

## THE CRIMINAL LAW AS A TOOL FOR SOCIAL JUSTICE?

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**HOLDING THE GOVERNMENT  
CRIMINALLY RESPONSIBLE WHEN  
CLIENTS INJURE THEIR  
DEVELOPMENTAL SERVICE WORKERS**

**By**

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TITLE:           The Criminal Law as a Tool for Social Justice? Holding the  
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## **ABSTRACT**

As democratic spaces and opportunities for oppressed populations are decreasing due to governmental neo-liberalism, groups are having to examine new ways to have their voices heard and needs met. One option for this is to charge governments criminally for the results of their neo-liberal restructuring and funding cuts. Particularly the opportunity to charge the government criminally when clients injure their developmental service workers could be an option to address restructuring and be a tool for social justice.

The criminal law has the ability to function as a tool for social justice only when there is popular mobilization to first pass progressive laws, and secondly to ensure the laws that are passed are used to hold powerful people and groups criminally accountable. Only with both steps can the criminal law be a possible but imperfect tool for social justice. By holding powerful people and groups criminally responsible, it can contribute to affirmative recognition and affirmative redistribution strategies of social justice.

Government restructuring in the developmental services can be clearly tied to an increase in client violence against developmental service workers and a lessened ability to contain that violence. Therefore to address these root causes of violence, the government could be charged criminally. These charges could help make the workplace safer by forcing the government to fully consider the victims of restructuring. As well it could work towards affirmative recognition and redistribution strategies of social justice by placing value on care work, women's identities and intellectually challenged individuals, and by increasing resources to these groups. However, while it is a tool, it cannot alone bring social justice to oppressed groups, nor is it a simple or perfect option.

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## INTRODUCTION

Recently there has been growing discontent with decreasing democratic spaces in society. As democracy seems to be losing ground, and even public institutions such as governments seem less accessible to the average citizen, people begin to look for alternative ways to influence their lives and the society around them. One method is to use the existing legal system to attempt to bring accountability to both private and public enterprises. New laws such as Bill C-45, An Act to Amend the Criminal Code, are attempts to bring that accountability to the workplace, to show that capitalist accumulation is not always beneficial to society, and should not take precedence over human lives. The same pressure for accountability is also beginning to be placed on the government as they adopt these same neo-liberal policies where pro-market/non-market values are placed above human values through a retrenchment of the welfare state. The legal system is one method unions and social groups are using in an attempt to bring accountability and publicity to the effects of these neo-liberal policies. This is one alternative for people who have been left out of the social safety net to endeavour to bring public knowledge to their plight as individuals abandoned by governments more concerned with the market than human interests and equality. Using the existing legal system for democracy and social justice is a hotly debated issue, and many argue it is unable to bring wide spread social change and thus not

an end in itself, but it does have the interesting potential be used as a tool for social justice.

These possibilities for the legal system to act as a tool for social justice have important potential in the social services, particularly the developmental services, where they have seen constant neo-liberal restructuring and funding cuts over the past ten years. The restructuring efforts have made social service provision increasingly pro-market/non-market (Baines, 2004a). These changes and cuts have left workers with insufficient time and resources to properly fulfil their caring roles to their clients. As workers are having a harder time caring for their clients, these clients are reacting negatively, and often lashing out against their care workers. While few studies have been done documenting the increases in client violence against developmental service workers, Boyd has found that in Canada “care workers in nursing homes and group homes experience rates of non-fatal workplace violence secondary only to police officers and taxi drivers” (Baines, 2004e). Despite this astonishing rate, problems of violence in caring labour remain sadly unrecognized in academia.

This paper will examine this growing trend of violence against developmental service workers as having lead groups to begin to examine alternative options to decreasing violence in their workplaces. One of these options is the aforementioned Bill C-45, An Act to Amend the Criminal Code that came into force on March 31, 2004, which for the purposes of this thesis will be

referred to as The Westray Bill. This Bill has made it easier to charge corporations, and made it possible to charge individuals in that organization, with criminal offences when their actions or negligence lead to an injury or death at work. The Westray Bill has therefore opened important discussions regarding the use of criminal law in the workplace. It is to this discussion that this thesis will attempt to add by examining how the criminal law can play a role in attempting to hold the government criminally responsible for their neo-liberal restructuring to the developmental services, and how this may contribute towards social justice.

For the purpose of this thesis, the term 'caring labour' will be used to describe the work performed by workers on the frontlines of the social services. This is a distinct form of work, with different requirements and demands than most jobs because not only do workers use their feelings to attempt to elicit a certain emotional response from their clients, but also because they are actively caring for the clients, physically and often mentally (Baines et al, 1991). The active caring for clients is what makes caring labour distinct from other forms of labour, and can make it very rewarding, but also very frustrating and tiring. The majority of caring labour is performed by women, and is seen as natural women's work and as requiring women's natural abilities (Baines et al, 1991). Since the required skills are viewed as 'natural' to women, this leads to a devaluing of caring labour (Baines et al, 1991). The majority of care labourers being women also mean that this important area is overlooked in most studies because they



focus on traditionally male occupations. These issues will be considered in the context of restructuring later in this thesis.

The developmental services must also be defined for the purposes of this thesis. They are an area of the social services funded by the provincial government. Their clients are people who require assistance due to intellectual disabilities. The agencies service different types of clients; those who live in the agency's homes and those who attend day programs. Those who live in the agency's homes generally used to live in larger institutions, however since the 1970s the provincial government has been de-institutionalizing these people, and moving them into the communities (Traustadottir, 2000, and Social Services Interview 2, 2005). Thus people with more and more serious developmental disabilities are being moved from large institutions, to smaller "community living" houses and programs. This move will be referenced at a later point with respect to its affect on conditions and violence in the developmental services.

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## CHAPTER ONE

### Methods

A qualitative methodology was used in order to elicit the richest possible data in new and unexplored territory. Data was collected primarily through key informant interviews. Key informant interviews are generally used when little is known about a topic, such as in the case of uses or potential impacts of The Westray Bill. Thus it is important to get the opinions and thoughts of experts in the necessary fields to develop the topic (Stimson et al, 2003). The lack of previous discussion of The Westray Bill with respect to the government and social services meant that survey or other quantitative methods would be unlikely to elicit a sufficient depth of analysis or opinion. Key informant interviews were sought from experts in the three fields of, social services, occupational health and safety, and labour law who were chosen based on who could provide a range of thoughts and experiences on the subject of The Westray Bill in the social services. The purpose of the interviews was a broad ranging discussion of violence in the social services, The Westray Bill, and extending The Westray Bill to include the government. The interviews were organized as intensive interviews (Kirby and McKenna, 1989) through the focus on the key informant's area of expertise that relates to the topic, and the depth of analysis gleaned from that focus. The data from the interviews were analysed and sorted according to key themes and codes

(Glesne and Peshkin, 1992) emerging from the data and present in the secondary research reviewed for this thesis.

*Research Sample and Subjects:*

The sample consisted of five individuals with expertise in various aspects of the research questions drawn from law, social services, or the health and safety community. Each person signed a consent form before the interview began, and was informed orally of the purpose of the study and their right to withdraw at any time. The consent forms as well as the interview guides passed McMaster ethics approval (please refer to Appendix 1).

The subjects were selected according to theoretical sampling (Stimson et al, 2003). Specific interview guides were used for each interview depending on whom the person was and where their expertise lay. Some general questions remained the same across interviews, however, allowing for a comparison of opinion and direction among the sample.

The first social services person interviewed was a staff member from CUPE 2191 who represents developmental service workers in Toronto, Ontario. This person was selected because of his experience in the social services as well as his activism with respect to workplace restructuring. He was originally contacted by an email that also outlined the research project. He signed a consent form before beginning the interview. This interview lasted seventy-five minutes

and was audio taped. For this interview I used the social services interview guide (please refer to Appendix 2), and transcribed the interview verbatim.

The second social services expert is a frontline worker and President of CUPE 3943, a local that represents Community Living Workers in Hamilton, Ontario. This person was selected because of his experience in the developmental services both as a frontline worker, and as a union activist. He was originally contacted by an email that also outlined the research project. He signed a consent form before beginning the interview. This interview lasted forty-five minutes and was audio taped. For this interview I used the social services interview guide (please refer to Appendix 2), and transcribed the interview verbatim.

A health and safety specialist from the Canadian Autoworkers was interviewed because of her experience and thoughts about The Westray Bill and workplace health and safety in general. She was contacted first by an email that also outlined the research project. She signed a consent form prior to the interview. The interview lasted thirty minutes and was audio taped. An interview guide was used (please refer to Appendix 3), and the interview was transcribed verbatim.

The first lawyer interviewed worked for the United Steelworkers of America, and is a key activist who pushed for The Westray Bill to be passed by Parliament. This person was selected both because of this activism, and because of his knowledge of labour law. He was contacted first by an email describing the

research project. He signed a consent form prior to the interview; the interview lasted one hour and was audio taped. An interview guide was used (please refer to Appendix 4). The interview was later transcribed verbatim, and analysed according to the methods described above.

