

Making Sense of Restorative Justice in the Criminal Justice System: A Study on Crown
Attorneys

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Abstract

Using an ethnomethodological approach, this research sought to describe how Restorative Justice is integrated into the daily world of the prosecution. This was achieved through the use of in-depth interviews with ten Crown attorneys from different sites in Eastern Canada alongside limited periods of participant observation.

This research described how Crown attorneys inhabit a world in which it is necessary to perform an in-depth analysis of the defendant, their characteristics and how much blame can be accorded to them in order to then consider what sanction, if any, is required. Their world also demonstrated that protection of the victim and of society are paramount. Nevertheless, issues such as delay and the reputation of the criminal justice system were shown to be an important factor to also consider as a competent member of the prosecution. Through these methods, participants described a world in which Crowns embody a quasi-judicial role by evaluating and deciding on the proper course of action in regards to a criminal file.

When applied to the use of Restorative Justice, these factors helped demonstrate that Crown attorneys thought of it as something which allowed victim and defendant to communicate with one another regarding the consequences of a crime. Restorative Justice was able to be justified through certain factors mentioned above; however, certain other aspects did not find support through them. Indeed Crowns appreciated such a process because they felt it would not endanger victims, that it might contribute to the safety of the public, and because it does not supersede the criminal justice system. Furthermore, for some, it might reduce delay. However, aspects such as attaining victim and or defendant satisfaction did not easily align with the aforementioned factors despite the positive manner in which these potential consequences of Restorative Justice were described by most participants.

It was hypothesized then that Restorative Justice is used in a seemingly appropriate manner due to the ways in which it can respond to issues which are important to the prosecution. Other potential positive consequences are simply viewed as beneficial but not offering strong justification for the use of such programs on their own. Indeed, through Restorative Justice, Crowns stay in some measure of control over proceedings while it may also help bolster the legitimacy criminal justice system by responding to certain criticisms levelled against it. Thus, to a certain degree, Crowns are able to reconcile the two different approaches by highlighting the benefits it brings to the criminal justice system while not drawing attention to the ways it does not.

Key Words: Restorative Justice, criminal justice, prosecution, ethnomethodology.

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INTRODUCTION

“Restorative Justice has come to mean many things to many different people” (McCold, 1998: 19); nevertheless it is a movement “whose time has come” (Lefranc, 2006: 395) so much so that different domains seek to emulate the restorative approach (Stern, 2017). How can one begin to speak of it then? What *is* Restorative Justice¹? Concretely RJ can be said to focus on harm and broken relationships between people (Johnstone, 2011; Strimelle, 2007; Strimelle, 2015). Restorative Justice in this sense refers to the mending of this broken relationship and the rebuilding of one’s self (Strimelle, 2015).

For the sole purpose of clarity, I present an often-cited definition of Restorative Justice: “Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (Marshall, 1996: 37). Though described as a process, it can also be thought of as a general approach and philosophy to doing justice (Zehr, 2002). This approach, which does away with the relatively narrow concept of crime, is thus less concerned with the act than the real consequences and damages of an act (Lemonne & Claes, 2014; Strimelle, 2015). Marshall (1996) notes that while his definition can certainly be built upon, “it is quite sufficient and robust in itself to serve” (:37). Furthermore, this definition does not identify a single manner nor a single type of offence that can be addressed by Restorative Justice; indeed, it is an approach with many possible manifestations that “encompasses a range of practices” (Sliva & Lambert, 2015: 79) such as Family-Group Conferencing, sentencing circles, and victim-offender mediation (Commission du Droit du Canada, 2003).

¹ Hereafter RJ.

These harms or wrongs (which include criminal offences) result in obligations that require addressing by those directly involved, the stakeholders (Zehr, 2002), because they create a certain inequality or imbalance between people that must be righted or restored as much as possible (Strimelle, 2015). To do so requires communication. Indeed, RJ is primarily based upon communication between those involved in a particular conflict, the recognition of all parties (*Ibid.*), and on mutual respect (Sharpe, 2010; Zehr, 2002). All parties have important parts to play in a restorative process (whatever its manifestation). These parts are not defined *a priori* however; they should be negotiated and discussed through direct or indirect interaction (Strimelle, 2015). To ensure this exchange can happen, all parties should recognize the harm caused, but also the *otherness* of other stakeholders. “Ce souci de reconnaissance mutuelle s’inscrit en droite ligne dans la démarche restauratrice qui considère que ce sont les liens intersubjectifs et intercommunautaires qui donnent sens à l’existence des individus et qui fondent leur identité” (Strimelle, 2015 : 10). Once again, this is but a brief and quite general overview of Restorative Justice which will be elaborated upon in the coming section, however such an elaboration is necessary so as to ensure initial clarity for the following chapters.

Some people may call this approach utopic. Nevertheless, there have been many recent advancements of Restorative Justice-inspired approaches in Western legal systems such as the *Youth Criminal Justice Act* [2003] in Canada (Woolford & Ratner, 2003), or various new Restorative Justice provisions in numerous American states (Sliva & Lambert, 2015). Additionally, several Canadian organizations have been created recently to promote RJ in the country (Tomporowski, 2014). The approach has been mentioned in the Justice Minister’s mandate as a current priority (Harris & Crawford, 2015) and is the subject of new legislation and guidelines for legal professionals (Manitoba proclaims first-of-its-kind Restorative Justice Act, 2015).

In Canada, Crown attorneys act as the gatekeepers to programs using a restorative approach as an alternative to the traditional criminal justice process (Clairmont & Kim, 2013; Commission du Droit du Canada, 2003) in that they permit a case to proceed through a Restorative Justice-inspired program, or disallow such a process. Indeed, under Sections 716 and 717 of the Criminal Code of Canada, any alternative measure, such as Restorative Justice (Archibald, 1998), must be authorized by the Attorney General of a region or by one of their delegates. For this reason, it is imperative to understand the decision-making processes and associated rationales of these actors. What does RJ mean for them? In what situations are cases sent or not sent to a Restorative Justice program? What is the purpose of sending or not sending a case there? How do these decisions fit into the socio-professional environment within which Crown attorneys operate?

This research thus aims to understand how Canadian Crown attorneys with some experience with the approach deal with the use of Restorative Justice-inspired approaches in the course of their work as prosecutors. To this end, ethnomethodology was chosen to guide this research. This tradition focuses on the experience and sense-making activities of particular groups of people (Coulon, 2011) and shapes the following research question this thesis attempts to answer: How are Restorative Justice-inspired approaches integrated into the daily world of Canadian criminal prosecution?

As such, Chapter 1 will cover the literature of two main themes: Restorative Justice and Canadian prosecution. This chapter will begin by exploring Restorative Justice generally, then its various manifestations in the Canadian criminal justice system². Afterwards, Canadian criminal prosecution will be examined including its function and the rationales that guide it. These topics will contextualize the use of Restorative Justice in the criminal justice system and, together,

² Hereafter CJS.

provide a foundation for comprehending the sense-making activities of Canadian prosecutors familiar with RJ approaches in the course of their work. This will draw attention to lacunae in the literature and then point to fruitful avenues of investigation.

Chapter 2 will describe the theoretical approach this research uses. It will demonstrate how ethnomethodology is an appropriate approach to utilize in order to understand the use of Restorative Justice by the Canadian prosecution given the state of literature concerning this topic. It will explain the major concepts of ethnomethodology in order to clarify this theoretical tradition's world view and how this applies to the current research. This chapter will finish off with an exploration of the methodological choices made in order to answer the research question. This second part of the chapter will describe the data collection methods, their adequacy and also the manner in which data was analyzed.

Chapter 3 will present the results of this research, elaborating the various ethnomethods that were gleaned from the data. This chapter will explore how Crown attorneys interact in a world they constantly create and recreate. In elaborating these ethnomethods, a larger discussion describing the world of Crown attorneys will be had.

Chapter 4 will continue the efforts of Chapter 3 except with a focus on how Restorative Justice fits within the world elaborated in the previous chapter. Indeed, it will describe how Crown attorneys purport to make use of Restorative Justice-inspired programs given their sense-making activities which create and shape their everyday world. Final conclusions will be made following this chapter in order to respond to the research question and consider the implications of such a response.

In such a way, this research will contribute to an understanding of the workings of institutionalized forms of Restorative Justice, the workings of Crown attorneys, and the interplay

between the two. Indeed, it will demonstrate how, in this specific context, Restorative Justice is taken up into the system and used by justice system actors. It will demonstrate how they are able to justify the use of Restorative Justice in the criminal justice system despite their theoretical differences. Indeed, this research will explain how Restorative Justice was made to be justifiable by referencing certain aspects of it which participants feel can support specific logics which organize the world of Crown attorneys; those aspects of Restorative Justice which cannot be made to support the logics of Crown attorneys, even if lauded by individual participants, are not able to render Restorative Justice justified in their world.

CHAPTER 1 - RESTORATIVE JUSTICE AND CANADIAN PROSECUTION

This chapter will take a closer look at what Restorative Justice is and its current manifestations in Canada. Though this is not an easy task due to the fact that RJ is often described in terms of what it is *not* (Zehr, 2002), I will attempt this exploration while capturing the great variety of opinions that exist in this field. This chapter will start with a brief history of the Restorative Justice movement in order to demonstrate the context of its contemporary emergence. This section will finish by analyzing the institutionalization of RJ and particularly the place it occupies in the Canadian criminal justice system. In this way, this chapter will contextualize one particularly visible manifestation of Restorative Justice present in Canada.

Once Restorative Justice has been adequately contextualized, this chapter will shift focus to Canadian prosecution which exerts a great amount of control over some RJ proceedings (Archibald, 1998). The prosecution, its role and the role of its representatives will be elaborated in an effort to demonstrate certain rationales and forms of reasoning proper to this institution. Afterwards, its relationship with RJ will be problematized. At this point conclusions will be drawn about the state of the literature on these subjects in order to situate the current research.

1.1 - A BRIEF HISTORY OF RESTORATIVE JUSTICE

Restorative Justice is often touted as being descended from much earlier forms of justice from older civilizations throughout the world, but particularly from First Nations around the world (Clamp, 2014; Pavlich, 2005; United Nations Commission on Crime Prevention and Criminal Justice, 2002; Van Ness & Heetderks-Strong, 2006; Zehr, 2002). Indeed, Daly (2002) states that a “common theme in the restorative justice literature is that this reputedly new justice form is ‘really not new’”, creating a sort of mythical origin story for the movement (Consedine, 1995: 12 as cited in Daly, 2002: 61). This status of myth does not necessarily mean these portrayals of justice are

untrue but rather that they must be problematized as they are intended to be “a kind of foundational myth about the ‘naturalness of RJ’” (Bottoms, 2003: 88) and thus may be more hyperbolic than literal. However more recent works in Restorative Justice such as Strimelle (2015) and Jaccoud (2007) often focus on the more modern genesis of RJ around the world in lieu of propagating what some consider a grandiose narrative about its origins.

The contemporary Restorative Justice movement has its origins in the late 1970’s and 1980’s (Jaccoud, 2007; Lefranc, 2006; Lemonne, 2002) and is understood to have been coined by Robert Eglash, coming from a more rehabilitative angle (Gavrielides, 2007; Jaccoud, 2007)³. The movement profited from various social movements unhappy with the administration of justice (Messmer & Otto, 1992); these include movements of religious orders such as the Mennonites and the Quakers (Bonafé-Schmitt, 2013), indigenous justice groups around the world, and penal reformers with a disdain for professionalism and State-dominated forms of justice (Lefranc, 2006). Specifically, there was great dissatisfaction among many people in Western countries with the manner in which the criminal justice system was operating (Cornwell, 2013; Garland, 2001). Indeed, the *Alternative Dispute Resolution* and mediation movements were some responses to this dissatisfaction⁴. Furthermore, the rehabilitation model had been perceived to have failed and “*just deserts*” was being attacked by critical criminologists for its many faults (*Ibid.*). Largely, the CJS was criticized by victims’ movements and also Restorative Justice proponents for its disregard for victims’ needs (Aertsen, 2004; Johnstone, 2011; Lawrence, 2017; Walgrave, 2008). In this way, RJ is said to have been an approach to grow from the ground up (Daniels, 2013), from individuals

³ This definition will be readdressed later on as it will not be specific to this rehabilitative understanding of the term.

⁴ ADR and mediation are not the same as RJ (Archibald, 2005). Though the former may be techniques used in some forms of RJ, they are not exclusive to the RJ approach. For further information on the differences, see Jaccoud (2003).

working with these populations rather than from the government. From the outset however, there have been differing opinions about RJ.

1.2 - RESTORATIVE JUSTICE VALUES

With competing views of Restorative Justice, there is nevertheless some consensus as to what is important. Zehr (2002) mentions six criteria in order to determine how restorative an approach is⁵ which are as follows: (1) Does the model address the harms, needs and causes? (2) Is it adequately victim-oriented? (3) Are offenders encouraged to take responsibility? (4) Are all relevant stakeholders involved? (5) Is there an opportunity for dialogue and participatory decision making? and (6) Is the model respectful to all parties? (:55).

If all these questions are responded to in the affirmative, an approach is completely restorative (Liebman, 2007). Unfortunately, these questions can almost never be answered definitively and, due to their subjectivity, depend greatly on the person answering them. However, they are still useful in understanding some underlying values of Restorative Justice. These values are summed up succinctly in several principles of restorative practice proposed by the Restorative Justice Council (2015): restoration, voluntarism, safety, accessibility and respect⁶.

Simply put, RJ should be restorative. A common fear among theorists and academics alike is that RJ will be coopted or used as a cover for other penal ends such as rehabilitation (McCold, 1998); in fact, Daly (2000) notes that “one significant misunderstanding is the tendency to see restorative justice [sic] as rehabilitation repackaged” (:45, as cited in Johnstone, 2011: 4). Just as justice is a personal experience that cannot be found objectively (Kellerhals, Modak, & Perrenoud, 1997), feelings of restoration belong to the participants in a process and they must find their own

⁵ Note that given the theoretical nature of this section concerning RJ, sources outside of Canada have been used, though they are by and large Western countries such as the United States, England and Belgium.

⁶ Zehr (2002) also speaks of “similar signposts” of Restorative Justice (:40-41) that can indicate the restorativeness of a program.

way to justice through their active participation (Commission du Droit du Canada, 2003; Strimelle, 2015). It should be noted that different approaches to Restorative Justice believe that restoration of the broken relationship at the heart of RJ can be found in different ways (Lemonne, 2002).

RJ should also be undertaken voluntarily (McCold, 2000; Zehr, 2002). Unfortunately in practice this voluntariness can often be compromised to varying degrees (Boyes-Watson, 2000; Zernova, 2007). Conducting RJ within the criminal justice system ensures that the spectre of its reappearance into the regulation of the conflict is constantly present (*Ibid.*). Thus, this is one value that is quite contested in the field of Restorative Justice.

Above all, Restorative Justice should be equally respectful of all participants (Commission du Droit du Canada, 2003; Zehr, 2002). All must be given the chance to speak and be heard in a safe environment. Indeed, individuals should be recognized as having valid experiences and be permitted their emotions, positive or negative (Strimelle, 2015). Though strong emotions are welcome, they should not be conveyed in a way that threatens the safety of another participant. Though some may disagree, the opportunity to voice one's experiences constitute an important part of RJ. Furthermore, Liebman (2007) adds that individuals should participate honestly and sincerely, adding a dimension to the mutual respect that should be demonstrated by participants.

Note that some proponents of RJ place greater stress on certain values than others (Lemonne, 2002). Indeed, certain ways of conceptualizing Restorative Justice are more strict in their interpretations while others are more flexible (Walgrave, 1999). As this research concerns only larger, more flexible understandings of Restorative Justice, this discussion will focus on such manifestations which emerge in the context of criminal justice as will be seen in presently.

1.3 - CAMPS IN THE RESTORATIVE JUSTICE FIELD

With this overarching desire to do justice better (Cornwell, Blad, & Wright, 2013; Daly, 2002: 72), different camps in the RJ movement have appeared over the years with different ideas concerning how RJ should be conceived and implemented. Indeed, Roach (2006) states that, “[o]ne of the reasons restorative justice [sic] has become so popular is because it means different things to different people” (:168). Indeed, “il serait erroné de croire qu’il existe en la matière *une* définition et *une* vision de ce que recouvre ce concept [Restorative Justice]” (Lemonne, 2002 : 413; *emphasis in original*). These camps with their differing views are often spoken of in dichotomous terms of *maximalist* or *purist/minimalist* (Clamp, 2014; Johnstone, 2011; Lemonne, 2002; Sharpe, 2010; Zernova & Wright, 2007)⁷. It is interesting to note that Woolford and Ratner (2003) identify a governmentalist and a communitarian approach which generally appear to adhere to the maximalist and minimalist camps respectively. It should also be noted that when writing in English, Lemonne (2003) characterizes the camps as “communitarian-diversionist” and “maximalist” (:46). In spite of the different names attributed to these various beliefs, they share many similarities and as such I will analyze them as either belonging to the maximalist or purist tradition, recognizing that even within these groups there may still be differences in opinion.

1.3.1 - Purists

The Purist (or Diversionist) camp in Restorative Justice, as denoted by its name, adheres to a strict view of RJ that allows for no compromise in form. Marshall’s (1996) definition previously given offers an appropriate Purist understanding of RJ. It is a process whereby all those who have a stake in an offence come together in order to work towards a mutually agreed upon solution:

Cette tendance [Minimalist] au sein du mouvement vise à privilégier, autant que possible, une réponse aux besoins des différents protagonistes, en encourageant la coopération volontaire et le dialogue...Justice est faite lorsque

⁷ Interestingly Jaccoud (2007) identifies a third, categorizing RJ approaches slightly differently. Though, this was its sole mention and as such does not feature prominently here.

les responsabilités sont assumées, les besoins sont rencontrés et le rétablissement, tant individuel que relationnel, est procuré” (Lemonne, 2002 : 418).

Manifestations of Restorative Justice should be voluntary in every sense; that is to say that there should be no coercion of any stakeholder (victim, defendant or community) to participate. This is one reason why Purists do not see a place for RJ in the criminal justice system for there is inevitably some coercion or lack of a true choice available to participants, thus perverting what RJ is meant to be (Jaccoud, 2007; Lalonde, 2003; Strimelle, 2007). Indeed, purists believe RJ is only truly viable, and able to keep to RJ values outside of a formal system (Lemonne, 2002; Pavlich, 2005) as “it may be difficult to achieve genuine healing, acceptance of responsibility and acknowledgement of harm and reparation in an involuntary, coercive process (Roach, 2006 :175).

However this camp has been criticized by the Maximalist camp which posits that an approach that does not ally itself with the criminal justice system and stresses fully voluntary, communicative processes will relegate itself to dealing with very minor incidents and contribute to a net-widening of the justice system, addressing situations that are not typically undertaken by the CJS, hence the name *diversionist* (Jaccoud, 2007; Lemonne, 2002; Walgrave, 2003). Indeed, with this approach, RJ risks remaining an add-on at the edges of the criminal justice system (Boyes-Watson, 2000; Lemonne, 2002) or becoming a “two-track system” whereby minor conflicts are handled by RJ while more serious ones are not (Lemonne, 2003; Woolford & Ratner, 2008). Furthermore, their preoccupation with voluntary processes, according to Maximalists, will not guarantee a restorative outcome (Lemonne, 2002).

1.3.2 - *Maximalists*

Maximalists on the other hand wish for “une fonction réformatrice maximale” (Jaccoud, 2007: 7); “pour eux [Maximalists], les expériences actuelles ne sont qu’une phase dans le développement d’une alternative à part entière, qui devrait, à long terme, remplacer les systèmes pénaux et des

mineurs existants” (Walgrave, 2003: 168). Whereas to Purists, “[t]he means and the ends [in Restorative Justice] are inseparable” (McCold, 1999: 33 as cited in Mackey, 2000: 453), for Maximalists, the end justifies the means; they accept that compromises in the restorative process, particularly in regards to voluntary participation, may be necessary so as to maximize the opportunities for an outcome that is restorative to the greatest possible measure (Walgrave, 1999). While Maximalists understand that a restorative process is beneficial (Lemonne, 2003), “ce sont surtout les résultats qui font qu'une démarche se révélera restauratrice ou non, les chemins empruntés pour y parvenir sont secondaires, même si les processus restauratifs y restent privilégiés” (Strimelle, 2015: 9). This is due to the fact that the Maximalist approach “includes within it the Purist model, but is not limited by it” (McCold, 2000: 376).

Moreover, theorists and practitioners of this mindset believe that society and the State have a particular, if lesser, role to play in RJ (Lemonne, 2003; Walgrave, 2008). They believe that RJ can be taken up in the criminal justice system and that it in fact should work with the current system in an effort to eventually replace it (Walgrave, 1999). As mentioned, if RJ is to become more commonplace in criminal matters, it cannot stay on the fringes as often happens with Purist manifestations of Restorative Justice (Jaccoud, 2007).

Like Purists however, Maximalists certainly have their criticisms. This approach to RJ often relies on government funding and support (Woolford & Ratner, 2003); consequently, they often rely on judicial terms such as “victim”, “offender”⁸, and “crime” which propagate the system that RJ is meant to replace and/or transform (Lemonne, 2003; Pavlich, 2005; Woolford & Ratner, 2008). Indeed, many critique the approach because it allows for the perversion of RJ and its values

⁸ At times in this thesis the word “offender” will be used as it is often the term employed in existing literature, as well as by research participants in this study. However, when not quoting, or paraphrasing, the term “defendant”, a term used in other similar studies (Travers & Manzo, 1997), will be used in order to avoid relying on judicial terms as described. I also consider “defendant” to be less stigmatizing than the word “offender” as it simply indicates a person faces criminal charges. However the use of this term should only be viewed in its repercussions in the context of RJ rather than understanding it in its legal sense.

in order to fit within the criminal justice system (Jaccoud, 2007; Woolford & Ratner, 2003), “becoming another tool available to the State” (Jantzi, 2010: 194).

As will be seen in the following section, Maximalist-style programs are the most visible in Canada and even in many Western European countries (O’Mahony & Doak, 2017); indeed, though certain Restorative Justice programs exist outside the sphere of State intervention, many programs are indeed funded by some government agency even if they retain some measure of independence, hence this research’s interest in Maximalist manifestations of Restorative Justice. Nevertheless, this does not denigrate the contributions of other Purist forms of Restorative Justice but rather focuses attention on a form that is more visible.

1.4 - RESTORATIVE JUSTICE AND INSTITUTIONALIZATION

Restorative Justice is an approach that has many different possible manifestations. One of the greatest disputes in RJ is the role that the State should play given its potential to shape its form and thus its outcomes (Walgrave, 2008). Nevertheless, as has been stated previously, Restorative Justice has, for better or for worse, been integrated to some degree in the criminal justice system and as such requires a more thorough examination.

1.4.1- The Canadian Criminal Justice System

To understand how RJ might be taken up into the criminal justice system, it is first necessary to describe some of the justice system’s characteristics⁹. Though this surely cannot be exhaustive, I will explore the CJS as often done in Restorative Justice research: by providing an overview of the logic of this system.

La rationalité pénale moderne or “modern penal rationality” is, among many other things, a system of ideas and inclinations pervading the criminal justice system that helps to explain penal

⁹ Note that further discussion on the Canadian criminal justice system will be had later in this chapter.

trends (Garcia, 2013; Pires, 2001). This modern penal rationality “possède la capacité de naturaliser la structure normative des lois pénales et ses pratiques institutionnelles” (Pires, 2001 : 181). This attempt to describe the justice system posits that it is characterized by an obligation to punish using afflictive punishments which, alongside social exclusion, are highly valued. Furthermore, prison is seen as the reference point for punishment, rather than a last resort; in turn, this leads to the devaluation of alternative measures or measures that do not necessarily inflict pain or suffering (Garcia, 2013)¹⁰. Just like many other authors (Jaccoud, 2007; Noreau, 2004), this theory depicts the CJS as resistant to change and to the use of alternative measures such as RJ (Garcia, 2013)¹¹. These conclusions find support in other research whereby authors speak of a punitive turn in Western judicial systems (Doob, 2012; Garland, 2001; Pratt, 2007; Roberts 2007).

These punitive characteristics of the modern penal rationality certainly contrast with the holistic, respectful values of RJ previously explored. Indeed, Stewart *et al.* (2018) mention that Restorative Justice is “considered the ‘third’ option to the traditional punitive versus rehabilitation models typically employed in Western correctional system” (:2) as opposed to retributive and rehabilitative forms of justice. Furthermore, Zehr (2002) and Liebman (2007) offer in-depth comparisons of criminal justice and Restorative Justice. One main difference is that while criminal justice seeks to establish guilt in order to administer the appropriate (afflictive) punishment, the RJ paradigm seeks to identify obligations resulting from wrongdoing and to address these in an inclusive, dialogical process (Liebman, 2007; Zehr, 2002). In this way, the criminal justice system is not designed to be restorative but rather, characteristic of the modern penal rationality, retributive, deterrent and, in certain instances, rehabilitative (Garcia, 2013); this then is the reality

¹⁰ For a more complete look at *la rationalité pénale moderne* refer to Dubé, Garcia & Rocha Machado (2013) and Pires (2001).

¹¹ Note that this theory does not attempt to explain all criminal justice systems in all of their aspects but rather it helps understand how change is effected within it.

Restorative Justice must face if it is to work within the Canadian criminal justice system. Nevertheless, despite the differences in logic, Restorative Justice and the criminal justice system are not necessarily mutually exclusive in that they seek similar goals: the righting of wrongs (Daly, 2002; Duff, 2011; Stern, 2017; Walgrave, 2008). Indeed, the two simply “differ...on the currency that will fulfill the obligations and right the balance” (Zehr, 2002: 59).

The criminal justice system can thus be seen to be guided by a certain set of ideals and goals; there is a particular rationale that differs from that of RJ. Nevertheless, despite these punitive characteristics, RJ approaches have been adopted to some measure within the Canadian criminal justice system (Roach, 2006; Tomporowski, 2014). Though, given the contrasting foundations of RJ and the contemporary criminal justice system, how does Restorative Justice behave once inside the system, once it is institutionalized? What is its current situation given the perils and possibilities of institutionalization in Canada?

1.4.2 - Canadian Institutionalization of Restorative Justice

In Canada, it can be seen that Restorative Justice has certainly been taken up into this punitive criminal justice system (Clairmont & Kim, 2013; Commission du Droit du Canada, 2003; Roach, 2006; Tomporowski, 2014; Tomporowski, Buck, Barga, & Binder, 2011; Woolford & Ratner, 2003). Regardless, it can and is used at any stage of the justice system, from pre-charge to post-sentence (Commission du Droit du Canada, 2003). Indeed, Archibald (2005) posits that Canada now has a hybrid, participatory model of justice whereby victim participation is emphasized, often through Restorative Justice processes. Moreover, there are several provinces that have handbooks or literature specifically for Crown prosecutors in order for them to understand the positions of their respective governments on various issues. Nova Scotia, Manitoba, Alberta and Ontario have specific sections in these handbooks that deal with RJ while other

provinces speak of community justice or alternative sanctions (Government of Alberta, 2015; Government of Manitoba, n.d.; Government of Nova Scotia, 2002; Ministry of the Attorney General of Ontario, 2005). Furthermore, sections 716 and 717 of the Criminal Code of Canada specifically authorize the use of alternative measures such as Restorative Justice if, among other criteria, it is permitted by the province or territory's Attorney General. Though I currently cannot conduct a complete content analysis of these publications, it can be seen that these sections promote Restorative Justice, but often in very specific cases concerning young, non-violent and/or first-time defendants. Nevertheless Tomporowski *et al.* (2011) note that Canadian "restorative justice [sic] is having difficulties 'making further inroads into the [criminal] justice system'" (:826), some arguing that it is "impeded by both political and policy choices" (Ney, 2014: 166).

Jaccoud (2007), Piché and Strimelle (2007), Strimelle (2007), and Woolford and Ratner (2003; 2008) highlight the peculiar position occupied by RJ within the Canadian criminal justice system. They demonstrate that it is coopted by the State, often reliant on State funding in order to operate; indeed RJ appears to be unable to fully realize its goals of replacing the criminal justice system because it is encased in rules and regulations, sacrificing or compromising certain RJ values in an effort to be considered a legitimate response in the criminal justice system (Woolford & Ratner, 2008). While Restorative Justice programs in the CJS may certainly be beneficial for some participants, it appears to be more of an add-on, an "*innovation complémentaire*" rather than an "*innovation de substitution*" (Jaccoud, 2007: para. 24); this is to say that current RJ practices do not challenge the *status quo* of the criminal justice system nor its current rationales, becoming an additional, optional response rather than a replacement.

