourse, objectives and techniques can be broadly characterized under the terms "Old Penology" and the "New Penology". In the Old Penology, criminal sanctioning was concentrated on the individual subject. It is ultimately concerned with concepts such as guilt, responsibility and obligation (Feeley & Simon, 1994). In this paradigm, correctional policy was focused on diagnosis, intervention and treatment of the individual offender. Conversely, the New Penology is rooted in actuarial logic as it is concerned with techniques of identification, classification and management so that groups may be sorted by levels of dangerousness. In its earliest conceptions, actuarial justice was based on an 'objective' ideology of probability and risk, not on clinical diagnosis and treatment of offenders (Feeley & Simon, 1992).

As such, actuarial justice is rooted in insurance ideology and techniques which systematically organize present experience in order to provide for future contingencies (Simon, 1987). Simon (1987:63-4) identifies this ideal within several actuarial frameworks. First, contingencies that may come to bear on an individual's life are mitigated by aggregating a group of individuals together.

Second, this aggregate data is most accurate when a larger sample is used. Therefore, the tendency of such a process is to grow, including a greater pool of people. Third, the data can

achieve greater precision by investigating the differences, or negative occurrences within the data. In this way, individual difference is to be identified and magnified within the information. Fourth, the data obtained does not seek to 'know' the individual, rather it seeks to situate the individual within the larger population. Despite these characteristics within actuarial frameworks, the historical evolution of this interplay between political and economic forces is not linear. In order to examine several major shifts in economic ideology and social policy that have been highlighted by scholars, it is important to examine these changes within their historical context.

Historical Development of Risk In Political Context

While insurance strategies can be traced back to the emergence of capitalism, they have been employed predominately in the twentieth century (O'Malley, 1994). Due to industrial capitalism, welfare policies involving health care, and education, developed after World War II in response to ever increasing demands on the working class (Woolford, 2009). In the Western world, the formulation of workers compensation began to gain momentum from the early twentieth century until World War II . With this development, workplace accidents were no longer seen as an anomaly with no cause, but rather as a normal and inevitable occurrence in work life (Simon, 1987). Therefore, employers were required to provide a measure of insurance to mitigate and manage these inevitable occurrences. After World War II, actuarial law developed even further and began to litigate harm due to industrial production and consumer products. Arguably, through these practices, individual security was established as a 'right' to be insured (O'Malley, 1994).

By the 1970s welfare policies were perceived to be in crisis by an increasingly mobile and global market economy. As Lacey (2010) notes, a neoliberal polity arose that was market driven and focused on private enterprise, deregulation, and liberalized trade. The underlying ideology was concentrated on consumer choice, efficiency, and individual autonomy. Feeley

and Simon (1994) suggest that this ushered in a shift in penal thinking— the New Penology. This penology suggests that the actuarial/risk logic does not seek to intervene in individual's lives in order to determine guilt or responsibility, but to regulate individuals in order to manage danger and the potentiality of risk (Feeley and Simon, 1994).

Despite this, scholars have argued that 'risk' is an abstract, constantly evolving technology that is fluid and flexible in the face of rising political and economic demands (Hannah-Moffit, 2005; O'Malley, 2004). Moreover, actuarial thinking may not be associated with conventional political labels (Feeley & Simon,1994). In their examination of criminal justice policy development in the United States, Simon and Feeley (1994) note actuarial logic is a technology that has been utilized and adapted by several political perspectives. For instance, actuarial connections with liberal polity are noted to emerge from "due-process oriented liberal" support for operations research and a management ideology that allowed for greater monitoring and coordination (Simon & Feeley, 1994:191). Conversely, they also note that "lock-em-up" conservative policy reflecting increased imprisonment also facilitates a dependence on actuarial techniques to substantiate the utility of more prisons (1994: 190). Underlying this analysis is the assertion that a risk ethos replaces rehabilitation and treatment in correctional strategies. Other researchers have questioned the linear implications of this logic. For instance, Hannah-Moffat (2005) argues that the neoliberalism/risk versus welfare/rehabilitation binary is overstated and that a more nuanced analysis of risk is needed.

Generational Development of Classification Schema

In order to provide this nuanced analysis, it is first important to examine how risk logic has evolved. Several scholars have outlined the development of risk logic over four 'generations' (Andrews, Bonta, & Wormith, 2006). The first generation of risk logic was rooted in a rehabilitative ideal that utilized a subjective, clinical prediction. In her review

of clinical studies, Ansboro (2010) found that this approach was often an inaccurate predictor of recidivism. Due to its subjective and unsubstantive nature, this approach fell from favour after a short period of time. In the second generation of risk assessment in the 1970s, risk assessment tools, such as the *Statistical Information on Recidivism Scale* (SIR) in Canada, were developed to account for static factors (Hannah-Moffat, 2005). Static factors are characteristics of an offender that are fixed and not amenable to change such as age, gender, and criminal history (Andrews, 1989). This generation of risk assessment is aligned with what Simon and Feeley (1994) referred to as the New Penology. This is where the fixed risk subject was assigned a static category that was 'objectively' determined, leading to mass incarceration and a limited scope of therapeutic intervention. However, by the 1980s concerns of this approach to classification and assessment were beginning to be voiced by psych-professionals within academic literature (Hannah-Moffat, 2005). This critique cultivated new ways of understanding the risk posed by the offender, and led to a third generation of risk analysis in the 1990s. A new way of thinking began to incorporate a therapeutic knowledge of an offender's needs, and individual amenability to change, alongside an actuarial lens. In a seminal article by Andrews (1989:13), he argues that practitioners must look beyond risk factors that cannot be changed and begin to identify those dynamic risk factors, or criminogenic needs, that may indicate opportunities for rehabilitation and a decreased probability of recidivism. As such, Andrews (1989) outlines other principles that should guide supervision.

First, offenders should be categorized according to a risk principle. This risk principle stipulates that the highest levels of service are allocated to the higher risk cases, and the lower risk cases are allocated lower levels of supervision (1989:13-14). Second, the need principle stipulates that it is necessary to target the criminogenic needs of offenders in order to reduce criminal offending. Accordingly, he identifies several targets of rehabilitative service, such as anti-social attitudes,

anti-social peer associations, increased self-management and problem solving skills, and reducing chemical dependency (Andrews,1989: 15). The third principle is the responsivity principle, and this principle asserts that the appropriate mode and style of service must align with an offender's identified risk level and need. Here, a cognitive behavioural approach is purportedly the most advantageous as it focuses on teaching rather than the traditionally rehabilitative ideal of 'treatment' (Hannah-Moffat, 2005; Bonta, 1997). Lastly, professional discretion underlies this risk-need-responsivity framework. As Andrews (1989: 17) states, "The professional reviews risk, need, and responsivity for a particular case under particular circumstances". Importantly, this review must account for ethical, humanitarian and legal considerations.

Bonta and colleagues (2006) assert that there is now a fourth generation upon us. This generation guides and follows service and supervision from intake to case closure. Case management is now the mantra for community corrections (Bonta, Rugge, Sedo & Coles, 2004). This involves a human service assessment and delivery focus, and follow-up orientation. New assessment tools such as the Wisconsin *Correctional Assessment and Intervention System* (CAIS) and *Correctional Offender Management Profiling for Alternate Sanctions* (COMPAS) are used to strengthen adherence to principles of effective treatment, as well as to provide efficient and accurate systems of offender classification in order to reduce recidivism. In Canada, the *Level of Service Inventory/Case Management Inventory* (LS-CMI) and the *Offender Intake Assessment* (OIA) are both utilized in order to provide a systematic and integrated information management system for all federal offenders from the date of admission.

In 1994, the Correctional Service of Canada implemented the *Offender Intake Assessment* (OIA) process for federal offenders (Taylor, 2001). Two core components of this process are the *Criminal Risk Assessment* and *Case Needs Identification and Analysis (CNIA)* (Taylor, 2001). The *Criminal Risk Assessment* includes static information about the offense (his-

tory, severity), as well as the results of the actuarial *Statistical Information on Recidivism Scale* (SIR). The SIR and CNIA risk score and ratings are both derived from seven dynamic/criminogenic need areas: employment, marital/family, associates, substance abuse, community functioning, personal/emotional, and attitude (Taylor, 2001). These quantitative scores indicate the overall risk and need level and identify ranges from low risk/low need to high risk/high need. While these processes provide a system of accountability in the provision of institutional supervision and services, it is also the major model for supervising offenders safely in the community (Bonta et al., 2004). The risk-need-responsivity principle guides information collected within the OIA process, therefore ultimately informing the overall correctional plan of an offender under community supervision (Bonta et al., 2004). However, there are several different types of risk/need assessment tools that are currently utilized within Canadian provincial jurisdictions. For instance, in Manitoba, all sentenced offenders are assessed using both the *Primary Risk Assessment (*PRA) and *Secondary Risk Assessment* (SRA) classification schemes (Bonta et al., 2004). The PRA is a more generalized classification instrument whereas the SRA is specific to an offense type.