The second lawyer interviewed has extensive experience both with occupational health and safety laws, and corporate crime. This person was selected because of his long involvement in the academic side of examining corporate crime. He was contact first by an email that described the research project. He signed a consent form prior to the interview, the interview last forty-five minutes and was audio taped. An interview guide was use (please refer to Appendix 4). The interview was later transcribed verbatim, and analysed according to the methods described above.

#### *Limitations of the Study:*

The subjects were chosen because of their interest and activism in reducing workplace hazards. All interviewees assumed that management or owners are generally at fault for occupational injuries and deaths. This could affect the study findings by limiting the examination of the role that workers or clients may play in creating unsafe workplaces. It focuses on the role of management and owners to the exclusion of these other factors.

Another limitation of the sample is that only one woman was interviewed.

In particular, this sample lacks female frontline workers. The use of key informant interviews requires that interviews are conducted with people with particular knowledge and expertise, and in the case of most social service unions, union presidents and activists are generally male. This seems to reflect the realities of women's lives in which their care responsibilities at home leave them less time for activism. Therefore the study reflects male front line opinions who may have less insight into the role that gender and gender power relations play in both the front line work environment and the responses by female workers to client violence.

## **CHAPTER TWO:**

### **Social Justice and the Criminal Law**

#### **Nancy Fraser's Framework of Social Justice:**

To examine how the criminal law can be both a form of social injustice and a tool for social justice, Nancy Fraser's Framework of Social Justice will be used. Nancy Fraser discusses two major forms of injustice: socioeconomic and cultural. Socioeconomic forms of injustice are rooted in the political economic structure of society, and include exploitation, economic marginalization, and deprivation (Fraser, 1989). Cultural injustices are "rooted in social patterns of representation, interpretation and communication" (Fraser, 1989), and include cultural domination, nonrecognition, and disrespect. Both forms of oppression are prevalent in society, and thus the search for social justice must address both.

It is difficult to develop remedies that address socioeconomic and cultural injustice simultaneously. Socioeconomic injustices can be remedied through redistributive policies that aim at spreading out economic benefits, and addressing exploitative practices. Cultural injustices must be dealt with through recognition strategies that can take the form of calling attention to differences of a certain group and affirming that group's value. Redistributive and recognition strategies can come into conflict because redistribution attempts to treat all groups equally, while recognition aims at promoting group differentiation. Most oppressed

groups experience both forms of oppression, and therefore social justice must address recognition and redistribution policies. This can be seen in the case of women. Women are both oppressed economically through the gendered division of labour and through androcentrism that creates “norms that privilege traits associated with masculinity” (Fraser 1989). Thus addressing the oppressions that women experience is applicable to other oppressed groups because it requires both recognition and redistributive remedies.

Fraser argues there are also two methods of fighting injustices through recognition and redistribution. The first are affirmative methods that are “aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them” (Fraser 1989). Transformative remedies, in contrast, “aim at correcting inequitable outcomes precisely by restructuring the underlying generative framework” (Fraser, 1989). Affirmative recognition remedies for racism involve multiculturalism, while transformative remedies would move towards a non-racial humanism that does not use race as an organizing tool or an identity, but has moved beyond that (Gilroy, 2000). Affirmative remedies for redistribution can involve methods such as welfare programs, while transformative remedies involve changing the capitalist system to socialism, or another form of public, non-exploitative, non-hierarchical system. While both forms of affirmative remedies appear to be more likely in the short term, they can “stigmatize the disadvantaged, adding the insult of misrecognition



to the injury of deprivation” (Fraser, 1989). In order to be effective a policy must be aimed at both affirmative redistribution and recognition, or at transformative redistribution and recognition. While the affirmative policies “fail to engage the deep level” (Fraser, 1989), they do recognize that a problem exists, and begin to publicly address it. Transformative policies are the step beyond this, wherein they properly deal with the root causes of social injustice.

Criminal law may have the potential to be a tool for social justice, particularly affirmative strategies; however it involves a redefinition of ‘criminal’, one that only can occur through the agitation and pressure from oppressed groups in society, not those who currently control it and benefit from unsafe workplaces. The Westray Bill is a law that arose out of public pressure (It’s Criminal, 2003). The thesis will argue The Westray Bill is one method by which recognition and redistribution can be addressed affirmatively for frontline social service workers impacted by workplace violence. While the strategy is not perfect, it has the potential for more benefit than harm vis-a-vis affirmative recognition and redistribution attempts for oppressed groups. It will also be argued that the criminal law is also a tool to begin to move towards transformative recognition and redistribution. It can be a tool by which the system that creates oppressions begins to be questioned and challenged. Again, however, this strategy is a tool, and not an answer in itself.

### **The Criminal Law:**

The criminal law is a system socially constructed by the powerful as an integral tool to maintain control in society (Martin, 2002). This type of tool becomes necessary when power imbalances and private property create those who receive the benefits of society, and those who are left out. For those who are left out or 'othered', the criminal law serves as the method for maintaining their 'othered' state. It criminalizes their attempts to survive, and places them within the reserve army of labour (Vogel, 2003). However, in certain instances the criminal law may also be used as a tool for social justice, allowing 'othered' groups to fight back, in effect, using the tools of their oppressors. This may be done through a redefinition of 'criminal' that reflects the needs and interests of oppressed groups in their attempts to gain social justice.

There are currently a variety of goals that can be achieved by using the criminal law. These include "compensation, retribution, rehabilitation, and specific and general deterrence" (Glasbeek, 2002). Part of both the retribution and the deterrence functions is the stigma that occurs when a person or corporation is labeled 'criminal', and is publicly held as working against the interests of society. In this way the criminal law can be used "to stigmatize wrongdoers and their conduct" (Glasbeek, 2002).

The criminal law has always existed to help the state maintain control. Under a neo-liberal regime, this involves an expansion of whom and what is defined as criminal (Hermer and Mosher, 2002). While previously criminals were defined as those who committed crimes against property (Chunn, Boyd and Menzies, 2002), now crime is being defined more broadly to encompass anyone who does not work within the capitalist system, or follow the “moral” rules of the neo-conservative state (Hermer and Mosher, 2002). The criminal law “has played a central role in the production of so-called disorderly people and in the facilitation of the forms of economic and social exclusion that these ordering practices have brought” (Hermer and Mosher, 2002). It is this broadening definition of crime that is making it harder for poor, racialized and sexualized people to live, and is what must be counteracted if the criminal law can be a tool for social justice. At the same time, the neo-liberal state is shaping perceptions of crime such that corporate crime is not viewed as criminal, and thus the state is diverting attention away from the serious problems of a capitalist state including inequalities and the environment (Martin, 2002).

### **Possibilities for the Criminal Law in Social Justice:**

While it is possible to use the criminal law for social justice; it requires some fundamental changes to the social understanding of crime and criminals and how the criminal justice system operates. Laws do have the ability to challenge

certain power structures in society, such as husband over wife, or corporation over the safety of a worker. The existence of these laws allows oppressed groups the tools with which to challenge their key oppressing groups. However there is a two part dynamic within the criminal law that requires more than the existence of laws in order to be used as a tool for redistribution and recognition strategies of social justice.

When an act is defined as criminal it sends a message to broader society that the act harms everyone, that it is anti-social. This can begin to redefine social definitions of crime and who commits crime. For example, an injury in the workplace is generally not viewed as a crime, but as a necessary by-product of the otherwise beneficial function of capitalist accumulation (Tucker, 1995). However definition of the acts leading to workplace injuries as potentially criminal in nature may begin to cause people to question the validity of placing monetary gain over people's safety. This allows the criminal law the possibility of contributing to affirmative recognition strategies for social justice according to Nancy Fraser's framework.

The use of criminal sanctions also has the potential to act as a deterrent against future anti-social acts. The same process discussed above that begins to redefine what is viewed as criminal allows informal sanctions to be imposed against offenders. By defining a powerful person's or group's actions as criminal, sufficient stigma may be generated to expose their actions as anti-social, and

hence create deterrence due to negative publicity (Ridley and Dunford, 1994).

Without the formal and informal sanctions created by using the criminal law against powerful offenders, they are likely to continue to offend because it benefits their interests (Glasbeek 2002). This again allows the criminal law to be a tool for affirmative recognition strategies for social justice. By questioning the actions of the powerful, it also opens the possibility to consider transformational social justice strategies that challenge existing power structures in society.

Contributing to the potential for deterrence and stigma is the criminal laws' ability to be used for redistributive social justice. Through retribution against the person who committed the crime and compensation to the victim, affirmative redistributive social justice can occur. The criminal law, therefore, has the ability to contribute to both redistribution and recognition strategies for social justice.