Given these impediments and compromises of RJ in the criminal justice system, it is perhaps more apt to speak of RJ-*inspired* approaches or programs in this system. As demonstrated,

different proponents of RJ have different ideas of what RJ is and is not. Therefore, in saying that a certain program or approach is *RJ-inspired*, this research is not claiming that any institutionalized program is unequivocally RJ but rather that certain logics or certain guiding principles are based on what those organizations perceive to be Restorative Justice.

1.5 - INITIAL COMMENTS ON THE STATE OF RESTORATIVE JUSTICE

This first part of this chapter has discussed the arguably innovative character of Restorative Justice. This approach is claimed to have its origins in many different cultures, dating back hundreds, if not thousands, of years. The more contemporary emergence of Restorative Justice is said to have begun in the 1970's as a result of several movements critiquing the criminal justice system. Restorative Justice is an approach that seeks to address the harm caused in the aftermath of some wrongdoing. It is a process that seeks to involve victims, defendants and the community in an open, dialogical process in order to reestablish relationships between these stakeholders.

Originally envisioned as an alternative to the criminal justice system, RJ has become a part of the Canadian criminal justice system. Currently however, many researchers agree that, in Western countries at least, it has not yet achieved this goal in that its use has not yet become commonplace (Tomporowski, Buck, Barga, & Binder, 2011). Though RJ may be innovative in certain ways, it is not yet so innovative as to replace the justice system as originally desired (Jaccoud, 2007). Nevertheless, while perhaps more optimistic than other authors, Archibald (2005) describes the important place that Restorative Justice occupies in the Canadian criminal justice system, responding to victims, community and offender needs given the system's weaknesses.

For this reason, it is fruitful to investigate further the place Restorative Justice currently occupies within the CJS; however, a new, empirical approach with a more specific goal would be ideal and could offer new insight into the current reality of RJ in the Canadian criminal justice

system as opposed to the now somewhat dated, theoretical abstractions discussed here. Indeed, instead of asking “Has Restorative Justice changed the criminal justice system?”, thus looking for large-scale change, we might ask “What, if anything, does Restorative Justice affect?” allowing for a more localized analysis of the state of RJ in the justice system. Indeed, exploring the place Restorative Justice occupies in the CJS will allow for a greater understanding of its use, areas of strength and weakness; in this way, these questions can contribute to a more grounded understanding of its use by the criminal justice system, providing insight into its integration rather than just the functioning of these programs themselves.

1.6 - CANADIAN CRIMINAL PROSECUTION

As discussed in the previous section, RJ has become institutionalized in the Canadian criminal justice system; though there are certainly organizations practicing versions of RJ away from State influence, these State-involved versions of RJ are more visible than their non-institutionalized counterparts (Roach, 2006). As a relatively new and arguably innovative approach, it is, to a certain degree, subject to the will of this system (Noreau, 2004). The principal actors in this system include the judge, Crown attorney, the Defence attorney, the police and the various members of correctional services (Goff, 2011). All of these actors have their own power within the criminal justice system (*Ibid.*). Indeed, they all have some part to play when the use of RJ programs is an option in a criminal matter (Clairmont & Kim, 2013). However, as will be seen later, the focus of this research will be Crown attorneys due to the incredibly amount of discretion they wield in the handling of their work (Mewett, 1992; Stenning, 1986).

This section then will provide a brief overview of the Canadian criminal justice system in order to contextualize criminal prosecution and the Crown attorneys that conduct this work. This section will demonstrate that in this system the Crown attorneys act as gatekeepers, affecting entry

and exit to the CJS and also, by proxy, to institutionalized forms of Restorative Justice (Clairmont & Kim, 2013). Finally, this section will explore the expected role of Crown attorneys and the socio-professional pressures that they are faced with.

1.6.1 - Canadian Prosecution

The Canadian criminal justice system starts at police contact and can last until release from prison and the completion of all necessary conditions; though, the process may stop at any number of steps along the way (Goff, 2011). Though this section will not explore every single step of this process in great depth given the limits of this work, it will nevertheless demonstrate that, at certain stages in this system, particular actors hold a great measure of discretion in deciding how to deal with a particular matter and if it will or will not progress further through this system.

Once police contact is initiated with individuals suspected of breaking the law and the police are satisfied that there is sufficient evidence to lay charges, they can do so, passing the case on to prosecutors. This individual may be taken into custody pending trial or may be released¹². Though at this stage the case may be in the hands of a prosecutor, “what the police...tell the prosecutor about a case can...have a significant impact on any decision made [by the prosecutor] about proceeding with a case”, particularly in relation to minor offences (Goff, 2011: 22-23).

At the following stage, Crown attorneys “have virtually unfettered discretion as to when to charge, what to charge, [and] when the charge should be reduced or dropped” (Stuart & Delisle, 1994: 525 as cited in Goff, 2011: 256). The Crown can thus decide if, when and under what conditions potential charges may find themselves in front of the courts (either for trial or for sentencing in the event that a defendant pleads not guilty or guilty respectively to the charges) (Goff, 2011). However, any prosecution must have a reasonable prospect of conviction and also

¹² For information on the decision-making process of Crown attorneys in regards to pre-trial detention, see Labelle & Vanhamme (2015).

be in the public interest (Minister of Justice & Attorney General of Canada, 1993); indeed, it is this second criteria that contributes greatly to the discretion of prosecutors as they are able to call upon a variety of justifications to prosecute or not prosecute in the name of the public interest, both being perfectly legitimate courses of action (MacNair, 2006; Phillips, 2015).

At the sentencing stage, the judge will issue a sentence if the defendant is found guilty beyond a reasonable doubt, or release them if the defendant is found not guilty based on the information presented¹³. Despite the judge's duty to decide upon a sentence, both the Defence attorney and Crown attorney may make suggestions as to an appropriate sentence; in some cases, a joint submission may be made by both the Crown and Defence, often arranged through some sort of plea bargain, strongly urging the judge to issue a particular sentence. Nevertheless, the judge has the ultimate say as to the sentence and can choose to respect or disregard submissions made by the attorneys (Goff, 2011).

Depending on the sentence a defendant receives, they may be incarcerated, coming into the care of correctional services; however, if they are released, they may have conditions. In this case they will need to report to probation officers who may make suggestions (in addition to those imposed by the judge) as to the behaviour required of the released individual (*Ibid.*).

In this way, it can be seen that the prosecution stage in the criminal justice system, led by Crown attorneys, starts before a trial and can reach into and past the sentencing stage; indeed, “[p]rosecutors’ duties encompass the entire criminal justice system [excluding corrections] from investigation and arrest through bail and trial sentencing to appeals” (Goff, 2011: 251).

¹³ In some cases a jury may decide on the guilt or innocence of a defendant; in others, a judge alone makes this decision.

1.6.2 - Gatekeepers to Criminal Justice

Crown attorneys, granted their authority through the respective Attorneys General of each province or territory, are afforded great independence from judges and the government in their work (Rosenberg, 2009). Indeed, while prosecuting an offence, the choices of provincial Attorneys General, and Crown attorneys by extension, are not to be questioned by the courts nor by the government except in extenuating circumstances (Public Prosecution Service of Canada, 2014). Indeed, “Crown counsel also retain a degree of discretion in individual cases” (Public Prosecution Service of Canada, 2014: *s.2.1*, 2). Nevertheless, “Crown counsel are obliged to make decisions in accordance with the directives of the Attorney General [who is also the federal Minister of Justice, itself a political position] and the guidelines of the DPP [Director of Public Prosecutions]...” (*Ibid.*) which could affect the independence mentioned above due to the political nature of those positions (Labelle & Vanhamme, 2015).

Though certainly not the only important actors in the criminal justice system, the Crown attorney, in leading criminal prosecutions, has an expansive reach in this system; indeed, they exercise great control over the course of files within this system (Goff, 2011). It has been well documented that prosecutors act as the gatekeeper to the criminal justice system, deciding on the substance and course of a criminal matter (Grossman, 1970; Jackson, 2004; Levenson, 1999; Ministry of the Attorney General of Ontario, 2005).

Prosecutorial discretion has long been part of the Canadian criminal justice system and has become entrenched as vital to the functioning of this system so much so that judges are quite hesitant to question these decisions (Goff, 2011; Layton, 2002; Whitley, 2010). Without this discretion to pursue certain charges in certain manners, it is unlikely that the CJS would be able to function efficiently, raising the cost of prosecution and the time required to deal with cases (Goff,

2011: 257). Thus, Crown attorneys, nominally independent from interference from the judiciary and from politics, occupy a quasi-judicial role (Layton, 2002; Philips, 2015) in the administration of justice. This is to say that, while certainly not a judge, a prosecutor, according to certain criteria, is able to decide when it is worthwhile to pursue charges and when it is not.

For this reason, it is fruitful to explore the attitudes of these actors concerning their decision making processes as done by Noreau (2000). Indeed, given the enormous discretion afforded to Canadian prosecutors in most facets of their work, it is understood then that much of their work takes place beyond formal codes or legislation (Layton, 2002; Whitley, 2010). Speaking of American prosecutors, Levenson (1999) remarks that the most important work they conduct is not governed by steadfast rules and that individuals make the best decisions they can based on a variety of situational factors such as available resources, the severity of the crime, public interest in prosecution, the strength of evidence and “the need to punish a defendant for his actions” (:558)¹⁴.

Noreau (2000) uses a sociological approach to studying Canadian attorneys; the author conducted semi-structured interviews with defence attorneys and prosecutors in Québec on the issues of “decriminalization”, “dejudicialization” and “depenalization” (:55; *my translation*). Decriminalization involves removing an act from the Criminal Code of Canada. Dejudicialization refers to not pursuing a matter in court while depenalization refers to commuting sentences either through an absolute discharge or other alternative sanctions (Noreau, 2000). Prosecutors state that for the most part they are against adding infractions to the criminal code (:62) and favorable to using alternative measures to pursuing formal charges (:68). In fact, the majority mention the responsabilization of offenders as the proper solution to criminality (:63). Most prosecutors are supportive of alternative measures to traditional sanctions such as imprisonment (:73); however,

¹⁴ Despite a concerted effort to use uniquely Canadian information, its absence in this area rendered the use of research concerning other Common Law nations necessary.

at the time of sentencing, prosecutors nevertheless come to favour “serious” sentences, believing that many crimes are not being punished severely enough (:74). In fact, “la gestion quotidienne des dossiers suppose un certain automatisme dans la définition des sanctions...L’existence d’alternatives aux sanctions traditionnelles est rarement évoquée par la couronne” (: 73). What should be noted here is that, given their powers to decide the fate of a criminal file, such beliefs help describe how and why Crown attorneys might lean more towards certain dispositions rather than others and how they might act in this role as gatekeeper.

Even if the term “gatekeeper” is not employed by some researchers, it is still recognized that “the prosecutor exercises a public function involving much discretion and power” (Dodek, 2016: 20-21). In fact, “[in] many respects, prosecutors are the most important participants in the justice system. They control the decision to proceed with charges and whether to offer and accept a plea” (The Role and Accountability of Prosecutors, 2010: 429). This is not to say however that they can act in whatever manner they please as there are still guidelines and forces that direct their actions to a degree.

1.6.3 - The Canadian Prosecutor and their Role in Prosecution

Crown attorneys “[wear] several hats” (Levenson, 1999: 555) as their responsibilities and duties are “diverse and voluminous” (Gomme & Hall, 1995: 191). According to the Public Prosecution Service of Canada (2016):

Canadian courts expect a great deal from prosecutors, who are subject to ethical, procedural, and constitutional obligations. Traditionally, their role has been regarded as *that of “a representative of justice” rather than that of “a partisan advocate.”* Their functions are imbued with a public trust... *Their role is not to win convictions at any cost but to put before the court all available, relevant, and admissible evidence necessary to enable the court to determine the guilt or innocence of the accused* (para. 16; emphasis added).

The role of the prosecutor is thus to be a representative of justice (Plater, 2011) with no concern for “winning” or “losing”, a sentiment that is mirrored, despite its age, by a frequently cited Supreme Court of Canada decision:

It cannot be over-emphasized that the purpose of a criminal prosecution is *not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime...* but it must also be done fairly. The role of prosecutor *excludes any notion 'of winning or losing; his function is a matter of public duty...* It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings (Boucher v. The Queen, 1955, as cited in Goff, 2011: 250; emphasis added).

The similarity between this account and the account given more recently by the Public Prosecution Service of Canada is remarkable despite their difference in age and may point towards the stability of this legal discourse. Both definitions stress that prosecutors occupy a very important role in the administration of justice and that, in representing State interests before the courts, they must act fairly, impartially and with integrity¹⁵. Furthermore, it is stressed in both explanations that a prosecutor should forgo any ideas of “winning” or “losing” a case; they are simply meant to present evidence to the best of their ability in an effort to ascertain, as much as possible, the legal truth of a potential crime (Paciocco, 2014).

This duty to simply present evidence without any notion of winning or losing causes tension when considering the fact that Crown attorneys are, as their name suggests, representatives of the Crown and thus the government (Whitley, 2010). Thus, while prosecutors are expected to be representatives of justice¹⁶, they are also representatives of the State; these roles can conflict for if one is a representative of justice, they must be impartial but if they are a representative of the State, they also have a particular interest in obtaining convictions (Archibald, 1998) in order to strengthen confidence in the CJS despite the explicit denunciation of this concern by the Public

¹⁵ What these terms might mean in practice however is open to interpretation. Though it is possible these terms are more strictly defined in various law societies' codes of conduct, I was not able to consult these documents.

¹⁶ Much like the terms such as “integrity” and “fairness”, justice is also a concept that may carry various definitions (Kellerhals, 1997).

Prosecution Office highlighted above. Indeed Goff (2011) and Gourlie (1981) mention that some prosecutors perceive their role to be more conviction-driven in contrast to simply presenting evidence, a recurring mentality given the 30-year age difference.

Goff (2011) explains that due to this substantial interest in obtaining convictions, “caseload pressure forces prosecutors to decide on the outcome of a case more on the basis of expediency than on that of justice” (:250). Indeed, this leads some authors to speak of another role of the Canadian Crown attorney: that of timekeeper. Citing *R v. Askov (1990)* and more recently that of *R v. Jordan (2016)*, the Canadian court system has become more concerned with delays in court processes particularly in order to avoid infringing on rights guaranteed in the *Charter of Rights and Freedoms*. Empirically, a Canadian study noted that a significant reason prosecutors were in favour of alternative measures was for their cost or time saving properties (Lemire, Noreau, & Langlois, 2004); this reinforces the idea of the timekeeper. In a less-than-scientific article written by a Canadian Crown attorney, efficiency appears to be at the center of the narrative as Hill (2002) describes an average day in his work as prosecutor in which he has many cases to work on, attending trial, speaking with witnesses, explaining the trial process to the victim, etc. Though this article is not peer-reviewed, it is meant for justice professionals and offers an anecdote into the busy life of a prosecutor with their various competing obligations to the criminal justice system, witnesses, their coworkers and also victims. However, while cases should be dealt with more quickly, there is an increasing complexity characterizing criminal issues; this places greater stress on prosecutors to perform their duties (Gomme & Hall, 1995). As such, this coupling of expediency and a desire for convictions leads to, among other phenomena, a rise in plea bargains (Di Luca, 2005) and thus greater use of discretion by attorneys.

These pressures appear however to have variable effects on the treatment of justice-involved individuals as this tension between representing justice or the State may not arise for some prosecutors who may not have difficulty negotiating the two seemingly conflictual roles (Gourlie, 1981). Indeed, some Crown attorneys in a Canadian study noted that their role is not to be a social worker (Labelle & Vanhamme, 2015); they cannot and should not be responsible for finding and organizing therapeutic treatment for defendants in society (*Ibid*: 78). While some participants in this study stated that victims are often forgotten in the CJS, they also noted that they are one of their greatest concerns (Labelle & Vanhamme, 2015: 72). Though if this is due to ethical reservations or due to practical issues in fulfilling this role is unclear. In this recent exploratory study of Crown prosecutors in Canada and their interaction with remand custody, Labelle and Vanhamme (2015) demonstrate that in the context of pretrial detention, Crown prosecutors, instead of necessarily being representatives (or advocates) of justice, describe themselves as protectors of society in that it is their responsibility to make sure dangerous individuals are not permitted to return to society while simultaneously ensuring justice is served, something which was reinforced in a recent update to Ontario Crown attorneys (Ministry of the Attorney General, 2017).

While Sylvestre, Bellot and Blomley (2017) also demonstrate that Crown attorneys work to ensure the safety of society in certain ways, Labelle and Vanhamme (2015) also remark that these actors work to ensure that neither their office nor the justice system are criticized for allowing a potentially dangerous individual back into society. There is a reputation that must be upheld for the public to see, as it is a duty of the Crown to maintain confidence in the justice system (Minister of Justice & Attorney General of Canada, 1993; Public Prosecution Service of Canada, 2014).

This literature describes an individual pulled in many different directions by State regulation and also unwritten codes of the profession. Indeed, prosecutors are said to be both a

representative (or advocate) of justice and also a representative of the State in criminal matters. They must also sometimes act as timekeeper, though this role is rejected by some authors and begrudgingly accepted by others as a necessity of upholding the functioning of the criminal justice system in Canada. These different roles may lead to different justifications among prosecutors as to their actions. In a particular case, should the practical maintenance of the CJS take precedence over seeking justice through the adversarial trial? Should the State's need to maintain confidence in the justice system trump individual rights as a citizen? As gatekeepers to the CJS, Crown attorneys are able to make decisions about a great deal of issues from charging to prosecuting, thus necessarily responding to these questions through their consequences (Clairmont & Kim, 2013).

1.7 - THE PROSECUTION AND RESTORATIVE JUSTICE

Literature concerning prosecutors and their important relationship with Restorative Justice is not common, despite their role as gatekeepers to the criminal justice system and thus also to institutionalized forms of Restorative Justice in Canada (Archibald, 1998). In fact, but one empirical study was found in the course of this research that spoke specifically of criminal lawyers and their perception of Restorative Justice or their relationship with it (Clairmont & Kim, 2013)¹⁷.

Archibald (1998) explores the theoretical implications of RJ and its possible application through the use of prosecutorial discretion. The author states that:

while the mechanisms are in place to allow for restorative justice through prosecutorial policies, the community resources...must be in place before prosecutors will feel comfortable in exercising their discretion in this fashion [as] [t]he weight of the punitive paradigm on the psyche of those trained in its operation is heavy (Archibald, 1998: 90).

Though, the author continues to say that if the use of RJ can be made attractive to prosecutors, they are more likely to make use of it. Indeed, he states that the more Crown attorneys use these programs, the more comfortable and supportive they are of them (Archibald, 2005: 249-250).

¹⁷ A Hungarian study (Fellegi, 2013) and a Greek study (Wasileski, 2017) were found but were not altogether useful given, among other factors, the very different histories and judicial systems of these countries.

Though, as described by Lemire, Noreau and Langlois (2004), perhaps the attractiveness is interpreted by prosecutors in terms of efficiency rather than the more radical values RJ such as participant satisfaction.

Clairmont & Kim (2013) however conducted semi-structured interviews with criminal lawyers in Nova Scotia regarding their knowledge and use of Restorative Justice. This research was conducted for the purpose of evaluating the Nova Scotia Restorative Justice Program. For this reason, the authors' principal concern was evaluating the development, impacts and outcomes of a particular program. Such evaluation is more concerned with specific performance questions regarding a particular program (McDavid & Hawthorn, 2006) rather than any particular social theory. Despite the lack of identifiable theoretical orientation, this research still provides useful data regarding Canadian Crown attorneys and their use of Restorative Justice.

The authors note that general knowledge of RJ and its various processes was widespread among attorneys. Participants appreciated the decrease in their workload that the program precipitated, however they were skeptical about its possible application beyond youth crime; nevertheless even with youth crime, one participant noted that "Quite frankly I'm more concerned with getting adult sentences on shooting files and murdering files than dealing with RJ" (Clairmont & Kim, 2013: 389-390). Despite this, the authors note that "Crowns generally considered that [the] NSRJ should and would extend to adults, but would be unlikely to receive adult referrals involving serious offences" (Clairmont & Kim, 2013: 390). Indeed, the possibility of using RJ-inspired programs in serious cases or with adults continues to appear almost farfetched. However the results of this research may not be generalizable to Canada as a whole because the program is greatly supported by the provincial government. Thus a general acceptance and usage of RJ may only be common in jurisdictions where a well-established and supported program exists as in Nova Scotia.

1.8 - COMMENTS ON CANADIAN PROSECUTION

The prosecution is a key component of the accusatorial system (Paciocco, 2010). Prosecutors are representatives of the State but are also meant to be representatives of justice. Crown attorneys are only meant to pursue charges when there is a sufficient prospect of conviction for the charge and when such a prosecution would be in the public interest; conversely, when there is not a reasonable prospect of conviction or a prosecution would not be in the public interest, Crown attorneys should not pursue charges (Minister of Justice & Attorney General of Canada, 1993). Though these actors must follow guidelines and policies imposed by the Attorneys General of each province or territory, the Director of Public Prosecution and the particular office within which they work, they nevertheless benefit from a great deal of discretion in leading prosecutions; as already mentioned, this great discretion gives them a quasi-judicial role as gatekeeper (Gourlie, 1981; Layton, 2002; Phillips, 2015), particularly in matters of RJ (Archibald, 1998).

Aside from more the formal instruction mentioned, prosecutors in Canada have also described other realities of their work. It has been noted that they feel pressure to convict while ensuring the efficiency and maintaining confidence in the criminal justice system, resulting in the rise of plea-bargaining (Di Luca, 2005). As seen, they deal with a large amount of work and thus seek to make their work less burdensome and more efficient. If alternative measures of any kind can do this, they appear to be well received by prosecutors (Clairmont & Kim, 2013; Lemire, Noreau, & Langlois, 2004). Though, this is not to say that Crowns think only in terms of efficiency, punishment, and conviction; rather, other concerns such as victim satisfaction and other less legal considerations sometimes appear to be taken into consideration (Clairmont & Kim, 2013), though they do not appear widespread nor significant factors in the daily workings of Crown attorneys.

1.9 - CONCLUSIONS FROM THE LITERATURE

Given that the Attorney General and Crown attorneys across Canada are given the authority to permit or disallow the use of RJ-inspired programs during a criminal process, it was necessary to explore both Restorative Justice in practice and also the actors that make this practice possible. Indeed, RJ in the Canadian CJS has not yet been found to achieve what was originally intended of it: the replacement of the criminal justice system; nevertheless, this does not mean that nothing is happening.

It is hypothesized that Restorative Justice is currently facing great difficulty penetrating deeper into the criminal justice system; however, while many studies embark upon fruitful theorizations about the state of RJ and what will happen to it as it is increasingly institutionalized, little current empirical research regarding its interaction with the Canadian criminal justice system in practice is available.

In an effort to shed some light on the integration of RJ within the CJS, criminal prosecution was analyzed through its representatives: Crown attorneys. They evidently play a great role in criminal proceedings, determining the course of any particular criminal matter by virtue of the great discretion at their disposal. Though, in deciding the proper course, they are subject to a great many pressures from policy both written and unwritten. Attorneys General and the Director of Public Prosecutions are more easily identified in shaping prosecutorial practices, though the head Crown attorney of any particular office has, to a certain degree, been shown to exert pressure concerning the charging decisions of individual Crowns. Thus, under great strain from both the legal hierarchy and their peers, Crown attorneys make decisions regarding criminal matters. Though some lawyers appear open to the use of RJ and other alternatives in some criminal matters,

others are not; however this reality is in need of further testing given the limits of the few studies encountered discussing the use of RJ by the prosecution.

Indeed, much of the literature concerning lawyers and their work has been rightly focused on structural factors affecting these actors. As this literature demonstrates, the structure of the legal hierarchy may very well play into the decision-making process of Crown attorneys when deciding upon the course of a criminal matter. Though, such an approach unavoidably overlooks personal agency; the actors are often regarded simply as a part of a larger structure, rather than an active player in the continuation of this structure. Though, many of these studies are becoming slightly dated and do not focus on Canada specifically, thus obliging a more current and local approach.

Certain recent Canadian studies such as Labelle and Vanhamme (2015) and Vanhamme (2016) take a much less structural approach to understanding how Crown attorneys decide to pursue or not pursue pretrial detention, such a choice is not common in literature regarding their work. Nevertheless, their use of cognitive sociology (Cicourel, 1974), a derivation of ethnomethodology, provides a different interpretation of the daily, banal work of Canadian prosecutors that could be used further in order to challenge the almost hegemonic use of structural theories in the study of the legal profession.

As such, this thesis not only aims to illuminate an area that has been overlooked empirically but to also bring a different approach to it as well. Indeed, in studying the use of Restorative Justice in the criminal justice system, not only will its practice be better understood, but so too will the prosecution's reaction to alternative measures. More concretely, this work aims to explore how Restorative Justice-inspired programs are implemented and integrated at the various levels of the CJS under the purview of the prosecution. Moreover, this research seeks to understand how the actors responsible for permitting its use, actually decide to make or not make use of it. Such an

interest does not exclude the possibility that these actors are affected by the structure of criminal justice system but neither does it exclude the possibility that they have their own motivations and rationales for the decisions they make.

CHAPTER 2 - THEORETICAL BACKGROUND AND METHODOLOGICAL COMMITMENTS

This chapter will explore the theoretical commitments this research has made. It will begin by exploring in further depth the research topic and how a new approach would contribute to its understanding. The chosen approach, ethnomethodology¹⁸, will then allow me to formulate an appropriate research question. This chapter will culminate with an exploration of the methods used in an effort to best answer this research question given the theoretical framework.

2.1 - INSTITUTIONALIZED RESTORATIVE JUSTICE AS A RESEARCH TOPIC

This research aims to study a particular manifestation of prosecutorial discretion: Crown attorneys' decision making process regarding the use of RJ-inspired programs in the course of criminal proceedings. In an effort to go beyond abstraction, this research aims to understand the actual work involved in making use of this alternative measure, the processes that leads to its use or lack thereof. This research will then seek the routine experiences of Canadian Crown attorneys when making decisions regarding the use of so-called Restorative Justice programs¹⁹ in the context of criminal law. More precisely, their lived experiences will be sought alongside the explanations they provide for such actions.

Given that this research focuses on forms of Restorative Justice within the criminal justice system, it is likely that specific programs or formats will be identified by participants as "Restorative Justice" despite certain reservations from some RJ theorists and practitioners who do not have experience as Crown attorneys. Indeed, as will be seen in this chapter, it is the lived experience and thought processes of a particular group of people that lies at the heart of this research rather than the understandings of those outside of this group.

¹⁸ ¹⁸ Hereafter EM.

¹⁹ "So-called" because not all would consider institutionalized RJ programs to be RJ while these programs still profess to be inspired by or guided by RJ principles.

When making use of Restorative Justice-inspired programs, prosecutors in Canada do not normally lead any process; they are not administering the program, though in certain formats such as sentencing circles they may participate (Commission du Droit du Canada, 2003). Instead, they receive cases from police and decide how they will proceed. The use of a Restorative Justice-inspired program is not always available in every jurisdiction. When they *are*, these cases are normally passed off to an organization, program or individual to conduct a Restorative Justice process such as Victim-Offender mediation (Archibald, 2005). Once a case reaches the end of the process of a certain program (either because it cannot proceed further or because some resolution has been achieved), the prosecutor will then proceed to sentencing, arguing for a particular sentence as they would in any other criminal case²⁰. At this point, they may or may not take this completion into consideration when submitting their arguments before a judge. Though, prosecutors also have the authority to withdraw charges either partially or completely after a Restorative Justice process has taken place, thus avoiding sentencing altogether (Archibald, 2005)²¹. As can be seen, these sorts of RJ programs do not necessarily replace the criminal justice system (unless charges are stayed as a result of Restorative Justice), but rather act as an addition that, in certain cases, may limit use of the traditional system.

This research thus has as its objective to better discern the place RJ occupies in the particular world of the Canadian prosecution. How does it come to be used? However, this objective necessarily includes another, to understand what the data reveal about the world and organization of Canadian prosecution.

²⁰ It is my understanding that some RJ programs are mandated as part of a sentence in other countries such as England (McIvor, 2004), however this was not found to be the case in Canada.

²¹ This is not to say that prosecutors can only withdraw charges after a Restorative Justice process. As explored in the last chapter, Crown attorneys have the authority to withdraw charges at nearly any point prior to sentencing.

2.2 - ETHNOMETHODOLOGY

The previous chapter brought attention to the lack of information regarding the operations of Crown attorneys in Canada, particularly in regards to their integral role in RJ-inspired programs. This is not especially surprising given that these actors are afforded great discretion in their duties; thus, there are precious few manners in which to gain access to this privileged, practical knowledge if not a member of the prosecution²². Nevertheless, what is clear is that these programs represent a certain shift from the common punitive or sometimes therapeutic approaches with which they are more familiar as discussed in the previous chapter. It must be asked then how this foreign approach operates within the parameters of the criminal prosecution.