Currently, the *Level of Service Inventory* (LSI) is commonly utilized across many jurisdictions with respect to community corrections. For instance, in a review of probation officers preferences, Hannah-Moffit & Maurutto (2003) found that a majority across several jurisdictions preferred the structure of the LSI. Utilized by provinces such as Ontario, Newfoundland, Prince Edward Island, and New Brunswick, the LSI has been the focus of several meta-analytic studies. In an early meta-analysis of 131 programs, Gendreau, Little and Goggin (1996) found that the LSI was the best available predictor of adult offender recidivism. More recently, in a meta-analytic review of community classification schemes, Andrews, Bonta and Wormith (2006:22) found that the predictive validity of the LSI, particularly for general recidivism, has consistently shown to be a valid predictor of recidivism as opposed to

"unstructured clinical judgment". However, they also maintain that the need principle was underestimated in earlier generations of classification schema and a more multi-model focus on criminogenic needs could be a more promising target for reduced recidivism (Andrews et al, 2006:18). Moreover, the responsivity principle has shown to be a necessary target in reducing recidivism in many studies. As they note, "The validity of general responsivity is overwhelming in the meta-analytic literature. Once again, of course, general responsivity is less important when service is not conforming with the risk and need principles"(2006:18). As such, the LSI/CMI *(Level of Service/Case Management Inventory)* has provided increased attention to offender's personal strengths and special responsivity factors (Olgoff & Davis, 2004).

This statement highlights the implications of the application and degree of adherence to principles outlined by correctional institutions. In this fourth generation of classification, studies have shown that it is necessary to monitor and assess the attitude and behaviour of the correctional official as well as the offender. For instance, in a study of the case management of sixty-two probation officers in Manitoba, Bonta et al (2004) found that needs assessments were often not addressed in probation meetings or integrated into intervention plans. This was particularly true of employment needs. Employment was identified as a need in 40 percent of cases, but only addressed 10 percent of the time (Bonta et al, 2004). As such, actuarial instruments, such as the *Correctional Program Assessment Inventory* (CPAI), have been developed to assess the degree of adherence to the principles of RNR in a program or correctional agency. Using this measure, Lowenkamp, Latessa, and Holsinger (2006) found that a variation in application and adherence to RNR principles are associated with the success of correctional programming in reducing recidivism. Their meta-analytic study of 97 community-based correctional facilities revealed that those non-residential programs that failed to meet RNR criteria were correlated with an increase in recidivism.

Further, studies have shown that probation officer's attitudes and interviewing techniques are important when examining programming adherence to RNR principles. Bonta and colleagues (2010) developed an experimental training program for probation officers with medium and high risk cases called the *Strategic Training Initiative in Community Supervision* (STICS). This 3 day skill training and maintenance follow-up was designed to expand and refine probation officer training to be more focused on RNR principles rather than a strict enforcement model. Compared to the control group, the researchers found that the STICS probation officers had a statistically significant higher proportion of their sessions focused on criminogenic needs. In contrast, officer-client interactions within the control group focused more on probation conditions and noncriminogenic needs. Officer-client interactions which focused on probation conditions for more than fifteen minutes per session were correlated with higher recidivism than those sessions lasting less than fifteen minutes. Overall, the recidivism rate for the STICS officers was 25.3 percent as compared to 40.5 percent for the control group (Bonta et al, 2010).

The Ideology of Risk

From such studies it is apparent that risk/needs classification schemes are interested in reducing recidivism and providing efficient, targeted treatment services to offenders (Hannah-Moffat, 2005). As was previously noted, actuarial instruments are based on ideas about risk, and how to best mitigate this risk for the largest group of individuals possible. As such, these instruments are subject to social forces and the groups and individuals who use them. It is here that the definition and nature of risk can be viewed through several lenses. As Simon and Baker (2002: 18 [italics original]) contend, "we are less interested in naming what *is* a risk than we are in what is done *in the name* of risk". As such, Baker (2002) suggests that the name of risk is intricately linked with the idea of responsibility. He suggests that a common ideology within western culture is that an individual procures insurance, not only

mitigate his/her risk, but also to lighten his/her responsibilities. In this sense, insurance serves to remove responsibility, not create it (Baker, 2002). However, Baker (2002) argues that as actuarial logic transfers and distributes risk, it also distributes responsibility. For instance, without insurance, an individual is responsible for his/her own medical bills or automobile damage. Insurance mitigates the inherent risks and responsibilities bound up in such realities, and ensures that these costs are distributed among a larger group of individuals. Further, insurance companies appropriate benefits or responsibilities based on a certain foreknowledge of potentially negative actions (Baker, 2002). What is problematic is this foreknowledge is purportedly based on objective data, however, it is constructed by social values, norms, and beliefs. For instance, only certain events, and certain people, are included within this risk calculus. As Baker (2002: 11) notes, "...concern is manifested in the concept of the deserving poor – the notion that children, the disabled, and the elderly poor deserve public support because their present need is not the result of irresponsibility on their part". In this way, the authority that is imparted through the risk calculus creates, ensures, and socializes responsibility. Insurance foresight claims the authority to prioritize and categorize who is responsible, and by how much. For instance, Reichman (1986) insists that actuarial models assume equality, however, in practice they form a veil over the sources of power. She argues that the distribution of 'risk' is rarely equal— instead risk classification creates and legitimates a "problem population" (Reichman, 1986:62).

Responsibility is also a nuanced concept with several meanings. Baker (2002) identifies five meanings that signify 'responsibility'. First, is the idea of being obligated— one who is responsible implies there is an obligation they are to meet. Second, is that of trustworthiness or loyalty— one can be counted on; they are responsible. Third, responsibility can signify a causal meaning. This means that due to poor choices, the onus is on the individual to pay— to be responsible. The fourth meaning suggests that the individual is a

free, self-determining agent is in control for his/her own area of influence. Within this area of influence the agent are free to act or not. The fifth definition conveys the interpersonal dimension of responsibility— solidarity. Through such personal relations there are bonds of attachment. Although responsibility has these five dimensions, all of these concepts share a common thread; it encompasses the social context of a group or individual. As McKeon (as cited in Baker, 2002;12-3) posits, "The concept of responsibility relates actions to agents by a causal tie and applies a judgment value to both. It involves assumptions about the agent and about the social context in which he acts".

Actuarial insurance relates to risk logic within correctional schemes in several ways. First, both aim to decipher and objectively name what constitutes a risk. However, it is questionable whether 'risky' situations or people can be objectively categorized. Hannah-Moffat (2005) contends that while risk classification schemes are touted to be a morally neutral objective, rational calculus of criminal offending, it is important to recognize that these 'risky' situations are predicated on middle-class, normative assessments of values, lifestyles and experiences. For instance, questions regarding income assistance, budgeting practices and credit capacity all assume that offenders have credit and/or are not to be financially over-extended (Hannah-Moffat, 2005). These indicators are often based on meta-analysis of correlations to offending but are not directly related to the offense in question.

Second, such logic also serves to define what kind of behaviour is responsible, and what kind is risky (Baker, 2002: Hannah-Moffat, 2005). Some scholars contend that the net of risk, conflated with needs, has widened (Hannah-Moffat, 2005). In earlier risk assessments, static risk factors such as age, gender, and offense history initially placed the offender within a risk category. These factors have now expanded to include other social categories equated with risk. These dynamic risk factors, including education level, employment status, peer associates, are social elements now enumerated

within the risk calculus. Further, specific social situations are framed either in a negative or positive way so as to encourage responsible behaviour (Baker, 2002). For example, probationary measures, such as requiring offenders to refrain from alcohol or visiting certain areas, all frame such activities through a subjective lens.

Third, risk assessments also determine and parcel out who must have a share in responsibility for this behaviour. Judgments are made about who or what caused the deviant events (Baker, 2002). For those who are low-risk, low-need, this responsibility is low; for offenders who are high-risk, high-need this responsibility is high. However, scholars have suggested that risk indicators are highly gendered and racialized. In a literature review, Hannah-Moffat and Maurutto (2003) suggest that actuarial tools may classify female and Aboriginal offenders as higher risk because of their greater criminogenic needs. In such instances, female offenders are often framed as higher risk as they pose a greater risk to themselves (Hannah-Moffat & Shaw, 2001, as cited in Hannah-Moffat & Maurutto, 2003). In their examination of the YLS/CMI youth classification system, Onifade, Davidson, and Campbell (2009) suggest that even multi-domain risk assessments do not factor in policing levels, community surveillance, and justice system attention. Consequently, members of minority and marginal communities that have disproportionate justice system contact have a greater likelihood of being apprehended and/or prosecuted for their offense.