However it can never be that simple to achieve, or contribute, to social justice through the existence of laws. There are significant debates within oppressed communities and those who represent them, as to whether criminal laws are a method to move towards social justice, or whether they actually impede the process. The criminal law can prevent these groups from focusing on transformational social change, by reframing social issues as criminal issues (Chunn, Boyd and Menzies, 2002). It is possible for what started as “multi-faceted struggles for gender equality and freedom from the violence of wife

assault, for example, [to be] narrowed into campaigns that simply produced an enhanced criminal law strategy” (Martin, 2002). Thus criminal law strategies can deplete and supplant more collective challenges to state and corporate power and the social structures of domination. Mass campaigns for change can be remade as arguments for stricter laws, rather than mobilizing and politicizing groups of people to organize for their shared interests.

It is for these reasons that the criminal law must be recognized as a potential tool for social justice, not an end goal or a solution. As a tool it can be used in many different ways, despite what the actual laws may say. Without a change in social views of what is criminal, a law on the books cannot be used towards social justice. If laws such as The Westray Bill are not used or are misused, and injuries in the workplace continue to be defined as regulatory offences, the criminal law is working against social justice (Tucker, 1995). In addition to viewing certain crimes as regulatory offences, they can also be viewed as private problems, with the authorities refusing to get involved. This occurs in many cases of spousal assault where prosecutors can be “disdainful of prosecuting domestic violence cases because of their purported perceptions that domestic violence cases [are] trivial” (Rebovich, 1996). Workplace injuries and violence can be viewed in a similar manner. Without social pressure and community mobilization the existence of new laws will not contribute to social justice, for they will not be used as such (Health and Safety Activist Interview, 2005).

Community mobilization is also important to continue to pressure governments to support and implement the laws they pass. Frequently, for laws that challenge power structures the police and authorities require special training and funding to investigate and prosecute. Often this is not made available, especially for workplace injuries, leaving improper evidence collection, and lack of necessary support for the victim (Stevens and Payne, 1999). Because of the nature of the crime, victim support is imperative for following through with the charges. For criminal laws that challenge power structures, special support from the government in the forms of training and resources is necessary. There are fears that the governments will not provide this with respect to The Westray Bill (Lawyer Interview 1, 2005), strongly hindering its ability to function as a tool for social justice.

Using the criminal law requires that the person who was wronged stand up to her oppressor at one of the most vulnerable times in her life. It also requires that person to stand up and challenge social norms and power structures that allowed the criminal behaviour. This is where community support or workplace support must occur to prevent the victim from becoming isolated in the criminal process (Tucker, 1995). The criminal law is also an exclusively after-the-fact remedy that requires a victim before it can act. In addition, it requires the use of time and resources that could deflect them from other necessary areas, such as the social services (Social Services Interview 1, 2005). The criminal law is not an

easy tool for social justice, but it is available with effective popular support and pressure.

The tensions involved in the criminal law complicate its use as a tool for social justice. While there are important benefits to oppressed groups using the criminal law, merely changing the laws will not achieve them. The definition of criminal must be challenged in order for the criminal law to be a tool for social justice. Changing the definition of criminal involves more than passing laws, it requires those laws being used effectively against the powerful and the involvement and mobilization, and resulting empowerment, of oppressed groups through the process. It is this process, combined with the potential for safer workplaces that gives The Westray Bill potential to be used as a tool for social justice.



### **CHAPTER THREE**

#### **Neo-Liberalism and the Results of Restructuring of the Social Services**

##### **Literature Review:**

Many authors have documented the move of Northern governments, particularly Canada, the United States, and Britain, towards philosophies of globalization and neo-liberalism (Abramovitz and Withorn 1999, Fabricant and Burghardt 1992, Baines 2004a, and 2004b). Neo-liberalism involves moving state policy to support market initiatives, and state services to function as private companies whose aim is to maximize profits. This falls under the neo-liberal philosophy that private companies are more efficient, and therefore all organizations should function as such (Fabricant and Burghardt 1992). This pro-market philosophy also involves attempting to change many services from being supplied by the state, to being under the control of private companies (Fabricant and Burghardt 1992, Baines 2004b). Those services still provided by the state are often cutback, restructured, and it is more difficult for people to qualify for assistance. This creates a contradiction between service provision and spending curtailment (Fabricant and Burghardt 1992).

Groups who are most affected by the privatization and cutbacks tend to be women and racialized people (Connelly and MacDonald 1996, Meyer and Storbakken 2000, Abramovitz and Withorn 1999, Armstrong 1996, and Baines et

al 2001). Members of these groups are often employed in the social services, and they are also the most dependent because of social structures of sexism and racism (Baines et al 2001, Armstrong 1996, Abramovitz and Withorn, Baines 2004b). These social structures that perpetuate sexism compel women to take on the caring roles in the home and in addition now force them into paid labour (Fitzgerald, 2004). This effectively creates a reserve army of female labour, as those denied social safety nets in the new neo-liberal societies, are pushed into lower paid positions generally fitting with the skill set viewed as traditionally being that of women's. For racialized women, the effect is much greater as they not only have to live within structures that place women in specific roles, but also must contend with the social structures that place racialized groups in the lower strata of society, maintaining an 'othered' status, and effectively keeping them in the reserve army of labour to fill those lower paid, lower skilled jobs (Fitzgerald, 2004). Neo-liberal restructuring further victimizes these women as the majority of front line social service workers, a job viewed as low skilled and traditionally women's. The adoption of neo-liberal philosophies are therefore not merely economic policies, but also social, racialized and gendered policies, that aim to create a society that facilitates the highest possible profits for private corporations.

One method that governments are using in neo-liberal restructuring of the social services is the adoption of New Public Management (NPM), or Total Quality Management (TQM). The aim of these management systems is to change

social service provision from systems that operate within the context of professional autonomy and mandate to provide 'care' to performance and results-based systems that emphasize lean work organization (Baines 2004a and 2004c). Under these new management models, services are restructured to run like business units where accountability and efficiency are considered paramount and only tasks that contribute to those outcomes are considered important (Baines 2004a, 2004c; Foster and Hoggett 1999). This removes time and ability for workers to actually care for their clients, as case work rarely creates tangible and immediately measurable results. Workers are instead forced to spend more time with paperwork, documenting tasks and results, and less time is spent their clients (Baines 2004a, 2004c). Supporters of NPM and TQM argue that these models make services more efficient and accountable, and allow workers to work in teams to provide services. However again, this is only focussing on the measurable tasks and results, removing the real caring labour importance (Baines 2004a and 2004c; Foster and Hoggett 1999, Connelly and MacDonald 1996, Armstrong 1996). Relating to clients, and spending time talking with them are not valued because these are not measurable tasks. These focuses also increase a care workers' workload and therefore the stress and risks they experience at work (Foster and Hoggett 1999). The focus on only measurable, tangible skills has meant an increase in paperwork as workers must document all of their actions and treatments for the statistics (Baines 2004a and 2004e, Foster and Hoggett 1999).

This has also meant the standardization of caring labour and deskilling as tasks are divided between different team members in an attempt to produce better statistics (Baines 2004c and 2004d, Armstrong 1996). Standardization has removed much of the voice for clients and workers in service provision and policy development, contrary to the arguments of NPM and TQM supporters (Foster and Hoggett 1999).

The teamwork that is used in NPM and TQM have meant task division and measurability, creating greater pressure on workers to speed up and complete more of the standardized tasks in a single shift (Baines 2004e, Foster and Hoggett 1999, Armstrong 1996). Combined with the speed up of the work pace, is the creation of lean staffing and flexible staffing in an attempt to save money by reducing labour costs (Baines 2004e). Flexible staffing has changed many full-time jobs into flexible part-time jobs, and many duties are now carried out by unpaid volunteers (Baines 2004c and 2004e).

The neo-liberal adoptions of NPM and TQM have lead to greater stress and pressures on social service workers (Foster and Hoggett 1999), and have created an environment where client violence is more prevalent and cannot be dealt with in the same effective manner. The close relationship between work organization and health in the workplace (Karasek 1990, Walters et al 1995), justifies examination of ties between the government's creation of these new work environments, and increased violence in the social service workplace.

Many authors have also documented how the above changes have fostered client violence against social service workers particularly in the developmental services (Baines 2004e, Sprout and Lassi, 1995, Wigmore 1995). Lean and flexible staffing have meant that clients in the developmental services do not interact with the same workers everyday, creating uncertainty and inconsistency. These feelings can be catalysts for client violence against their workers, who also do not know the clients' routine, or how to calm them down effectively (Baines 2004e). Lean staffing, involving contract workers and volunteer workers who end up working by themselves or with few other people, also means that when violence does occur workers are less able to deal with and contain that violence because of lack of support (Baines 2004e, Sprout and Lassi 1995, Wigmore 1995) and lack of experience (Baines 2004e). The lack of opportunity to share skills between experienced and newer workers has meant that most workers are less prepared to deal with client violence (Baines 2004d and 2004e). Work speed up has been shown to cause clients to feel alienated, frustrated and despondent as workers no longer have the time to spend with individual clients, and are struggling to stay on top of their overburdened workload (Baines 2004e, Hesketh et al 2003, Wigmore 1995). Lack of resources also contributes to the violence levels in workplaces as clients become frustrated at not receiving a certain level of care (Baines 2004e, Hesketh et al 2003, Shields and Kiser 2003, Wigmore 1995). A significant number of authors have documented how the government

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restructuring New Public Management and Total Quality Management have lead to increased violence in the social services, and particularly from the more vulnerable clients in the developmental services (Baines, 2004e).