In an effort to explore the use of Restorative Justice by the Canadian criminal prosecution, I will make use of ethnomethodology, which, in short, studies the actions used by members of a group to accomplish everyday tasks that simultaneously organize and make sense of their world (Coulon, 2011). Though this concept will be revisited, an action, in the sense of this tradition is not necessarily a physical action but any process, mental or otherwise which members of a group utilize in order to accomplish particular ends. This exploration of prosecutors' work will help fill this gap in knowledge surrounding the discretion they possess in matters of RJ-inspired programs by permitting a better understanding of their world than has currently been achieved.

This research tradition is, “etymologically the ‘study of members’ methods’ [or ethnomethods], where ‘member’ is an ordinary [or typical] person, someone typical of the group, a participant in mundane social life; and his or her ‘methods’, are the ordering, or sense-making, practices that persons in interaction recurrently produce and reeact [sic]” (Travers & Manzo, 1997: 5-6). For the purpose of this research, Crown attorneys will be considered members, a

²² The difficulty of working with lawyers as a researcher will be discussed further on in this chapter.

particular group with its own rationales and justifications operating within the world of the Canadian criminal justice system but more specifically the prosecution. However, it must be mentioned that “ethnomethodology is not a “unitary perspective” as some suggest, but rather “a variety of distinctive subfields ... [comprised] of several bodies of work, rather than a single enterprise” (Maynard & Clayman, 1991: 386 *as cited in* Pollner, 2012: 7)²³; however, the theoretical underpinnings remain relatively uniform. Nevertheless, I will present this tradition cognizant of these differences while presenting the version I follow as others have also done (Livingston, 1987).

2.2.1 - The Ethnomethodological Approach and Its Foundation

Ethnomethodology “concerns practical activities in their details, and it treats as topical and notable what other avenues of social research either ignore or obscure...” (Travers & Manzo, 1997: 9). Rather than seeing the world of members of a particular group (such as prosecutors) as something set and determined by powerful structures exerting pressure on actors, EM considers it to be a practical accomplishment (Garfinkel, 1967); this orderly world is thus something that is constantly negotiated, created, and recreated in conjunction with other members of a particular group. Indeed, the order of their world only exists because members create and recreate it in accomplishing their tasks. Thus, in conducting their business, members are achieving a certain order they believe to share with others. This order appears objective to these individuals, as if it exists independent of their practical activities, because they create and recreate it naturally, without necessarily being conscious of its accomplishment or creation.

²³ Pollner (2012) explains that there appears to be a disconnect between the interests and importance accorded to certain ethnomethodological features by those adhering to, what he calls, Ethnomethodology 1.0 and Ethnomethodology 2.0. This divide draws attention to the transformations EM has undergone over the years. Nevertheless, Quéré (2012) contests this affirmation, saying that these are of a single approach, and quite inseparable.

In order to illustrate this point, Vanhamme (2009) and Mehan and Wood (1975) use the example of the Azande peoples of Africa. The Azande, when seeking guidance for important decisions will consult the entrails of chickens which they sacrifice ritualistically, the results then considered the word of an oracle. If they are unsure about the answer, they consult a second chicken, sacrificing it in the same manner as the first. Its entrails are then consulted in order to make the proper decision. If the results from the first and second chicken are not compatible, the people find a way to reconcile the answers with their trust in the oracle and the ritual through their unique cosmology, further bolstering the rightness or objective reality of this world. With Western knowledge of medicine, it is evident that the tree matter administered is poisonous to certain chickens and that this is the reason one dies while the other lives. However, to the Azande people, such an assertion is unimportant and would be staunchly refuted²⁴. Indeed, Mehan and Wood (1975) state that “[t]he incorrigible faith in the oracle is ‘compatible with any and every conceivable state of affairs [or contradiction]’”. It is not so much a faith about a fact in the world as a faith in the facticity of the world itself” (:9). It is precisely this unwavering faith in the rightness of their world (or the oracle in this case) that permits its conception as objective. Indeed, “ces explications et interprétations sont donc des activités pratiques, naturelles, descriptibles, qui justifient, produisent et actualisent la réalité objective des Azandés” (Vanhamme, 2009: 76).

Stated otherwise, the justifications used by the Azande to explain this phenomena are a product of and also a constituting factor to their reality which, to them, is unquestionable. While this description harkens to the reflexive nature of actions that is at the heart of EM, this point will be explored in greater depth in the following section. This initial description is simply meant to

²⁴ Indeed, this assertion *was* refuted by the researcher interacting with the Azande (Mehan & Wood, 1975: 10).

describe how and why EM considers the world of members an accomplishment while stressing that it is still seen to be objective.

To digress, EM is informed by several concepts that specify the lenses to be used in triangulating a proper research question and in analysis; it does not seek to impose foreign theoretical concepts onto group members under study but relies on their own words and actions to describe the often taken for granted sense of their ordered world. For this reason I, like many others, have chosen four concepts that are crucial to understanding the point of view adopted in ethnomethodology: members, indexicality, reflexivity and accountability.

Members are people that have or at least believe they have a common understanding of their world, a common “language” with one another that may not necessarily be understood or even known by non-members. In ethnomethodology:

[w]e do not use the term [member] to refer to a person. It refers instead to mastery of natural language, which we understand in the following way. We offer the observation that persons, because of the fact that they are heard to be speaking a natural language, *somehow* are heard to be engaged in the objective production and objective display of commonsense [sic] knowledge of everyday activities as observable and reportable phenomena (Garfinkel & Sacks, 1970: 339).

Indeed, as EM studies *ethnomethods*, it necessarily refers to a particular group of individuals. As stated previously, being a member involves certain rationales, particular manners of reasoning or justifying of some action that ought to be mutually comprehensible between members as well as reportable to them (as will be discussed shortly). These everyday tasks are crucial for understanding the order of the world inhabited by members for they will have proper and known consequences. Though not the object of EM, this can be contrasted to more extraordinary tasks that an established order may not have ever encountered and thus, on the spot, may not have a recognized, adequate response for a member to use. However while these rationales for normal, everyday actions may not be universally agreed upon by members of a specific group, they are nevertheless understood.

Members do not necessarily need to see themselves as a “member”, however in becoming one, that person becomes affiliated with that group in some way. Individuals, upon becoming members of a particular group, become knowledgeable about their culture, about their world and its social order (Garfinkel, 2002). They understand the conditions of their actions and the manoeuvrability they possess; that is, they are not strangers to their culture and understand what must be done as a member of the group in order to act in an adequate fashion (Coulon, 2011). As mentioned above, not all members will agree with all rationales; in such a case, members will find another adequate justification for the course of action they wish to take or would at least prefer. This could also mean that members will modify their potentially unacceptable actions to adhere to *some* acceptable justification, rendering them acceptable to other members.

Moreover, the processes involved in accomplishing tasks are often implicit, and rarely if ever fully elaborated. Questions about these processes may seem strange to members due to their commonsense nature as these processes are taken for granted (Coulon, 2011), given a member’s familiarity with the particular language of their group. Indeed, while members might be cognizant of these rationales, in each and every situation these rationales are invented anew given the indexicality of the situation, which will be explored shortly. In this way, the rationales may change and evolve, preventing efforts to refer to static rules and thus requiring constant recreation.

This ever-changing context of interactions in which members interact is understood in EM as “indexicality”, a term borrowed from linguistics (Coulon, 2011). It refers to the uniqueness of each and every situation that must be grasped in order to properly understand actions that occur; “[i]ndexicality points to the natural incompleteness of words, that words only take their complete sense in the context of their actual production, as they are ‘indexed’ in a situation of linguistic exchange. And even then, indexing does not eliminate possible ambiguities in their potential

meanings” (Coulon, 2011: 17). While this passage refers to speech, this is not the only application of indexicality as it can be applied just as coherently to actions or other forms of communication. In order to understand the actions or methods of members, their indexical nature must be understood and taken into account. Without understanding the particular circumstances in which a certain order is produced, any possible understanding is incomplete.

It is for this reason that Garfinkel (2002) stresses the unique adequacy requirement by which researchers conducting studies in the ethnomethodological tradition should aspire to be members of the group they are studying or at least partial members as some researchers have done (Vanhamme, 2009). It stresses an intimate knowledge of the group being studied on the part of the ethnomethodological researcher; without this status, one risks being treated as an outsider by the participant and missing important information that members take for granted and leave unsaid. In the current research, without at least some recognition as a partial member by participants, I risk being given a lesson on law rather than being treated as somebody meriting a more intimate explanation. Though, even if mitigated, this risk remains for all following EM’s program unless one is a fully recognized member of the group under study.

In this indexical context, members shape their world through actions as explained by “reflexivity”; in ethnomethodological terms it does not refer to reflexivity as a process of self-reflection as traditionally understood in the social sciences but rather that members do not necessarily think about what they are doing. In EM, reflexivity refers to the dual nature of actions and words. Specifically, it “refers to the practices that at once describe *and* constitute a social framework... [It] refers to the equivalence between describing and producing an action, between its comprehension and the expression of this comprehension. ‘Doing’ an interaction is telling it” (Coulon, 2011: 23). Thus, in accomplishing a task, members also demonstrate to other members

that they are capable members of their group that they do what they are supposed to be doing according to the logic of their world. Reflexivity is thus the characteristic of ethnomethods (or actions) that permits the maintenance of social order within a group. In this way, the reflexive nature of ethnomethods facilitates interactions, continually constructing and reinforcing their particular social world within which the members operate; they are making it “objectively” real for themselves. However in so doing, members act rationally, in a specific way which makes sense.

Accountability refers to the “visibly-rational-and-reportable” (Garfinkel, 1967: vii) nature of members’ methods for accomplishing everyday tasks. Indeed, actions are taken in consideration of one’s environment; “[L]es décisions [que les membres] prennent peuvent être imparfaites, voire révisables, mais qu’ils s’y arrêtent...parce qu’elles sont adéquates, raisonnables et défendables, qu’elles sont reconnues comme valables dans le groupe” specifically by other members (Garfinkel, 1997, *cited in* Vanhamme, 2009 : 79). In this way, there is a manner of implicit understanding among group members about what needs to be done; though the *how* may differ in achieving a certain social order or sense of things, the *why* of such methods is generally agreed upon and is visible through the created order of a given situation despite its unspoken and taken-for-granted nature. Stated otherwise, the actions of members have meaning and are not simple actions but an organic, natural, even unconscious projection of their adequacy in whichever world they must appear competent. Nevertheless, as mentioned previously, some members may not agree on the rationales for their actions; however, they will still find another rationale and/or action because they are accountable as members of a group.

Accountability has two important characteristics: it is reflexive and rational. It is reflexive in the way explained in the previous point: to say is to do and to do is to say. Though, “to say that it is rational, is to emphasize the fact that it is methodically produced in situation, and that the

activities are intelligible, that they can be described, and evaluated under the aspect of their rationality” (Quéré, 1984: 105 *as cited in* Coulon, 2011: 23). Therefore, in conjunction with reflexivity, accountability is a characteristic of members’ methods that permits the study and analysis of these methods. Indeed, the accountable nature of actions allows the researcher to witness and comprehend the collective world created and recreated among members of a group without the member having to describe it in such explicit terms.

Thus, ethnomethodology posits that members’ actions take place in a particular situation, mentally, physically and temporally that cannot be fully understood outside of this space (*indexicality*). These actions require certain justifications that are in line with the group’s guiding logic(s), though these justifications are implicit and rarely, if ever, elaborated; as such, questions about these justifications may seem strange to members as their rightness or adequacy is taken for granted (*accountability*). Furthermore, actions undertaken by members continually create and perpetuate a certain order. In speaking of these actions or in accomplishing them, members are naturally demonstrating their adequacy as a member of the group as well as creating and sustaining a particular world which employs a certain logic (*reflexivity*).

2.2.2 - *Ethnomethodology and the Research Topic*

Ethnomethodology has many contributions to make that justify its use. In the context of the current research, the environment within Crowns work is integral for understanding the indexical nature of their actions. As such, an exploration of the literature regarding Canadian prosecution was undertaken in the previous chapter in order to gain further insight into their indexical reality; to this end, certain motivations for actions and certain rationales were analyzed in the research as much as was possible. However, further study detailing the world of prosecutors in greater depth is needed, hence the current research. Indeed, Crown prosecutors will be

considered in their status as members of the criminal prosecution. As legal professionals, EM posits that they have their own language to communicate in the broadest sense possible; that is to say that they have their own way of demonstrating their membership through the use of particular logics that are not fully comprehensible to individuals that are not prosecutors. However, this language cannot and should not be understood as simply verbal or non-verbal; rather, once again, this language refers to the myriad ways in which members communicate their adequacy to other members through their actions in addition to their speech.

While not all following EM's program, various authors have shown that members of the justice system such as Defence attorneys and Crown prosecutors do indeed have their own rationales, motivations and language (Labelle & Vanhamme, 2015; Lemire, Noreau & Langlois, 2004; Noreau, 2000; Vanhamme, 2016), thus justifying the use of the term *member*. For example, while all of ethnomethodology's concepts can be seen to underpin the explanations by attorneys interviewed by Labelle and Vanhamme (2015), it is especially apparent that they form a group of their own with particular ways in which to appear adequate as required by EM. Indeed, both Noreau (2000) and Labelle & Vanhamme (2015) demonstrate that members of the Bar have their own rationales, and furthermore that prosecutors, though sharing some view points and traditions with other members, have their own specific justifications and manners of conducting their work.

Furthermore, as per the disposition of EM, the reflexive and accountable nature of members' actions together will allow me to draw conclusions about the order and world of prosecutors while investigating their practices. Indeed, as prosecutors describe the process utilized to incorporate RJ into their work, I will be given a glimpse into the way in which their *world* incorporates differing logics. Moreover, in exploring their work, it is understood that they will be explaining in a manner that espouses the logic of criminal prosecution. Even if justifications differ

between participants, they will nevertheless be understood as contributing to an accomplished reality that can reconcile differing courses of actions or different decisions.

These four ethnomethodological concepts together demonstrate why and how EM inquires as to the practical activities of members. These concepts allow for everyday actions to be scrutinized in-depth in a way that has not always been done; as mentioned earlier, aside from a handful of studies seeking to explain the actions of prosecutors or other judicial stakeholders in-depth, much of the research on exploring their behaviour has been predominantly focused on determining structural factors (Travers, 1993; Travers, 1997). Such an approach can easily overlook the actions of individuals; however, because of their reflexive and accountable nature, everyday actions, such as deciding on the use of Restorative Justice, offer an understanding of the creation and upkeep of the unique world in which they take place. For these reasons I have chosen EM to investigate the use of Restorative Justice-inspired programs by the prosecution in criminal proceedings. Thus, given the use of the ethnomethodological approach, the present research will seek to answer the following research question: *How are Restorative Justice-inspired approaches integrated into the daily world of Canadian criminal prosecution?*

This question recognizes that the prosecution has its own logics that interact with RJ approaches and deal with them in a manner congruent with said logic. Furthermore, it draws attention to the fragmented nature of the Restorative Justice movement, but stresses its reliance on the CJS in Canada. With the ethnomethodological approach, RJ can be conceived in many different ways with many definitions. Indeed, EM denies a positivistic ontology, instead embracing a certain restricted version of constructivism in which reality is conceived as an accomplishment of various actors (and the structures they identify) (Garfinkel & Sacks, 1970). Restorative Justice can thus, for the purpose of this study, come to mean any practice identified as such. Regardless if RJ

theorists agree or disagree with a certain program self-identifying as a Restorative Justice program, these programs are nevertheless presented as such and will be treated as such by the judicial personnel making use of them; indeed, Thomas (1928) states, “[s]i les hommes définissent des situations comme réelles, alors elles sont réelles dans leurs conséquences” (:572). Said otherwise, if Crowns see something as RJ, they will act on such an identification and definition. To return to the idea of the Azande, if they were to actually be using some other bird than a chicken and were to be corrected on their assumption, it would not matter; the Azande would be performing their tasks as if it *were* a chicken given their “knowledge” that they are using a chicken for their ritual.

2.2.3 - Using Ethnomethodology: Its Strengths and Weaknesses

Until relatively recently, much research in the sociology of law has favoured more structural than interpretive approaches to understanding the field (Israël, 2008; Travers, 1993; Travers, 1997). Furthermore, approaches that promoted the sociologist as the sole person capable of understanding various phenomenon were in fashion until the late 1980’s and 90’s (*Ibid.*).

Travers and Manzo (1997) state that:

For most conventional legal sociologists, the activities that constitute work in legal settings – the talk that makes up plea bargaining [etc.]... – is an annoyance...that exposes the gap that exists between idealized theoretical or philosophical constructs surrounding law...The Gap helps explain the curious disjunction between classical theoretical works and the empirical studies of contemporary analysts...The activities they obtain in legal settings do not fit idealizations developed in theory...and so in lieu of attempts to bridge “theory” and “practice”, many researchers have chosen to abandon such attempts altogether (:11).

Thus, as highlighted above, ethnomethodology offers the possibility to address this gap that exists in socio-legal research. It uses the everyday practices of individuals and the way they speak about them as its empirical and theoretical interest instead of overlooking them as other theories and traditions. Indeed, members, in explaining their actions, are not simply offering an explanation but are demonstrating how their world is and ought to be organized, thus bridging the Gap between

theory and practice. Therefore, this approach brings a *bottom-up* approach to an area of research that tends more towards the *top-down*.

EM is an alternate reading or analysis to traditional sociological methods. Its focus on everyday actions originally distinguished ethnomethodology from the more structural-leaning sociological field of the time (Coulon, 2011; Travers & Manzo, 1997). In this way, EM seeks to be grounded in the most concrete sense possible, developing an understanding of members' actions from the members themselves rather than claiming a better sociological understanding and advancing their own academic interpretations based on this understanding, placing the researcher above and beyond the world they study.

Focusing on what members understand does not limit ethnomethodology's ability to address structures and their role in shaping members' realities. Indeed, EM does not deny that these actors can feel and act on pressures from a structure within which they operate (Garfinkel & Sacks, 1970) which is particularly important to consider when investigating the functioning of the criminal justice system; this is especially the case for the present research given the large amount of guidance for prosecutors but also the great discretion afforded them. Furthermore, though the approach may be considered microsociological in that it is concerned with individuals and how they create order, this interest is an effort to understand larger patterns of behaviour and thus operates at the micro, meso and macrosociological levels (Vanhamme, 2009: 77).

To look solely at the effect of structure on a practice that is not explicitly regulated is sure to be fruitful but certain to miss many important details about the true goings-on of prosecutors (as they accomplish their regular, day-to-day tasks). Conversely, to ignore the effect that structures may have on individuals is naïve. A proper balance between the two is necessary and is provided by ethnomethodology's program. EM strikes this balance in its approach by incorporating

structures into the order-creating behaviours of members only if they are accounted for by these members (Garfinkel & Sacks, 1970: 345)²⁵. As such, though EM does not seek out structures as causal factors when exploring order-making activities, it understands nevertheless that members of a group can perceive these structures and may incorporate them into their reality. Indeed, this perceived objectivity is an accomplishment of ordinary, daily activities (Garfinkel, 1967: vii).

Ethnomethodology can thus be understood as a useful approach for understanding the use of RJ in the Canadian criminal justice system. Indeed, it has been well established as an approach for investigating the legal profession and the functioning of this system. The first ethnomethodological inquiries conducted by Garfinkel, the father of the approach, concerned juries. There are also many other ethnomethodological studies in the legal field such as Garfinkel's work on inter and intra-racial homicide (1949), degradation ceremonies (1956) or the decision-making processes of juries (1967)²⁶. There are also seminal works making use of EM that explore police practices (Pollner, 1987; Sacks, 1972), and the practices of "radical" lawyers (Travers, 1997). Plea-bargaining has also been investigated using EM by Maynard (1984) and Lynch (1982), who specifically studied Canadian defence attorneys. Lynch (1997) also investigated Ontario judges in their role as accountable judicial actors. Sudnow (1965), despite not using EM explicitly, described how certain crimes are qualified based on their social characteristics rather than the letter of the law, influencing how they were to be dealt with. More recently Vanhamme (2009) used EM to understand the process used by Belgian judges during sentencing while Prates (2013) used the approach to understand the essence of culpability among Brazilian judges. Finally, as already mentioned, Labelle and Vanhamme (2015) and Vanhamme (2016) have also made use of cognitive

²⁵ For further explanation, see Garfinkel & Sacks (1970).

²⁶ Garfinkel (1949) and (1956) were written before the author had developed the foundation of ethnomethodology.

sociology, an offshoot of EM (Vanhamme, 2009), to investigate Canadian Crown prosecutors and their use of pretrial detention.

Despite what EM brings to the study of sociology and particularly to the current research, there are nevertheless critiques to the approach. Vanhamme (2009) identifies two main critiques as “son manque d’intérêt à identifier les facteurs du social et le subjectivisme” (Sharrock & Anderson, 1986; ten Have, 2004; Vanhamme, 2009: 80). The first critique about its disregard for “social factors” is a critique arising from sociologists with a penchant for structural explanation. EM does not seek *determining* factors; this is simply not the point of the approach; it seeks to understand the appearance and maintenance of social order through the actions of members. Indeed, the goal is not so much identifying these factors as understanding what is at play in the maintenance of order and describing how this comes to be. Nevertheless, in realizing a particular social order certain factors may become apparent; as discussed previously, these will be used to understand the indexical world of members rather than to pinpoint a certain factor, structural or otherwise. Said differently, EM “ne va donc pas se satisfaire d’une explication du social qui identifie les déterminants structurels (objectifs) de l’action, puisque son objet est d’en comprendre les fondements, la façon dont les actions sont interreliées pour produire et reproduire un ordre reconnaissable dans la vie ordinaire” (Vanhamme, 2009: 80). Thus, EM does not ignore these factors but seeks a deeper understanding of them which goes beyond their simple enumeration.

In taking such an in-depth approach to the actions of individuals, EM has been criticized for being much too subjective, almost to the point of triviality (Coulon, 2011; Sharrock & Anderson, 1986). However, Coulon (2011) and Vanhamme (2009) note that such an accusation arises from a misunderstanding of ethnomethodology. Sharrock and Anderson (1986) explain further that this accusation is debatable given the varying definitions of subjective and objective;

furthermore, they explain that EM is less concerned with ontology, instead focusing more on visible practices. They continue to say that:

Criticism of the...approach as necessarily subjectivist and relativist arises from a tendency to read ontological claims much too quickly into steps which are taken for methodological reasons. These steps are not taken in order that the world of daily life...may be identified as the ultimate locus of reality and the final focus of sociological inquiries. Indeed, it is just these attempts to lay out in advance what the scope and subject matter of sociology *must* be that ethnomethodology declines to make (Sharrock & Anderson, 1986: 106).

This section has thus demonstrated the adequacy of the ethnomethodological approach for the current investigation. Indeed, von Lehm (2014) states that “ethnomethodological research has become very influential in the sociology of law” (:152); it offers the opportunity to investigate in particular depth the actions of members of the prosecution and will allow me to provide detailed descriptions of these actions in order to understand the social order that is created by members of the prosecution. This will then allow a deeper, and more practical understanding of criminal prosecution’s use of Restorative Justice and its underpinning logics.

2.3 - METHODOLOGICAL CHOICES

In this section I will present the methodological commitments undertaken in the present research. In order to answer my questions regarding the decision-making process of Crown Prosecutors in relation to Restorative Justice, several avenues of investigation are appropriate and seem quite interesting. However, I chose to conduct semi-structured alongside short periods of participant observations as research participants appear in court for cases that have made use of RJ in some capacity. This is not to say that this is the only manner in which to accomplish this goal but rather, as I will demonstrate, that given practical constraints and theoretical guidelines, this is the most appropriate course of action. This section will discuss the most appropriate type of data given my theoretical framework. Once this is ascertained, the manner in which this data was analyzed and subsequently presented will be elaborated.

2.3.1 - Research Topic

Crown attorneys, representing the prosecution, have been clearly demonstrated to be the gatekeepers to the CJS. As “alternative measures” explicitly require the approval of the Attorney General in order to operate, the Attorney General and their representatives are ideal for understanding how RJ is used in this system. Nevertheless, empirical research on the use of RJ in a Western legal system is lacking despite numerous studies concerning RJ programs themselves. This gap in the literature, coupled with my theoretical framework have helped me develop the afore-mentioned research question. How this question will be answered will be explored presently.

2.3.2 - Gathering the Data

As stated previously, in order to answer my questions regarding the integration of Restorative Justice by Crown prosecutors, various approaches could be used; however, I opted to conduct short periods of participant observation alongside semi-structured interviews. It is evident then that a qualitative approach is being taken in this research, an approach which seeks “to understand the everyday lives and social settings of those under study...[which] allow the studied people to define what is central and important in *their* experience” (Van den Hoonaard, 2012: 2; *emphasis in original*).

This research question stresses in-depth comprehension as it asks *how* RJ is integrated rather than if it simply is or is not integrated nor to what degree. Indeed, Laflamme (2007) states quite succinctly that “[l]es données dont [méthodes qualitatives] dispose[nt] et sa manière de réunir de l'information lui permettent de découvrir du sens dans les corpus étudiés bien au-delà de ce à quoi pourrait accéder l'analyse quantitative” (:145). This is not to say that a quantitative approach could not address the integration of RJ within the CJS but rather that a different theoretical framework and thus a different research question would be necessary. Qualitative methods on the

other hand allow for a thorough response to questions of “how?” (Morse, 1994; Neuman, 2009). Furthermore, qualitative methods such as interviews and participant observation are often used to understand meanings of certain phenomena and also the meanings we use to “define ourselves as members of certain groups” (Van den Hoonaard, 2012: 18). Thus, in seeking to understand how RJ is integrated into the criminal justice system, I am able to account for the variety of understandings that may be present among Crown attorneys.

Ethnomethodology stresses the uniqueness of members in a world that is mutually intelligible to them. It is important to recall that this does not mean all members agree constantly or that they all act in the same way; rather it stresses that they understand how they believe they *should* act given their particular context in which they seek to appear adequate to others. If they do act in accordance with this expectation, all is well. If they do not, they may be questioned but so long as they adhere to certain justifications that are acceptable to other members, the orderliness of their world continues. Indeed, the worldview in EM is one of continual accomplishment; reality is not something that is static but rather is continually constructed and acted upon by various individuals (Coulon, 2011) despite its seeming objective facticity for those who operate within it.

These types of studies often involve researchers immersing themselves into the world of their participants, becoming intimately familiar with the daily order and actions that are characteristic of the group being studied in an effort to identify and analyze them (Lynch, 1997; Travers, 1997; Vanhamme, 2009). This is often accomplished through a mix of participant observations and in-depth interviews with participants, an oft-used combination (Warren, 2011). Garfinkel, in his seminal work *Studies in Ethnomethodology* (1967), frequently uses interviews in order to understand the everyday talk of various groups of people. Travers (1997) mixes informal interviews with participant observation in order to understand the work of Defence attorneys.

Vanhamme (2009) uses similar methods. Indeed, this author also uses interviews in order to understand how Crown attorneys in Ontario and Québec render their use of pretrial detention understandable and acceptable to other members of the prosecution (Labelle & Vanhamme, 2015). It can be said then that these methods are tried and tested with EM.

(1) Data Collection Techniques

As mentioned, the techniques employed in this study include participant observation and in-depth interviews with Crown attorneys. These techniques will allow me to collect (or rather, as will be seen shortly, *create*) appropriate data that will answer this research question.

(a) Participant Observation

Observations allow the researcher to experience phenomenon that the participants may not think to bring up due to the commonsense nature of a certain action or behaviour. Indeed, the goal of participant observation is “to understand everyday community life from the perspective of the participants” (Van den Hoonaard, 2012: 52). This is stressed in the ethnomethodological tradition; in valorizing lay sociology, this current recognizes the need to understand how members act *in situ* and how this contributes to the order of their world (Coulon, 2011). For the present research, participant observations allowed a brief look into the world Crown attorneys. They permitted the viewing of behaviours that may not be perceived as important by the participant or that may be completely overlooked due to their intimate familiarity with their work. However, not all aspects of Crown attorney “community life” could be observed; instead, but a small aspect of it was observed. For example, private meetings between the Crown and Defense attorneys in which the course of a criminal matter is discussed were not witnessed²⁷. For these reasons, in-depth interviews were used to bolster the utility of these observations.

²⁷ Due to the confidential nature of the Crown attorney’s job and my understandings of the criminal justice system, attending these meetings was beyond what I felt comfortable asking participants given our relationships.