Fourth, within correctional schemes the offender is conceived as an active risk subject amenable to therapeutic interventions (Hannah-Moffat, 2005). As the presence of dynamic risk factors signals the likelihood of increased offending in the future, targeting these factors in treatment is thought to reduce the likelihood of harm or risk. Moreover, it is presumed that responsible behaviour is fostered through the development of rehabilitation regimes and surveillance techniques. Such techniques are designed to make it easier to complete treatment and meet probationary conditions, or at least more

difficult to avoid them (Baker, 2002). The underlying ideology legitimates this intervention as 'good' for society and for the offender, purportedly not a moralistic act. It also reasserts the responsibility of the offender – the offender must simply be more *motivated* to meet his/her responsibilities.

Needs/Risk Conflation

Another problematic issue in the RNR model is that the relationship between risk and need in RNR schema is unclear (Ward & Stewart, 2003; Hannah-Moffat, 2005). Analytically, static and dynamic factors comprise two different spheres. Indeed, in the early generations of risk assessments, static factors were considered more empirically valid predictors of recidivism than dynamic factors (Gendreau et al., 1996). Since this time, studies have found dynamic risk factors to also be strongly correlated with recidivism. For instance, a meta-analysis by Gendreau and colleagues (1996) found that static factors, such as criminal history, and dynamic factors, such as antisocial behaviours, were both valid predictors of recidivism. Currently, both static and dynamic factors are considered in risk assessment models, such as the LSI-R, and in correctional treatment. One indication of the conflation between risk and need is that while initial assessments are based on static and dynamic risk variables, once in treatment, dynamic *risk* variables are framed as criminogenic *needs*. It is now needs, rather than risks, that are the most significant factors of interest (Ward & Stewart, 2003). The offender's level of risk is now determined by the depth or severity of his/her need. While this logic suggests that an offender's needs exist on a more fundamental level than what is simply driving the offending behaviour, dynamic risk factors and criminogenic needs are treated as essentially the same thing (Ward & Stewart, 2003). Similarly, Hannah-Moffat and Maurutto (2003:16) found that many correctional professionals could not distinguish the difference between a risk and a need, often conceptualizing them as a "part of the same issue".

Historically, 'needs' have generally have implied entitlement

to resources, whereas risk has been associated with danger and security (Hannah-Moffat & Maurutto, 2003).This blending of risk with needs means that needs are identified as 'problems' in the risk calculus (Hannah-Moffat & Maurutto, 2003). Therefore, legitimate needs are constructed within highly defined parameters, and are identified as those factors that reduce recidivism and are amenable to treatment (Hannah-Moffat, 2005). Here, criminogenic needs are conflated with a *specific* type of risk. Here, it is not an offender's self-identified need that is of paramount importance, but keeping needs confined to those parameters which are linked to recidivism.

Also problematic is the normative nature of needs. The identification and interpretation of needs are framed according to value judgments that are embedded in a particular view of human nature (Ward and Stewart, 2003a). For instance, the RNR model is based on social psychological theory of criminal offending, whereby thoughts and behaviour are conditioned and shaped by conditioning and re-enforcement mechanisms (Bonta, 1997;Ward & Stewart, 2003a). The g*ood lives* model (GLM), as proposed by Ward and Stewart (2003b), has been noted as a new way forward. The GLM is a strengths-based, positive psychological approach that focuses on empowering offenders to with the necessary internal and external resources in order to "secure primary goods in socially acceptable and personally meaningful ways" (Ward & Stewart, 2003b: 356). This definition of 'need' is rooted in the *Self-Determination* theory of needs proposed by Deci and Ryan (2000, as cited in Ward & Stewart, 2003). This theory proposes that humans are inherently active, self-directed mechanisms predisposed to seek autonomy, relatedness and competence. Needs are purportedly separate from wants in that they are universal and objective. Ward and Stewart (2003a: 128) suggest that, "Needs are concerned with the attainment of objective goods that sustain an individuals life...". With this view, basic needs require internal and external satisfiers such as adequate parenting, health, and acquisition of skill training. The nine needs identified in the model

are life, knowledge, excellence in play and work, excellence in agency, inner peace, friendship, community, spirituality, happiness, and creativity (Ward & Stewart, 2003b). However, Ward and Stewart (2003b) acknowledge that the nature of basic needs is context dependent. This means that the nature and relative importance assigned to these needs, are informed by personal and cultural contexts.

Ward and Stewart (2003a) suggest that this risk/need conflation may be related to a failure to articulate between two types of needs— instrumental and categorical. Instrumental needs are defined as those needs, "whose value depends entirely on their contribution to a future goal or end" (Ward & Stewart, 2003a:131). Categorical needs, on the other hand, "derive their value from the needs themselves; they are not means to a further, more fundamental end" (Ward & Stewart, 2003a:131). When confronted with obstacles, individuals attempt to satisfy basic needs in the best way that they can, resorting to proxy or substitute needs (Ward & Stewart, 2003a). In this sense, criminogenic needs are not needs in and of themselves, rather they are internal and external obstacles that lead to need distortion or the acquisition of proxy goals. Instrumental needs must be located in categorical needs in order not to be conflated with risk factors. For instance, in the RNR paradigm, impulsivity is construed as a criminogenic need. This leads one to question if impulsivity is really a need in and of itself, or if it is an instrumental means to obtain objective goods such as autonomy (Ward & Stewart, 2003a).

Ward & Stewart (2003a) also argue that the RNR paradigm does not account for the causal mechanisms linked to offending behaviour or the interaction between identified needs. For instance, re-integration is offered as important within RNR programming, but it fails to theoretically account for the psychological need that re-integration hopes to address. Ward and Stewart (2003a) assert that the 'need' for reintegration is linked to a deeper, more inherent needs for autonomy, relatedness and competency.

They contend that a more thorough epistemology in conceptualizing need identification within RNR schema is important in order to advance effective treatment services.

There have been several critiques of the g*ood lives* model. First, there is the issue of empirical validity. Bonta and Andrews (2003) argue that the needs identified within the model have no empirical basis on which to assess the identified offender needs within the model. Second, there is also some question whether there is really any substantive difference between the GLM and the RNR ideologies. For instance, Olgoff and Davis (2004) maintain that many of the needs identified in the GLM are domains that are covered in the RNR. He also notes that newer assessment tools, such as the LSI-R and the LS/CMI also focus on offender strengths. There are also questions as to whether the GLM will redirect rehabilitation focus on criminogenic needs to that of non-criminogenic needs. Olgoff and Davis (2004) question whether this may unintentionally re-enforce pro-criminal attitudes and behaviours, without addressing the factors that relate to offending.

Overarching all of these questions are several theoretical issues with how needs are framed within the correctional ideology, regardless if this is found in the RNR or GLM approaches. Whether needs are labeled as criminogenic, non-criminogenic, categorical, or instrumental, they are still understood to be generated within the individual nature. While the GLM is concerned with needs as more than a subset of factors related to recidivism, it still focuses on the psychosocial constitution of the offender at the expense of the social structures and institutions that frame the offender (Avruch & Black, 1987). Though the GLM has been touted as context-specific, this context is not viewed as essential to understanding how needs are constructed. Rooted in a universal perspective of human needs, the GLM posits a rational yet needs-driven actor. Such an actor is relegated to an at-any-cost irrationality when faced with fulfilling his/her needs (Avruch & Black, 1990).

Sampson and Lauritsen (1997) suggest that definitions of

crime may be re-conceptualized and understood to be a social problem at a larger level. With such an understanding, assessment structures would isolate particular characteristics of cities and communities that build the social bases of crime. The unit and explanation of analysis would not exhausted at the interpersonal level, but would include the historical, political, and economic macro-level forces that shape local communities. In such an analysis, it would be important to look at the immediate contexts and the ecological circumstances in which particular events take place (Kozleski et al., 2010). For instance, Smith (1986) found that police were more likely to arrest, or use coercive force, against suspects in racially mixed neighbourhoods than in more homogeneous communities (as cited in Sampson & Lauritsen, 1997). Here, community characteristics such as racial composition and socio-economic status can interact with suspect characteristics to predict and measure police arrest rates and incidences of coercive authority (Sampson & Lauritsen, 1997). Such arrest rates could then influence an offender's static risk level in terms of criminal history, and dynamic risk level in terms of anti-social behaviours. In this context, community characteristics have an interactional effect on police response and reporting, which then impacts individual-level risk factors. In this nuanced examination, risk and need are not viewed with an exclusive eye towards recidivism, but a more holistic view of building capacity within communities. Linear cause-and-effect relations are eschewed for a more interactional, systemic analysis of the bases of crime.