Data collected for this thesis confirmed most of the proceeding discussion of the literature. The main comment made by both of the social service activists interviewed for this study was that there is constant restructuring in social service workplaces (Social Services 1 2005, Social Services Interview 2 2005). More specifically, it is not merely restructuring of the social services, but constant cuts to funding as the government attempts to step back from responsibility for the social services (Social Services Interview 1 2005). The policy of neo-liberalism, as noted by the informants, has been to move the government away from this direct accountability to a transfer payment relationship with the developmental services agencies (Social Services Interview 1 2005). This essentially allows the government to attempt to deny any responsibility for problems within the social services.

Another reported aspect of the government retreat from involvement and accountability in the developmental services has been the downloading of these services to the community. The systems of funding “are being set up in a way that it’s harder to find who’s responsible” (Social Services Interview 1 2005). The move to a community care system of integrating developmental service clients into the community through smaller facilities and more out-patient facilities has

not necessarily made a negative impact on the developmental services for workers or clients according to the informants, it is instead the funding model that has damaged workplaces (Social Services Interview 2 2005). One informant observed that the move to community care was not about improving care for the client, but instead it “is about doing services in a cheaper way, fragmenting them further and removing [the government] from direct responsibility” (Social Services Interview 1 2005). Community care is also cheaper for the government as they no longer have to run large facilities (Social Services Interview 2 2005).

Under the new liberalism, the funding model has also changed so that agencies must compete for funding, often resulting in agencies under-bidding, and thus further depleting their stretched resources. One informant observed that workers and supervisors in the developmental services have had to make choices such as buying cheaper or less food in order to remain within budget (Social Services Interview 2 2005). These are not choices that are made in agencies that are properly funded, but rather are choices made in agencies that have been chronically under funded over a long period of constant neo-liberal restructuring. The threat of funding being withheld from the agencies can occur if that agency goes over budget too often, further decreasing the abilities of workers to properly care for their clients (Social Services Interview 1 2005).

Another aspect of the neo-liberal restructuring discussed by the authors cited above and re-iterated by the front-line social service workers, has been the move to a business model or “customer service model” method of organization in order to apply for, and receive funding. Key to this model has been a change to neo-liberal language in which people who require developmental services now must be treated as customers. Language is key to restructuring a service to a neo-liberal business model as it changes and restricts how workers think about their role and their priorities. Under this model supervisors must increasingly rationalize their budgets. This has resulted in a move away from concern and focus on client needs to budget and cost justification. The informants report that currently in order to receive funding the supervisors and agencies must create business plans based on business models of running their organization (Social Services Interview 1 2005). This change has been discussed in detail by the authors cited above in addition to the focus on quickly reportable statistics and results. Care for clients is increasingly now replaced by statistic gathering, and actions and skills of workers are now devalued if they cannot be measured. The business models have also taken control and input away from front-line workers who have the most direct knowledge of client needs and work conditions replacing it with bureaucratic reasoning and rules (Social Services Interview 2 2005). The combination of chronic under-funding by the government and required business models to receive this funding has resulted in drastic changes in



service provision, as discussed above, and working conditions.

A key change that both social service key informants reported from the under-funding has been staffing cuts. The first to be cut were supervisors (Social Services Interview 2 2005) followed by positions for fulltime, permanent staff (Social Services Interview 1 2005, Social Services Interview 2 2005). The cuts in supervisors have forced workers, who due to staffing cuts are already over worked, to take on some aspects of supervisory roles. Between these requirements and the increasing numbers of difficult clients being moved from the large institutions to communities, the complexity of the work has increased significantly (Social Services Interview 2 2005). At the same time, there has also been an increase in casual, part-time workers who are much less experienced. Developmental services agencies prefer to hire these workers because they are cheaper, do not qualify for any benefits, and have no seniority (Social Services Interview 1 2005). This allows the agencies to cut their labour costs, and put more of their small funding amounts into service provision. The lack of staff, especially experienced staff can result in workers coming to work sick, and therefore unable to effectively fulfil their care work, because there is no one to replace them (Social Services Interview 2 2005). Some agencies also keep wages low in an attempt to minimize labour costs, resulting in fewer experienced people being willing to work for that particular developmental service agency (Social Services Interview 2 2005). Another method used to cut labour costs has been the

deskilling of worker's roles. Many of the tasks that were the responsibility of the fulltime, permanent workers, have now fallen to 'aides' who do not have the experience, or the interaction with the clients (Social Services Interview 1 2005).

While permanent worker's roles are getting more complex, and many tasks are being transferred to 'aides' and temporary, part-time workers, the lack of funding is resulting in decreasing interaction between staff. The informants report less time for staff meetings, and the use of part-time, temporary workers means that often different people are on shifts together, and the abilities for skills sharing is drastically diminished (Social Services Interview 1 2005). They also report greater upheaval as community centres constantly move to different locations in attempts to save money through cheaper rent (Social Services Interview 2 2005).

The social services key informants also tied these changes in the work environment from government funding requirements, to an increase in client violence against the workers. As the key informant from CUPE 2191 reported, "every negative impact that comes to a worker is a negative impact on the people we support" (Social Services Interview 1 2005). The decrease in staffing levels and the replacement of experienced fulltime staff with temporary part-time workers has resulted in less support and ability to deal with violent clients. There are fewer staff available to help minimize the violence client, and to keep the other clients from becoming violent at the same time (Social Services Interview 2 2005). In addition to understaffing, the chronic under-funding of developmental

service agencies can result in workers not having the necessary resources, such as cell phones, to deal with violent situations (Social Services Interview 2 2005). As the above authors discussed, the changes in staffing in an effort to decrease costs to fit with government budgets, and the decrease in funding has meant that workers are less able to deal with violence by a client, and less able to prevent escalation.

Not only are workers hindered in their ability to deal with client violence and prevent escalation, the key informants reported that the government enforced restructuring is also leading to increasing levels of violence from developmental services clients (Social Services Interview 1 2005, Social Services Interview 2 2005). The understaffing has workers handling larger case loads, and not able to spend as much time in actual caring labour with each client. This can create frustration for the clients, and often means acting out in efforts to get more attention (Social Services Interview 2 2005). Some clients also lash out violently from the lack of continuity in the service provision. The staff they work with are constantly changing due to the use of temporary, part-time workers, and often the locations where the services are being provided are moving around (Social Services Interview 2 2005). These changes can create feelings of fear and uncertainty that can often lead to clients respond violently (Social Services Interview 2 2005). The experiences of the front line social services key informants support those arguments of the authors discussed above, that

specifically as governments pull away from support of the social services and enforce neo-liberal business style changes, violence is increasing in the social services, workers are less able to deal with it, and less able to de-escalate the situation.

Many authors and workers have placed the blame of unsafe workplaces in the developmental services squarely at the feet of the government. The government has restructured the developmental services to run similarly to private companies with the focus on the bottom line and measurable results. These changes, combined with funding changes, have created an environment of uncertainty and constant flux that is under-funded and understaffed. This atmosphere has increased the risk of violence that developmental service workers are threatened with daily. Therefore in order to create a safe work environment both for the care workers and for the clients, the underlying causes of restructuring must be addressed and explicitly tied to the violence. The Ontario Government must change its policies to create a properly funded, staffed, and safe workplace for developmental service workers.

### **Official Responses to Violence:**

Care workers have a number of official options to choose from to attempt to create a safer work environment when they are injured by a client. These options include making a formal incident report to management, or to dealing with

the incident by using outside methods, such as charging the client, management, or the government with a criminal act. Reporting the violence to management may appear to be the easiest and most direct method of dealing with the incident, however there are drawbacks to this option, and a large proportion of social services workers do not report violence to management.

*Reporting Violence to Management:*

Studies have shown that underreporting of client violence against care workers is a serious problem. Hesketh et al (2003) found that only 33.9% of workers reported client violence. There are a variety of factors present in the structure of caring labour that make reporting client violence difficult for care workers because of their fear of management retribution against themselves or the clients, and because they feel it will not address the underlying reasons for the violence.