(b) In-Depth Interviews

In-depth interviews allow the researcher to collect information that is not visible such as thought processes, feelings, and justifications (Van den Hoonaard, 2012). They seek rich data that cannot be answered in a standard interview nor through observation involving checklists and variables. The aspiration of in-depth interviewing “is one of subjecting yourself...and your own social situation, to the set of contingencies that play upon a set of individuals, so that you can physically and ecologically penetrate their circle of response to their social situation, their work situation...” (Goffman, 1989: 125 *as cited in* Johnson, 2011: para. 13). Said otherwise, the in-depth interview seeks to understand the situation of an individual (Lessard-Hébert, Boutin, & Goyette, 1996); this situation is understood in its widest sense whereby it could mean, among many others, the social, economic or emotional state within which participants find themselves.

Indeed, the questions to be addressed in the interviews aim to allow participants to walk through their thought processes which may normally be less than explicit. In this way how RJ fits into their thought processes in relation to criminal prosecution was discerned. It should be noted however that there is a distinct difference to ethnomethodological interviews compared to other theoretical approaches. Given this framework, explanations were considered an exercise in reflexivity whereby these Crown attorneys are not simply describing their practice but also discussing and creating the proper orderliness of their world. Indeed:

[E]thnomethodologists study interviews as instances of settings like other interactional events that are not interviews in which members use interactional and interpretive resources to build versions of social reality and create and sustain a sense of social order. Interviews, then, are seen as a particular subset of interactional settings and as events that members make happen thoroughly inside and as part of the social worlds being talked about, rather than as “outside” or “time out” from those social worlds. Understood this way, interviews are treated not so much as techniques for getting at information...but more as in-their-own-right-analyzable instances of talk-in-interaction (Baker, 2011: 20).

Here Baker (2011) explains that viewing interviews in such a way allows the researcher to analyze the findings as something created within the context of that interview rather than pre-existing. This

is to say that the ethnomethodological in-depth interview is not precisely for data collection but rather data *creation* as the interview provides the interviewee with an opportunity to demonstrate their competence and status as member to the interviewer who is, ideally, considered to be a partially competent member, meeting the unique adequacy requirement. Thus, the interviews were instances in which interviewees demonstrated their member status and, simultaneously, described the proper functioning of their reality as Crown attorneys.

Together, a robust study is conducted that allows for in-depth comprehension of participants in addition to permitting an outsider's witnessing of behaviour and actions. Indeed, in this tradition, participant observations are commonly used in conjunction with in-depth interviews, particularly when investigating a legal setting (Garfinkel, 1967; Travers, 1997; Travers & Manzo, 1997; Vanhamme, 2009) in an effort to triangulate data.

(2) Moving into the Field

Despite some restrictions to be discussed shortly, these were the techniques used in order to collect appropriate data. Snowball sampling was employed in order to recruit appropriate participants for this research, ensuring participants were knowledgeable about Restorative Justice-inspired programs. In the case of this research this means that potential participants were identified through existing contacts among Crown attorneys at a courthouse in Eastern Canada, thus helping me fulfill the unique adequacy requirement at least partially due to some prior contact in a professional environment. Indeed, knowing some participants in a professional context prior to interviews helped ensure they understood I had some knowledge of their work, and, as such, did not need to be taught law, a danger explored earlier in this chapter.

Once contact was made, these Crown attorneys were asked to distribute the invitation to participate among their networks which sometimes extended beyond their courthouse. Participants

were accepted on a first come-first served basis. Indeed, those who met the criteria were invited to participate until a point of theoretical saturation was met, thus leaving the construction of the sample otherwise out of my control. This form of sampling aids in the deep understanding of Crown attorneys' thought processes as "les recherches qui recourent à l'échantillon par homogénéisation [snowball sampling] permettent de décrire la diversité interne d'un groupe" (Pires, 1997: 72).

The inclusion criteria for participants were as follows: (1) an individual must be or have been a Crown attorney in Canada and (2) this individual must also have had experience with RJ in the context of their work as Crown prosecutor in criminal matters. For the purpose of this research, "experience" refers to any choice to use or not use an RJ-inspired approach or program, whether or not much thought goes into this decision. These criteria ensure that only those with practical knowledge of using RJ in the Canadian CJS are targeted, while avoiding the unnecessary exclusion of potential participants. This purposeful differentiation between those with and without knowledge of Restorative Justice is congruent with qualitative data as participants "are purposively selected to represent rich knowledge about the research questions" (Beitin, 2014: 248).

Several Crown attorney's offices which adhered to these criteria were identified in Eastern Canada. This office was chosen due to existing connections and contacts made during time spent working with Crown attorneys in the context of RJ. They in turn referred to other colleagues in other areas of Eastern Canada. Travers (1997) notes that the legal field can often be difficult to penetrate due to the confidential nature of the work conducted by lawyers and also the busy schedules of these individuals. As such, in order to investigate the use of RJ in the criminal justice system by the prosecution, it was necessary to make choices to facilitate access to these actors.

Note that while speaking of a Crown attorney's office, not all attorneys in these offices were participants. Though this would be interesting, not all were interested or able to participate.

For the current research, ten (10) Assistant Crown attorneys, Deputy Crown attorneys and Crown attorneys²⁸ were interviewed from four sites in Eastern Canada, all of whom having had the opportunity to refer cases (or at least think about referring) to a so-called RJ program. With consent, these interviews were audio-recorded. Participants were ensured confidentiality and anonymity, hence the use of pseudonyms. The interviews, though quite open, asked participants to answer three questions: (1) What is Restorative Justice for you? (2) Can you describe to me the process you use when deciding on using Restorative Justice in the context of a criminal matter and (3) What is Restorative Justice for? What purpose does it serve? These questions were designed to elicit details of the conditions surrounding the use of RJ in the world of Crown attorneys as well as their understanding of it, thus responding to the research question.

Participant observations were also conducted at Site 4, whose characteristics will be discussed below. Appropriate court appearances were identified through contacts in a courthouse in Eastern Canada. A total of four sentencing hearings were attended in which both Crown and Defence put forth their arguments in regards to the sentence. This stage of a case was chosen due to the fact that all actors in the courtroom would have much more to say than during an appearance in which a simple adjournment is requested (which is commonplace with cases making use of RJ). In all cases a Restorative Justice process was considered and referred. However, in three of these cases, the process did not come to fruition for program-specific conditions which are not shared outside the program. Nine pages of notes were taken during these observations.

²⁸ For the sake of this research, I will simply refer to Crown attorneys rather than using their full titles

Particular attention was paid to what the Crown attorney said to the judge regarding the use of the RJ program. First and foremost, the mention of its use or lack thereof was noted. In this way, the particular words used and also the purpose of these words was deduced from the overall argument the Crown is presenting to the judge. Though I made note of any interactions revolving on the discussion of RJ, this was in addition to interactions between attorneys or those otherwise involved in the case as EM stresses an openness to any possible justification or action. Nevertheless, I was especially cognizant of the justifications that are put forward for the sentence sought by the prosecution and the justifications they present.

All locations were in relatively urbanized areas. Indeed, all locations had a population of over 70,000 (Sites 1, 2, 3, 4). However, Sites 2 and 4 had populations of over 700,000. All interviews were conducted in English. Four women were interviewed and six men. The majority (8) have or do currently practice in one location (Site 4) while another was from a smaller urban area (Site 1) and another from a much larger urban area (Site 2). Nevertheless, three of the eight practicing in Site 4 have some legal experience in other jurisdictions (hence the inclusion of Site 3). Three participants are now retired, with two currently practicing as judges; two of these participants have only been retired from the prosecution for a relatively short period while one participant has been retired for over 15 years from the prosecution (though is still active as a judge). Indeed, most Crowns had between 20 and 30 years of experience, while two have between 10-19 and one had less than two years of experience as Crown (though many had varied experiences in other legal fields). Interviews lasted on average 53 minutes, ranging from 35 to 76 minutes in duration for a total of 534 minutes. A total of 162 pages of transcriptions were created from the interviews and another five pages of interview notes from one participant who asked not to be recorded.

It is almost inevitable however, that when conducting research that unexpected issues will arise despite one's efforts; this research is no exception. Thus, in conducting this research, there were some divergences from the methodology originally envisioned. The original intention was to perform these observations before meeting with Crown attorneys in order to enlighten discussions concerning their use of Restorative Justice. However, by chance, at the time observations were being conducted, there were simply far fewer eligible cases taking place. As such, in order not to wait several months, interviews were conducted with the aim of conducting the observations *after* the interviews. Despite the fact that these observations would be more difficult to discuss with prosecutors, they would still hold at least some value even without discussing them with the observed participant. It was soon discovered that the (Assistant) Crown attorneys I was able to speak with did not always represent a case they had referred to a so-called RJ program before the judge and that, in fact, it was another Crown attorney who would represent the Crown. It was my thought that I may simply have to conduct more interviews with those who *were* representing the cases. Though this was not to be as it soon became apparent that negotiating access would prove to be more difficult and obstacle-ridden than anticipated despite my efforts to foresee such issues before commencing this research. While some Crowns were quite eager to participate, those that did often possessed greater seniority and felt greater ease in meeting and speaking on the record for the purpose of this thesis. Those that did not, from what I was explained, were more junior and as such were more cautious in engaging with a researcher. Such a selection bias is not greatly troublesome given the theoretical framework of this research. Indeed, as EM stresses the implicit knowledge of members, it is perhaps preferable to have participants who are indeed quite familiar with the intricacies of the work and the world they create.

Given such practical difficulties however, further observations were not conducted. As mentioned, there was a large period of time with no eligible cases. Nevertheless, through those that were undertaken I was able to glean a better understanding of the world of Crown attorneys; in this way, they contributed to my understanding of the indexicality of the environment as stressed by EM. It was uncovered that in court, RJ is spoken of very little. When brought up, it is the defense who discusses it in relation to sentence mitigation. The Crown never contested this; as was discussed in later interviews, it became apparent that Crowns would not contest this as they had to give their permission to take part in a so-called RJ program before it happened and as such, the mitigation would not be a surprise to them. Thus these observations should be understood principally as preliminary observations helping this researcher understand the indexicality of the world of Crown attorneys. As such, while observation data was not actively used in analyzing these findings, they still played a role in setting and understanding this particular context.

With such a setback, it is appropriate to further discuss the suitability of in-depth interviews when not used in conjunction with participant observations. Though preferable if used together, the decreased use of these observations in this study's analysis is not ruinous. Firstly, it should be noted that some EM studies have only used interviews such as Garfinkel (1967), studying the case of Agnes, a transgender woman; moreover, Agnes was the only participant used in this intriguing study. Though not using EM explicitly, Robert, Faugeron and Kellens (1975) relied solely on group interviews with judges in order to understand the sense of their actions and what this sense revealed about the organization in an effort to understand the social dimensions of sentencing. Similarly to the current research, Wieder (1974) undertook observations of a halfway house but relied predominantly on discussions he had with residents in his analysis. Watson and Weinberg (1982), and also Baker (1984) too relied uniquely on the collection of interview data in their

ethnomethodological research. Secondly, given that EM does not necessarily seek to predict or understand what members of a group *actually* do, but seeking to understand the rationales and ways in which they *ought to* act (Coulon, 2011; Vanhamme, 2009), interviews on their own are able to provide this information. Had observations been conducted, they may have permitted another dimension to the interviews and another manner in which to contrast what was discussed in the interviews; indeed perhaps differences between the accounts given in interviews and the accounting in court observations might have differed, allowing me to compare the two in more depth. However, to once more emphasize Baker's (2011) explanation of ethnomethodological interviews as a site of data creation rather than data collection, it is plain that interviews are quite capable of producing data to understand what is and is not important in the world of Crown attorneys, even if one might suggest that such rationales might differ from those that might be seen in a court room. Indeed, Gubrium and Holstein (2012) state that "accounts...are as discernible in interviews as they are through participant observation...As Pollner [a pioneer in EM research] would undoubtedly remind us in this case, what members do with words in interviews is as genuine and scientifically valuable as what they do with words in more "natural" settings" (:92-93). In this way, the interviews conducted in this research are able to properly answer its research question even if observations would have added to their power to do so.

(2) Advantages and Limits

These choices relating to the type of data sought, data collection techniques and sampling methods have certain benefits and weaknesses. While some justifications and consequences have been elaborated, the shortcomings of these choices must also be discussed further.

(a) Constraints on Funds and Time

As alluded to previously, the constraints of a Master's thesis preclude the researcher from lengthy and costly undertakings. As such, the first issue related to this issue is the limited observation period that took place. Though longer periods of observation in different court appearances for the same criminal issue would be enlightening, oftentimes adjournments for cases making use of RJ-inspired programs last between one to three months at a time, if not more.

One recent study was conducted however that circumvented certain time constraints related to court observations. Saghbini (2016) instead sought court transcripts, conducting an analysis of these documents. Initially encountering a difficulty due to the cost of transcripts, the author was able to access certain transcripts; unfortunately, the same possibility was not available for this research due to their cost. This is not to deny the strengths of an analysis of court documents related to RJ. In fact, this could prove quite useful in triangulating data; however, to conduct sufficient analyses of interviews, observations and court documents would prove too burdensome for the current research given its parameters as even the first two already prove quite demanding.

(b) Purposive Sampling in a Limited Area

One other concern with this research stems from the purposive sampling technique employed alongside a limited geographical area. This limited area was not chosen so as to exclude other regions. Once more, this decision was simply a matter of practicality and accessibility. Indeed, gaining access to the realm of lawyers can be difficult due to its exclusive nature (Travers, 1997). Moreover, lawyers are known to have very busy, often stressful schedules (Chan, 2014; Hill, 2002). Especially given the current (public) crisis occurring due to court delays in Canada, much more scrutiny is being placed upon the work of judges and prosecutors. As such, it is reasonable to think that their time is quite precious and not lightly given.

Also at issue is the fact that I did not have sufficient time nor sufficient connections to a great many number of Crown attorney's offices in Eastern Canada. Though it is possible I may have been able to access several other offices, in reaching out to them, help was not forthcoming; this further cemented my impression that lawyers are an "elite" group which, according to Atkinson and Flint (2004), is a group more easily reached through referral, hence the use of snowball sampling. Therefore, sampling within a group that is similar geographically will impact how generalizable the findings of this research can be (Beiten, 2014; Neuman, 2009; Pires, 1997).

As alluded to above however, mitigating this potential lack of generalizability is the fact that "[t]he concept or the experience under study is the unit of analysis; given that an individual person can generate hundreds or thousands of concepts, large samples are not necessarily needed to generate rich data sets" (Starks & Trinidad, 2007: 1374) as sometimes done in the ethnomethodological tradition. Indeed, Pires (1997) notes that when using a snowball sampling technique, theoretical saturation allows for a degree of generalizability in findings despite a lower number of participants (:72). Thus, the validity of the research should not be judged on the number of participants, but the breadth and depth of information created as well as the interaction of my conclusions with existing literature.

2.3.3 - Data Analysis

Interviews were audio recorded and later transcribed using QDA Miner software. Field notes taken during observations and interview transcriptions were processed in QDA Miner. Once electronic copies were made of both observations and interviews, all transcripts were read multiple times to familiarize myself with their contents. Going through the collected data several times allowed for a greater comprehension of what is being discussed in these "documents". The data collected was then coded according to these patterns that arose.

As per EM, these transcripts were considered documents not because they are written but because they point to “a presupposed underlying pattern” which must be revealed (Garfinkel, 1967: 77). Indeed, “[d]ocumentary interpretation consists of identifying an underlying pattern behind a series of appearances such that each appearance is seen as referring to, an expression of, or a “document of,” the underlying pattern. However, the underlying pattern itself is identified through its individual concrete appearances [in dialogue for example], so that the appearances reflecting the pattern and the pattern itself mutually determine one another...” (Wilson, 1970: 68). These patterns were not analyzed for their “truth”; indeed, if transcripts were truly indicative of the participant’s conduct is irrelevant. Rather, analyzing these “documents” pointed to the ways that competent members of the prosecution think they *ought to* act. Instead of the specific content of these accounts, it is the form with which EM concerns itself, the patterns and principles that underlie the content (Vanhamme, 2009, 76-77). In other words, field notes and transcripts were not understood as truly representative of specific behaviours of the participant but rather as behaviour members feel are expected of them. This permitted access to expected patterns of action and, specifically, the sense-making activities of these participants in their work as it pertains to RJ.

Returning to the transcripts, the various themes evoked by each participant through open coding, a primary set of many different codes that were later synthesized was created (Berg, 2001: 251-253). Themes arose in an inductive manner through the reading of these transcripts as the ethnomethodological approach insists on letting participants speak for themselves rather than having preconceived notions thrust upon them. Concretely, while analyzing this data, I combed through the data in order to discover (1) what was said, (2) what arguments arose, and (3) what was at issue in these arguments. Thus, transcripts were analyzed with these questions in mind:

(1) *What was said?*

Understanding what was said forms the basis of this data since, in EM, stating something is an action in and of itself. Through their words, participants demonstrate their adequacy in their role as member of the prosecution. Though, it is not simply what was said but also *how* it was said. This in turn helps better understand the *indexicality* of the situation. For example, if any noticeable changes in intonation, the use of colloquialisms, etc., these could all help understand the meaning or patterns behind the words of participants. Furthermore, at times during the interview, participants were pressed on what was stated in order to elicit further explanations.

(2) What arguments arose?

After understanding what was said, arguments or thoughts would arise through the words of participants. Indeed, in speaking, they necessarily choose certain topics or arguments to bring up in their explanations. These arguments and ideas were grouped together in an effort to find similarities, but also differences in the words of the Crown attorneys. Such arguments and ideas were found in the stories chosen by participants, in the words they used and in the details they decided to highlight (to the necessary detriment of other words, ideas and stories). Moreover, as described above, the way in which something was said also hints greatly at the meaning of these words. At this point, any constraints or situational factors mentioned were taken into consideration so as to better understand these arguments as they allow for a greater understanding of what Crowns consider to be an impediment and how they deal with them in a sensical manner.

(3) What is at issue in these arguments?

This final step involved understanding, given these arguments and constraints, what sort of world is described and made visible by the participants. Indeed, through these stories, ideas and arguments, certain realities became evident in the manner in which these things were presented as right or wrong, having or not having sense. In this way it was possible to understand what should

and should not be for proper, competent Crown attorneys.

Together these guiding questions, but particularly the final question in this evaluation grid, permitted a systematic review of the methods and justifications given by Crown attorneys for their actions, thus providing insight into their particular reality as these interviews were understood as accounts, rather than reports, as a site in which data is created rather than simply divulged (Baker, 2011). Indeed, these concepts that arose during analysis were considered membership categorizations (Baker, 2004) or *ethnomethods*, which are “commonsense [sic] logic[s] that [members] possessed and ‘embodied’” (Coulon, 2011: 30) by which participants try to demonstrate their adequacy to other members of their group.

2.4 - CONCLUSION

In this way, the current research seeks to adequately answer the following research question: How are Restorative Justice-inspired approaches integrated into the daily world of Canadian criminal prosecution? The literature has demonstrated that RJ, despite an increasing profile in Canadian criminal justice, faces challenges regarding its continued use in criminal matters. For this reason, it was expedient to look at Crown attorneys due to their status as gatekeepers of Restorative Justice due to provisions in the Criminal Code of Canada and the discretion they wield in prosecution. Despite some studies, there is little empirical data on the actual work of Crowns in this context. As such, an empirical study that stresses practice is necessary.

It was for this reason that ethnomethodology was chosen to frame this study; indeed, it emphasizes practice and seeks to understand it, giving special attention to situations where potentially discordant actions can coexist such as with Restorative Justice and criminal justice. Given this framework, interviews and participant observations were chosen as the main data

collection methods as is often the case when using EM. It is thus hoped that these theoretical and methodological choices will guide a study that will contribute to the field of Restorative Justice and also to the sociology of law.

The following chapters will explore the principal results and themes which emerged from the coding of the data. However, results will be split up into two chapters in order to answer what becomes a two-part response to the research question given the theoretical approach for this study. Chapter 3 will focus primarily on the world which Crown attorneys create as they go about their daily activities. In this way a fuller picture will be drawn about the realities of prosecutors. Indeed, the methods they use to create order in this world will be highlighted. With this task accomplished, this chapter will also elaborate what these ethnomethods reveal about this world, highlighting issues that might be taken for granted by these members. It must not be forgotten however that this world was gleaned from interviews which had Restorative Justice as the principal theme. As such, the portrait, though useful, might not be complete. However, existing literature will be used in order to bolster potential weaknesses in any conclusions made.

At this point Chapter 4 will discuss, given this world, how Restorative Justice is incorporated. Indeed, given the ethnomethods elaborated in Chapter 3, this chapter will discuss the interplay between the two paradigms of criminal and Restorative Justice, thus answering just how RJ is taken up and used by the prosecution and by extension, the criminal justice system. In this way, it will give a thorough explanation to the research question.

Once more, in this way, this research will contribute to social understandings of the world of Crown attorneys as well as the functioning of institutionalized forms of RJ, demonstrating how it is taken up into the criminal justice system and offering glimpses into the transformations it itself undergoes or conversely those which it engenders in the system itself.

CHAPTER 3 - ANALYSIS: PRACTICAL PRINCIPLES OF THE CROWN ATTORNEY

The following chapter will discuss the results of this research in an effort to answer the larger research question. However, it will first ask: How is the world of Canadian criminal prosecution organized? Specifically, this question seeks to answer how the world inhabited by members of the prosecution persists not in a chaotic fashion but rather in an orderly manner without constant, explicit referral to basic knowledge and assumptions of the profession. This chapter will thus explore the practical methods used by participants to justify their decisions, making them rational and understandable for fellow members of the prosecution. Said otherwise, this chapter will explore the various *ethnomethods* employed by Canadian Crown attorneys in respect to their daily activities which will provide an in-depth understanding of the organization of their world.

The chapter is divided into three main sections. Each section groups certain rationales which emerged during the course of this research in order to highlight the use of these social and mental processes. Each section addresses a particular theme which emerged from the analysis of the data. Each subsection in turn can be seen as a particular instruction which shapes and guides the world of Crown attorneys. These “instructions” or ethnomethods, arose in an inductive fashion from the reviewing of the data while answering the afore-mentioned questions. Specific quotes were chosen for their representativeness in the context of the instruction being discussed. Moreover, as these instructions are grouped thematically, there is overlap and interaction between them. As such, the presentation of these instructions does not denote chronological order in the reviewing of a criminal file.

Once each method has been elaborated, an exploration of what they mean in terms of the world they shape will be undertaken. The first section deals with how Crown attorneys evaluate

defendants. The second will then discuss how Crowns evaluate potential risk and harm. Finally a discussion how Crowns feel that they ought to sustain the criminal justice system will be had.

The subsections of this chapter will thus elaborate manners in which Crown attorneys demonstrate their adequacy to other members of the prosecution, in other words ethnomethods or instructions; moreover, each one will discuss how these various justifications and considerations organize and reorganize the world of Crown attorneys through their use. As such, this chapter will elaborate, at least in part, what it means to be a Crown attorney and how order, rather than chaos, reigns in the world Crowns inhabit.

3.1 - ASSESS THE DEFENDANT

As explored in Chapter 1, Crown attorneys are meant to be representatives of justice and are asked to take into account a variety of factors when exercising the discretion that is afforded them. In deciding on the fate of a criminal case, Crowns perform evaluations of the defendant in order to make their decisions. As such, two instructions will be addressed in this section.

3.1.1 - *“Assessing the Defendant’s Character”*²⁹

In making decisions about how to proceed once participants received a file, participants spoke of certain characteristics they look for in order to proceed. These characteristics helped participants class defendants. One such characteristic was remorse:

And so when we talked about [using RJ] in that, I mean you got the sense from his Defence lawyer, that he now felt incredible remorse. At the same time, *he was doing it* [offending] out of a sense of admiration [...]. It’s not like he was [...] robbing a bank. [...], [t]rying to use [deception] as some sort of way to further a criminal offence. (Xavier, Site 4; redacted for confidentiality)

Immediately when the police came to arrest the [offender]...he immediately, very appropriately, says that he didn’t handle [the issue] very well and [...] was showing remorse quite early on”. (Shannon, Site 4)

²⁹ This subsection’s title is inspired in part by the work of Vanhamme (2009); indeed, one chapter of that work is dedicated to similar issues regarding the offender, hence the quotation marks used.

In both extracts, participants were speaking about the defendant's good-will. Indeed, both were saying that defendants showed remorse which was "very appropriate" (Shannon). It can be inferred then to not have showed remorse would not have been appropriate for this Crown³⁰. Xavier continues on to describe how the defendant showed remorse and that he did not have malicious intent in his criminal actions. In both cases, the Crowns are extolling the merits of the defendant while choosing not to focus greatly on the negative impacts of the crime nor of the defendant, even downplaying them ("It's not like he...criminal offence" [Xavier]). Crowns sought to ensure that they were not seen as a hardened criminal other, but rather highlighting their remorse to show a more repentant individual.

If this was not the case, if the defendant was not seen to be remorseful, participants spoke of how their evaluations and thus their decisions might change. Indeed, though some still spoke of remorse, they concentrated on how it might also show how a defendant to be opportunistic:

[In referring cases to RJ], one of my concerns, and I think that some of the Crowns were skeptical about it because of this, and that was that people would be accused, persons would be agreeing to go through this process not because of any genuine desire but to get a lighter sentence [...] Sort of...you know...fake kind of intent here [...]. So that's...an issue – fake remorse. (Ron, Site 4)

Ron begins to show how he takes issue with dishonesty on the part of the accused. He states that he is preoccupied with an individual who might appear to be remorseful, once again demonstrated to be positive, but who, in actuality, is simply motivated by possible benefits he or she might receive by demonstrating such a characteristic. The implication here is that a lighter sentence is a reward for a defendant showing themselves to be remorseful but that it should not be given if the individual is not. Furthermore, the supposed dishonesty the defendant demonstrates in their "fake intent" is an issue according to this participant. Others also spoke about defendants who did not even attempt to be dishonest; their negative intentions were plain:

³⁰ The fact that it was very early on also appears to have been well received by this participant. However, such a concern harkens to dealing with cases in a timely manner which will be explained in the last section of this chapter.

Frankly...there are some bad people out there [...]. Who have no interest in being accountable or being bound by the court, who pose an ongoing danger to the community and to individual members of the public. I don't see any use for Restorative Justice for those people. (Jay, Sites 2 & 4)

This participant introduces the idea of “bad” people, those who have no regard for the court, for the public, nor the victim. He states that for these individuals, one particular course of action (RJ) would not be a useful endeavour. Indeed in all of these excerpts, whether focusing on remorse, dishonesty or callousness towards the criminal justice system, Crowns are assessing defendants' behaviours post-arrest in order to ascertain what course of action would be appropriate. If defendants demonstrate what they consider to be positive traits (in this case remorse for one's actions) they might allow for a more lenient disposition, whatever they might consider that to be. If they are not, they might not be offered such an outcome. Such a process was elaborated by another participant:

So [...] most of the cases where somebody is looking at a pro-social program either to deal with the root cause of their addictions [...], I would approve [diversion]. [...] So ones where I'm iffy, I may ask...for some more information...as to what's going on, what they've been doing in the community [...] so that I can feel more confident that I am doing my job appropriately [...] (Tony, Site 2)

This Crown highlights that he is looking for “pro-social” efforts on the part of the defendant in order to consider diversion, an alternative to a full criminal justice process; ensuring this would mean he is doing his job “appropriately”. Indeed, he wants to know what the individual has done in the community post-arrest to determine if the use of particular measures are justified. If he considers pro-social programs to have been completed to his satisfaction, this Crown states that he is more likely to consider diversion; if they are not, diversion would not likely be a possibility. In this way, similar to Labelle and Vanhamme (2015), these Crowns are seeking guarantees as to the conduct and character of the defendant in an effort to assess proper courses of action.

It can be seen in these excerpts then that possible courses of action might be affected by what the Crown sees in a defendant's behaviour. If they do not perceive honesty and pro-social attitudes, this might disqualify certain more lenient courses of action, causing the defendant to be

judged more harshly by the Crown. In this way Crowns perform character judgements of the defendant which are treated as objective. Indeed, Crowns stated with confidence that a defendant *is* remorseful or *does* demonstrate fake intent. In this way Crowns place themselves to be able to confidently deduce not only the attitudes of a defendant but also their motivations.

What can also be seen here is that Crowns feel they are permitted to conduct these evaluations. Given the theoretical framework of this study, it can be understood that Crowns, in discussing their behaviours and thought processes, reveal acceptable behaviour. Thus, taking into account the efforts made (or not made) by a defendant post-arrest and pre-sentence can justifiably be taken into consideration when deciding on the course of a criminal file as it helps reveal the character of the defendant in question. However, separating defendants into certain categories of good and bad or honest and dishonest is not likely done for simple categorization purposes. As will be seen presently, such categorizations may help Crowns perform other duties.