The disarticulation of the offender also ignores the social constructs such as language, gender, race and class that constitute the offender, the correctional staff, and the culture in which they live (Avruch & Black, 1987). It is necessary to step back from essentialized, generalized notions of risk and need, and to acknowledge that particular constructions, histories and applications of the term 'risk' and 'need' in a society are not neutral— they are value-laden and have embedded within them notions of the 'other' (Hannah-Moffat, 2005; Reichman, 1986). This is consistent whether analysis is conducted at the

micro-level or macro-level. While the empirical link between dynamic risk factors/criminogenic needs and recidivism has been touted, it is significant to question whether these links are due to empirical validity, or if it is because constructions of risk and need are framed by actuarial models at the outset. For correctional officials, academics, and practitioners, it is important to investigate where systemic bias is built into risk assessment models themselves. In this exercise of "delinquency instrument construction"(Sampson & Lauritsen, 1997:330), it is necessary to examine how word choice, word usage, and word control continue to create and sustain what is considered a risk and a need in criminal justice parlance (Coyle, 2010). Moreover, it is important to examine the underlying views of culture that create disproportionality – how culture frames and mediates certain assessments about peer groups, household functioning and educational access (Artiles, Kozleski, Trent, Osher & Oritz, 2010).

Conclusion

This paper has argued the notion that the domain of dynamic risk and criminogenic need within community classification schema are blended so that offender needs can be perceived as risk-laden and dangerous. Through historical analysis, evidence shows that the fluidity of risk logic enables it to conform to various political and economic leanings. Moreover, actuarial models have undergone several transformations since its beginnings. The construction of risk and responsibility has been linked to the evolution of risk assessment and treatment. The framing of needs have also been highlighted, with specific emphasis on the normative nature of such exercise. It has been argued that the conceptual framework for a need must be disentangled from the ideology of dangerousness and risk. This paper has outlined the *good lives* model criticism of the RNR, recognizing the utility of distinguishing between instrumental and categorical human needs within RNR frameworks. However, this paper has also discussed the limitations of the *good lives* model (Ward & Stewart, 2003a). When offenders are disarticulated from the

social and cultural context in which their offending occurs, it ensures that the social systems which give rise to, and frame, deviance and criminality remain in the shadows.

References

Artiles, Alfredo, Kozelski, Elizabeth, Trent, Stanley, Osher, David and Ortiz, Alba. (2010). Justifying and explaining disproportionality, 1968 – 2008: A critique of underlying views of culture. Exceptional Children 76(3): 279-299.

Avruch, Kevin, and Black, Peter. (1987). A generic theory of conflict resolution: A critique. *Negotiation Journal,* 3(1): 87-96.

Andrews, D.A. (1989). Recidivism is predicable and can be influenced: Using risk assessments to reduce recidivism. *Forum on Corrections Research: Risk Assessment and Prediction* 1(2): 11-18.

Andrews, D.A, Bonta, James and Wormith, J. Stephen. (2006). The recent past and near future of risk and/or need assessment. *Crime and Delinquency* 52(1): 7-27.

Andrews, D.A., and Dowden, Craig. (2006). Risk principle of case classification in correctional treatment : A meta-analytic investigation. I*nternational Journal of Offender Therapy and Comparative Criminology* 50(1): 88-100.

Ansbro, Maria. (2010). The nuts and bolts of risk assessment:When the clinical and actuarial conflict. *The Howard Journal* 49(3): 252-268.

Baker, Tom. (2002). Risk, insurance, and (the social construction of) responsibility. *University of Connecticut School of Law Articles and Working Papers.* Paper 8. Retrieved from http://lsr.nellco.org/uconn_wps/8

Brown, Shelley. (1997). The Case Needs Review Project: Background and research strategy. *Forum on Correctional Research: Dynamic Factors 10*(3). Retrieved from <//www.csc-scc.gc.ca/text/pblct/forum/e103/103b_e.pdf>

Bonta, James. (1997). Do we need theory for offender risk assessment? *Forum on Corrections Research: Offender*

Classification 17(1). Retrieved from <//www.csc-.gc.ca/text/pblct/forum/e091/091g_e.pdf>

Bonta, James, Rugge, Tanya, Sedo, Bill and Coles, Ron. (2004). Case management in Manitoba. *Public Safety and Emergency Preparedness Canada.* Cat no. JS42-120/20044E-PDF.

Bonta, James, Bourgon, Guy, Rugge, Tanya, Scott, Terri-Lynne, Yessine, Annie, Gutierrez, Letticia, and Li, Jobina. (2010). The Strategic Training Initiative in Community Supervision: Risk-Need-Responsivity in the Real World. *Public Safety Canada.* Cat no. PS3-1/2010-1E-PDF.

Coyle, Michael J. (2010). Notes on the study of language: Towards a Critical Race Criminology. *Western Criminological Review* 11(1): 11-19.

Feeley, Malcolm, and Simon, Jonathon. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology* 30(4): 449-74.

Feeley, Malcolm, and Simon, Jonathon. (1994). Actuarial justice: The emerging new criminal law. In David Nelken (ed.) *The Futures of Criminology.* London: Sage Publications, 173-201.

Gendreau, Paul, Little, Tracey, and Goggin, Claire. (1996). A meta-analysis of the predictors of adult offender recidivism: What Works! *Criminology* 34(4): 575- 607.

Gray, Patricia. (2009). The political economy of risk and the new governance of youth crime. *Punishment and Society* 11(4): 443-58.

Lacey, Nicola. (2010). Differentiating among penal states. *The British Journal of Sociology* 61(4): 778-94.

Lowenkamp, Christopher, Latessa, Edward, and Holsinger, Alexander.(2006). The Risk Principle in Action: What Have We Learned From 13,676 Offenders and 97 Correctional Programs? *Crime and Delinquency* 52(1): 77-93.

Hannah-Moffat, Kelly and Maurutto, Paula. (2003). Youth Risk/Need Assessment: An overview of issues and practices. *Department of Justice Canada.*

Hannah-Moffat, Kelly. (2005). Criminogenic Needs and the transformative risk subject. *Punishment and Society* 7(1): 29-51.

Olgoff, James, and Davis, Michael. (2004). Advances in offender assessment and rehabilitation: Contributions of the Risk-Needs-Responsivity approach. *Psychology, Crime, & Law* 10(3): 229-242.

O'Malley, Pat. (2004). The Uncertain Promise of Risk. *The Australian and New Zealand Journal of Criminology* 37(3): 323-43.

Onifade, Eyitayo, Davidson, William, & Campbell, Christina. (2009). Risk Assessment: The Predictive Validity of the Youth Level of Service Case Management Inventory with African Americans and Girls. *Journal of Ethnicity in Criminal Justice* 7(3): 205-221.

Reichman, Nancy. (1986). Managing crime risks: Toward an insurance based model of social control. *Research in Law, Deviance and Social Control* 8: 151-172.

Sampson, Robert J. and Lauritsen, Janet L. (1997). Racial and ethnic disparities in crime and criminal justice in the United States. *Crime and Justice* 21: 311- 374.

Silver, Eric and Miller, Lisa L. (2002). A cautionary note on the use of actuarial risk assessment tools for social control. *Crime & Delinquency* 48(1): 138-161.

Simon, Jonathon and Baker, Tom. (2002). Embracing Risk. In Jonathon Simon and Tom Baker (Eds.). *Embracing Risk: The Changing Culture of Insurance and Responsibility* (1-26). (Chicago: University of Chicago Press).

Taylor, Gilbert. (1997). Implementing risk and needs classification in the Correctional Service of Canada. *Forum on Corrections Research: Offender Classification 17*(1). Retrieved from <//www.csc-scc.gc.ca/text/pblct/forum/e091/091g_e.pdf>

Ward, Tony and Stewart, Claire. (2003a). Criminogenic needs and human needs: A theoretical model. *Psychology, Crime and Law* 9(2): 125-143.

Ward, Tony and Stewart, Claire. (2003b).The treatment of sex offenders: Risk management and Good Lives. *Professional Psychology: Research and Practice* 34(4): 353-60.

Woolford, Andrew. (2009). *The Politics of Restorative Justice*. Winnipeg, MB: Fernwood Publishing.

Questioning Justice: Kenyan Ethnopolitical Violence and Truth, Justice, and Reconciliation Commission

Peter Karari, Peace and Conflict Studies,
University of Manitoba

Transitional Justice

The end of bi-polar power politics saw the emergence of a new global challenge— the proliferation of intrastate and ethno-political conflicts characterized by unspeakable atrocities in which nation states face multiple challenges of coming to terms with their violent past and healing and rebuilding their societies (Hayner, 2001). This has led to the emergence of transitional justice mechanisms which respond to legacies of collective violence, severe and systematic human rights violations in a bid to establish the truth about the past, determine accountability, and offer some form of redress (Van Der Merwe et al., 2009). Establishing the truth about past human rights violations and patterns of violence is a central dimension of transitional justice processes. There are different mechanisms of transitional justice including retributive, restorative, procedural, and distributive justices (Maiese, 2003).