The formation of what workers and management view as violence or injuries in the workplace is a social process that involves the interaction between all workplace actors. In caring labour this process involves clients as an integral part of the control structure. This three way negotiation of acceptable risk has resulted in a significant amount of worker blame. There is a widely held belief that injuries and violence in the workplace result from some level of worker culpability particularly in caring labour, precluding the examination of the work

organization and government restructuring as the root causes of violence. The social formation of risk and violence in the workplace instead puts the emphasis on worker actions, which “helps to legitimize occupational health-and-safety policies that are worker- rather than workplace-oriented” (Walters et al, 1995). Therefore workers who experience these violent acts often do not report them, and even when they do, organizational policies do not help to prevent violence since they are based on the assumption of worker culpability. The invisible nature of violence in caring labour, and underlying reasons for it, cannot be addressed through reporting the violence to management, as the structure of caring labour perpetuates the underreporting.

Lack of management support for reports of client violence against care workers is widespread in caring labour. In general, “underreporting is attributed to workers being misinformed or hassled by management or other workers for filing a claim” (Walters et al, 1995). Management effectively dissuades workers from reporting client violence in caring labour situations. Care workers face many obstacles when reporting client violence “including burdensome paperwork, lack of institutional support, or, in some cases, dissuasive, sometimes subtle, arguments from co-workers, administration or law enforcement” (Duncan et al, 2003). Management often is not supportive of worker reports of client violence because it does not fit with the need to provide services and care for clients.

Since the majority of care workers are female, this adds additional levels of control by male clients and assumptions regarding female's 'traditional' role. This traditional role can mean a variety of things including women being viewed as caring, passive, self-sacrificing, and sexualized beings. If they were to report the violence, this would go against the expectations of these workers being caring and passive. Possibly "the most debilitating characteristic of care work is the extent to which it is saturated with the ideology of women's care as self sacrificing, undemanding, and dependable regardless of working conditions or safety" (Baines, 2004e). Again because of these expectations of female workers, many do not feel that they can report client violence. The gendered expectations of caring labour result in many women not reporting client violence because they are expected to allow it as part of a 'natural' woman's character.

An integral aspect of caring labour is that in general workers actually care for their clients. The "culture of care work itself... emphasizes the subordination of the care-giver's needs to the care recipient, as well as tolerance and forgiveness for transgressions up to and including acts of violence" (Baines, 2004). This ties in to the gendered notion of caring labour that requires the women to accept violence passively because they care. When "vulnerable patients are involved, workers may be reluctant to report violent episodes or to press charges" (Duncan et al, 2001). This is also common because many developmental service workers see the criminal justice system as something that will only serve to further harm

their clients. Jails are seen to be places where people are harmed further, not helped. Therefore, especially when it comes to developmental service clients, many workers do not wish to place them within a system whose control and violence will only make their problems worse.

Underreporting client violence in caring labour, especially in the developmental services, is a serious problem. Workers are often at loath to report the violence to management because of a fear that the client will be punished, or out of fear that they themselves will be blamed. Therefore the answer to lessening violence in the social services, particularly in the developmental services, cannot merely be reporting the incidents to management. Instead there must be an alternative route that allows the worker to address the underlying reasons for the client's violence, and creates a stigma against violence, showing that it is wrong. It must also help the worker herself see that client violence is not her fault. This would protect the client from blame, as well as begins to place blame on the shoulders of those who created the atmosphere of violence, the government.

#### *Charging the Client:*

A second option for workers to address client violence through official channels is to criminally charge the abusive client. The hopes in this action would be to show both the offending client, and other clients, that violence against developmental service workers will not be accepted. However, there is significant



opposition to this route from the developmental service workers themselves.

There are mixed opinions in the literature about the results of charging a client with abuse. Some authors argue that charging a client with assault is important because it will force that client to begin to accept a level of responsibility for their actions (Schwarz and Greenfield, 1978, Phelan, Mills and Ryan 1985); however the ability for clients in the developmental services to accept some responsibility differs according to their diagnosis. In addition, the success of these prosecutions is not guaranteed because of the legal process of establishing whether a client can be held liable for their actions, or if they have diminished capacity (Lapierre and Padgett, 1992). Thus the act of charging a client with assault is a problematic option because often clients in the developmental services cannot be held responsible for their actions.

There is also reluctance amongst developmental service workers to pursue criminal charges against their clients. Baines (2004e) found in her study that “the overwhelming majority of workers oppose the use of criminal assault charges against violent clients”. This stems from the work culture that has previously been discussed, including the ethos of caring labour – which workers actually care for their clients. Jails are also often viewed as places that will further harm the client, and hence charging a client with assault would go against the ethos of caring.

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~~There are further drawbacks to charging a client with criminal assault.~~

Similar to reporting client violence to management, charging a client with assault individualizes the violence “to become the problem of the perpetrator, the victim, or both and take the spotlight off the structures of work and the role of violence in larger society” (Baines, 2004e). Therefore charging a client with assault will not get to the root of the problem, and will not make the workplace safer by changing the work structure and organization, and minimize violence.

### **Conclusion:**

Charging a client with assault and reporting client violence to management are options for workers to take in attempt to make their workplace safer. However these options individualize the worker's experience, and do not begin to address the underlying reasons for increasing client violence. Instead of focusing on the worker and the client perpetrator, instead the focus must be put on those who are responsible for the work organization, structure, and funding in the developmental services.

## **CHAPTER FOUR**

### **The Westray Bill**

An alternative to charging a client with assault, or reporting the violence to management would be to charge either the agency or the government with a criminal act under changes from The Westray Bill. The Westray Bill, an amendment to the Criminal Code of Canada, was brought into law in 2003. The impetus for the new law came from the 1996 Westray Mine explosion that killed twenty-nine miners in Nova Scotia. The explosion was caused by the conscious gross negligence of management in the mine, ignoring safety standards to cut cost (Tucker, 1995). When criminal charges against the managers and the owners of the company failed, pressure was put on the government to amend the criminal code to make it easier to charge management with criminal acts in the event of injury or death in the workplace, and to make it possible to charge the corporation criminally in this event (It's Criminal, 2003). The Bill has three important aspects. First, it allows individuals to be held accountable. Second, it makes it clear that corporations are able to be held responsible for criminal acts with respect to health and safety. Third, it refers to organizations, as opposed to corporations, creating some important implications. These changes will be discussed below.

The Westray Bill eases the ability for management and owners of companies to be held criminally responsible because it imposes “a duty on everyone who employs others to perform work, or has the power to direct how work should be done, to take reasonable steps to ensure the safety of workers and the public” (Labour and Employment, 2003). While this duty existed before the amendments to the Criminal Code, by including it in The Westray Bill, it is made more explicit. A compromise was made with the writing and passing of The Westray Bill. Originally the Bill was expected to focus on upper management and owners as those who are at the root of the unsafe workplaces either because of orders or because of workplace culture. However compromises that occurred before the Bill was passed meant the Westray Bill was written to say everyone is responsible for health and safety, and that lower level workers who direct the work of others can also be charged criminally (Health and Safety Activist Interview, 2005). According to one key informant, the watering-down of The Westray Bill to include anyone who directs the work of another, was important to politicians because they did not want to focus all the blame for workplace injuries and deaths on the corporation; they wanted to diffuse the blame (Health and Safety Activist Interview, 2005). Thus many in the labour movement felt betrayed with this change because those who are most hurt by health and safety infractions can now also be blamed for conditions and cultures they could not affect (Health and Safety Activist Interview, 2005).

The aspect of The Westray Bill that gives the ability to hold corporations responsible is developed from the concept of cumulative negligence. Instead of one individual being held responsible for his or her own actions, this is a new concept in the criminal law that allows a group to be punished for the cumulative actions of that group (Failes, 2003). This is a new concept in criminal jargon and begs the question as to whether it may begin a new focus of the criminal law, recognizing crimes originating from more than one person, and resulting in punishments in the form of group punishments. However, as one informant noted, this group aspect has the ability to obscure the fact that there are individuals behind the corporation who are making the decisions consciously and whose key concern is personal profit (Lawyer Interview 2, 2005). This is a dangerous possibility because it makes the corporation an entity in itself, and ignores those who are directing the corporation in that manner (Lawyer Interview 2, 2005).

While The Westray Bill opens the concept that not all actions by corporations are socially beneficial, and can begin to question their actions in general (Tucker, 1995), a key change to The Bill that occurred in the House of Commons, brings the importance of this possibility into question. The Westray Bill states that all organizations can be held criminally responsible, not just for-profit corporations (Lawyer Interview 2, 2005). One of the informants, a corporate lawyer with extensive experience in the area of corporate responsibility argues that these changes take away an important intention by those who fought

for The Westray Bill, questioning of the profit motive, particularly personal profit and gain (Lawyer Interview 2, 2005). By allowing all organizations to be held criminally responsible, the government seems to be stating that it is organizational bureaucracy that is the problem, not profit-making. Thus according to one informant The Westray Bill does not necessarily question profit and capitalist labour relations, but is instead merely identifies bureaucracy as the source of criminal acts (Lawyer Interview 2, 2005). In this way, he asserts, The Westray Bill falls dramatically short of the hopes of those who fought for its inception. The neo-liberal restructuring to the developmental services, however, does reflect the ideology of profit as the priority, and thus charging the government may in fact maintain the focus of questioning the capitalist philosophy of profit to the exclusion of other concerns.