3.1.2 - Assess Potential Sanction(s) for Defendants

Keeping in mind that this research focuses on the use of RJ in the criminal justice system, Crown attorneys demonstrated that some sort of sanction ought to be applied to defendants; indeed sanctions appeared almost essential to their intervention. Indeed, though the following point will be explored in further detail in the next chapter, most Crowns spoke about how RJ did not take away the possibility to sentence or otherwise sanction a defendant:

Generally speaking, I'll look at [a case] carefully, depending on [...] their ability to comply with past dispositions [...] to determine whether or not the [...] diversion is appropriate. [...]. And once we, you know usually 6-8 months, that there's an appropriate period of stability and people have done what they've indicated they would, we will stay the criminal charge. (Tony, Site 2)

In this excerpt, the participant is speaking about how he is open to possible courses of action such as dropping charges, and thus necessarily forgoing any formal sentencing in the knowledge that the defendant will undergo an “appropriate period of stability”, to be reported to him in one way

or another before he allows charges to be dropped. Indeed, here he speaks of ensuring “stability” and “complying with past dispositions”; in mentioning this, he is seeking confirmation that this defendant is trustworthy of having charges dropped. However, even in this scenario where sentencing would not happen, this Crown is still able to guarantee some period of supervision through which a defendant must pass before being set free of criminal justice intervention, a quasi-sentence. If he or she can comply, then they can be considered for a certain sanction (or lack thereof); if not, they are not considered stable or deserving of such a disposition. Thus even in a situation without formal sanction, there can be some oversight and the continued threat of sanctions should the Crown deem them necessary. In this way, the sanction appears to be the reference point from which other dispositions are compared (as opposed to no sanction). However, despite the privileged place of criminal sanctions, Crowns demonstrated that even having a lenient position ought not to disqualify Crowns from seeking some form of punishment:

If you were agreeing to [RJ], you would know that that would be something on the table, that it would be a mitigating factor. One thing I would have been concerned about as a Crown was... is it going to entirely take the place of punishment? (Jean, Site 4)

In this particular excerpt, the Crown demonstrates further that some form of sanction is necessary. Indeed, in discussing potential sentence mitigation, he states that such a possibility would be known if the choice of using RJ was made; what could not be supported however is if this mitigation was so great as to “take the place of punishment”³¹. Thus, if a sentence is mitigated, such an outcome is tolerable as long as there is still some sanction or some punishment for the defendant. In this case, it can be seen that the Crown places themselves in a position of authority whereby they permit the use of certain potentially sentence-reducing measures as long as such measures do not endanger the place punishment reserves at sentencing.

³¹ Though such a discussion will be had in the following chapter, such a statement insinuates that RJ is *not* punishment.

This same participant also discussed how sometimes Crowns need proof to demonstrate why the lowering of a sentence (once more considered to be beneficial for the defendant rather than for the Crown) is appropriate:

So the effect it [RJ] has is positive record building. It puts something concrete on the record you know, aside from the synopsis of what happened, a criminal record if any, victim input up to that stage. Aside from those hard facts, it puts something there that can be used to bridge a gap between two positions and to lighten the sentence. [...] And sometimes what you're looking for as a Crown... is something to latch onto that will allow you to lighten the sentence to get something resolved [...] (Jean, Site 4)

Indeed, here he is seeking “something to latch onto”, something prosocial as discussed in the previous subsection, which will provide some “positive record building”³²; he is seeking something prosocial to justify the lightening of a sentence. Stated otherwise, he is trying to demonstrate to himself and others that this defendant is deserving of the benefit that comes from a lighter disposition. Taken alongside his previous statement, this Crown demonstrates the acceptable place for some sentence mitigation in their world so long as there is some “positive record building” being undertaken by the defendant.

It is revealed here is the question prosecutors ought to ask themselves when looking at a case is “What sanction, if any, does this person deserve and why?”. Indeed, these Crowns are seeking to justify particular sanctions or other dispositions that might be considered lenient. However, as in the first example, the sanction might take the form of supervision before dropping charges, thus allowing for a large understanding of what a “sanction” is.

Corroborating this concern for sanctions or other forms of prosecutorial supervision, one participant, speaking about when she might make use of certain alternative programs, stated quite succinctly that “With a more serious matter, there *will* be a sanction. It *was* criminal” (Shannon, Site 4; *emphasis in original*). Here she is quite clear about the need for a sanction in the event of a “serious” crime. The coupling of the two is quite simple: with one, you must have the other. Indeed,

³² Though this Crown mentions it will help “get something resolved”, this will be explored later in this chapter.

her tone when stating this was matter-of-fact, indicating such a coupling should be plainly obvious, as if begging the question. Thus, the decision has already been made that the defendant is deserving of punishment; there *will* be a sanction; as alluded to above, the question remains what it will be and how harsh or lenient it will be. However, here she has specified that it is a serious crime that requires a sanction; such a specification denotes that a less serious crime might not necessarily require a formal criminal justice sanction. Indeed, while Pires (2001) discusses the coupling of crime/sanction, it is possible that such a coupling is less powerful when the crime is perceived to be less serious by Crown attorneys.

Similarly, a few Crowns specified how their quest to ensure a sanction does not just mean *any* sanction but rather an *appropriate* sanction. One Crown was explaining how other members of the prosecution might respond to the possible use of alternative measures:

“If he [the offender] does [Restorative Justice] then the judge is likely to give a lighter sentence”. So then they get a lighter sentence! Who cares?! You know, if it’s an unfit sentence, we will appeal it. And if it’s not an unfit sentence, who cares? They’re judges, they’re deciders! That’s what they get paid to do. That is in fact their job! To decide things! (Nick, Sites 3 & 4)

Such an assertion, while ostensibly placing the responsibility for sentencing on judges, reveals a measure of control retained in the participant’s ability to appeal a sentence should he judge it inappropriate. Thus, the need for a sanction is not in question here; the coupling of crime/sanction remains intact (“If he...lighter sentence”); the question remains what Crowns think the defendant deserves³³. However, while this Crown states that the judge will make such a decision, he recognizes his ability to appeal the decision, thus allowing the Crown to further arrogate control of a case even into the sentencing stage, strengthening the position of authority Crown attorneys inhabit in the CJS. In this way, as discussed by Paciocco (2014), the roles of Crowns and judges

³³ However, it is also understood that should a Defence attorney feel a sanction is too punitive, they may also appeal, demonstrating that they too have a measure of authority in this situation.

are greatly intertwined while Crowns are able to influence the actions of judges through their decision-making. This is interesting given the fact that there is a:

“virtual absence in the *Criminal Code* of any substantial set of provisions concerning the procedural rights and duties of prosecutorial authorities at the sentencing hearing...With the exception of Sections 592 and 740 concerning proof of previous convictions, none of them deal with prosecutorial responsibilities at the sentencing hearing itself, but rather with various powers and rights which arise *after* a sentence has been imposed” (Stenning, 1986: 237).

Thus, despite a dearth of clear, explicit duties at this stage of the criminal process and also the place occupied by the judge, Crowns continue to affect the process in a way which is congruent with their own rationales. Indeed, Szott Mhoor (2004) states that the prosecutor is the central actor in in the adversarial system (:208) and continues on to lament the lack of an “effective counterbalance to prosecutorial power” (*Ibid.*).

In these excerpts, the Crowns make clear that sanctions are a necessary part of their world. Even in situations where somebody might not proceed to formal sentencing, there are still manners in which Crowns are able to exercise control over the situation by offering to defendants or their Defence attorney something they perceive to be a reward in order to ensure that *something* has been done to respond to a crime; in such a way, sanctioning appears to take on this definition of doing something, of responding to a crime and intervening in the life of an individual through the criminal justice system. In such a manner, Crowns can be seen as operating from a position of authority in the ways they judge certain sanctions (informal or otherwise) to be appropriate or not.

3.1.3 - Synthesis: What do They Deserve?

Taken together, several hypotheses about the world shaped by Crown attorneys emerge. First and foremost, a typology of defendants begins to take shape. Though only rudimentary at this stage, not least because this research concentrated primarily on offenders in a Restorative Justice context, it can be seen that Crowns perform a separation between “good” and “bad” defendants, those that will take responsibility for their actions, engaging in prosocial activities and those

defendants who have no interest in doing so. Other such as Sudnow (1965) and Dupret (2001) demonstrate how prosecutors perform various categorizations of defendants. However, participants in this research appear to perform such categorizations based on judgements of character, themselves based on the context of the offence and what has happened in the interim between arrest and the decision of the Crown attorney. Similarly, Vanhamme (2009) also discusses how judges perform similar evaluations at sentencing, taking into account factors beyond formal, written law, supporting these conclusion. This typology, while potentially useful in the world of the prosecution, might also wrongfully colour the impressions of Crown attorneys, thus having some effect on their decision making. Nevertheless, it reveals a sort of tool that Crowns use in their case management.

Such a typology points to guiding logics of retributive theories of punishment in the criminal justice system. Indeed, as Tonry (2018) states, “Retributivists of every stripe believe that defendants’ blameworthiness is fundamental in some way to justifying punishment” (:130) and that “moral blameworthiness is an important consideration in determining just punishments” (:128), hence trying to ascertain the blameworthiness of defendants. Thus, even when a Crown might consider a defendant to be attempting prosocial activities such as RJ, in an effort to make sense of their character, they underscore the continued importance of punishment which includes denunciation, often seen as a component of retribution (Tonry, 2018), while also being open to the possibility of rehabilitation. One Crown stated that:

But I don’t see it [RJ] assisting in terms of general deterrence or denunciation but that’s why it’s not the only solution right? (Nick, Sites 3 & 4)

Thus for him, denunciation, as well as deterrence, necessarily form part of an appropriate sentence. Both sentencing principles ask what the defendant deserves (Tonry, 2018). Indeed, it has been made clear that, despite potentially prosocial or other positive attributes of a defendant, there must

still be some sort of repayment for the crime. Indeed, it must form part of the sanction, itself a requisite response to a criminalized act. While deterrence will be addressed later in this chapter, concerns with retribution became quite prevalent.

Furthermore, Van de Kerchove (2005) states, “la rétribution se tourne essentiellement vers le passé, comme le suggère la signification littérale du terme: attribuer en retour.” (:29). Indeed, in all of these excerpts, the assumption is that something negative (punishment) *will* follow a crime which has taken place in the past. However, these participants attempted to demonstrate positive aspects of the person which would lessen the punishment. In this way, a sort of equilibrium is sought: an eye for an eye, yes, but if it can be demonstrated that it was really only an eyelash that was harmed, then only an eyelash would need to be taken in repayment. Thus the simple fact that punishment follows the crime does not point to the privileged place of retribution for participants; rather such evidence is based in the efforts of Crowns to diminish the perception of the past harm in an effort to lessen the requisite punishment which is to follow. A past harm thus continues to justify a future harm. It appears then that such a retributive principle pervades the world of the prosecution.

Interestingly however, Tonry (2018) discusses how in evolving forms of retributive theory, considerations beyond simple moral blameworthiness may be taken into consideration in assessing what recompense is necessary in the wake of a crime. Indeed, “If the substantive criminal law does not take account of these and other complexities of human lives, decisions about punishment can incorporate what Hart (1968) approvingly called informal mitigation” (Tonry, 2018: 138), something which these participants achieve as, for them, it is not simply the past harm that is taken into consideration but other factors not native to the traditional retributive framework.

3.2 - ASSESS SAFETY AND RISK

The next two subsections will demonstrate how Crowns are guided by logics of (1) ensuring the safety of society, and (2) managing potential harm to victims. These guiding logics were placed together because they were presented as particular goals concerning the assessment of potential risk which Crowns feel they ought to conduct and, moreover, through which they justify their actions to other members of the prosecution.

3.2.1 - Reduce Crime, Protect Society

Participants spoke in great length about how their efforts seek to reduce crime in society, thus protecting it in some way. Indeed it emerged that Crowns, through all of their actions, seek to eventually reduce or even eliminate crime in the future. They often mentioned trying to address the root causes of crime such as addiction or responsabilizing and educating a defendant in the hopes that they would commit no further crimes.

Participants were nearly unanimous in their stated concern for reducing crime, which was frequently conflated with protecting society. One participant was quite introspective and thorough in describing his motivations when dealing with a criminal file in his role as Crown attorney:

There are different sentencing principles [...]. And they all boil down into two things: preventing this accused from ever doing it again and trying to prevent other accused from ever doing it again...Anything we do, and the tools we use to sentence people. Ultimately it is about reducing recidivism, right? [...]. “What will stop this person from doing it again?” – Rehabilitation. Specific deterrence. Jail...Why do we want to rehabilitate them? So they don’t become recidivists. That’s what we want...No more recidivists. So...anything that I think will help reduce recidivism is valuable and protects Canadian society. (Nick, Site 3 & 4)

Such thoughtful insight was mirrored by another participant:

The hope as a Crown is that it [their efforts] is going to either reduce recidivism or make this person in a better position when they are back out in the community...And then hopefully less crime. That’s what we want. Healthier communities, less crime. So, you know, that’s the hope when we divert [...]. (Tony, Site 2)

These two excerpts demonstrate that ultimately Crown attorneys are looking to reduce recidivism in order to benefit society, so much so that a mission begins to appear with a crime-free society as its goal, deterring individuals from future crime. Though one (Nick) specifically says that reducing

recidivism is valuable in order to protect society, the other (Tony) speaks of “healthier communities” in which recidivism is reduced. Indeed, this Crown does not simply speak of a healthier individual post-conviction, but rather of a healthier *community* as a whole. Though he is not as explicit about protecting society as Nick in the first excerpt, it is not unreasonable to think that in speaking of a “healthier community” and also of “less crime”, Tony was including an environment in which other members of the community would not be victimized, thus offering them protection as well. Indeed, reduced crime is equated to fewer victims.

Protecting the public was endorsed by most every Crown who participated; however, there were slight differences on how they emphasized this could be achieved, whether that be (a) addressing the root causes of crime and/or (b) the education and accountability of the defendant.

(1) Addictions

Several participants spoke about addressing issues defendants might have with addictions:

[Some offenders are] stealing for...the purposes of feeding their addiction but also dealing with the trauma they suffered through their whole lives. [You] get rid of 80 or 90% of criminal matters if you cured the addictions issues that human beings face right...So many times people are doing these things [crimes] because of drugs...but at some points, people who have been charged have reached a point where they sincerely want to make an attempt to break their addiction [...]. And a lot of times it doesn't work...They go back to the criminal lifestyle, but as you know it takes *multiple* attempts [...] And any time people seem genuine in their attempt to deal with their addictions issue, knowing that that has been the cause of their criminal lifestyle, you try to help them [...]. (Xavier, Site 4; *emphasis in original*)

In this extract this participant makes reference to addiction being, by his evaluation, a contributing factor to a defendant's criminality. Indeed as he stated above, you would “get rid of” 80 or 90% of criminal cases if addictions were cured. He also discussed that sometimes the prosecution's efforts do not work and that the individual will return to a criminal lifestyle. This suggests that for these programs to work, the individual would *not* return to a criminal lifestyle, or to desist in other words, reducing or even completely eliminating recidivism. Indeed, success for Crowns can thus be understood as intervening upon a defendant and having them abstain from criminal activity thereafter by eliminating what they see as the cause of a defendant's criminality. In this way, with

less crime, there are necessarily less victims, whether that be society in general or individuals. Thus in seeking to end criminal lifestyles, Crowns work to lessen the cost of crime on society by working on the defendant. Though, perhaps it is more apt to say that they work *with* the defendant for such an approach places responsibility in the hands of the defendant; indeed, Xavier states that if he perceives a genuine attempt to tackle addictions issues on the part of the defendant and that he should “try to help”. In this sense defendants are not passive recipients of Crown attorneys’ attempts at addressing addiction but rather active participants in their own rehabilitation, responsible for their own actions.

In this excerpt about addiction, Xavier (Site 4), like others, returns to evaluating the defendant’s intentions and motivations as explored in the previous section. He speaks of an arduous, criminal, and almost pitiful path a defendant might fall into as a result of addiction (“There could be...whole lives”). He describes how sometimes they have a “sincere want to make an attempt to break their addiction”. Not only does this give the impression that addiction is seen as a sort of prison in and of itself from which a Crown might be able to spring the defendant, it stresses that defendants need to have a desire to escape their addictions as well. Indeed, he states that only at “some” points do defendant have this desire to escape. Thus it is deduced that not all defendant will demonstrate the requisite genuineness or a desire to change and thus as a Crown he might not endeavour to aid such individuals through what he acknowledges might be “multiple attempts”. Such a distinction between those that are ready or not ready to address their personal issues harkens to the “good” or “bad” defendants spoken of previously in that some are ready and some are not ready to address their addictions and the crimes which are necessarily intertwined according to these participants. Indeed in the eyes of the prosecutor, certain defendants are or are not appropriate candidates for attempts to rehabilitate them into law-abiding citizens.

However, this participant also argues that there is a great risk for failed attempts which include a relapse into a criminal lifestyle. Once more, Crowns are seeking to ascertain which defendants demonstrate sincerity or honesty in order to determine a path through the criminal justice system. What is added at this point is an assessment of the risk the defendant might pose due to characteristics such as addiction; in this way, rather than being focused predominantly on issues of retribution, evaluations of rehabilitation and subsequent deterrence present themselves.

Such risk calculation was prevalent with many participants and will continue in the next excerpt; however, emphasis shifts and is more explicitly concerned with community safety:

Sometimes because of mental health addictions, homelessness [...] sometimes you have to be flexible...Sometimes it means...looking at how they can better themselves and in that way bettering the community. Like, you know, checking into detox or sometimes it means taking a course, getting a health card [...] and [if] people are willing to deal with the mental health court worker, they're willing to address the root cause of their criminality. [...] [I]t really depends on the individual and how they do in the community. (Tony, Site 2)

The idea is that these individuals will better themselves but with the ultimate goal of bettering their communities (“and in that way bettering their community”), giving back to them in some way upon their return. Tony spoke of the individual receiving a health card, thus gaining them access to health services, helping them address (and subsequently rectify) underlying issues in that individual’s life that may have driven them to criminality. In this way they might be giving back to the community by abstaining from crime, helping achieve the Crown’s mission of prosecution. In this way, participants demonstrate that rehabilitation should be accorded a place in their considerations; indeed, for this theory of punishment, “[t]he intention is to cure offenders of their criminal tendencies by changing their personality, outlook, habits or opportunities so that they are less inclined to commit crime” (Hopkins Burke, 2012: 159). Moreover, such attempts seek to include the offender in society rather than exclude them through the use of incarceration, another characteristic of rehabilitation (Raupp, 2013: 163).

The Crown, in exercising their duties as Crown, thus intervenes into aspects of the defendant's life which they judge to be contributing to their criminality for the benefit of the community. While the defendant would gain certain benefits in this logic, the focus of such concern rests ultimately with how such intervention will benefit the community despite intervention occurring on an individual level. In this way, the defendant becomes a vector to improve communities through the reduction of crime, promoting desistance through rehabilitation.

(2) Responsibilization and Education

As mentioned, some participants while demonstrating concern for the safety of society emphasized different manners in which to do so. While the differentiation between focusing on addictions or on the moral character of an individual are irrelevant in this ethnomethodological study, what is interesting in these approaches is their different consequences when trying to accomplish the very same goal of reducing recidivism and protecting society:

Sometimes the acts [crimes] are based on a lack of understanding. They [the offenders] know acts are wrong but they don't know how people feel. In [one sexual assault case] they [did] not understand the consequences of their actions or [did] not appreciate it...This understanding can be something that is accomplished if it goes through [an RJ program] ... This will also serve to protect other women down the road... I think you can protect the public by better informing and making more responsible citizens [...]. How do you protect society by prosecuting them? [...] If we *prove* it and they're found guilty then they're held accountable. But what do they learn from that? What they're learning is how not to get caught. (Shannon, Site 4)

You know, you're making society safer by having somebody take responsibility for what they've done and make reparations...and come away from the system feeling like they've been treated fairly too you know? (Shelby, Site 4)

In this way, participants suggested that these defendants could themselves benefit but in so doing, benefit society. Indeed, they explained that if defendants learned something and better understood the consequences of their actions, they would be less likely to reoffend ("This will also...responsible citizens" [Shannon]; "making society safer" [Shelby]). Once more, participants demonstrate a concern for the well-being of society, wishing to create "responsible citizens" who feel they are "treated fairly" in the criminal justice system.

Responsible citizens can be seen, in this criminal justice context, as those who understand their actions and their consequences, and “who take responsibility for what they have done” (Shannon, Site 4). In these situations, a sort of moral (re)education of defendants appears; Crowns discussed attempting to educate defendants through their intervention in the hope that learning responsibility and understanding the consequences of their actions, they would abstain from crime in the future, learning their lesson so to speak. Taken into consideration with the previous section regarding the assessment of defendant characteristics such as honesty and remorse, it is interesting that at this point participants continue to seek to foster more pro-social attitudes. Indeed, remorse might help demonstrate one is taking responsibility for their actions, that they are becoming a responsible citizen and thus less likely to commit a crime in the future (Walgrave, 2008). As seen previously however, the key is that the defendant must assume responsibility and work on themselves.

It thus begins to emerge that defendants who are prosocial in taking responsibility for their actions and are perceived to sincerely want to work to become responsible citizens will be perceived more positively by Crown attorneys and more likely to benefit from favourable dispositions from participants in their role as gatekeeper to the CJS.

3.2.2 - Managing Potential Harm to Victims

Victims are at the center of Restorative Justice theory; indeed, it is the harm they suffered that, to some measure, should be restored (Walgrave, 1999). However, this is not necessarily the main focus of the criminal justice system (Zehr, 2002). Be that as it may, victims, and particularly their well-being while involved in the criminal justice system were often spoken of by the participating Crown attorneys. It should be noted however that given that interviews concerned RJ, it was anticipated that such concerns would arise. Nevertheless, it is revealing of an

understanding about the fundamentals of Restorative Justice; while such concerns will be revisited in the following chapter, at this point the management of victims will be explored.

Nearly all Crown attorneys interviewed described their hesitancy to use these so-called RJ programs if there was any possibility that a victim could be put in jeopardy, whether that be emotional or physical. The uniformity in their responses was staggering. One Crown stated that:

I remember I did have a case of impaired causing bodily harm... That went that route [through a Restorative Justice program]... So I ... [found] out whether she was amenable to it [...]. I was also firm in the thought that a plea had to be entered before we went that route. And the reason for that is certainty that... I couldn't put the victim through the emotional turmoil of going through this and then have things change as we went down the road. I had to be able to tell her "This is the outcome that is going to happen. He has plead guilty". And I also in the course of that negotiation discussed with the Defence about fixing a range of sentence [...]. So my main concern as the Crown was whether it was appropriate for the victim. I didn't want to do something that would revictimize them [...]. (Jean, Site 4)

This Crown acknowledges that victims of crime may go through "emotional turmoil" and seeks to avoid it by offering some certainty to the victim. For him, such certainty in the outcome (i.e. that the defendant has plead guilty and *will* receive a sentence in an agreed-upon range) will reassure the victim that regardless of what happens, if they participate in a certain program or not, a particular outcome is guaranteed. This would be beneficial to the victim so as not to produce an unexpected and potentially harmful result ("something that would revictimize").

As such, it is clear that this Crown believes the CJS *capable* of revictimizing the victim with its potentially uncertain outcomes; interestingly, this Crown presents RJ as introducing the possibility for a defendant to have their sentence mitigated and potentially changed in an unexpected manner, thus harming the victim. However, as a Crown he is also capable of judging when this might happen and is able to take steps to avoid such a situation ("So I...amenable to it"). He seeks to offer certainty to the victim in the form of particular sentences given the agreed upon guilty plea, which he requires ("I had to be able to tell her...a sentence within this range"), avoiding a potential trial. In so doing, he feels permitted and able to exercise a degree of control over the course of a criminal matter, ensuring a guilty plea is obtained and a certain sanction range is

guaranteed so as to protect the well-being of the victim. In this way, though the CJS can be a source of potential harm for the victim, the Crown is able to ensure that it can instead guarantee safety and certainty to them. Thus, the CJS appears to be understood as potentially harmful to victims through decisions Crowns might take such as RJ or even a trial; however, with Crown intervention, the CJS is also presented as quite capable of ensuring that little or no harm comes to them.

Further cementing the fundamental character of such a task for Crowns, another participant even laughed at the possibility that a victim might be put in jeopardy, offering what he frames as a sort of maxim for Crowns:

[Victim safety] is one of the goals of course... You can't do something where you think ultimately- Well, you certainly can't do something where you think the victim is going to be in jeopardy (laughs). (Xavier, Site 4).

Here, in responding to a question asking if a victim's safety plays into his decision making, he replied in the affirmative. He then takes a pause, starting a sentence and then cutting himself off to reply matter-of-factly that you "certainly" can't do anything that could put a victim in jeopardy. Indeed, he appeared to grapple with how to properly express such an idea. His subsequent laugh after this statement points to the incredulity of such a situation and that such a pronouncement is so basic as to be overlooked. Indeed, it is possible he struggled in finding the proper words, restarting his sentence because of its fundamental nature which, as a Crown, he takes for granted. For this reason, he may have had to think at a more basic level which he already does naturally.

It can be seen that Crowns attempt to avoid harming victims through an arrogated ability to identify potentially dangerous situations, exercising their discretion and control to avoid them. Presently however, this ability and the ways in which Crowns identify potentially harmful situation will be explored. Indeed, as will be seen shortly, the majority of participants mentioned that in cases where there is a potential power imbalance between victim and defendant, certain avenues of dealing with a case would not likely be a course of action; the principal reason was the potential

harm they thought victim might suffer as a result. The following excerpts further demonstrate several indicators which might solicit categorizing such a situation as risky:

(1) An age difference between parties

Brendyn: OK. So you mentioned that there were certain cases, like murder and things like that that you wouldn't really think are appropriate or [...] not eligible [for RJ]...So what might be something that is ineligible versus inappropriate for you?

Jean: So I would say virtually ineligible would be a murder...I don't think it [RJ] was ever asked for. (Pause). It...The stakes I guess are just too high...And something where it's inappropriate... (Pause). Where there is a significant age gap or power gap between the offender and the individual. If you're dealing with a child victim...Or a very young victim. Somebody who is not on an equal footing...maturity-wise let's say with the offender. Where there could be further harm to the victim (Jean, Site 4)

(2) A physically abusive relationship

So when I am looking at [a case], where it's you know, restoring a relationship (um) first of all if it's a domestic situation, I don't use it [RJ]. There is a power imbalance there....I consider, you know, the nature of the charge, so whether, you know, domestic, or...If it is too serious or...if the victim could be in jeopardy. [...] I would also consider...the relationship between the accused person and the victim. So if there seems to be a power imbalance of some sort [...]. There is a risk to the victim. (Abby, Site 1)

While I did not push for further explanation, rather than offer a specific definition of what a power imbalance is, participants offered examples, often speaking of domestic violence cases (as seen above) or offences of a sexual nature involving children as examples of such an imbalance. Consequently, these references to power imbalances do not simply refer to physical strength but likely also to social, economic, or cultural disparities which differentiate the individuals and could potentially allow one party to further victimize the other.

Thus, in the parameters of the CJS, to permit a situation in which power imbalances can emerge freely is seen as a potentially harmful situation for the victim, something unacceptable for the Crown. As such, it becomes clear once more that Crowns feel they can and should ensure protection for the victim from the defendant through the CJS. Interestingly though, they also understand that they should protect them from a potentially harmful justice system. In this way Crowns place themselves as the protectors of the victim, cognizant of the risks the criminal justice system poses for these individuals but also capable of avoiding the danger to some measure.

However, at the same time Crowns continue to place themselves in a position of authority, outside the calculation of potential risk to victims but also concerned with issues beyond their safety.

3.2.3 - Synthesis: Who Could Be Hurt?

This section has explored two ethnomethods, or instructions for being a Crown attorney, which concern the assessment of risk and safety by members of the prosecution. Indeed, it was demonstrated that Crowns assess potential risks to society in the form of recidivism and crime and also the risk to victims from both the defendant and also to a certain degree, the potential harm from the criminal justice system itself, otherwise known as secondary victimization (Wemmers, 2017). In both cases, Crowns demonstrated that to act and be seen as a competent member of the prosecution, they must avoid these risks, both physical and emotional, as much as possible; nevertheless, sometimes avoiding one entails taking another, lesser, risk.