Distributive justice advocates for fair allocation of resources in terms of amount of target goods to be distributed, the procedures of distribution, and patterns of distribution among and across community members (Maiese, 2003). However, the question of a "fair allocation" is contentious especially in the dawn of scarce resources and diversity of needs which

necessitates the focus on distribution principles based on need, equality, and equity (Buttram et al. 1995: 261). Equality means equal distribution of goods among all members of a community, equity means that the benefits are distributed according to the ratio of an individual's productivity or contribution where equal opportunities to compete are provided while distribution according to needs assumes that those who needs more benefits receives more and vice versa (Maiese, 2003). Distributive justice facilitates justice through fair allocation of benefits, services, goods and resources across the community thereby bridging the gap of relative deprivation — that sense of injustice relative to others — and creating stability in the society (Deutsch, 2000).

Procedural justice advocates that fairness, respect, and dignity for all people in the community should be entrenched in the processes of making and implementing decisions thereby facilitating the ownership of the outcomes (Deutsch, 2000). Fair procedures accommodates consistency in making and implementing decisions (Buttram, 1995: 272), in facilitating impartiality, neutrality and focus on expressed needs of the beneficiaries (Ibid: 273), and in the representation and participation of the target communities towards nurturing trust, transparency and accountability (Maiese, 2003). However, while fair procedures nurtures ownership, they must translate to fair outcomes (Nelson, 1980: 506). Procedural justice is pivotal in conflict resolution and management procedures such as mediation, arbitration, adjudication, and negotiation (Maiese, 2003).

Retributive justice is a retroactive approach that advocates for punishment to those who violate human rights law and commits crimes against humanity such as rape, ethnic cleansing, and genocide (Maiese, 2003). Trial in the aftermath of mass atrocity marks an effort between vengeance and forgiveness by transferring the individual's desire for revenge to state bodies, creating an aura of fairness, establishing a public record, and producing some sense of accountability (Minow, 1998: 26). By holding accountable the offenders of mass

atrocities through justice and law, trials facilitate accountability and acknowledgement of harms done and the consequent reconstruction of impaired relationships, enabling others to learn from the past and warning those in the future (Maiese, 2003). However, in a critical perspective, the failure of trials of the superiors who gave orders, inducements, and threats, as well as the selectivity, arbitrariness and creation of martyrs out of a few who are subject to punishment, discredits the courts and threatens any sense of fairness or rationality (Minow, 1998: 40-50). Therefore, trials should not be pursued where there is no chance or perception of fairness, political will, resources and capacities of lawyers and judges (Ibid).

Restorative justices facilitate mutual healing of the victims and survivors of atrocities; access to social, financial, material, and emotional needs; rehabilitation and restoration of impaired social relationships between the victims and the perpetrators; and renewed dignity, respect, and reintegration of both the victims and the perpetrators into the community (Zehr and Mika, 1998). Restorative justice provides public spaces for active participation of both the victims and the perpetrators in finding truth through dialogue thereby facilitating informed understanding of the root causes of past atrocities and creating opportunities to break the cycle of violence and facilitate mutual healing (Hutchison and Wray, 2003). Victims' testimonies facilitate recognition, empowerment, humanization, respect, and dignity while the offenders acknowledge responsibilities for the harms they committed and bridge the gap through agreed upon reparations, apologies, seeking forgiveness towards renewed social relationships (Marshall and Gurr, 2003). Truth telling exposes structural injustices that cause structural and physical violence thereby enabling informed intervention and sustainable reconciliation and peacebuilding (Hutchison and Wray, 2003). To facilitate effective transitional justice in Kenya, it is important to understand the root causes of ethnopolitical violence in the country. This is discussed in the following section.

The Genesis and Progression of Kenyan Ethnopolitical Violence

Ethnic Relations in Pre-colonial and Colonial Kenya

Before colonialism, Kenyan communities led a mutually beneficial and interdependent communal life characterized by inter-ethnic interactions, marriage, barter-trade, and patronage (Lonsdale, 1989; Oyugi, 1998). Ethnic mutual antagonism in Kenya can partially be attributed to colonialism (Berg-Schlosser, 1984). The settlement of the British in Kenya led to the grabbing of about 7.5 million acres of land, approximately 25 percent of high potential land (white highlands) across Kenya thereby displacing millions of Kenyans from their ancestral homes and confining them to squatter settlements (Berg-Schlosser, 1984). The divide and rule administrative structure of the British colonial government created a homogeneous politico-administrative centre which broke independent tribal authorities and confined natives to prescribed administrative enclaves. The colonial administration introduced taxation which was earned through forced labour in the white highlands. The worst affected were the Kikuyu ethnic group whose 10 percent of the population were squatters by the end of World War I (Oyugi, 1998). The creation of the money economy by the colonial government led to rural-urban migrations that made the distinct pre-colonial ethnic boundaries porous. The industrious Kikuyu traversed the whole country as petty traders to the disgruntlement of other local communities (Ibid). Competition for limited opportunities led to the invocation of blood brotherhood, based on ethnic ideologies and consciousness (Oyugi, 1998).

The colonial education policies were discriminative, with the missionary led education concentrated among the Kikuyu, Luo, and Luhya ethnic groups and denied to nomadic communities such as the Maasai, Turkana, Samburu and the Kalenjins (Ibid). This preferential education system affected the marginalized communities in terms of job accessibility. Similarly, the colonial administration adopted preferential recruitment policies in favour of some ethnic groups (Oyugi,

1998). The Kalenjins were recruited to join the police and the army, while the Luo joined state corporations. The aforementioned developments nurtured a sense of consciousness about "us versus them" (Mamdani, 1996).

Racialization and Deracialization of the Structures of Privilege

Kenya's ethnic situation was also aggravated by immigrant communities such as the Indians who had earlier been contracted by the British to build the Kenya-Uganda railway (Oyugi, 1998). In the provision of social services such as education, health care and housing, race became a factor in determining the structure and quality of access. The "deracialization" of the structures of privilege on the eve of independence which involved the incorporation of Africans into the public service generated rivalry and conflict because it was ethnic oriented (Ibid). The structure of access to employment both in public and private sectors continues to generate ethnic-conflict in post-colonial Kenya (Nnoli, 1998). Africanization of public service meant that expatriates would be replaced by the Kikuyu, Luo and Luhya ethnic groups who were the benefactors of the preferential colonial education (Ibid).

Land Ownership and Post Colonial Settlements

Land ownership is a key catalyst of ethnic conflicts in Kenya. The colonial land displacement and consolidation led to the proliferation of squatter farming and porousness of ethnic boundaries leading to the encroachment of ancestral land of some ethnic groups by other ethnic groups. The Presidential Commission of Inquiry into Illegal Allocations of Public Land observes that 50 percent of Kenyans live under poverty line with majority of them residing in the slums (Republic of Kenya, 2004). The colonial and post-colonial preferential settlement of the landless Kikuyu, Luo, Kisii, Embu, Meru, Kamba, and Luhya in areas dominated by minority ethnic groups such as the Maasai and the Kalenjin in the Rift-valley province generated antipathy, resistance, and animosity and

was interpreted as relative deprivation (Haberson, 1973). These grievances constitute historical injustices and have nurtured protracted mistrust, resentment, and animosity among ethnic groups in Kenya.

The Role of Pre-Independence Colonial-engineered Political Alignments

The pre-independence colonial engineered political alignments played a great role in structuring the Kenyan ethnic map (Oyugi, 1998). The white settlers actively strived to determine the context of transition and the shape of future governance in Kenya. This was intended to nurture political allies in the post-independent regime to ensure the security of the whites' interests and investments in the country. An indigenous middle class was adopted as the best bet. Ironically, the buffer class constituted the colonial loyalists and sympathisers during the struggle for independence. This class was to be used as a buffer between the white elites and the African masses (Blundel, 1964). This buffer class was later to invoke the inherited colonial constitution to promote its interests and marginalize the Kenyan masses in postcolonial Kenya (Berg-Schlosser, 1992).

In the quest to divide and rule, the political parties' structures engineered by the colonial authorities also played a role in ethnic politics in Kenya (Oyugi, 1998). In the 1950s, Kenya African Union (KAU), the only national political party in Kenya was banned by the colonial government to prevent national unity and was replaced by ethnic-based political associations such as the Baluhya Political Union, Kalenjin Political Alliance, and Maasai United Front (Ibid). This nurtured ethnicisation of politics in which national political parties became a source of suspicion among minority ethnic groups who could not control them. Proliferation of ethnic parties facilitated peripheral bargaining frameworks when competing at the centre was deemed impossible. In 1960 Kenyan African National Union (KANU) and Kenya African Democratic Union (KADU) were formed with the former consti-

tuting of the Kikuyu and the Luo while the latter served the minority ethnic groups including the Kalenjin, Maasai, and the Luhya (Oyugi, 1998). KANU advocated for centralization of administrative structures while KADU pushed for decentralization of administrative structures (Majimboism) to protect the interests of minority ethnic groups especially against land encroachment by the dominant groups.