Legally, for an organization to be held responsible, it must be shown that employees of the organization committed the wrongful act and that a senior officer of the organization “should have taken reasonable steps to prevent them from doing so” (Criminal Liability of Organizations, 2003). These actions, whether committed by lower or senior employees, must have the purpose of benefiting the organization in some manner for the organization to be held responsible. Corporations can also be held responsible under The Westray Bill for actions of their representatives, which beyond directors, partners and members can also include agents and contractors. Therefore, a corporation can be held

criminally responsible for actions taken in sum from people they contract to fulfil a service.

There are two different forms of intent and crimes the individuals and organizations can be charged with under The Westray Bill. The first does not require intent, but instead comes from a wilful disregard of the safety of workers, and the failure to show due diligence. This is the crime of criminal negligence. For an organization to be found guilty of this crime it must be shown that a representative of the organization committed the offence and that senior management failed to exercise the appropriate care to prevent the person from doing so (Goetz, 2003). Charges can also be laid if the management did not know about the offence, but should have reasonably been aware and did not take action.

The second group of criminal acts that a corporation or individual can be charged with under The Westray Bill are crimes that require a conscious act, such as murder. These acts tend to be based on recklessness or fraudulent intent. The corporation can be liable when a senior officer commits an offence, with the intent to benefit the organization, when with the same intent; they direct a representative to commit an offence, or when they allow a representative to commit an illegal act to benefit the corporation. This is a more difficult charge to prove, and “it is not likely that an organization...would be prosecuted – in relation to safety issues – to anything other than [negligence] offences” (Canadian Law Reform – New Principle of Liability).

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Is The Westray Bill therefore a triumph? It is a law that allows the weak to charge the powerful, but at the same time it has been altered enough to allow the weak to also be held responsible. It presents the possibility to question corporate profit-making, but it also takes away the exclusive focus on the profit motive and personal gain. Finally, it allows crime to be considered as group actions, not just individual actions, but this can take away from the people directing the corporations and organizations, who make the actual decisions. Therefore, The Westray Bill is an important bill, and opens important discussions, however it has complicated possibilities. These possibilities will be examined in detail within the concept of charging the government when clients injure their social service workers.

### **The Westray Bill in the Social Services:**

The Westray Bill allows that not all actions taken and policies developed in the workplace are socially beneficial and acceptable. This concept can be used to assist workers and clients in the social services if The Westray Bill were to be applied to those that manage and set policy in the developmental services, namely management and the government. The concept of charging management will be examined first.



*Charging Management:*

The Westray Bill allows Crown bodies to be charged criminally in the event of injury or death at work. Therefore, it must first be proven that management were either wilfully negligent or allowed employees to act with wilful disregard for the safety of other workers. With respect to client violence against a worker, it would have to be shown that a lack of due diligence or a conscious act resulted in the conditions for the client to lash out violently at a worker (Lawyer Interview 1, 2005). This would be a difficult thing to prove, because often when placing blame, the criminal law focuses on the last action, or actor, in the crime. However, The Westray Bill has the potential to cut through this difficulty by showing policies and actions that may reveal a lack of due diligence. By aggregating the actions of different senior managers in the developmental service workplace, combined with the actions of workers, towards reaching those goals, a case could be made that due diligence was not applied, and therefore the client lashed out against the negative circumstances. It is possible under The Westray Bill to charge management in the developmental services with criminal acts in the events of clients injuring their workers.

The difficulty with this scenario however, is the reluctance that many workers show towards initiating proceedings against their managers or organization. The first is tied in to the reasons that care workers often do not report client violence, because they are afraid of backlash from their management

(Baines 2004e). Thus it is not likely that these workers who do not report violence to management would be willing to turn around and charge those managers with a criminal act. The second reason that care workers may be unwilling to initiate charges against their managers or the organization is because they all seem to be stuck in the same situation of being under-funded and resourced by the government. Many workers may view their managers as in the same boat and doing their best in conditions of under funding, and therefore do not see blaming and punishing them as helpful or morally right (Baines 2004e). Both key informants from the developmental services reported sympathy towards management and their agencies. They sympathized with their supervisors as their workloads increased, and viewed the agency as often on 'their side' against the government (Social Services Interview 1 2005, Social Services Interview 2 2005). The agencies were seen by key informants in this study as making the cuts reluctantly, and fighting the government in conjunction with the care workers (Social Services Interview 1 2005, Social Services Interview 2 2005). It is unlikely, therefore that care workers in the developmental services will charge their management.

### **Charging the Government under The Westray Bill:**

An alternative use for The Westray Bill in the developmental services is to “apply the new criminal negligence remedies against the government itself, for its chronic under funding of developmental services” (Baines 2004e). There are difficulties and possibilities in this proposal that will be discussed subsequently including how this could be achieved, and whether attempting to criminally charge those at the top of decision chains is an optimal method for dealing with violence in the workplace.

#### *Why the Criminal Law:*

Important in assessing whether the government can and should be held responsible for client violence toward social service workers, is the discussion as to whether the criminal law is the appropriate avenue to achieve this. Will charging the government address the problems that other options for workers cannot?

A central aspect that all the previous strategies miss is that they do not address the root causes for the violent work environment. If charging the government when clients injure their workers is a preferable option to reporting the violence or charging the client, it must begin to address the root causes of the violence. These root causes, according to the evidence presented by both the authors and key informants in the social services, are the neo-liberal changes

being forced on the developmental services. When people lose faith in democracy, they begin to search for alternative ways to achieve their goals. Therefore, the option of charging the government when clients injure developmental service workers would be an option in attempts to address both restructuring, and neo-liberalism itself (Lawyer Interview 2, 2005). However, according to one key informant there is the possibility that if the government was charged they may either repeal The Westray Bill, or stop funding the developmental services (Lawyer Interview 2, 2005). These are important potential outcomes to consider, as the government is not receiving personal gain from the funding of the developmental services, unlike a private corporation (Lawyer Interview 2, 2005), and therefore may decide to stop funding them entirely, as they are not bound to fund them by law (Social Services Interview 2, 2005). This result would not address the root causes of client violence against developmental service workers, but rather would put those workers and their client in a much worse position with even greater problems of under-funding and under-resourcing.

However, at the same time, the prospect of criminal charges could cause policy makers to take notice, and more carefully consider their policy decisions and methods of implementation. As well, the symbolic sanctions of criminal charges would be important with respect to the government, as being charged with a criminal offence would have consequences for that political party in public support. As in the case of corporations, the loss of “prestige and employee morale

caused by adverse publicity, and the distraction of senior managers from their normal duties while they defended the corporation from public attack, were found to have a large impact on corporate wrongdoing” (Brown, 1992). This could also hold true in the government, as bad publicity and the inability to continue with their neo-liberal agenda due to time spent in legal proceedings, may deter them from continuing to create dangerous work environments in the developmental services. Criminal sanctions would be more effective at achieving this end than charges under the Health and Safety Act, as “the media may be more likely to publicize the criminal penalties than the administrative sanctions because prosecutions are acted out in open court” (Brown, 1992). This however, may also prove to deter the use of criminal sanctions against the government as prosecutors may fear attempting a large move against a powerful body such as the government, and ideologically may not wish to charge the government (Brown, 1992, Tucker, 1995). However, over time the use of criminal sanctions against corporations, and the possibility of using them against the government “may generate a stronger moral commitment to protecting the well-being of employees” (Brown, 1992). In this case, it may be able to force the government to consider the affects of neo-liberal restructuring on the developmental services, and thus begin to address the root causes of client violence.

*Can the Government Be Charged?*

Using The Westray Bill against the government would require a broader definition of The Westray Bill than was originally intended by policy makers. It is, however, an important change to the concept of The Westray Bill. However, despite this broadening of The Westray Bill, the government could still fall within the definition of an organization as introduced by The Westray Bill. The actual definition of an organization used in The Westray Bill includes “a public body, body corporate, society, company, or municipality, firm, partnership, or trade union” as well as “any association of persons that: 1) is created for a common purpose; 2) has an operational structure; and 3) holds itself out to the public as an association of persons” (Goetz, 2003). Therefore a consideration of the definition of an organization would allow the Provincial Government to be included under The Westray Bill, and thus able to be held liable. However, while the Federal Interpretation Act states that the Crown is not included in any legislation, unless explicitly stated, The Westray Bill does explicitly state that public bodies can be held liable. Under a broad definition of ‘public bodies’ the Ministry of Community and Social Services therefore could potentially be included.