While Crowns demonstrate that they should attempt to reduce the potential for revictimization of the victim by the defendant, they also show that they should take steps to not add to it through the criminal justice process, whether that be through a trial or through the non-application of criminal sanctions on the defendant as mentioned briefly earlier in this subsection. With this said, it makes all the more sense that one participant stated, with little elaboration, that “Crowns see themselves often as the... protectors of the victims” (Jay, Sites 2 & 4). This is interesting when contrasted when the same Crown also stated that:

Because the Crown is not the victim’s lawyer. It has a higher calling to...protect the community and to uphold the law. (Jay, Sites 2 & 4)

Thus, while the Crown should attempt to avoid harm coming to the victim, they also have a “higher calling”. They must “protect the community and to uphold the law”; indeed, while upholding the law would include protecting the victim, the law is not necessarily upheld when the victim is protected. In this way, a sort of hierarchy appears to emerge whereby Crowns should first ensure

that the victim is protected from the defendant³⁴. Indeed, it was mentioned several times how participants quickly and unequivocally stated that victims should never be put in a situation where the defendant might harm them further. They must also ensure that society is protected from the defendant as well. It should be noted that there might be overlap between these two as a victim can be protected in the same way as society; as such, it is difficult to say definitively if Crowns place one of these rationales before the other. Thus it might be more apt to say that the protection of victims and society from defendants is the first concern of Crowns. Indeed, participants discussed the topics nearly interchangeably; though, victims were occasionally given a modicum of reverence not afforded to the public generally, and as such were separated. What can be said however is that if these two are ensured, the Crowns' next concern would be ensuring victims are not harmed by the criminal justice process.

Furthermore, concerns with the rehabilitation of the defendant can be gleaned from these interests. Indeed, many participants spoke about helping defendants overcome addictions or to become better, moral citizens while being flexible in their position so as to promote their reintegration into society, concerns for this theory of punishment (Raupp, 2013). Despite this, for these participants, rehabilitation was inextricably linked with the safety of the community for the goal of rehabilitation is to address those factors such as addiction which contributed to one's criminality. Such concerns were congruent with Fanflik and Troutman (2007) who discussed prosecutors having similar concerns, though that study demonstrated less consensus as to this role. However, Labelle and Vanhamme (2015) found that Crowns were generally uninterested with such concerns in the context of pre-trial detention. This may be due to the nature of the current

³⁴ Though in this excerpt the participant speaks of upholding the law coming before the needs of the victim, there was not sufficient data nor space to discuss this issue in further depth.

study whose focus is RJ; in this way perhaps such concerns with rehabilitation might only be so strong among those prosecutors who are familiar, and potentially receptive to the ideals of RJ.

It appears fundamental then for Crowns to assess the safety and risk of various parties in order to decrease recidivism, thereby protecting victims and the public. Indeed, in their role as gatekeepers to the criminal justice system, participants demonstrated how Crowns perform such risk assessments with such ease and naturalness. They also demonstrated that the criminal justice system has the power to harm but also the power to protect justice-involved individuals when they are able to perform these assessments. Indeed, underlying these critiques of the system is an assumption that both they and the criminal justice system are capable and appropriate interveners.

3.3 - SUSTAINING THE CRIMINAL JUSTICE SYSTEM

This research also deduced how Crown attorneys ought to promote the CJS and its use. Indeed, they demonstrated that in their world it is accepted and sensible to ensure State resources are used prudently in their quest to protect society, and that confidence in the system is reinforced.

3.3.1 - Avoid Frivolous Use of Resources

While Crowns intervene in criminal cases as they attempt to create an orderly world, there are certain considerations which might make such organization more difficult. For example, according to many participants, certain fiscal and material realities make the achieving of the crime/sanction couplet difficult. One such difficulty discussed by many participants was the lack of resources in the criminal justice system, from funds, to personnel, and to court space:

But we just can't deal with all these offences. [...]. So it's an administrative thing too [...] because we're having to make calls on what offences we can deal with right? We only have so many resources. And...that can be difficult sometimes when you're talking about criminal offences. [...] Because we just don't have the resources [...] that would have met the definition for a criminal offence right? (Xavier, Site 4)

Another Crown, in responding to a question about why he might not necessarily go for the “tougher” sentence responded:

Ya and I think that's the perception of the Crowns that they just go in looking for a hard sentence. But the reality is that for the volume of cases that come into the criminal system only 10% or less go to trial, which means that 90% resolve. [...]. So the job of the Crown, from that point of view, is 90% resolving cases and 10% running trials. [...]. And...the workload of the courts is only manageable if cases are resolved so the Crowns are responsible for doing that. [...]. And they have to make accommodation [...]. (Jean, Site 4)

In this excerpt, though this participant states that Crowns do not always look for a “hard sentence”, he nevertheless alludes to the fact that Crowns are indeed seeking *a* sentence, corroborating what was discussed in the previous section. However, similar to Xavier before him, he acknowledges that accommodations need to be made in order to “manage” the workload. The implication is that seeking a “hard” sentence would create more work and require more resources than advocating for a lighter sentence or through other forms of resolution. They feel they must “make calls on what offences [they] can deal with” (Xavier, Site 4). Thus, the issue of a Crown’s workload appears to force Crowns to make decisions about how to proceed with a case due in part for “administrative” reasons. Such a concern is mirrored by another participant:

Time is an issue...But only when we look at it in terms of, you know, how much time has it taken to get rid of this case. Because, you know (*laughs*) that's what we're told. “Get rid of this case. Get rid of them”. (Shelby, Site 4)

Indeed, this shows a preoccupation with the time it takes Crowns to close cases. They should get through large numbers of cases, settling the majority of them in order to get them speedily to some resolution. This is especially salient given the climate since the Supreme Court of Canada *Jordan* decision in June 2016 which instituted time limits on the duration of cases before being ruled unconstitutional and, as a consequence, potentially having charges stayed. However, this reveals that participants feel that there are not enough prosecutors for the workload they face; indeed, they cannot possibly take every crime to trial and must resolve instead. Thus, in such an environment, should a Crown not attempt to seek to settle cases before trial, they would likely be questioned by other members of the prosecution as they risk allowing a potentially guilty defendant to avoid sanctions should it take too long. However, as discussed previously, it is likely minor offences that

would require settling since, according to these participants, they do not demand the same level of sanction. More serious sanctions on the other hand might be more easily accepted as requiring more resources than other cases.

Indeed, the Crowns see themselves and their skills as valuable resources that cannot be wasted on every case “that would have met the definition for a criminal offence” (Xavier, above). With this said, though not explored in great depth in this research, there is a hierarchy of cases which merit prosecution and greater time investment than others as this Crown mentioned:

We just don't have the resources here anymore to prosecute everything in the criminal code. And the question is whether or not we need to as well. (Xavier, Site 4)

Though which sorts of cases these might be is not well defined in this research, it is not necessarily the purpose of it. What can be said currently however is that for Crowns, the reference to a perceived lack of resources colour the decisions-making in their world; indeed, for them, they must make decisions about which charges to pursue and not pursue as well as *how* they might pursue them in an effort to respond to the criminal activity that comes to their attention. The only way to do so is to be efficient and to avoid wasting time in potentially lengthy litigation.

Indeed, for the proper functioning of their world, and of the CJS generally, Crowns must find ways to resolve cases, closing them in a timely manner. One manner in which to do so, according to this Crown, is to resolve the case without a trial in some kind of plea bargain or other resolution outside the walls of the court. Continuing from the excerpt above, Xavier states that:

The good thing about *Jordan* is that it is forcing us to look at some of these things anew. There [...] has been now for a while ...the realization that a lot of the more minor offences don't need the full criminal sanction [...]. That has been around for most of the time I have been a Crown. I think it's just [...]...we're realizing that we have to use it [alternative measures] to a greater extent now because of the stress upon the legal system. (Xavier, Site 4).

This nuances statements made in the previous section regarding the use of sanctions; indeed, while Crowns demonstrated that in their world, sanctions ought to be the consequence of their intervention, based in part on the merits of the defendant and their case, the perceived lack of

resources might affect what is perceived to be the appropriate sanction. Indeed, due to the “stress upon the legal system”, some more minor cases might not receive the “full” criminal sanction; rather, Crowns would attempt to find ways for the CJS to intervene in the case while not necessarily dedicating significant resources to them as a more serious case might require. As discussed in the previous section, such a statement reiterates the coupling of crime/sanction as described by Shannon (Site 4); however, while she specified serious crimes require criminal sanctions, in this scenario, less serious crimes should still receive some sanction, albeit not “full” criminal sanctions.

3.3.2 - *Protect the Criminal Justice System*

Another issue that participating Crowns addressed in discussing their decision-making processes for dealing with their casework was the anticipated perception of the Canadian public. Indeed, it emerged that for many Crowns there was a duty to ensure that the reputation of the CJS was upheld. Crowns spoke of how their decisions are public and are visible, not just to fellow members of the prosecution, but also to the media and the Canadian public generally:

There’s a real tension amongst Crowns, between Restorative Justice and community safety. And traditionally, community safety *meant* some sort of punishment. Often but not always custodial...And ...community opinion I guess...Sort of a three-cornered conundrum that Crown attorneys face when they are considering how to proceed with a case. (Jay, Site 2 & 4)

Claudia: So, it’s [reoffending] very concerning [...] and [if] in the meantime, there was a further offence while they were waiting, you know, while they are participating in [a program]. That’s very concerning and that’s what we want to avoid. That’s a scary possibility [...].

Brendyn: Certainly. (Um) And you were saying it’s a scary possibility that someone might reoffend. Does that...Is that a concern of ...issues of public perception of the justice system come into play there also?

Claudia: [I]f there is a joint-submission on any type of disposition, whether it’s a sentence or to refer a matter for Restorative Justice, that’s one consideration the Crowns have to think about. And it’s a discretionary type of decision so the buck stops with you as a Crown if you referred something to Restorative Justice and that person reoffends and something bad happens. The weight of ethical, personal responsibility there is pretty significant [...]. I think Crowns should have discretion, but it is, it’s a decision that is not taken lightly. (Claudia, Site 4)

These excerpts begin to demonstrate that Crowns are in a “conundrum” involving community opinion; they should take the opinion into consideration, but this can come into conflict with

different considerations such as community protection and alternative measures. Indeed, the possibility of reoffending is “scary” as Crowns must try to reduce reoffending. If they exercise their discretion and “something bad happens” (namely reoffending), blame is perceived to fall on them. They are responsible to the public if reoffending happens as a result of their decision, particularly if their chosen sanction (or lack thereof) is questioned in its adequacy, reinforcing the need for a retributive vision of justice over other ideas such as rehabilitation as will be seen shortly. Indeed, the Crown above continued on to state that:

I am very cognizant of the fact that I’m not the only person in these decision processes [...] You take an oath of Office, so I am not me. I am somebody occupying that space. All of my decisions are supposed to be the decisions of that role. So it’s not just about me. (Claudia, Site 4; *emphasis in original*)

Thus it can be seen that it would reflect badly on the prosecutor and thus the CJS, if something bad such as reoffending occurred as a result of a decision they take. Such concerns help explain why some Crowns are loathe to evacuate principles of retribution from their decisions, findings similar to that of Labelle and Vanhamme (2015).

Indeed, participants perceive themselves as operating under an intense gaze from the Canadian public, causing them to be “risk-averse” in an effort to avoid complaints:

Ron: Crowns tend to be risk-adverse. Why stick your neck out and take a chance? ...And that’s one of the big problems that ...Charging people is very easy. And it’s a safe thing to do. [...]. They’re not faulted for it. The moment you exercise discretion and say look. “In this case I won’t lay a charge” you could get complaints from the victim, you could get complaints from some groups... [...]. it’s risky... [...] (Pause).

Brendyn: And...some other Crowns, they mentioned something similar and they were saying that if they reoffend afterwards, that’s a risk too.

Ron: Ya. Ya. (Ron, Site 4)

There is thus a desire to protect the public image of the CJS, or at the very least avoid complaints as these may reflect negatively upon the Crown and thus the justice system³⁵. Furthermore, Ron

³⁵ Though some may see Ron’s quote as referring to an aversion to being blamed personally for a particular decision, nowhere in our interaction (nor that of any other participant) was I given the impression that he was concerned about his personal reputation. He always spoke of the prosecution as one entity rather than of the individual Crown attorneys. Furthermore, as mentioned in Chapter 2, I engaged with Crowns that tended to have more experience. In our discussion, they explained how that, if anyone, it is more junior Crowns who may feel personal, professional responsibility for their decisions as they may feel their job is less secure. Those who were more senior discussed explicitly how their personal reputation was not a factor in their decision-making.

speaks of being “risk-adverse”, where risk is perceived as a defendant reoffending, thus harming society or potentially revictimizing a victim, if the Crown makes the decision to not lay charges or seeks a “light” sentence whereby the defendant’s potential risk has not been properly addressed. Though this harkens to the idea of protection as mentioned above, this Crown relates the idea of making a decision, taking into account potential recidivism, alongside the potential backlash he might have from justice stakeholders and the Canadian public.

In this way, though the public cannot be considered members of the prosecution, Crowns still attempt to justify their actions to them. It can be inferred that for the participants, a justice system requires the confidence of the public, or at least a lack of complaints. One manner in which to do this is by adhering principally to a retributive vision of justice whereby defendants receive punishment for their crimes. Interestingly however, while ensuring confidence requires that safety be attended to, safety was never demonstrated to be predicated on the public’s image of the system.

3.3.3 - Synopsis: Extra-Legal Realities

Underlying concern for the efficient management of Crown resources and the protection of the CJS's reputation do not enter the hierarchy described in the previous section; rather, they appear to exist as a footnote to these concerns. Neither appear to come before or after concerns of risk and safety but nevertheless help Crowns account for their actions and provide credibility to one’s actions at each level; thus they do not occupy their own level but help organize each one. Where these instructions appear to have a more direct impact is the typology of defendants discussed earlier in the chapter. Indeed, when discussing how certain defendants might be unwilling to accept responsibility for themselves nor their actions, this might demonstrate that this person requires more resources from the CJS such as the use of trial. If however the person seems to be willing to accept responsibility, they may not require such an investment while Crowns still

achieve the goal of reducing crime; ideally, crime would still be reduced while being efficient with court resources.

Taking into account potential delay might also help Crown attorneys achieve confidence in the CJS. Indeed, the adage “justice delayed is justice denied” might take on new consequences given the *Jordan* decision; given the time limits instituted by the Supreme Court of Canada and the potential for charges to be dropped due entirely to delay even in the most serious of charges, such cases can easily be seen as “justice denied”. If charges are dropped, the courts are unable to respond to crime and the public is unable to see that justice has been done, bringing disrepute to the system (Standing Senate Committee on Legal and Constitutional Affairs, 2017).

Similar concerns with public opinion were also uncovered by Labelle and Vanhamme (2015); indeed, with this discretion or control at their disposal, Crowns ought to exercise it in a way which would not create waves, so as to avoid jeopardising themselves as the Crown on a case (*Ibid.*), and also to avoid jeopardising the State as its representatives. In closing criminal files, Crowns attempt to ensure that the CJS retains respect and the legitimacy to perform its duties.

3.4 - CONCLUSION

This chapter has highlighted various ethnomethods which shape, at least in part, the world of the prosecution. It was discussed how, in evaluating a course of action for a criminal case, Crowns ought to **evaluate the defendant’s character** and their **appropriate sanction** as well as **assess potential risks** to the safety of victims and the public, and finally how Crowns should be conscious of the need to **conserve resources** and **respect the image of the CJS** in the eyes of the public; these instructions help paint a picture of what Crown attorneys, as competent members of the prosecution feel they ought to do when presented with a criminal file. All have consequences on the organization of their world and how these members create an order which makes sense to

them. Such consequences intermingle greatly, affecting one another to various degrees and will have consequences on the use of Restorative Justice, which will be explored in the coming chapter.

In broad strokes, Crown attorneys examine cases and their merits on a daily basis. Participants explained how they look for indicators such as the crime, its severity, and aggravating and also mitigating factors; such considerations are not altogether surprising given the importance accorded them in the *Prosecution Policy of the Attorney General of Canada* (Minister of Justice & Attorney General of Canada, 1993). These factors all help Crowns assess the culpability of an individual, what, if any, criminal justice intervention is necessary, and subsequently what sanction would demonstrate proper reproach for said crime, all the while protecting society from further crime. While Crowns consider certain factors more or less serious, such evaluations help separate individuals into different categories of moral culpability, risk, and consequently deservedness; this deservedness refers to the type of sanction or lack thereof that the defendant merits. Similar categorizations of defendants were elaborated by Saghbini (2016) and Sudnow (1965), even if ideas of deservedness were not discussed as they were in the current research. Moreover, other studies, though in an American context, also discussed how prosecutors assess blameworthiness, harm, (Babbitt, Cory and Kruchek, 2004; Brown, 2012) and, available resources (Babbitt, Cory and Kruchek, 2004; Brown, 2012; Goff, 2011) in their charging decisions and sentencing positions.

Though comfortable and justified in using their discretion to class defendants, Crowns are nevertheless guided by other instructions. Indeed they appear to follow a rough hierarchy of duties, an idea touched on very briefly by Plater (2011: 233). Indeed, they must first ensure the physical safety of victims and society generally from the defendant and then the emotional/mental safety of victims from the CJS all the while conscious of the need to judiciously expend court resources and build confidence in the system. However, while Vanhamme (2009) states that the public's desire

for speedier justice does not give weight to the actions of judges, this research has demonstrated that such considerations appear to be understood as reasonable in the world of Crown attorneys.

In these ways, Crowns place themselves in a position of great authority over the defendant, making decisions based on their perceptions of moral culpability and also what they see as being pro or antisocial behaviours (their risk in other words). While few studies have discussed the specifics of such decision-making, they still acknowledge that Crowns decisions outside of the courtroom are based on a variety of factors which are well protected from review (Paciocco, 2014). In an American context, “Justice Robert Jackson famously characterized the federal prosecutor as having ‘more control over life, liberty, and reputation than any other person in America’. Sixty years later, Judge Gerard Lynch raised the prosecutor’s standing when he remarked that federal prosecutors perform ‘the role of god’” (Szott Mhoor, 2004). Vanhamme (2009) discusses how judges conduct similar evaluations in a great many situations, contexts and factors when faced with a case. It is interesting then that Crown attorneys also perform such extensive evaluations of both the defendant and the needs of society and victims of crime despite the deference afforded to judges. Though this study mentioned involved judges, it is still interesting to see similar logics between actors in the CJS. This research thus clearly gives support to assertions of the authority wielded by Crowns in the current research.

It becomes plain then, even with an ethnomethodological reading of data, that Crowns do indeed embody the quasi-judicial role discussed in Chapter 1 through which Crowns make important decisions in a criminal case, using their discretion, even if it might traditionally be considered the realm of the judge. This hypothesis is strengthened when recalling how participants’ decide if a charge will be diverted completely from the criminal justice system or brought before a judge. However, what is interesting is that these decisions appear to be

remarkably widespread and that these Crowns operate in a world which permits such decisions and the consideration of these factors. Indeed, among Crowns, it is obvious that such decisions ought to be made and that Crown attorneys ought to be the ones to make them. Such a conclusion is in contrast to authors such as Paciocco (2010) who states that “adversarial systems, including the Canadian criminal justice system, tend to emphasize the separation of the investigative, prosecutorial, and adjudicative functions” (:309); instead, this research has shown some blurring of the prosecutorial and adjudicative functions, more closely to the characterization of the quasi-jurist discussed by Layton (2002), Paciocco (2014) and Philips (2015). Indeed, while the adversarial system *might* appear to emphasize such separation, other authors, as well as the current research, strongly suggest the contrary.

Nevertheless, it must not be forgotten that such prioritizations may help legitimize the CJS in the public eye. Indeed, public confidence in the system, and thus its legitimacy, are often thought to be predicated on its effectiveness in stopping crime and or its ability to treat those with whom it interacts respectfully (Bradford, 2011; Bradford & Myhill, 2015; Freiburg, 2001; Gilling 2010); as such, protecting victims might be viewed as building support for the system, thereby increasing its legitimacy in intervening into the lives of citizens. Moreover, actions such as ensuring safety or sanctions for crime appear to boost public confidence (*Ibid.*), and is perceived by Crowns thusly. This assertion requires further discussion and will be revisited in the coming chapter.

CHAPTER 4: ANALYSIS - RESTORATIVE JUSTICE IN LIGHT OF PRACTICAL PRINCIPLES

The previous chapter discussed various ways in which prosecutors go about creating a certain sense to their world, reasoning and justifying according to certain instructions or values which are generally accepted in this world. This chapter will instead highlight how Crown attorneys conceive of so-called RJ programs and how it does or does not fit into those rationales or ethnomethods described in Chapter 3. As such, the first section of this chapter will describe the various definitions and examples participants gave when they were speaking of “Restorative Justice” so as to clarify what participants mean by “Restorative Justice” and how they make use of such a concept. The following two sections will focus on how so-called Restorative Justice, as discussed by the participants, fits neatly within prosecutors’ rationales but also how it forces participants to stretch acceptable justifications in order to use such an approach.

4.1 - WHAT IS RESTORATIVE JUSTICE?

In this section how participants describe and conceptualize Restorative Justice will be discussed. This exploration is necessary in order to understand what participants are referring to when discussing this paradigm and, given the theoretical background, what decision they are justifying. Indeed, this section will help make sense of how Crown attorneys conceptualize RJ in their world, offering a first glimpse into their integration of these practices.

Given that a large proportion of participants came from a single location or have at least worked there at some point in their careers, it is interesting to note the differences in opinion of what constitutes Restorative Justice for these members. Nevertheless, even those from differing locations presented similar ideas even if familiar with different programs claiming to offer RJ. To recall, all participants had experience using what they considered to be RJ in the course of their work. Moreover, a large majority learned about RJ programs primarily on the job, often learning

from more senior, influential prosecutors. Nevertheless, there were a few participants who noted that they had previous experience with it in an academic environment. None were trained RJ practitioners, providing services themselves.

Many participants noted that the idea of Restorative Justice is quite large and that there is room for various interpretations, some stricter and others looser; however, some participants appeared to be less favourable with looser definitions:

So Restorative Justice has [...] a pretty loose definition once you get into our world. We all like to say [a certain program is] Restorative Justice but the [...] confluence of...accepting accountability and responsibility for what you have done, involving the victims of crime and the community into coming up with a solution that addresses all the different aspects of the crime is rare. (Jay, Site 4)

This participant notes that RJ has a “pretty loose definition” and that criminal justice system actors “like to say” something is RJ but that in spite of this eagerness, what he believes to be true RJ is not always achieved (“confluence of...crime is rare”); for him, RJ requires, among other things, victim and community involvement, accepting responsibility, etc. He reveals that he believes the label of “Restorative Justice” is used too liberally.

However, the larger majority of participants were nominally at ease with a definition of Restorative Justice which included a great variety of interventions:

So when I think of Restorative Justice, you know my definition...could include [...] ways of dealing with persons who have been charged with criminal offences. That can include dispositions that don't have the usual criminal sanction attached to them. So that can be a relatively broad definition because there's a lot of ways in which people who are charged criminally can have their charges dealt with [...] which could mean that the charges end up getting withdrawn or they get a peace bond,³⁶ something of that nature if they do certain things. Restorative Justice by its very term seems to imply, or you would think, is trying to put people back closer to the position they were in before the crime happened right? (Xavier, Site 4)

Xavier speaks of a broad definition; for him, RJ seeks to address criminal charges without the “usual criminal sanction attached to them”. Indeed, RJ is a manner in which to deal with a case that does not sanction in a typical manner and that can result in the dropping of charges provided

³⁶ A peace bond is a court order to keep the peace. It is often used proactively to avoid future crime (Department of Justice, 2015). In this example, it is clear this Crown believes it can be used as a remedy to a crime already committed.

a defendant comply with certain conditions. Such an approach to the use of RJ is congruent with the last chapter which discussed how dropping a sanction is permissible if Crowns are still able to exercise control over the case, requiring certain conditions be followed prior to dropping charges. Furthermore, as mentioned in Chapter 3, a sanction is still necessary and implemented, though the idea of what such a sanction constitutes is tempered and the defendant does not receive a “full” criminal sanction but certain “conditions” instead (“which could mean...things”). Such a utilitarian view of RJ is mirrored by several other participants:

...I think you have to have a broad interpretation [of RJ]. Because when you look for these really great “paint-my-picket-fence” [RJ cases], that just isn’t reality for many people and you have to find, I would say, creative ways...to find restorative aspects to a sentence. (Tony, Site 2)

Indeed, here this Crown states that you “*have* to have a broad interpretation” of RJ because the “paint-my-picket-fence” cases, a common image in RJ whereby a defendant repays the victim and restores the harm caused, is simply not going to happen in many cases. Thus for this Crown, you must look beyond those types of stereotypical RJ outcomes to *find* restorative aspects in a sentence³⁷. To digress, while these participants state that RJ must be used “creatively” in contexts that are less than perfect, they demonstrate that they still seek out ways to introduce aspects of RJ into a criminal file. Thus, for these Crowns, it is permissible to actively seek out ways to use such an approach in their dealings. This is despite the fact that many participants described RJ as an alternative to the traditional CJS:

I think Restorative Justice is a different way of approaching the criminal justice system. So rather than just looking at punishment or deterrence [...] (Abby, Site 1)

[...]Restorative Justice to me is a non-traditional or alternative form of...trying to get two parties or three parties to a dispute to come to an understanding about what happened and about the impact it had on the victim, primarily. (Nick, Site 4)

³⁷ Though participants were not explicit about what these restorative aspects might be, they did offer certain hints by describing what RJ was to them, as will be outlined in this section. Indeed, in explaining what RJ is for them and what it entails will undoubtedly offer an understanding of what types of restorative “aspects” they might attempt to integrate into a criminal case.

Indeed, calling an approach an alternative implies that it is not the same as the traditional approach; despite the contrast between the two, these Crowns still felt able to conduct themselves appropriately while using these alternative approaches.

In addition to the breadth of the definition for RJ, almost all participants agreed that, concretely, RJ is something which brings defendant and victim together in order to communicate:

I tend to think of it [RJ] as anything that brings the victims and the perpetrators together... Where there are meetings between the victim of crime and the charged person. Generally after they have acknowledged the guilt...Now, broadly speaking it can include other things that aren't as personal. Restorative Justice can be repayment of restitution to a victim.... (Jean, Site 4)

[RJ is] looking at [crime] more broadly and can mean either bringing in a complainant to kind of restore a relationship or restore the community in some way... Or on a smaller scale, if there is an identified victim, to try to restore that relationship, I guess, to deal with the underlying issue that that lead to the criminal offence [...]. (Abby, Site 1)

[RJ is] to have a forward-looking process that brings about some kind of healing for the community and some kind of reconciliation, but not necessarily that they're going to...be friends, between offender and victim. To try to [...] find a way to bring them back to some sort of harmony with the community and remedy the harm that has been done. (Claudia, Site 4)

While these excerpts show that for these Crowns, RJ is an “approach”, they note that RJ involves bringing the victim and defendant (the “parties”) together so they may come to an “understanding” about the impact of a crime on the victim “to put people back closer to the position they were in before the crime happened” (Xavier, Site 4; above, Page 97). Thus, for them, RJ requires victim and defendant participation³⁸. In such a way, Crowns are able to ensure they, even in this “alternative”, continue to have some control over the defendant as traditionally had in the CJS.

What is also seen in these remarks however is a preoccupation with repairing broken relationships between victims, defendants and the community (“bringing in a complainant...restore the relationship” [Abby, Site 1]; “some kind of healing...offender and victim” [Claudia, Site 4]). For these individuals, repairing these relationships or at least addressing the harm could contribute to greater satisfaction on the part of the involved parties. Though this

³⁸ Despite this author's intuition, there is no strong evidence that direct and indirect contact between parties is viewed differently.

point will be further explored later in this chapter, the majority of Crowns who participated begin to demonstrate an understanding of the basic tenets of RJ, of which concern for relationships is one (Zehr, 2002).

The only participant who did not speak about some form of communication or meeting between victim and defendant however, still spoke about these individuals but stated that the actual form of it, if victims and offenders communicated, was not crucial:

Restorative Justice is (Pause). A process that leads to some greater satisfaction of the outcome of a criminal case on the part of the victim or victims, the community and as well as some meaningful impact on the accused [...] It could take different forms but I think it's the outcome ultimately that's the important thing. (Ron, Site 4)

Indeed, while the specific practice was not important for this Crown, RJ was some process which would bring about greater satisfaction for victims and have a “meaningful impact on the accused”. Thus, while this Crown did not speak specifically about the communication between affected parties, he was still concerned with what other Crowns mentioned: the satisfaction, or restoration of a relationship. For him, it did not matter if it was the communication which brought about the satisfaction or restoration, so long as it happened or could potentially happen.