Post-Colonial Ethnic Politics

Jomo Kenyatta, the first Kenya's president and the chair of KANU, marginalized KADU's interests until it broke up in 1961 making Kenya a de-facto one party dominated by Kikuyu. Marginalization of other ethnic groups and their demands for equal representation led to defections to ethnic political parties including African Peoples Party (APP) of the Kamba; Luo United Movement (LUM) of Luo and a splinter group from KANU namely Kenya Peoples Union (KPU) of Luo (Oyugi, 1998). The massive suppression of other tribes by the Kenyatta regime dominated by Gikuyu, Embu, Meru, and Akamba (GEMA) nurtured mistrust and resentment between GEMA communities and the minority tribes in Kenya. This was Kenya's scenario when former President Moi, a Kipsigis from the Kalenjin bloc of minority ethnic group took over leadership after Kenyatta's death in August 1978.

The Moi Nyayoism and "Corrective Justice"

Moi's new regime adopted a philosophy coined "Nyayoism" meaning "following the footsteps." This meant that his new regime was to follow Kenyatta's "footsteps." Ironically, this actually meant that ethnic favouritism would be entrenched as in Kenyatta regime, but this time, the previously marginalized minority ethnic groups and specifically his own people, the Kalenjins, would be the new beneficiaries (Oyugi, 1998). To be precise, the Moi Nyayoism pursued what could be interpreted as "corrective justice" – tit-for-tat, which saw the replacement of Kikuyus from their structures of privilege by the semi-educated minority Kalenjins (Ibid). Moi entrenched

Majimboism as opposed to Kenyatta's centralization, in a bid to broaden his power base and strengthen the political clout of minority groups. To decentralize the Kikuyu hegemony rooted in GEMA, he dissolved all "tribal" associations thereby dismantling GEMA's vast economic empire and Kikuyu's entrepreneurial interests (Nnoli, 1998). The new wave of multipartyism and political alliances between 1980s and 1990s were met with brutality, propaganda and suppression but finally Moi gave in to the change of constitution demand by the grand coalition – Forum for the Restoration of Democracy (FORD) to accommodate multipartyism (Oyugi, 1998). But the survival of the grand coalition depended on the ethnic factor, a weakness that Moi was sure to manipulate.

The Ethnic Factor in Political Alliances and Multiparty Politics

The grand ethnic coalition, FORD, disintegrated due to ethnic-based factions jostling for power, representation, and control. Ethnic affiliations to political parties and political alliances based on mistrust, fear, and propaganda continues to characterise multiparty politics in Kenya. Despite giving in to multipartyism in 1991, Moi labeled the new wave as being against the interests of minority ethnic groups and advocated for majimboism. The Kenya Human Rights Commission (KHRC) (1998) observes that the birth of multiparty politics in Kenya was a threat to the political survival of former president Moi, a staunch one party advocate. Therefore, the "foreign" ethnic groups which were sympathetic to multipartyism and living in the Rift valley province, his home turf, had to be chased away leading to 1992 and 1997 ethnic conflicts (Ibid). The Politicians linked to the de-facto Moi regime invoked hate speech and called the minority groups to unite and flush out the "enemy" (Kikuyu, Luo, Luhya, and the Kisii) from their ancestral land. The former victims had become the aggressors (Mamdani, 2001). The Kikuyu supremacy during Kenyatta's era was being replicated by the minority ethnic bloc under Moi's Nyayoism. This was the genesis of the ethnic-clashes that began in 1991 culminating in the near genocide ethnopolitical violence in 2007.

The Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other parts of Kenya estimates that 779 "invaders" were killed during the first wave of ethnic clashes from 1991 to 1992 (Republic of Kenya, 1992). To preserve ethnopolitical constituencies, it became the tendency of the affected political elites to organize local militias to scare away the "outsiders" during general elections leading to violent conflicts (Africa Watch, 1993). The Republic of Kenya ethnic violence reports (1992; 1999; 2004; 2008) indicates that the 2007 post election violence of Kenya was the peak of a growing tide of disgruntlement among various ethnic groups backed by their ethnic politicians.

The 2008 Post Election Violence in Kenya and the Birth of TJRC

While Kenya has a history of ethnic violence since 1992, the 2008 disputed presidential elections could have sunk the country into genocide (Republic of Kenya, 2008). Approximately 1,500 Kenyans were killed, 500,000 were displaced, pillaging was extreme, and crimes against humanity committed (Ibid). Fortunately, Kenya was salvaged from the verge of collapse by the international community through the auspice of African Union's (AU) Panel of Eminent African Personalities chaired by the former UN Secretary-General Kofi Annan (United States Institute of Peace (USIP), 2009). This led to a power-sharing pact and a coalition Government between the Party of National Unity (PNU) of the incumbent President Mwai Kibaki and opposition's Orange Democratic Movement (ODM) led by the leader of the opposition, Raila Odinga (Ibid).

The coalition Government agreed to establish several commissions of inquiry including the Commission of Inquiry into Post Election Violence in Kenya (CIPEV), the Independent Review Commission on the General Elections, a National Ethnic and Race Relations Commission, and a Truth, Justice and Reconciliation Commission (TJRC) (USIP, 2009). The mandate of CIPEV was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies, and to make recommendations for the

way forward (Republic of Kenya, 2008). Reports from these commissions indicate that the 2007 post election violence in Kenya constituted ethno-politically instigated systematic attacks. The reports recommended the establishment of a Truth, Justice, and Reconciliation Commission to pursue accountability for those responsible for the post-election violence and crimes against humanity. In October 2008, the Kenyan parliament enacted the TJRC bill mandated to establish an accurate, complete, and historical record of gross human rights violations and economic crimes committed between December 12, 1963, when Kenya gained independence, and February 28, 2008, when the power sharing pact was signed (International Centre for Transitional Justice (ICTJ), 2010). However, TJRC has been dismissed by the civil society and the legal fraternity for inconsistencies such as providing amnesties for human rights violations, exclusion of victims from the process, and failure to offer sufficient protection for witnesses. TJRC is conceived as a process that will perpetuate the culture of impunity (USIP, 2009). The merits and demerits of TJRC are discussed below.

Demerits of TJRC in Facilitating Reconciliation and Peacebuilding in Kenya

Top-down Approach and Political Unwillingness

The implementation of a truth and reconciliation committee (TRC) depends on the initial mandate which determines the nature and breadth of investigations (Hayner, 2001). In South Africa, the expressed needs of victims who resisted amnesty were ignored while their refusal to forgive was met with ridicule, shaming and intimidation (Ibid). To achieve sustainable reconciliation, it is necessary that the truth about gross violations of human rights be established through official investigation, using fair procedures, fully acknowledged by the perpetrators, victims and bystanders (Minow, 1998:55). This is unlike in the Kenyan context where the chairperson of TJRC was allegedly a perpetrator of past atrocities (ICTJ, 2010). Lack of political will has also compromised the Ken-

yan TJRC thereby casting doubt about the sincerity and commitment of the Kenyan leadership in facilitating sustainable reconciliation and peacebuilding in Kenya (USIP, 2009).

Amnesty Trades Justice for Truth

Through granting of amnesty, TRCs trade justice for truth (Wilson, 2001). The concept of amnesty is criticized for its inability to facilitate reconciliation, especially in cases where the perpetrators grant themselves immunity. In El Salvador, for example, the parliament enacted an amnesty law to shield senior military leaders (Hayner, 2001) while in South Africa, amnesties focused on salvaging the nation-building project (Wilson, 2001). In South Africa, survivors of murdered activists dismissed amnesty as a violation of their rights to seek judicial redress for the murders of their loved ones and argued that reconciliation must come with justice (Minow, 1998; Woolford, 2009). The Kenyan TJRC has been blamed for allowing amnesty for human rights violations (ICTJ, 2008). It is feared that TJRC commissioners are instruments of power politics with an aim of unfairly granting amnesty to senior politicians who were perpetrators of mass atrocities (USIP, 2009).

Who has the Power to Forgive?

Closely linked to amnesty is the concept of forgiveness. Proponents of the redemptive model, such as Tutu of South Africa, have evoked the slogan *No future without forgiveness* (1999). Tutu argued that "letting go" of the desire for retribution is important for transition from apartheid to democracy. He evoked the concept of *Ubuntu* – the principle of interconnectedness, the notion that a person is a person through other people and that whatever hurts one of us, hurts all of us (Tutu, 1999; Woolford, 2009). TJRC has faced stiff resistance from many Kenyans who feel that the power to forgive lies with the victims and survivors of mass atrocities. Critics of amnesty argue that no one has the right to prevail on others to forgive (ICTJ, 2010). This is echoed by sentiments of vic-

tims in South Africa's TRC (SATRC) who argue that forgiveness should be voluntary and not imposed by the government (Brudholm, 2008: 33).