This argument may be problematic in the courts. The courts are often loath to allow a government to be sued civilly for policy decisions. According to the Supreme Court Decision, *Swinamer v. Nova Scotia*, the court found that

true policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However the implementation of those decisions may well be subject to tort (1994).

They found that the government can be held to a duty of care, and therefore be liable “when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness” (Swinamer v. Nova Scotia, 1994). This can therefore include the restructuring requirements the government is currently tying to their funding cuts, and the implementation of the funding cuts, for this could be considered administrative direction, or expert or professional opinion. Therefore the government could be held liable under tort law for these actions, which also may cause the courts to be more open to entertaining criminal prosecutions for those same actions.

The courts do, however, allow governments to be sued when a policy infringes on the rights of a group of people (Tucker, 1995, Lawyer Interview 1 2005). This precedent could be extended for charging a government criminally. Inherent in the definition of a criminal act is that it is infringing not only on the rights of the victim as in a civil trial, but on the rights and freedoms of all of society, and hence is an anti-social act. Therefore the courts should allow the government to be criminally liable as an organization and an employer when they commit gross anti-social acts such as being the root cause of dangerous

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workplaces in the developmental services.

Since the government could be included under The Westray Bill using the broad definition of organization and public body, it must therefore be established whether it could be held criminally liable for the health and safety conditions in developmental service agencies, to which they provide funding. An organization, in this case the government, can only be held criminally liable if the criminal act was carried out by a “representative” which “includes virtually everyone who works for, or is affiliated with, an organization: directors and partners, but also any employee or member, or even an agent or contractor” (Goetz, 2003). In order to be liable, a senior member of the organization must also have known, or should reasonably have known, the results of such actions. (Goetz, 2003). These requirements can be attributed to the government because a developmental service agency is clearly a contractor, who has been hired to provide care for the developmental services clients, which falls within the definition of a representative. It is the developmental service agency that, due to the actions and policies of the government, restructures and cuts in accordance with the funding formulae. It is, therefore, the developmental service agency acting as a representative for the government that commits the immediate crime of creating an unsafe workplace. As asked in the key informant interview with the second social services worker “if private businesses can be held responsible, why not the government?” (Social Services Interview 2).



The government officials and policy makers however, are the senior officers who should have reasonably known that their lack of funding would force cuts that would create the unsafe workplace. It is a reasonable assumption that when an agency receives lower and lower amounts of funding to care for people with developmental disabilities, it would make it impossible to care for people properly. Numerous reports and articles have been written about the effects of restructuring on the abilities of developmental service agencies to fulfill their mandate to care for developmentally disabled clients. As has been evidenced and discussed previously, it is a reasonable assumption that such funding cuts and restructuring requirements are making developmental services agencies more dangerous places to work. Therefore, the senior officers, in this case policy makers in the Ministry of Community and Social Services, should have reasonably known that their actions increase the danger of client violence against developmental service workers.

*Types of Crime:*

As discussed previously, there are two forms of crime that the government could be charged with; negligence or conscious crimes. It is unlikely that the government could be charged with a conscious crime with respect to client violence against developmental service workers. The decisions to reduce funding and to force restructuring in the social services are not fraudulent decisions, they

are not criminal per se. It is the results of these actions, result that should be foreseeable to a reasonable person, that create the criminal act. Therefore it is unlikely that a conscious charge such as fraud would be used against the government under The Westray Bill.

However, it is much more plausible for the government to be charged with negligence under The Westray Bill. The drastic funding cuts have been shown to create work environments that foster client violence against developmental service workers as staffing levels decrease and workload increases. This is a foreseeable result when the requirements of developmentally disabled clients are taken into account. The effects of restructuring of the developmental services can be considered in the same way. When a developmental service worker's time is restructured to take her away from the clients, it also takes away the workers' capacities to properly help the clients. An organization or upper management can be charged with negligence under The Westray Bill when senior management should have known, or taken action to prevent, the reckless or negligent act from occurring. In the case of the government this can be seen through their willful disregard for the results of the restructuring and funding cuts to the developmental services.

This is a difficult case to prove. Courts require a direct causal link between the injury or death, and the actions that caused it. Therefore charging the government would prove difficult, as the creation of the dangerous work

environment must be traced obviously to the government. While the government's funding and restructuring actions are clearly creating a violent work environment, this will be difficult to prove in a court of law. However, this difficulty does not preclude using these arguments as a tool for social justice, as will be discussed in detail later in this paper. It is important to note here that the process and awareness gathered in any attempt to charge the government would be a valuable thing for both the victim and society at large.

An added difficulty with charging the government with respect to violence in the developmental services sector is that the violence tends to cause relatively minor injuries and is more frequent and systematic than in an industrial workplace. The Westray Bill came into being because of the mine explosion in 1992, and its recognition of workplace injuries and its focus is on major and infrequent incidents, such as Westray. These forms of injuries tend to occur in male dominated manufacturing workplaces, and hence have been the focus of numerous studies, and also are the focus of The Westray Bill.

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## CHAPTER FIVE

### **Will Applying The Westray Bill to the Government Achieve Social Justice?**

#### **Should the Government Be Charged?**

It is important to ask whether although it may be possible, yet difficult, to charge the government criminally in the event of client violence in the developmental services, should charging upper management in businesses or the government be used as a tool for social justice and workplace safety? Is the criminal law a proper way to work to achieve these ends? Will the process contribute to changing the current definition of criminal? And most importantly, is this an option that developmental service workers want to pursue?

As per the discussion previously, the criminal law only has the potential to contribute to social justice if the definition of what and who is criminal is changed through popular pressure and mobilization. Redefining 'criminal' can contribute to affirmative redistributive and recognition strategies of social justice (Fraser, 1997) by giving increased power to oppressed groups and changing popular perceptions. By recognizing that the government's restructuring as taking away the ability for workers to use their caring skills and thus creating dangerous workplaces, this puts value on care work. It also labels the government, an extremely powerful group, as criminal, empowering those who are hurt by government policies and practices. Recognition strategies through affirmative

identities could, once again, place value on the ethos of care, causing it to be no longer devalued as 'women's natural abilities'. Valuing and respecting the work and skills involved in caring labour, through criminal sanctions, can also lead to a redistribution of resources towards the caring aspects of the developmental services. Criminal sanctions against the government can therefore also contribute to affirmative redistribution social justice for both care workers and people who require the care of the developmental services.

A revaluing of caring labour also contributes for affirmative recognition and redistribution strategies by taking a step towards increased gender equality. When criminal sanctions are available, and used properly, they begin can to change social perceptions that devalue care work as women's natural abilities, towards valuing care work as necessary and important to society. Placing increased importance on work that is dominated by women begins to move towards affirmative recognition and also affirmative redistribution as valued work tends to be compensated as such. Criminal sanctions against the government for their restructuring to the developmental services therefore have the potential to act as both affirmative recognition and affirmative redistribution strategies for social justice for women.

The revaluing of care work also serves to move towards affirmative redistribution and recognition strategies of social justice for those people with intellectual disabilities, and people requiring care in general. When care work is

valued as important to society, it increases the dignity of those who require the care. They are no longer viewed as drains on society, and treated as such with decreasing resources available for their care. Instead as the work for them is valued, so are the people whom the work is performed for, giving them dignity. In addition to this affirmative recognition, the increased resources that come from valuing the care work and services lead to affirmative redistribution.

The use of the criminal law against the government with respect to their restructuring to the social services, can contribute to affirmative redistribution and recognition strategies of social justice through sending a message to those people who place value of profits over the value of people. It will force them to view their actions as criminal, and begin a process of social questioning of priorities wherein human lives come second. It also allows that the powerful can commit anti-social acts, and that those acts are equally, if not more, harmful to society as street crime. The criminal law can therefore function as a tool for social justice through changing public perceptions of the government and its actions, and thus moving towards affirmative recognition and redistribution strategies of social justice. This is also the first step towards transformational social justice through questioning and revaluing social priorities and power structures.

Devoid of popular involvement however, criminal laws that appear to challenge power structures will merely perpetuate existing power imbalances. Without worker and community pressure to use The Westray Bill to charge senior

officials, corporations, or the government, there is the danger that workers may be charged, perpetuating the belief that workers are the causes of workplace injuries and deaths (Glasbeek and Rowland 1979, Lawyer Interview 1 2005). As a number of key informants stated, workplace safety comes from agitation and power by workers in the workplace, not from legislators (Health and Safety Interview 2005, Social Services Interview 1 2005). This statement is supported by health and safety historian Eric Tucker who maintains that the “history of health and safety reform provides ample evidence that, to achieve even moderate reforms, legal strategies must be linked to mobilization strategies” (1995). It is, therefore, the role of workers, unions and the community to mobilize and press to ensure that The Westray Bill is used against those creating the unsafe workplaces, those people and groups at the root of the problem. This popular groundswell can be a step towards a redefining of ‘criminal’ to include powerful capitalists and government officials, those who perpetuate a system of market values over human safety (Rosner, 2000). This redefinition is an important step towards affirmative recognition and redistribution strategies of social justice.