However, despite several Crowns saying victim and defendant communication was important for their definition of RJ, some were open to using such an appellation in contexts which did not necessarily guarantee such an outcome. Indeed, several also felt that certain specialized courts such as mental health court, drug treatment court or community courts could also fall under the umbrella of RJ, even if they sometimes appeared reticent to make such an association:

Jean: I see [specialized courts] more as treatment courts. I think drug treatment, mental health, more dealing with the treatment of the offender or the accused person. I can see broadly classified how it's restorative to the community.

Brendyn: Certainly. OK. But not necessarily to the victim?

Jean: No. No.... (Jean, Site 4)

Brendyn: So those [specialized] courts, do they fall under your definition of Restorative Justice then?

Abby: I think they can. I think that the drug treatment court is a little more structure in the main focus is, you know rehabilitation of the offender...You know, in a way I guess that can be construed as restorative in some way because their addiction, it's a health issue [...]There is a component however of our...drug treatment court where they have to be reengaged in society in a safe way and we encourage and also demand they also do a certain number of community service hours before graduating so I guess you can say they are giving back to the community in a way as well[...]. (Abby, Site 1)

Here, specialized courts were seen as restorative in a larger sense, using a broader definition, whereby the community might potentially be restored; though, as stated above, this inclusion seemed reluctant (“I can see broadly...to the community” [Jean]). Indeed, for most participants it appears that they see RJ primarily as a manner to foster communication between victim and defendant in an effort to come to some understanding about the consequences of a crime; without such communication, the endeavor would less likely be seen as RJ. Naturally then, Jean states that he would not classify something as RJ if there was not a focus on victims as well as the defendant; he states above that these courts can only “broadly” be classified as RJ because they do not include the victim while Abby states that she “guesses” that community service hours restores because it gives back to the community (“also demand...way as well”). This second remark is interesting because, rather than these interventions being downgraded to “broadly restorative” for not including victims as is the case with Ron, the endeavor appears to be *upgraded* to that category by giving back to the community, including it in the mix. Thus, Crowns begin to differentiate between “rehabilitation” and RJ, though still believe the two are linked in certain ways, that their goals overlap (“I think they can...it's a health issue” [Abby]; “I see...the community” [Jean]).

These Crowns present a relatively uniform understanding of RJ in which both victim and defendant participation is certainly preferable but not necessary for such a process to occur. Indeed, almost every Crown interviewed, when asked what they thought of when they thought of RJ spoke of bringing victims and defendants together for their mutual benefit; if pressed, several would include specialized courts and other forms of RJ which do not necessarily include communication between the two parties. Thus, it can be gleaned that communication, in the context of RJ, is

important for Crowns. Indeed, all of these factors might be seen as so called “restorative aspects” (Tony, Site 2) that might be added to a sentence or criminal proceeding.

Notably absent in these definitions however are concerns for punishment, reducing recidivism or protecting society. Such concerns are congruent with many authors’ views on this paradigm of justice which does not place in them great import (Johnstone, 2011; Zehr, 2002). This does not mean that such concerns do not exist but that for these Crowns, such concerns are not essential in their understandings of RJ despite otherwise creating a sense of order in their world; but neither does this mean that these concerns are completely evacuated when a decision to use RJ is made. Indeed, it remains to be seen how Crowns justify their use of Restorative Justice and in what ways such practices are made to fit within the parameters of their world. Thus, the following section will specifically target the use of Restorative Justice rather than general ethnomethods as done previously. This does not mean ethnomethods will be ignored, but rather that participants’ remarks on RJ will be analyzed alongside those same ethnomethods in order to elicit the order within which these programs exist. While this endeavor of understanding the organization of the world of Crown attorneys began in Chapter 3, it will continue presently.

4.2 - FITTING THE CRIMINAL JUSTICE MOULD

Participants spoke of many things which they appreciated about Restorative Justice but also of some things they perceived to be weaknesses. Their statements regarding their perceptions of what RJ is and what purpose it serves demonstrated how this approach to justice aligns with the ethnomethods or instructions elaborated in the previous chapter.

4.2.1 - Protecting Victims, Society and Reducing Crime

As was made evident in Chapter 3, Crown attorneys feel a certain responsibility to provide protection for victims involved in the justice system and also to society as a whole through the

actions they take. Thus, it is clear that for RJ to be used and be seen as being used appropriately by other members of the prosecution, it must not endanger anyone. Crowns were quite sure that such endangerment would not occur when making use of a Restorative Justice-inspired program:

[...] “Considering the safety of Canadian society, are there any crimes you wouldn’t refer?” No because...ultimately the goal is reducing recidivism. [...]. Because if the victim felt unsafe, they wouldn’t participate in it. [...]. I’m going to say no because [...] But at the same time, the [RJ] workers are going to say no. [...] It’s never going to happen that somehow that would be a dangerous situation. (Nick, Site 3 & 4)

That is a very significant priority duty we have, to protect society. [...]. To ensure the protection of the public. So a Restorative Justice process is not going to be available in certain situations when it can’t be done in such a way that the public is going to be protected right? (Claudia, Site 4)

In this way, interviewed Crowns described comfort in using RJ because they understand there to be safeguards in place to avoid revictimizing a victim, offering them protection from a defendant (“Because if the victim...dangerous situation” [Nick]). Indeed, given that Crowns often spoke of communication between victim and defendant, it would be necessary to ensure this communication would not harm the victim. Therefore, using Restorative Justice-inspired programs would not contradict any duty among the prosecution to protect victims, thus at least partially permitting its justifiable use by these Crown attorneys. Moreover, Crowns would not feel at risk of criticism from colleagues for endangering a victim by using RJ-inspired programs.

However, some Crowns were convinced that Restorative Justice interventions could actively contribute to public safety rather than simply avoiding its endangerment, strengthening any justification for the use of RJ. For participants, RJ-inspired programs may reduce recidivism which is, according to them, a main objective of criminal prosecution:

Anything we do, and the tools we use to sentence people. Ultimately it is about reducing recidivism, right? [...]. If you told me, you know, you could send this guy to jail for five years and he’ll learn his lesson *or* he can go and do [Restorative Justice] and he can learn his lesson, it’s insane for me to send him to jail for five years. It’s completely irrational. [...] [I]f it reduces recidivism, if it gives the accused insight into his behaviour, if it puts a human face on the victim so he thinks twice about doing it the next time, then it does help protect Canadian society (Nick, Site 3 & 4)

Though parts of this quote were used previously, taken in this state, it demonstrates that this Crown believes Restorative Justice-inspired programs can responsabilize a defendant; indeed, the

defendant could “learn their lesson”, to be a better and law-abiding citizen, through such a program or also through the use of incarceration. This Crown states that Restorative Justice would be the obvious choice among the two as it can help make a defendant “think twice”, putting a “human face on the victim”, insinuating that incarceration would not. Another participant stressed how the trial process and incarceration might fail to teach somebody a positive, socially-conscious lesson in stating that “What they’re [defendants] learning is how not to get caught” and thus “Sometimes you’re not sure at all people are learning the right things at all in trial” (Shannon, Site 4).

Many of Nick’s statements above are conditional however: *if* it reduces recidivism, *if* it gives the defendant insight into their actions. Indeed with his logic, if these conditions are met, they would contribute to protecting society generally (and thus reducing future victimization by the defendant). It can be seen then, if these conditions are not met, society could not be said to be protected through the use of RJ, contravening a guiding logic of the prosecution; thus, Crowns ought to either find another acceptable justification to use such a program or simply not agree to its use. In either case however, RJ and the CJS ought to “teach the defendant a lesson”, offering support to hypotheses of rehabilitative ideas of justice colouring the world of Crowns as discussed in the previous chapter in that they are trying to transform the defendant. However here it can be seen that these ideas are being transplanted into their understandings of RJ or at the very least its implementation.

Nevertheless, this is not to say that Crowns believe these programs to be near-magical in their ability to stem crime:

But the protection of society, that’s ultimately what we are hoping for through the use of Restorative Justice. [...] Do we know that there is a good chance that it is going to fail? Of course we do [...]. Why are we doing it? Because we are hoping that [...] that it is going to help them pursue a [...] a good life. Not committing criminal offences. Ultimately what we are hoping for is the protection of the public by a person not committing further offences right? (Xavier, Site 4)

Brendyn: ...Still in the line of what does Restorative Justice serve or what does it do...Some people talk about the duty to protect society and...Does that come into play ever?

Shelby: For sure! Absolutely because you know people who go through the [RJ] system often are amongst those that don't come back into the system. [...]. I know it can work for people....And that there is a likelihood that he won't come back or she won't come back... You know, you're making society safer by having somebody take responsibility for what they've done and make reparations... and come away from the system feeling like they've been treated fairly too you know? (Shelby, Site 4, *Emphasis in original*)

As seen above, they understand that these types of programs will not always stop the defendant from committing a new offence. They stated explicitly that it was their *hope* that an RJ-inspired program would eventually lead to a decrease in criminality; nevertheless, they support these types of interventions. Said otherwise, despite an instruction for Crowns to protect society from victimization and to reduce recidivism, they speak of situations, similar to addictions discussed in the previous chapter, where the defendant might want help, but Crowns can rarely if ever ensure an attempt actually succeeds; regardless, participants might try RJ because in a particular situation they feel it has a better chance of addressing root causes of crime than the traditional system.

Indeed, it is logical that Crowns would make the decision which they judge to be the most likely to reduce crime, meaning that in certain situations such as those involving addiction, RJ serves as a better tool to accomplish this goal than the traditional criminal justice system and prison even if it might fail. Indeed, for participants, Restorative Justice, is still an appropriate course of action despite its potential failure because of its potential success. While Shelby and Xavier above acknowledged defendants might recidivate after a Restorative Justice-inspired process or program, they refer cases to these programs because, in their appraisal of a particular case, there is a strong enough likelihood that the defendant might not. What is at issue here is not whether Restorative Justice does or does not in reality reduce recidivism, but rather the fact that Crowns, believing that it can possibly contribute to a reduction in recidivism and thus to the protection of society, couple RJ with this mission. In this way, its use is justified by its supposed usefulness in achieving Crown objectives.

4.2.2 - Conserving Resources

Restorative Justice's ability to reduce court delay and also the use of State resources was another aspect of its use which Crown attorneys appeared to appreciate. Indeed, while reducing court delay and the incredible use of State resources by the CJS was demonstrated to be an important instruction for participants, some Crowns felt the use of such programs might help achieve this necessity "I think [RJ] would have a beneficial impact. It *does* have a beneficial impact on...delays and court resources" (Abby, Site 1). When asked about the purpose Restorative Justice serves for them, these Crowns responded thusly:

So [RJ has] got [...] it has the benefit of bridging disparate positions. [...]. If the Crown is looking to resolve a case, on the facts before me, before the Crown it's worth a certain amount. The Defence is looking for quite a bit lower. The Crown needs some justification to bring it to a lower amount. [...]. So the effect it has is positive record building. It puts something concrete on the record [...] aside from the synopsis of what happened, a criminal record [...]. Aside from those hard facts, it puts something there that can be used [...] to bridge a gap between two positions and to lighten the sentence. [...]. [T]his...can often be a very practical tool for that. (Jean, Site 4)

You have a lot of files [...] that need to be processed. [RJ] can provide an answer. [...]. Because the fact that the [...] criminal justice system is overburdened, delays are a real issue and a Restorative Justice process can actually reduce the workload on the court, on the Crown prosecution. [...] So there is that sort of economic, practical reality of it's a way to deal with the case...that can be done quickly, and, you know, it goes out to the community group that is administering it and it comes back to one more appearance to confirm it [...]. So that's one piece of good that can come of it. (Claudia, Site 4)

For these participants, so-called Restorative Justice programs can thus potentially be used as a response to the backlog of cases: if a case can be addressed in such a way so as to help address this backlog through a quick resolution, this would be supported by Crowns or at the very least be understood by them as a worthwhile, socially acceptable goal for a fellow member of the prosecution. Indeed, for these Crowns, RJ has the potential to reduce the backlog by reducing the number of appearances ("it goes out...appearance to confirm it" [Claudia]). It also allows for "positive record building" (Jean) which will allow Crowns to agree to an arrangement proposed by the Defence attorney, thus having them work together for a common goal, decreasing time spent litigating or otherwise dealing with the case. Interestingly, in speaking of "positive record

building” once again as in the last chapter, Crowns appear to differentiate between defendants who have or do not have positive records, helping them decide which are deserving of potentially receiving a lesser sentence through the use of RJ.

Nevertheless, as mentioned earlier, there were also those who believed RJ-inspired programs would not reduce delay, potentially even increasing it:

So you are saying would it help speed up the processing of cases...generally? [...] No. No, I don't see it because the problem with Restorative Justice is that it takes so long...So it doesn't really speed up things. It doesn't really help with the delay...My only concern with respect to delays was the delay that it takes to process a file at [a Restorative Justice program]. That is the only thing. (Shelby, Site 4)

So that, the relationship I think between delay and Restorative Justice is this: Restorative Justice takes time. [...]. You can't have a circle in less than 2 hours. I can't have a circle for every file that comes through here. [...]. So you kind of have to pick your places for this full on Restorative Justice. It takes time in court [...]. So those are kind of limitations on Restorative Justice. (Jay, Sites 2 & 4)

These Crown attorneys believe that RJ programs take significant time and resources to administer, just as the criminal justice system does. Indeed, Jay said you must “pick your places” to use RJ, giving the impression that these programs can only be used in certain cases, rather than as a general remedy to court delay; nevertheless, they still make use of these programs despite the potential delay. Once more, this last excerpt demonstrates further that Crowns are entitled to discern which cases merit a restorative intervention, similar to how Crowns discern those who have a genuine or sincere desire to address their criminality as explored in Chapter 3. A few other participants echoed such sentiments, that RJ can actually take *more* time than a CJS response while adding that using RJ’s potential ability to effect delay is not a proper measurement of its effectiveness:

And unfortunately I have to confess or...I believe that Restorative Justice processes actually...add time to the case. They do not – Restorative Justice cannot be seen as a way to reduce court delays. [...] Restorative Justice processes, if done thoroughly and properly are much more difficult and time-consuming than running a case through the courts. [...] And they have to be measured in terms of victim satisfaction rather than simply money saving or court backlog reduction. (Ron, Site 4)

In this way, neither did Ron think that RJ could respond to court delay. Indeed, he believed it to add to the issue. This suggests that he does have a concern with court delay which is unanswered by RJ but that he also sees benefit to such a practice and that its effectiveness should be measured

in other terms than delay such as victim satisfaction. Thus, while Crowns were previously demonstrated to be preoccupied with shortening court delay, this apparently does not mean that Crowns will do *anything* to reduce delay. Indeed, given Ron's use RJ, there appears to be cases where delay is acceptable if it might serve other purposes.

This subsection has demonstrated a divergence in opinion regarding RJ's use among Crown attorneys. A slight majority though these programs could actively help respond to the lengthening of court processing times and reduce court resources while the rest believed RJ either did not help with delay or actually increased delay and use of resources. These diverging views suggest that if RJ can still be used reasonably even if it is not perceived as helping alleviate delay as discussed in these last excerpts, perhaps reducing delay isn't a strong enough justification on its own to justify its use but neither is it strong enough to disqualify it. Indeed, while the first part of this subsection discussed how several participants believed RJ to help this problem and several others stated the opposite, it is possible that referencing RJ's potential positive benefits on court delay alone is not strong enough to justify its use given the potential for lighter sentences; perhaps such references must be used in conjunction with other guiding logics of the Crown's world in order for RJ to be seen as an appropriate, and sensible course of action. Such a hypothesis is strengthened due to the fact that it was normally through some prompt that participants spoke of delay; though they had much to discuss in this regard, it was not their primary focus when speaking of RJ. Rather, their justifications for RJ primarily concerned recidivism.

4.2.3 - Sanctions

It was mentioned in the previous chapter that retributive ideas of the criminal justice system are understood as adequate and justifiable in the world of Crown attorneys. Moreover, when speaking of "learning a lesson" Crowns are ensuring that defendants receive some sanction

(informal or otherwise) for their actions in return for the crime committed, while also ensuring that they learn they should not commit more crime. With that said, the majority of Crowns interviewed expressed an appreciation for the continued role for “punishment” even when RJ is in play:

And [a certain Restorative Justice program] is interesting because they can still have a criminal law sanction, they can still have a penalty according to the criminal law (Xavier, Site 4)³⁹

This participant believes it “interesting”, in the sense of its novelty, that the use of RJ does not preclude the use of a sanction. While this demonstrates the importance of sanctions, it can also be deduced that RJ is not considered a penalty; rather, it is something more lenient. Though, as explained in the previous chapter, if RJ is more lenient in that it might reduce or stop the use of a possible sanction, then it would only be available to those defendants whom Crowns believe to merit such a benefit. Another participant continued on, speaking about a situation in which charges might eventually be dropped, thus benefitting the defendant:

We can't ignore the traditional system but we have to operate within its rules. We cannot agree upfront to dropping charges. There has to be some certainty to the outcome. If things go well, very often charges are dropped. That is us trying to use RJ still within the confines of the system because we cannot set a trial and then go [to RJ]...and then no. [...] Even if found guilty, charges can be withdrawn until sentencing. We may choose to stay charges instead of withdrawing because we may need to keep the ability to reopen a case within one year. (Shannon, Site 4)

Here, this participant differentiates between the “traditional system” and Restorative Justice, stating that “we have to operate within its rules”. Thus, RJ is apart from and is known to have different values from the system; as such, Crowns must find ways to make it fit into the logic of the system. This Crown states that charges cannot be dropped immediately but that they must ensure a certain outcome will occur. Once more, as discussed in Chapter 3, while RJ might result in the lack of formal sanctions, it appears to offer Crowns the opportunity to continue its surveillance of a case (“Even if...within one year”). Thus, the threat of reopening a case operates

³⁹ This participant mentions that the sanction is “according to the criminal law”. This evokes ideas of protecting the rule of law. Though prominent in coding, this topic could not be included in this work due to constraints on space.

as a sort of probation, though it would not formally be recognized as such. As in probation, if a defendant was to commit another crime, charges might be "reopened", acting as a guarantee for pro-social behaviour. Thus, while RJ could potentially alleviate sanctions, it is not necessarily able to do so completely; this is something for which Crowns are appreciative as it allows them to monitor compliance with the conditions they judge to be appropriate in the situation and hopefully avoid recidivism while, as seen previously, dedicating fewer resources to the case in question.

Another participant, having previously said he would be hesitant if victims' wishes were determinative of a sentence, continued on to state the following:

And I say that because in Canada, there are certain crimes [...] we have deemed to be repugnant. And while it is amazing if victims of those crimes can bring themselves to forgive the perpetrators, that doesn't serve as a veto on Canadian society's whole ability, and our obligation to punish these crimes. [...] Because in some cases I think it would work an injustice because people who should go to jail for a significant amount of time would be spared that fate [...]. But because it's [RJ] not determinative, because it's simply a consideration that is to be accorded *some* weight [...], even if there is to be some discount for the insight gained between the two parties, it [...] wouldn't move it [the sentence] leaps and bounds. (Nick, Sites 3 & 4)

It can be seen here that there is a continued imperative to punish a defendant for the crimes committed. Though it is seen that RJ might help the victim and satisfy them, society is also owed something and RJ does not and *should* not take away the possibility for the righting of this debt; indeed, criminal punishment, which should repay this debt, is still to be had even if mitigated to a degree ("But because it's...leaps and bounds"). In this way RJ does not appear to supersede retributive justice for Crowns. However, it does suggest that if the use of RJ and the subsequent (possible) mitigation of sentence *did* move a sentence "leaps and bounds" or disqualified the use of official or quasi, non-criminal or informal sanctions, its use would not likely continue as it would interfere with the place accorded to punishment and sanctions.

4.2.4 - Synopsis: Protection, Expediency, and Punishment

This section has analyzed certain ethnomethods or instructions which organize the world of Crowns in light of the use of so-called RJ. It discussed how certain instructions are invoked in

such a way as to allow the use of such programs. Specifically, RJ is meant to act positively with Crowns duties to protect victims and society from defendant and future offending as well as those to use resources judiciously, and finally to ensure sanctions are applied. Aside from a few participants discussing potential delay, RJ was shown to positively impact these missions or at least not affect them negatively as also found by Clairmont and Kim (2013). Indeed, RJ was understood by participants as potentially reducing recidivism, saving court resources and allowing punishment by having these cases dealt with primarily by somebody else than the prosecutor and in the understanding that they would have final say in the outcome of the case regardless.

However, concerns for the protection of society through the responsabilization of defendants beg the question if Crowns transform victims into a sort of tool for reducing recidivism. Indeed, given that Crown attorneys stressed in the previous section that RJ, with few exceptions, requires the participation of the victim (for without it the endeavour might only be considered somewhat restorative) and that Crowns see RJ as a *means* to reduce recidivism, this could imply that victims, as integral for RJ, are thus also a means to reduced recidivism. Indeed, though Crowns should seek to protect the victim above all else, then it is quite possible that Crowns use RJ and victims of crime in an effort to responsabilize defendants so they understand the consequences of their actions, subsequently being less likely to commit another crime. Victims can thus be seen as helpful to Crowns in the sense that they might help reduce recidivism when taking part in an RJ-inspired process. However, such a potential benefit should not come at the expense of a victim's safety in regards to participating in such a program. Though, as discussed in the previous chapter, the safety of society and that of victims from the defendant appears to be more important than the safety of victims from potential revictimization. Wemmers (2017) extensively details how victims can be instrumentalized by the CJS and also the prosecutor for ends which might not be those of

the victim, thus causing potential secondary victimization. Thus the hypothesis of a hierarchy is strengthened; indeed, since community safety ranks higher on this hierarchy, it is acceptable to instrumentalize a victim if the aim is to help protect the public.

It is also notable that, despite Goff's (2011) comments that Crown concerns of expediency come at the expense of justice (:250), this did not appear to be the case here. Indeed, for Crowns, expediency did not supplant other concerns even if it has been demonstrated as an instruction Crowns ought to follow in their daily workings. Indeed, delay was seen as important to reduce but not if the result would work some injustice; moreover, *more* delay due to the use of RJ is permissible if it would create a better, more appropriate outcome for the justice system.

Interestingly, these are not traditional concerns for Restorative Justice. Instead, these are concerns that are borne out of logics native to the criminal justice system. However, there is one caveat: RJ does still seek to punish, if not in those same terms (Zehr, 2002); congruent with theories of retribution, participating Crowns seek to right a wrong, to repay a victim and society for a harm. These are indeed, at least partially, the goals of RJ (Duff, 2011; Stern, 2017; Walgrave, 2008).

4.3 - STRETCHING THE CRIMINAL JUSTICE MOULD

While the previous section described how certain understandings of RJ and accolades attributed to this paradigm correspond to the ethnomethods which help create order in the world of Crown attorneys, this section will discuss those which were still congruent but did not appear to provide robust support for the use of RJ. Stated differently, this section will discuss how RJ is partially integrated into the world of Crown attorneys using acceptable rationales that, alone, are not sufficiently appropriate to allow for its use; while understood by Crowns as worthwhile, they appear to be secondary benefits which require support from other, stronger instructions discussed in the previous section. Nevertheless, they exist in the world of Crowns, encouraging it to adapt.

4.3.1 - Victim Satisfaction

Crowns stated that one purpose of using Restorative Justice was that it was able to provide satisfaction to victims. This term, which will be explored shortly in greater detail, appears to mean a great many things to participants but generally refers to the victims' experience with the justice system and their personal sense of rightness in the wake of a crime. As Crown attorneys go about their work dealing with criminal cases, RJ often becomes an option when participants believe that a better result be achieved than through the traditional CJS. Indeed, for all but one participant, victim satisfaction was stated to be an important reason to refer to these program as, for them, they offer greater satisfaction.

The lone individual who did not stress victim satisfaction instead stressed issues of community safety and rehabilitation, which will be discussed in the next subsection. However, this absence can be coherently attributed to this participant's view of RJ which did not stress the active participation of victims; thus, if their participation is not of great importance, it is unlikely achieving satisfaction for them would be either. For almost every other participants however, one of the most attractive things about Restorative Justice-inspired programs was that they offered things which are not typically available through the regular criminal justice system:

Communication:

The adversarial system is a great system. There's nothing wrong with it in terms of a criminal law system but at the same time one thing that is does do is that it really can separate the connection or any kind of...communication between the accused and the victim [...] So having said all that though is that the one thing, which I think is important for criminal justice, is that it does have some ability in certain cases to be able to do things such as offer Restorative Justice. Because when Restorative Justice works [...] it can achieve results which the typical adversarial process could never achieve. (Xavier, Site 4)

A voice:

So they [victims] can be part of the solution right? Instead of looking at the justice system and being angry with the justice system for failing to address what they want. They can have some ownership of the process by which...what has happened is addressed and they can have a role and a voice. (Claudia, Site 4)

Answers to questions of victimization:

I think one of the benefits for the victims is that it takes away something that is entirely unknown... I think victims come in to the system...they often don't know what lead to [...] somebody committing a crime [...]. They can be left with lingering fear over what happened...which can often be mitigated by actually meeting

the person who did it. And finding out what their motivation was or what kind of person they are [...]. I think anytime you give somebody a voice or control, I think you're providing them some benefit. (Jean, Site 4)

Thus, all Crowns save one see so-called Restorative Justice as a fruitful avenue to address victims' needs because the CJS is not able to do so fully itself; it offers a place for victims, suggesting Crowns believe victims desire more participation and a larger role in the handling of their victimizer(s), a link described by Tyler (1989) in discussing procedural justice. Some of those participants also noted that this was an area in which the traditional system faltered. Indeed, other Crowns explained succinctly that the CJS is less able to consider victims and their needs:

Sometimes I feel kind of...what we can offer in all of our efforts is not adequate or is not connecting with what [victims] need. Because they're not the primary focus of our consideration. We do have an accountability to the victim. We do have a quasi-judicial role in terms of thinking about victims...They're not apart from our considerations but the primary focus is on the accountability of the offender or the alleged offender...So they're not the center of anything right? (Claudia, Site 4)

I knew what would likely happen in this [fatality] case. I knew that there would be, if anything, more pain and destruction that came out of the court process than anything else... Even if he was found guilty, the family of the [victim] would be unsatisfied with whatever sentence was imposed because you just cannot...you know, compensate for loss of life [...]. So, I know, from a case like that that the human tragedy would not be addressed in any way and it would just lead to...worse. (Ron, Site 4)

These Crowns are clearly cognizant that victims face various issues when involved with the criminal justice system. Consequently, they take steps which they believe will help, trying to integrate them into the process (“so the victim...solution right?” [Claudia Site 4, above]; “I think anytime...some benefit” [Jean, Site 4, above]). Indeed, Crowns see themselves capable of identifying issues they believe victims face and also capable of mitigating them to some degree, as well as offering a place in criminal proceedings which, according to them, will help victims in the wake of crime, something uncharacteristic of the CJS. Such concerns align with RJ theory which seeks to include victims in the process of responding to harm, although RJ theory often goes further, discussing how defendants and communities should also be involved (Johnstone, 2011).

Such concerns can potentially align with one ethnomethod discussed in the previous chapter by which Crowns ought to protect the reputation of the criminal justice system. Indeed,

the RJ movement emerged from, among other things, the victims' rights movement. (Lefranc, 2006; Johnstone, 2011; Walgrave, 2008). Coupled with Crowns' statements regarding the scrutiny of the public and other justice stakeholders, it can be seen that concern for victims and their satisfaction in the justice system can be perceived as a response, intentional or not, to such criticism. Crowns, perceiving the gaze of justice stakeholders operate in such a way as to promote the system and its legitimacy to them by addressing one critique often levelled against the system.

Crowns until this point have shown a concern for the wishes of victims and what they might need from the justice system in order to feel better at the conclusion of the intervention. However, there *are* cases where Crowns feel that such wishes are overruled by other concerns, where satisfying victims of crime was not paramount to Crowns:

Upholding the law (against strong emotion):

[...] the Crown is *not* the victim's lawyer. It has a higher calling to...protect the community and to uphold the law. And sometimes...victims are more interested in vengeance than upholding the law. And if you get...pulled into the wake of a victim who is going full-steam ahead...then the Crown can end up not doing their traditional job. (Jay, Sites 2 & 4)

Victim Identity:

Well there are some cases where whoever the victim is, to some extent, doesn't matter. Where you have those cases involving thefts for example (*laughs*). Where...I mean, Shoppers Drug Mart could come to us and say you have to apply the criminal law to the max here, right? And we'll go "Well, no, we're not going to do that" right? (Xavier, Site 4)

Punishment:

And while it is amazing if victims of those crimes can bring themselves to forgive the perpetrators, that doesn't serve as a veto on Canadian society's whole ability, and our obligation to punish these crimes. The cases where – and I've been involved in one of these cases where a guy killed his best friend. [...] Drinking and driving. And the [victims] came to court and didn't want the accused to go to jail because he was like a son to them.[...] They pleaded with the judge and...his sentence I think was fairly discounted keeping in mind the views of the victim. But to have acquiesced to them would have...removed the rest of Canadian society's say (Nick, Sites 3 & 4)

These excerpts demonstrate quite clearly that there are numerous conditions to satisfying victims.