Non-Forgiveness as a Virtue is Dismissed

Critics of TRC are sceptical about the blanket forgiveness and justify non-forgiveness by arguing that negative emotions have a moral component, that there is a moral significance of expression of anger in the face of evil, which does not necessarily reflect a thirst for revenge or personal deficiency (Brudholm, 2008). Precisely, non-forgiveness as a moral protest is permissible and admirable because negative emotions in transitional justice facilitate mourning and sustainable healing. According to Kenya National Commission on Human Rights (KNCHR) (2008), this reality is a challenge to the Kenyan TJRC which borrows heavily from the SATRC model.

Lack of Authority to Punish

Another demerit of TRC is the lack of authority to punish or to facilitate the implementation of institutional reforms as stipulated in the final report (Hayner, 2001; Minow, 1998). While the goal of TRC is the facilitation of transitional justice, victims often feel that justice has been compromised. More so, there is no guarantee that justice would be met in cases where the legal system is weak, corrupt or simply overwhelmed by the number of cases (Ibid). This justifies the fear among Kenyans who maintain that comprehensive institutional reforms must precede the TJRC to facilitate effective address to impunity (KNCHR, 2008).

Lack of Resources

The success of TJRC is mostly determined by political will and resources from official authorities. Young democracies in transition have limited resources, which hinders the potential success of TRCs in these locations. For example, while South Africa's TRC had an annual budget of $18 million and a staff

of approximately 300, Chad's TRC had neither an office nor other necessary resources (Hayner, 2001:41, 57). In Kenya, the government has either delayed or failed to release salaries and resources required by the commissioners for their normal operations (ICTJ, 2010).

TRC Process Re-opens the Wounds of the Victims and Survivors

The cathartic effect of TRC is highly contested (Brudholm, 2008; Hayner, 2001; Minow, 1998). While proponents indicate that addressing the past would lead to hurting the healed wounds of victims of mass atrocities (Minow, 1998), critics argue that it is absurd to even think that such wounds have ever been healed (Hayner, 2001). Healing is conceived as an irrational notion for those who have died or the survivors of mass atrocities who still live in the reality of death (Ibid). Endurance and not healing is conceived as what survivors can at best seek (Minow, 1998). TRC is a source of wide dissatisfaction and a catalyst for post-traumatic disorders in South Africa (Hayner, 2001; Tepperman, 2002). Reparations are criticized on the basis that it is difficult to cost human emotional and psychological suffering. For many Kenyans, no amount of truth telling can bring back their loved ones or make whole their bodies again (Republic of Kenya, 2008).

Security of Witnesses

Within the operation of TRC are the concepts of public hearings and the fear of revenge as witnessed in South Africa (Wilson, 2008). While public hearing facilitate legitimacy of the process and the authenticity of the final report, it compromises the security of witnesses. In Kenya, victims of post election violence have shied away from giving testimonies for fear of reprisals (KNCHR, 2008). More so, powerful figures in the corridors of power have continued to threaten those who wish to give testimony. There is unwillingness on the part of the government to offer security to those who give testimony while some of those who have given testi-

mony have been compromised to withdraw their statements (Ibid).

Lack of Power to Implement the Final Report

While the TRC often concludes with a final report recommending institutional reforms, research indicates that implementation is often compromised by lack of political will (Hayner, 2001). The history of Kenya indicates that while commissions have been formed in the past, reports have always been shelved without implementation. The implementation of the new constitution in Kenya and especially institutional reforms is pivotal in promoting a transparent TJRC in Kenya (KNCHR, 2008).

Discrediting Former Regimes and Legitimizing New Governments

The success of TRC depends heavily on political will and genuine need for transitional justice. Many TRC's have been dismissed as avenues for discrediting former regimes and legitimizing new governments (Hayner, 2001). Precisely, TRCs are not immune from political manipulation and their reports may be dismissed if they are found to be critical of new regimes while decisions to grant amnesty is aimed to protect newly formed, or fragile democratic regimes (Minow 1998: 28). For example, the Haitian and Zimbabwean TRC reports were termed as too critical of the ruling regimes and were never published while the Bolivian and Ecuadorian TRCs were regarded as too sensitive and disbanded prematurely. The Chadian and Ugandan TRCs were masked efforts to discredit former regimes while legitimizing the ruling regimes (Hayner, 2001). This revelation worries majority of Kenyans whose desire is to have a genuine, sincere, and transparent transitional justice for the welfare of the current and future generations (ICTJ, 2010).

Reconciliation for Whom

The success of TRC is an uphill task. The expressed needs of

the victims may often be irreconcilable with the national or political goals. SATRC's redemptive model is criticized for sacrificing justice and delegitimizing the popular notion of retribution (Wilson, 2001). SATRC compromised the victims hunger for justice with Africa National Congress (ANC) nation-building project. The nation-building project inhibited the promotion of a culture of human rights and the very goal of reconciliation. As Wilson asks, "Reconciliation for whom?" (2001:153). While reconciliation should facilitate the contact between perpetrators and victims, SATRC was designed to legitimize the post-apartheid state's power and construct a new political identity. This creates a conflict of what should precede what— individual reconciliation or nation building. SATRC prioritization of nation-building was based on the fact that the Apartheid regime still controlled state institutions and resources and therefore any revenge would have led to a civil war (Ibid). In Kenya, the former president and powerful political figures allied to him still control a huge part of the Kenyan economy and resources (KNCHR, 2008). The Kenyan legislature, judiciary and the executive have senior and powerful politicians who are loyal to former regimes. This makes it challenging for TJRC to make any meaningful impact in fighting impunity (KNCHR, 2008).

Merits of TJRC in Facilitating Reconciliation and Peacebuilding in Kenya

TRCs Facilitate Public Spaces, Humanization, and Dignity

Despite of the numerous demerits, TRC has its merits too, that makes it a powerful form of transitional justice. TRC creates an authoritative record of what happened, provides a platform for the victims to tell their stories and acquire some form of redress, recommends legislative, structural or other changes to mitigate past abuses, and facilitates responsibility and accountability for atrocities committed (Popkin & Arriaza, 2000). This is important for reconciliation and peacebuilding among adversaries living in the same community (Tutu, 2000). By addressing collective denials through truth

telling, the TRC process deters the relapse of injustices, impunity, and human rights abuses in the future. TRC denunciation of past injustices and those associated with them empowers the formerly marginalized, humanizing them and giving them a sense of dignity and respect (Hayner, 2001).

TRC Facilitates a Cathartic Effect

TRC facilitates the exposure of factors that nurtured impunity while at the same time facilitating restorative justice. TRC's formal acknowledgement of past atrocities is said to facilitate a cathartic effect, a feeling of recognition and a restoration of dignity whereby the story of trauma becomes a testimony (Minow, 1998). TRC has widely been acclaimed as a success story in El Salvador (Popkin and Arriaza, 1995). Truth telling illuminates and acknowledges historical injustices and structural violence, thereby enabling a foundation for structural reconstruction, democratization, and rule of law, as well as equality, social justice, and social transformation (Tutu, 2001).

TRC Facilitates Breaking of the Cycle of Impunity

TRC facilitates the breaking of the cycle of impunity, national healing, and deterrence of the relapse of violence and revenge (Hayner, 2001). TRC also facilitates empowerment of those formerly marginalized by the structures of power and the humbling of the perpetrators (Brody, 2001). Key to such empowerment is the revelation of information about the past atrocities which facilitates forgiveness and reconciliation. While individuals who want to forgive may lack information about whom to forgive, TRC seeks to establish a baseline of right and wrong, to humanize the perpetrators and to obtain and disclose previously hidden information about what happened, who gave orders, and where the missing persons ended (Minow, 1998:78). Ethnic politics and lack of political will in Kenya has hampered the efforts to fight impunity while TJRC has remained a smokescreen to cover up injustices (ICTJ, 2010).

TRC Addresses Structural Violence

TRC addresses structural violence by facilitating institutional reforms, economic reparations, and land reforms, rehabilitation of medical and educational systems thereby laying a foundation for socioeconomic and political development (Minow, 1998: 83). Collective reparations such as funds for gravestones, monuments, parks, medical and therapeutic stipends and schools named after victims and survivors are key to sustainable national healing, humanization, and dignity (Hayner, 2001).

Discussion and Conclusion

This paper has discussed "truth" as a contemporary and principal societal response to collective violence. However, the main focus of this paper is to question TRC as a mechanism of transition justice by focusing on its merits and demerits in the lens of the Kenyan context. In a bid to understand, analyse and connect the effectiveness of TRC in the Kenyan context, the history of ethnopolitical conflicts in Kenya has been discussed. The Kenyan ethnopolitical profile indicates deep rooted cleavages based on colonial divide and rule, racialized and ethinicized structures of privilege, land distribution, political alignments and alliances. Consequently, contextualized approach and complimentary transitional justice mechanisms are important in addressing the expressed needs of the victims, survivors, perpetrators, and bystanders in the Kenyan ethnopolitical violence towards facilitating sustainable reconciliation and peacebuilding.