In addition to redefining ‘criminal’ the popular mobilization and charging of powerful officers or officials can be a cause for empowerment of workers and hence lead towards affirmative recognition strategies of social justice. The Health and Safety Key Informant argues that charging management will allow workers to feel vindicated and feel that future dangers will be prevented (Interview, 2005).

The process of bringing powerful people to account for the risks they create for workers can be an empowering process if the victim receives support and assistance from co-workers, their union and the surrounding community. If those affected groups recognize their common interests in this process then they can become a powerful support mechanism for the victim to effectively use the criminal law as a tool for social justice through recognition strategies.

Finally, key to The Westray Bill functioning as a tool for social justice in the developmental services is that developmental service workers and unions will actually use it against the government. Again, without popular support to use the Bill it cannot create deterrence, or change perceptions of criminal. There is some support for having the ability to charge the government criminally under the changes from The Westray Bill. Both key informants in the social services felt that having the capacity to hold the government criminally responsible for the effects of their restructuring is an important ability. It will help draw the casual link between insufficient client services and government restructuring, and trace the accountability to the government (Social Services Interview 1 2005, Social Services Interview 2 2005). There are currently other attempts by developmental service unions to trace accountability for developmental service workplace conditions back to the government. The CUPE locals that represent developmental service workers are developing coordinated bargaining with the hopes of pressuring the government to also come to the bargaining table (Social



Services Interview 1 2005). This would be an important admission by the government of their responsibility for conditions in the developmental services. While both social service key informants felt that they would hope never to use criminal charges against the government, they felt that having the option would also pressure the government to accept responsibility for the effects of their policies on the developmental services.

## **CHAPTER SIX**

### **Conclusion**

There are many different strategies used by oppressed groups to work towards social justice through redistributive and recognition methods. Key to any of these strategies is community involvement and mobilization, for without these, the powerful can continue to function in an oppressing manner. One strategy, that of using the criminal law to hold governments accountable for the effects of their neo-liberal changes to the developmental services, has the potential to facilitate social justice through community and worker involvement. If the process involves community involvement and mobilization, it has the potential to be a tool to work towards both recognition and redistribution strategies of social justice, as well as creating safer workplaces for developmental service workers. This however, is one strategy that is not simple and has drawbacks, and therefore cannot be the answer for social justice. Using the criminal law can, on the other hand, be a tool, and therefore should be considered and valued as such in the struggle for social justice.

The purpose of this thesis however was not to argue that using the criminal law is the answer for social justice and workplace safety, it was instead to suggest another way for senior management and officials to be held accountable, and potentially begin changing public perceptions about priorities and risks at work, to

establish that even the powerful can be criminals. This is a step towards social justice.

Further studies on this topic would be helpful to get a wider opinion from front-line workers in the developmental services as to their support for charging the government. It would also be helpful to look at this issue again once The Westray Bill has been used against senior management in the private sector, and thus have a gauge to its treatment of government officials. There is, therefore, significant work to be done on the use of criminal sanctions against the government as a tool for social justice and workplace safety in the developmental services.

## APPENDIX ONE

July 11, 2005

Dear Participant,

### **Re: Letter of Information and Consent**

I am looking for people to interview for my Master's Thesis on the criminal culpability of Governments in cases of client violence against developmental service workers. If you are interested in participating please contact me to set up an interview at your convenience. Further details regarding the study are provided below. If you decide to participate, at the end you will find a place to sign stating that you understand your role in the study, and that you give your consent to participate.

Thank you,

Christie Harper

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**Supervisor:** Dr. Donna Baines  
Department of Labour Studies  
McMaster University  
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(905) 525-9140 ext. 23703

### **Purpose of the Study:**

In this study I hope to establish whether governments can be held criminally responsible for client violence against workers in the developmental services, based on the Criminal Code of Canada amendments in Bill C-45, and the effects of neo-liberal restructuring on the social services. I also hope to find out how workers and their organizations feel about using criminal charges against the

government as a method of addressing what some people see as the effects of neo-liberal restructuring and the sources of violence in the social services.

**Procedures Involved in the Research:**

I will be asking you questions about your opinion of whether the law can and should be extended to include charging the government for client violence. You will be asked to discuss possible benefits and drawbacks to using criminal charges against the government to address client violence. I will also ask you for some demographic information including your education and employment.

The interview will take place at a location of your choosing. The interview will last for approximately one hour, and you may be asked to participate in a follow-up interview at a later date. The interview will be taped and transcribed, with the tapes being destroyed upon completion of the study,

**Potential Harms, Risks, or Discomforts:**

It is not likely that there will be any harms or discomforts associated with your participation in the study. However, you do not need to answer questions that make you uncomfortable or that you do not want to answer.

**Potential Benefits:**

I hope to gain further understanding about how social service workers feel about charging the government as a way of addressing the claims that there is increased violence in the workplace. This study could also benefit workers and their organizations by providing knowledge about the viability of using new amendments to the Criminal Code of Canada.

**Confidentiality:**

Anything that I find out about you that could identify you will not be published or told to anyone else, unless I get your permission. The information obtained by me will be kept in a locked cabinet, and will only be available to my thesis supervisor and myself. The information will be destroyed following the completion of the study.

**Participation:**

Your participation in this study is voluntary. If you decide to participate, you can decide to stop at any time, even after signing the consent form or partway through the study. If you decide to stop participating, there will be no consequences to you. If you do not want to answer some of the questions you do not have to, but you can still be in the study. If you decide to withdraw from the study, the information you have given will be destroyed unless you indicate otherwise.

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**Information About the Study Results:**

A summary of the study results will be provided to you upon completion of the study. You may obtain a full copy of the results of the study by contacting me.

**Rights of Research Participants:**

In you have any questions or require more information about the study itself, please contact Investigator Christie Harper, or Supervisor Dr. Donna Baines.

This study has been reviewed and approved by the McMaster Research Ethics Board. If you have concerns or questions about your rights as a participant or about the way the study is conducted, you may contact:

McMaster Research Ethics Board Secretariat  
Telephone: (905) 525-9140 ext. 23142  
C/o Office of Research Services  
Email: [ethicsoffice@mcmaster.ca](mailto:ethicsoffice@mcmaster.ca)

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**CONSENT**

I have read the information presented above. I have had the opportunity to ask questions about my involvement in this study, and to receive any additional details I wanted to know about the study. I understand that I may withdraw from the study at any time, if I choose to do so. I have been given a copy of this form.

---

Name of Participant

In my opinion, the person who has signed above is agreeing to participate in this study voluntarily, and they understand the nature of the study and the consequences of participation in it.

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Signature of Researcher or Witness

**APPENDIX TWO**  
**SOCIAL SERVICES INTERVIEW GUIDE**

1. Have you seen or experienced any client violence in the workplace?
2. Have you experienced any government restructuring of the social services?
3. If you have experienced restructuring, what results have you seen or experienced following the restructuring?
4. Have you or others in your experience responded to government restructuring?
5. Would you or your organization consider charging the government criminally because of client violence against workers?
6. Some have suggested that charging the government would help make workplaces safer, do you agree?
7. Some have suggested that the government would effectively address the problems associated with government restructuring, do you agree?
8. Could the process of charging the government be used as an empowering process for workers?

**APPENDIX THREE**  
**HEALTH AND SAFETY INTERVIEW GUIDE**

9. Have you seen the new amendments to the Criminal Code of Canada in Bill C-45 used, and if so how so? What was the result?
10. What do you believe are important aspects of, and changes from, Bill C-45?
11. Some have suggested that governments could be held criminally responsible for client violence against developmental service workers under the changes from Bill C-45. Do you agree with this?
12. Would you or your organization consider charging the government criminally because of client violence against workers?
13. Some have suggested that charging the government would help make workplaces safer, do you agree?
14. Some have suggested that the government would effectively address the problems associated with government restructuring, do you agree?
15. Could the process of charging the government be used as an empowering process for workers?



**APPENDIX FOUR  
LAWYER INTERVIEW GUIDE**

16. What do you believe the purpose of Bill C-45 is?
17. What are some of the benefits and drawbacks to Bill C-45?
18. Have you seen the new amendments to the Criminal Code of Canada in Bill C-45 used, and if so how so? What was the result?
19. Some have suggested that governments could be held criminally responsible for client violence against developmental service workers under the changes from Bill C-45. Do you agree with this?
20. How could the government be criminally charged under Canadian law?
21. Would charging the government under Bill C-45 fit within your view of the purpose of the Bill?
22. Would you or your organization consider charging the government criminally because of client violence against workers?
23. Some have suggested that charging the government would help make workplaces safer, do you agree?
24. Some have suggested that the government would effectively address the problems associated with government restructuring, do you agree?
25. Could the process of charging the government be used as an empowering process for workers?

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