This discussion indicates that TRC has some significant disadvantages. The process has been described as overly top-down administration and characterised by political unwillingness, as well as focused on discrediting former regimes and legitimizing new governments (Hayner, 2001; ICTJ, 2010; Minow 1998). The TRC's idea and emphasis on amnesty is highly challenged noting that it compromises justice and ignores the fact that it is the victims who have the power to forgive. It is argued that indeed non-forgiveness is also a

virtue and that victims and survivors have the free will either to forgive or not to forgive (Wilson, 2001; Woolford, 2009). The TRC process has also been challenged for lack of authority and power to punish or even to implement the final report or finance its operations (Hayner, 2001; ICTJ, 2010; KNCHR, 2008).The TRC process is also believed to re-open the wounds of the victims and Survivors thereby re-traumatizing them (Hayner, 2001; Tepperman, 2002). Furthermore, the TRC process of public testimonies may compromise the security of the witnesses (Wilson, 2008).

The TRC process also has some advantages. The process has been described as a form of transitional justice that facilitates reconciliation among the perpetrators, victims and bystanders by digging into the past in search for truth (Brody, 2001; Hayner, 2001). It constitutes an alternative to vengeance and challenges the notion that prosecutions are the best form of response to mass atrocities (Minow, 1998). Vengeance begets vengeance; it nurtures retaliation, a notion of equivalence that animates justice. The TRC process institutes an alternative to vengeance that nurtures forgiveness, acknowledgement of past atrocities, and commitment to building new relationships (Tutu, 2001). The TRC process focuses on the victims and survivors thereby giving them a voice and empowering them. The process is said to nurture a cathartic effect, a healing and reconciliation of the past to the present in a bid to build a new future (Minow, 1998; Popkin and Arriaza, 1995). The TRC process also addresses the structural conditions and inequalities that nurture protracted violence (Hayner, 2001). This facilitates breaking the culture of impunity and creating a foundation for sustainable reconciliation and peacebuilding.

This discussion indicates that the TRC process is a necessary evil, it has advantages and disadvantages. Therefore, a TRC by itself is not a panacea for justice. Other mechanisms of transitional justice such as indigenous approaches should be used for complementary purposes. From the aforementioned, justice based on the TRC process is questionable and this

presents a challenge for the future of the Kenyan ethnopolitical violence and transitional justice. This challenge is perhaps best described by Minow (1998:87): "what is the point of knowledge without justice? Should justice or truth be the guiding aim of accountability? Is punishment through the criminal justice system a suitable means of arriving at knowledge?" Minow's assertion indicates that both truth and justice are significant in enhancing sustainable reconciliation and peacebuilding. Her slogan is, "all the truth and as much justice as possible" (Ibid). Precisely, justice requires truth and truth cannot be implemented without justice.

In sum, this discussion has indicated that while the TRC process has merits and demerits, it is an important form of transitional justice. To bridge the gaps of demerits, it is important to complement TRC with other mechanisms of transitional justice. For example, in East Timor and Sierra Leone, truth commissions have successfully been complimented by tribunals (Hayner, 2001). Brudholm (2008:7) reiterates the incompleteness and inescapable inadequacy of each possible response to collective atrocities and advocates the importance of finding an all inclusive stance where victims, bystanders and perpetrators actively participate and are actively involved in united efforts to create sustainable reconciliation and peacebuilding. This should be the way forward in addressing the Kenyan ethnopolitical violence. The TRC process is just but one track of peacebuilding and may not facilitate sustainable conflict resolution in isolation of other complementary transitional justice mechanisms. But it is also important to establish which other transitional justice mechanisms would best compliment TJRC in the Kenyan context. Therefore, contextualized and comparative research is important in establishing the impact of TJRC and the existing gaps that need to be bridged in order to facilitate sustainable reconciliation and peacebuilding (Gibson, 2004; Gibson and Gouws, 2003).

References

Africa Watch. (1993). *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* .New York: Consultancy Africa Intelligence.

Berg-Schlosser, D. (1992). Ethnicity, Social Classes and Political Process in Kenya. In Oyugi, Walter (ed.) *Uneasy Alliance: Party State Relations in Kenya.* Konrad Adenauer Foundation.

Blundel, M. (1964). *So Rough a Wind*. London: Windus.

Brody, R. (2001). Justice: The First Casualty of Truth? *The Nation*, April 30.

Brudholm, T. (2008). *Resentment's Virtue: Jean Amery and the Refusal to Forgive*. Philadelphia: Temple University Press.

Buttram, R., Folger, R., and Sheppard, B. (1995). Equity, Equality and Need: Three Faces of Social Justice. In B. Bunker and M. Deutsch (eds.) *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch*. San Francisco: Jossey-Bass Inc. Publishers, 261-289.

Deutsch, M. (2000). Justice and Conflict. In M. Deutsch and P. Coleman (eds.) *The Handbook of Conflict Resolution: Theory and Practice.* San Francisco, Jossey-Bass Inc. Publishers, 41-64.

Gibson, J. L. (2004). *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* New York: Russell Sage Foundation.

Gibson, J. L. and Gouws, A. (2003). *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion*. New York: Cambridge University Press.

Haberson, P. (1973). *Nation Building.* Wisconsin: University of Wisconsin Press

Hayner P. (2001).*Unspeakable Truths.* New York: Routledge.

Hutchison, P. and Wray, H. (2003)."What is Restorative Justice?" http://gbgm-umc.org/nwo/99ja/what.html. Accessed on November, 10, 2011.

International Centre for Transitional Justice (ICTJ) (2010). Kenya, Impact of the Rome Statute and the International Criminal Court. http://www.ictj.org/static/Publications/ICTJ_KE_RSRC-ImpactofICC_bp2010.pdf Accessed Dec 13, 2010.

Kenya Human Rights Commission. (1998). Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya. Nairobi.

Kenya National Commission on Human Rights. (2008). On the Blink of the Precipice. A Human Rights Account of Kenya's post 2007 election violence. Nairobi.

Lonsdale, J. (1989). The Conquest State 1895-1904. In Ochieng, William (ed.) *A Modern History of Kenya*: *1895-1980.* Nairobi: Evan Brothers.

Maiese, M. (2003). Types of Justice. In Guy Burgess and Heidi Burgess (eds.) *Beyond Intractability.* Bolder, CO: Conflict Research Consortium, University of Colorado. http://www.beyondintractability.org/essay/types_of_justice/

Mamdani, M. (1996). *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism.* Kampala, Uganda: Fountain Publishers.

Marshall, M. and Gurr, R. (2003). *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-Determination Movements and Democracy*. College Park, Maryland: Center for International Development and Conflict Management.

Minow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press.

Nelson, W. (1980). The Very Idea of Pure Procedural Justice. *Ethics* 90(4): 502-511.

Nnoli, O. (1998). *Ethnic Conflicts in Africa*. Dakar: Council for the Development of Social Science Research in Africa.

Oyugi, W. (1998). Ethnic Politics in Kenya. In Nnoli Okwudiba. 1998. *Ethnic conflicts in Africa.* Dakar: Codesria.

Popkin M. L. and Roht-Arriaza N. (2000). In Christie Kenneth's *The South African Truth Commission*. New York: St. Martin's Press.

Popkin, M. L. and Roht-Arriaza N. (1995).Truth as Justice: Investigatory Commissions in Latin America. *Law & Social Inquiry* 20(1): 79-116.

Republic of Kenya. (1992). *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and*

Other Parts of Kenya. Nairobi.

Republic of Kenya. (1999). *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya*. Nairobi.

Republic of Kenya. (2004). *Presidential Commission of Inquiry into Illegal and/or Irregular Allocation of Public Land*. Nairobi.

Republic of Kenya. (2008). *Commission of Inquiry into Post Election Violence in Kenya*. Nairobi, N. Government Press http://www.dialoguekenya.org/docs/PEV%20Report.pdf Accessed 23-11-10.

Tepperman, J. D. (2002). Truth and Consequences. *Foreign Affairs* 81(2): 128-145.

Tutu, D. (2000). *No Future Without Forgiveness. London, L:* Rider books United States Institute of Peace (USIP). (2009). http://www.usip.org/publications/truth-commission-kenya. Accessed November 10, 2011.

Van Der Merwe, H., Baxter V., and Chapman A. (2009). *Assessing the Impact of Transitional Justice. Challenges for Empirical Research*. Washington, D. C: University of Peace Press

Wilson, R. (2001). *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. New York: Cambridge University Press.

Woolford, A. (2009). *The Politics of Restorative Justice: A Critical Introduction*. Halifax and Winnipeg: Fernwood Publishing.

Zehr, H. and Mika, H. (1998). Fundamental Concepts of Restorative Justice. *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 1(1): 47-56.