Unlike ethnomethods explored previously which were rarely shown to be undermined for one another, victim satisfaction appears to be a concern but is easily overtaken by other concerns of the Crown or other ethnomethods they ought to follow. Indeed, victim satisfaction, while acceptable for Crowns does not appear to have significant sway in the organization of the Crowns'

world and thus in how much it might help allow RJ to be integrated into the world of the prosecution. Indeed, it appears less important if the victim is seen by the Crown as only seeking vengeance, is a corporation rather than an individual, or if there is a need for particular punishment(s)⁴⁰. There are thus apparent limits on how far Crowns might go in trying to satisfy a victim's needs and thus a limit to addressing certain criticisms levelled against it, such as inattention to victims.

However, concern for a lack of victim satisfaction, when discussed, did not provoke the same incredulity as did the contravention of those ethnomethods discussed previously, thus leading to the belief that victim satisfaction, though important for some, is not necessarily the only nor the strongest way in which to protect the reputation of the CJS⁴¹. Indeed, victim satisfaction appeared to be more of a perk than its own goal, helpful but not seen as essential.

In this way Crowns demonstrate their concern for victims and thus for the reputation of the criminal justice system without necessarily changing the *status quo* of the system, garnering what might be seen as good public relations by finding new, partial solutions to issues faced by the adversarial system. Furthermore, while victims appear to be mobilized to responsabilize defendants so as to reduce recidivism as discussed in the previous section, they are also potentially mobilized to bolster confidence in the CJS, offering a double benefit to Crown attorneys and another way in which such practices can be integrated into the criminal justice system.

⁴⁰ While authors such as Rossi (2011) and Cauchie and Sauvageau (2011) explain, at least in the context of family-victims of murder that calls for satisfaction (or closure as these authors put it) increase calls for the protection of victims and the harshening of punishment, in this case, the needs and satisfaction of victims temper punishment in that alternative measures which might be less traditionally punitive are supported by these Crown attorneys.

⁴¹ However, it is possible that concern for victim satisfaction is in fact a continuation of the Crown's duty to protect victims; stated otherwise, perhaps for some participants, the duty to ensure victim safety evolves into a duty to satisfy them. Unfortunately more data is required to address this point than is currently available.

4.3.2 - Defendant Satisfaction

Participants also spoke positively of how they believed RJ to be able to provide benefits to defendants and that this was one advantage of the approach. While achieving such benefits cannot be considered a guiding logic of Crown attorneys, such concerns are able to offer some information on the organization of their world and how RJ is integrated within it. Many of these benefits can also be linked easily to ideas of regret, remorse, and recidivism as discussed in previously. Several participants were remarkably similar in the way they described the ways RJ can benefit defendants:

It [Restorative Justice] offers a voice to the victim and I think it offers a voice to the accused too...It allows him to do something good as a result and maybe allow the offender to move on as well knowing that "I did a bad thing, but you know what? I did a good thing"...And so they can move on a little bit easier. [...] (Shelby, Site 4)

So it's [RJ] not solely focused on making the victim whole, but sometimes it's also a little bit of a cathartic process for the accused and allows them introspection on their part as to what was going on in their head when they did this. (Nick, Sites 2 & 4)

While Nick states that the defendant might go through a "cathartic process", he is also saying that one goal is making the victim whole, the understanding being that the defendant is going to help accomplish this goal, framing defendant benefits as a side effect of helping a victim. Meanwhile Shelby speaks of a process which allows the defendant to overcome the shame of their crime ("It allows him to...a little bit easier"). Such comments point to a recognition by defendants of their "bad" behaviour; indeed, RJ is said to help defendants realize that their behaviour is unacceptable, or socially undesirable and also give them tools to help overcome these issues. However, the goal of these emotions has also been the betterment of defendants by addressing criminogenic needs. In this way, while these afore-mentioned emotions harken to retribution, there is clearly a logic of rehabilitation underlying it as well.

Above Nick speaks of a “cathartic process” but he also mentions stigma when speaking about potentially making use of Restorative Justice in cases of minor sexual assaults⁴²:

And [RJ] also might save him, frankly if it went well, it might save him the stigma of having a sex assault conviction on his record, the stigma of being on a sex offender registry. Like all of those very important tools that we have for certain classes of sex offenders but that might not be...it might be too big of a hammer for everybody. (Nick, Sites 3 & 4)

When I’m thinking about Restorative Justice as a lawyer I am thinking about “Is this something this individual-?”. Like, if they can avoid getting a criminal record from this, is that actually going to be good? You know? Is there a way they can, without causing further harm to the community, can we prevent further harm? Including harm to that person. (Claudia, Site 4)

Thus, some Crowns spoke of how a Restorative Justice-inspired program could potentially allow a defendant to avoid a criminal record or particular charge on their record as this could cause stigma and difficulty in securing employment, avoiding further harm. In this way, RJ is conceived of as a manner to respond to crime with the proper sized “hammer”. Indeed, the idea behind such assertions is that if a defendant is punished too severely or improperly then further harm could result, all the while holding to the idea that a hammer is needed, that a punitive, retributive response is required if only a smaller more appropriate one than might normally be applied. Though this point was not thoroughly addressed in the interview, what harm that might be was considered to be potential recidivism given how this study highlighted a duty to reduce crime by Crown attorneys as did the research of Labelle and Vanhamme (2015). Indeed, studies demonstrate a difficulty securing employment with a criminal record and a subsequent higher risk of reoffending (Kurlychek, Brame & Bushway, 2006; Sampson & Laub, 1993). Thus, though participants speak of avoiding harm or stigma to the individual, it is quite possible that their concern arises at least partly from concern for the safety of society from future criminal acts.

Another participant, in describing what Restorative Justice is and what purpose it serves mentioned her concern for the community, strengthening such an assertion:

⁴² He specifically noted that calling a sexual assault minor was in no ways an attempt to minimize potential trauma.

So, in community courts [which for this Crown are restorative] it [RJ] can be, you know, the offender giving back in some way to the community to restore the relationship with the community. Or on a smaller scale, if there is an identified victim, to try to restore that relationship, I guess, to deal with the underlying issue that that led to the criminal offence. (Abby, Site 1)

Here, the defendant's primary function appears to be to restore the community and/or victim ("the offender giving...the community")⁴³. Thus, it can be interpreted that by making use of so-called RJ, the Crown continues to adhere to a concern for the wellbeing of society as a whole and its safety. This statement also introduces how Crowns might utilize defendants to help victims.

Indeed, while the previous subsection discussed how Crowns are able to justify seeing to the satisfaction of victims by referring to the strengthening such an action offers to the reputation of the CJS, it can also be said that defendants might be used to help satisfy both victims and society, contributing in turn to a stronger reputation for the criminal justice system:

It [Restorative Justice] was good [...] if everybody was willing to participate, it could help comfort the fears of the victim. (Jean, Site 4).

It can be seen here that if "everybody" was to participate in RJ, meaning at least the victim(s) and defendant(s) if not the community, such an outcome could help satisfy the victim as discussed previously; such a statement however is conditional upon the participation of the defendants. In this way, the defendant is understood to help the victim achieve benefits that could ultimately reflect positively on the criminal justice system. This is especially convincing given how participants stressed that their versions of RJ emphasize communication, and thus participation, between victim and defendant rather than simply working with an offender alone, reinforcing the double benefit for Crowns discussed in the previous subsection.

Such a consideration is interesting given the previous section in which it was advanced that victims, once they are judged to be in no danger by the prosecutor, can be utilized to responsabilize

⁴³ While concern for the defendant *can* be seen as indirectly contributing to the protection of society, this does not mean Crowns have no concern for the defendants themselves; rather, such concerns find purchase in the world of Crown attorneys through the manipulation of logics understood by members of the prosecution.

a defendant. Indeed, taken together, this use of both the victim and defendant for the benefit of the other demonstrates an interesting cycle in which, ultimately, both parties are made use of by the Crown for ends which extend beyond simple altruism for the individual. Thus, the Crown's objectives of reducing recidivism and building public confidence in the justice system can be seen to be met when using RJ, transforming it into a useful tool.

It must also be mentioned that, despite relatively clear linkages between reduced stigma and protection of society aiding Crowns in the pursuit of their various missions, defendant benefits were discussed in this section rather than in the first section (whose focus are those aspects of RJ that fit partially with instructions discussed in Chapter 3) due to the smaller amount of participants who discussed this topic as well as a lack of literature to support such concern for defendants outside of a protection framework. Indeed, while all participants spoke of the importance of protecting society from crime and recidivism, few spoke of defendant benefits achieving this goal. Thus, while these Crowns demonstrate further their openness to certain tenets of RJ, only a minority feel that they can properly integrate concerns for the defendant into their world. This is interesting given the place RJ reserves for such benefits (Johnstone, 2011; Zehr, 2002) and also other theorists speaking of procedural justice, whereby satisfaction with CJS interactions are important for all parties rather than simply the victim (Tyler, 1989).

4.3.3 - Synopsis: Make It Fit

This section has demonstrated that certain aspects of RJ, foreign to the criminal justice system at first glance, are integrated into the world of Crown attorneys. Indeed, while defendant satisfaction and defendant benefits are concerns for RJ theory (Toews & Katounas, 2010; Zehr, 2002), this is not traditionally the case in criminal justice. Nevertheless, Crowns are able to find a way to work towards such ends by ensuring they fit within accepted rationales of the prosecution.

Indeed, in helping satisfy victims involved in the system, Crowns are able to provide a more positive experience for them; however, participants never entertained the notion that a Restorative Justice system should replace criminal justice. Indeed, working towards victim satisfaction through RJ appears to be more of an add-on to the CJS, allowing Crowns to respond to criticism regarding victims' rights. One participant stated the following:

The criminal law system is an adversarial system and I think anytime that we can bring...solutions or ways of dealing with matters that removes the total adversarial component of it, it makes for a better system. [...]
(Xavier, Site 4)

In this way, responding to victims' needs and removing some adversarial aspects of the system to the benefit of so-called Restorative Justice helps improve the CJS. Thus, victim satisfaction with justice can be supported by its ability to work towards promoting the presence and legitimacy of the CJS, something demonstrated to be important for Crown attorneys in their role as members of the prosecution.

Additionally, for participants, ensuring defendants benefitted from the absence of stigma or a criminal record for example might also contribute to their desistance from crime, protecting Canadian society and potential future victims. In this way, both actors, at the center of RJ, are utilized by the prosecution in order to contribute to their ends.

Despite the fact that RJ understands defendants to have needs of their own beyond those that oblige them to the victim and society (Strimelle, 2015; Toews & Katounas, 2010; Zehr, 2002), perhaps the concern RJ has with defendant needs is more easily mobilized by Crowns through its use in regards to community safety and victim satisfaction as the former is found in the principles of sentencing in the Criminal Code of Canada (s. 718) and the latter in handbooks for Crown attorneys (Minister of Justice & Attorney General of Canada, 1993; Ministry of the Attorney General, 2017).

It is interesting then that defendant are mobilized to respond to the satisfaction of victims and that, as discussed in a previous section, victims are mobilized to help society by interacting with defendants under the auspices of RJ. In this way, Crowns can benefit from positive public perceptions by trying to respond to crime while being seen as responsive to victims' needs and working towards the reduction in crime; a self-sustaining cycle then emerges whereby defendants and victims are used for the benefit of the other with the ultimate consequence of increasing the legitimacy of the prosecution, their work, and the discretion at their disposal. Such a hypothesis may find support in Wemmers' discussion of how victims are sometimes used by Crown attorneys for their own goals which may not be those of the victim and which, in some cases, may even be completely contrary to them (2017: 176). As such, it can be seen again how even in other contexts such as the use of victim impact statements, other research has shown prosecutors to integrate their own justifications into actions which might not be outwardly compatible with their guiding logics.

Thus it can be understood that these two goals of RJ, satisfying victims and responding to defendants' needs, while understood by some Crowns do not appear to be completely viable in the world of Crown attorneys. Indeed, while they can merge in some ways with logics guiding Crown attorneys, a great consensus was not reached, giving the impression that these goals are not strong enough to allow the integration of RJ into the world of the prosecution on their own.

4.4 - CONCLUSION

This chapter has demonstrated just how Restorative Justice-inspired programs are conceived, incorporated and utilized by members of the criminal prosecution. Participants discussed their flexible definitions of Restorative Justice and were forthcoming about the aspects of programs they embraced. Mirroring to a certain degree the ethnomethods explored in the previous chapter, participants believed RJ would not jeopardize the victim and also that it had the

potential to protect society from recidivism in the future. Indeed, it was discussed how Crowns make use of victims and defendants to benefit the other. For many participants, RJ also serves to address issues of delay in the CJS and can potentially reduce the amount of resources expended by the Crown, bolstering similar conclusions by Lemire, Noreau and Langlois (2004).

However, other stated attractive points of Restorative Justice did not strongly reflect those ethnomethods explored. Indeed, obtaining defendant benefits and achieving a measure of satisfaction for victims were presented more as perks of RJ interventions rather than actual justifications shaping the world of Crown attorneys. Their potential absence in the criminal justice system was seen as unfortunate but not damning.

Among many other potential benefits, Restorative Justice theorists and others posit that, through RJ, victims are able to better understand the circumstances of the crime, have questions answered such as why *they* were chosen and if this will happen again to them or to others (Commission du Droit du Canada, 2003; Zehr, 2002). Nevertheless, RJ should take into account the needs of defendants (Toews & Katounas, 2010). Participants demonstrated familiarity with these characteristics of Restorative Justice; however, they also ascribed several benefits to such practices that are not traditional territory for RJ theory such as reducing recidivism, conserving court resources, and punishing defendants⁴⁴. Nevertheless, it is principally this second group of factors through which Crown attorneys are able to make use of so-called Restorative Justice; by discussing how RJ is sufficient or even *more* able to address concerns of recidivism for example, Crowns are creating a situation which will allow RJ-inspired approaches to take root. Indeed, by highlighting its potential to address concerns inherent in the world of the prosecution rather than those of RJ, it becomes a useful and reasonable course of action when faced with a criminal file.

⁴⁴ However as discussed previously, RJ does share some goals of retribution, without necessarily being fixated on “punishment”.

Though, given an explicit concern for victims, it can be understood that this interest is a manner in which to demonstrate to the Canadian public and victims, to whom the Crown is at least partially responsible, that they are conducting their duties in a responsive manner and building a positive image of the justice system. In this way, Crowns make use of this program quite probably in a genuine effort to help victims but with the aim of potentially reinforcing the use and legitimacy of the criminal justice system under the guise of Restorative Justice.

Furthermore, given participants' demonstrated mission to reduce crime, it is unsurprising that their images of RJ for the most part required the participation of victims and defendants. Indeed, such a dyad was necessary if the litany of benefits achieved through the utilization of both parties could materialize. Without such a starting point, RJ becomes less likely to achieve both its goals and those of the Crown, such as the responsabilization of defendants and their subsequent reduced recidivism, through which Restorative Justice is justified and sensical.

In this way, RJ is primarily mobilized and integrated into the world of the prosecution within certain parameters such as retribution, rehabilitation, and its ability to respond to various duties and obligations held by the Crown. Anything it does above and beyond that is understood as a perk, not important enough to justify its use on its own but nevertheless beneficial in that it might help *add* to the strength of their justifications, ensuring their actions are well received by other members of the prosecution. Indeed, Crowns are still able to integrate concerns from the RJ paradigm which are not typically a concern in the CJS by highlighting how they can help achieve goals of the prosecution. However, these concerns do not appear to lend the same strength to the acceptability of RJ as those other concerns which match with guiding principles of the prosecution with more obvious ease.

CONCLUSIONS FROM THE RESEARCH

Borne out of an interest for the functioning of Restorative Justice practices within the criminal justice system, the purpose of this research has been to answer the following question: How are Restorative Justice-inspired approaches integrated into the daily world of the Canadian criminal prosecution? In an effort to do so, this work provided a review of the literature which can be divided nominally into two sections: one reviewing RJ theory and practice whilst the other reviewed Crown attorneys, the criminal justice system and their work. Efforts were also made to consolidate these two areas to review all relevant information. This then lead to a two-part response to the research question in which it was first necessary to discuss Crown attorneys and their work and, this goal accomplished, how they made use of Restorative Justice-inspired practices.

The literature noted that RJ is a movement with many different manifestations and understandings. It is beginning to take more prominence in the Canadian judicial system but it is still marginalized (Tomporowski, 2014). It arose through the work of many groups and movements, not the least of which was the victims' rights movement (Lefranc, 2006). In this context RJ appears to have begun flourishing (Tomporowski, 2014.). However in this context where ideas of crime, harm and the affected parties differ from traditional criminal justice system logics, it is a wonder the two coexist. Indeed, a comparison between the retributive and restorative justice paradigms is often undertaken, though as noted they are not irreconcilably opposite (Zehr, 2002). Furthermore, some research pointed to the fact that Crown attorneys, holding their quasi-judicial roles as gatekeepers to the criminal justice system place a great amount of stock in the work they do and the system within which they work, ultimately proving to be at best cautious and at worst detrimental to alternative measures (Archibald, 1998; Noreau, 2000; Noreau, 2004).

In an effort to address these questions and the coexistence of potentially opposing paradigms, this research made use of ethnomethodology, an approach which seeks to understand the organization of everyday events through the activities of those under study. For this study, Crown attorneys were chosen as the group of study in order to understand how their use of RJ-inspired programs creates and recreates an orderly world, understood by other members of the prosecution. EM provides an interesting lens for understanding how potentially opposing views can work together; according to this approach, such an explanation can be found in the actions of members of a group. Indeed, in accomplishing everyday tasks and in explaining these actions, members are also referring to justifications that are acceptable and defensible among fellow prosecutors in order to demonstrate their adequacy as a member of the group.

The first analysis chapter highlighted ethnomethods of the participants which in turn helped paint a picture of the world Crown attorneys create and recreate in the course of their activities. For these Crowns, there was a duty to protect victims and society from being (re)victimized by the defendant; they also seek to ensure that victims are protected from the criminal justice system itself while they are involved therein, whilst seeking appropriate sanctions for defendants.

Some of these ethnomethods find support in prior research while others appear to be less explored. Indeed, Goff (2011) spoke of the timekeeper role of the Canadian prosecutor. However, while this author places a great emphasis on this role almost to the point of overruling most other concerns, this study has found that, while important, Crowns do not sacrifice other issues such as the protection of society or the prosecution of a crime simply for matters of efficiency. Labelle and Vanhamme (2015) also spoke of how Crowns in Québec and Ontario sought to protect the public from defendants. This same study also found that Crowns feel responsible for upholding the reputation and legitimacy of the criminal justice system. Furthermore, in their work, these authors

did indeed mention how Crowns seek to protect the victims, however issues of secondary victimization did not feature prominently; this might be due in part to the focus of this research being on Restorative Justice. As such, it is quite possible participants were more attuned to issues justice-involved victims face as was discussed. In this way, these ethnomethods find support in existing literature while also going slightly beyond some of their conclusions, helping it surpass what might be considered limitations on its generalizability.

These instructions discussed point to a typology of defendants, whereby Crowns differentiate those who are deserving or undeserving of particular dispositions⁴⁵. Such deliberations are intertwined with a hierarchy of duties to which Crowns respond. Indeed, Crowns assess the safety of the victim and society in relation to the defendant, and finally the safety of the victim from secondary victimization in the CJS. Such classifications were previously shown to be discussed by several other studies even if only in a broader sense of those who are meritorious and those who are not of certain judgements (Dupret, 2001; Sudnow, 1965; Vanhamme, 2009⁴⁶). However, other concerns such as the judicious use of court resources and public confidence in the system were also demonstrated to be important logics for participants even if they did not enter the hierarchy, both of which being topics mentioned by the Minister of Justice and Attorney General of Canada as important in a publication for prosecutors (1993). These different goals were thus understood to be missions of the Crown that are understood as worthwhile and congruent in the world of the prosecution.

This world was also shown to be coloured by both classical ideas of retribution but also of newer, evolving forms of this school of thought as discussed by Tonry (2018). This world is shown

⁴⁵ As stated previously, Plater (2011) makes a very brief reference in his dissertation about the hierarchy of duties for Crown attorneys. However, discussion beyond its existence is not had and thus it is difficult to know if the same duties appear in the hierarchy discussed therein.

⁴⁶ In the case of this study, the categorizations were performed by judges rather than Crown attorneys.

to take a variety of facts into account that are not necessarily written down in a case file but are known to the Crown attorney nevertheless and perceived to be relevant in their ultimate decision as to their disposition on the case. Indeed, these ethnomethods thus revealed how Crown attorneys seek to control the trajectory of a criminal case in the justice system.

Together, these ethnomethods demonstrate a world in which Crown attorneys are able to judge the merits of a situation, the possible risks it presents, and ought to act in a way which will reduce these risks, in line with descriptions by Pires (2001) of the current *société du risque* that characterizes society. Moreover, Crowns feel that the CJS and their actions are right and that they should continue to exercise the discretion they currently possess; however, in so doing, they ought to ensure that the public sees such work in an effort to bolster legitimacy of the criminal justice system, findings similar to those of Vanhamme (2009).

A second analysis chapter explored what Crowns thought of Restorative Justice, what it was and how RJ-inspired programs fit into their world. For these participants, their primary understanding of RJ was a process involving victim(s) and defendant(s) communicating in some way so as to address the causes and consequences of a crime. Most Crowns, having gained their knowledge through interaction with these programs on the job, also felt that while this is ideal, there is a larger and more flexible idea of RJ which included specialized courts and ideas of rehabilitation. This chapter went on to elaborate how several goals sought by Crown attorneys can be attained through these RJ approaches. Indeed, Crowns felt that these programs would never jeopardize a victim and that it could also protect the public. Furthermore, for many Crowns, RJ could respond to problems of court delay, something which Crowns seek to reduce and which was also supported by research conducted by Clairmont and Kim (2013). Nevertheless, there were

those who believed it did not help with problems of court delay despite the consensus found in the study of the afore-mentioned authors.

Indeed, a few participants also said that defendants would potentially commit less crime, fitting the Crown's duty to protect society from recidivism as discussed by Labelle and Vanhamme (2015), and the Minister of Justice and Attorney General of Canada (1993). In such a manner, for these participants the defendant was mobilized primarily in order to help the community and/or the victim.

However, there were other aspects of RJ that were not naturally congruent with the ethnomethods presented above: its ability to provide various benefits to victims and defendants, indeed one of its greatest strengths according to many (Johnstone, 2011; Lefranc, 2006; Zehr, 2002). Nevertheless, many Crowns were very receptive to using RJ-inspired programs because of the benefits they could provide victims which are not traditionally known to be met through the criminal justice system (Wemmers, 2017). In recognizing this weakness, Crowns were quick to praise the system for its strengths. Once more, though this desire did not obviously fit within any particular ethnomethod described above, by responding to victims' needs, the Crown may improve perceptions of justice among these victims, and society as a whole by responding to longstanding critiques of the system as has also been described (Wemmers (2017).

Nevertheless the satisfaction of victims and defendants, though beneficial and admirable, are not ethnomethods of the Crown; they are not actions which contribute greatly to the organization of the world Crowns inhabit as members of the prosecution. In the case of the former, it can potentially aid in the building of confidence in the criminal justice system. In the case of the latter, there were few enough participants espousing such a point of view that it could not be determined if it was truly a guiding factor in the world of Crowns; however it should nevertheless

be interpreted as an acceptable position. Indeed, the absence of either, though lamentable is not taboo for these Crowns like failing to protect a victim or society might be. In this way, these factors, though potentially helpful in justifying the use of RJ, are only strong enough an instruction to justify its use when implemented alongside other instructions explored previously.

Crowns have also been shown to seek a measure of control in an effort to attain their goals while RJ gives them such an opportunity while also deferring to their discretion and judgment. RJ, as described by participants, ensures that should they need to intervene they may, leaving them with a degree of maneuverability. Thus, Crowns are able to use RJ in order to deal with only those cases which they deem to be appropriate and leaving them the ability to reevaluate if necessary. Indeed, it does not necessarily contravene their rules as they are able to find justifications for this paradigm which fit within their own language, allowing for its integration into their world. Thus, it becomes a tool for Crown attorneys to achieve their goals while not threatening the rationales of the prosecution.

Stated otherwise, Restorative Justice appears to be a parging coat meant to seal cracks in the wall that is the criminal justice system, not fundamentally changing its colour nor adding to its structural foundation, but blending in somewhat so as almost to be hidden yet also repairing it to a degree. This is a job that regular concrete could not accomplish but, nevertheless, its use for the rest of this wall is never questioned despite some imperfections. In this way, RJ does not challenge the status quo of the CJS. Indeed, if it did, it might not be possible for Crowns to find the proper justification for its use, eliminating the possibility for any integration whatsoever.

Thus, it can be seen generally that RJ is supported for issues with which it traditionally has little to no concern⁴⁷. This begins to hint that its retributive undertones render it at least partially transferrable to the criminal justice system while other benefits can be found in its practice, leading to its sensical use by members of the prosecution. Furthermore, potential conflation of rehabilitation and RJ, as common among some theorists (Braithwaite, 2002), also allow for Crowns to justify their actions referencing potential desistance achieved through such a process. In these ways, RJ helps support a system with a basis in various theories of punishment which are partially or wholly incompatible with its philosophy, a fate of alternative measures such as RJ discussed by Garcia (2013).

Similar conclusions have been made by other studies such as Piché and Strimelle (2007) who discuss how the criminal justice system makes use of those aspects of Restorative Justice which are helpful while modifying other aspects if not ignoring them altogether. Nevertheless, this research has made use of a different approach in coming to them. Indeed, Restorative Justice is taken up into the criminal justice system by prosecutors who ensure its palatability to other members of their profession by highlighting how it is able to achieve ends which are important for Crowns such as retribution, deterrence, and rehabilitation, all sentencing goals as laid out in the Criminal Code of Canada (*s. 718*), save for retribution which itself has been shown elsewhere to be ingrained in the system nevertheless (Dubé, Garcia, & Rocha Machado, 2013; Pires, 2001).

However, the manners in which Crowns are able to match the outputs of Restorative Justice with their own objectives also demonstrate a certain penetration into the minds of individual prosecutors even if Restorative Justice itself is not naturally congruent in their world more

⁴⁷ This is not a judgement on the value of seeking such goals. Indeed, perhaps Restorative Justice *should* be more concerned with recidivism and other such factors. However, this is a point of contention in Restorative Justice theory. Though this is not the goal of this research and as such further discussion will not be had.

generally. Indeed, even aspects of RJ theory which are potentially at odds with criminal justice find a foothold in the world of Crown attorneys. For example, certain aspects of RJ which stress satisfaction on the part of the parties involved are interpreted in such a way as to not be rejected by participants nor by their peers. In this way, participants ensure that different logics such as RJ are injected into the criminal justice system with less apprehension about potential rejection. In so doing, the criminal justice system mould is expanded little by little. Indeed, Noreau (2004) explains that despite many aspects of the justice system that render it resistant to change such as its fragmentation and constitution of various rules, procedures and actors, the legal system is not a fixed entity; it is still amenable to change under certain conditions provided that actors within the system mobilize (Archibald, 1998; Noreau, 2004). In this research it can be said that some mobilization has occurred, if only on a small scale. Interestingly however, while Archibald (1998) believes that this must happen through the introduction of structures and procedures, this research has shown members of the prosecution function in what might be considered a microsociological context to effect the use of Restorative Justice.

Such an ability to find similarities between Restorative Justice and criminal justice points to a great familiarity with it and even a dedication to its use given the “weight of the punitive paradigm on the psyche of those trained in its operation” (Archibald, 1998: 98); moreover, their efforts to highlight certain aspects of the paradigm which are not necessarily congruent with criminal justice demonstrate this further. In this way, Crowns demonstrated a concerted effort to make RJ fit in their world. Moreover, this demonstrates that potential fears of the Minimalist camp in RJ regarding the bastardization of the practice might indeed have come to pass; indeed, many authors have pointed out this possibility (Boyes-Watson, 2000; Lemonne, 2002); nevertheless there is still evidence that members of the criminal justice system are finding ways in which to

ensure that at least certain aspects of Restorative Justice are able to flourish in an environment that requires certain justifications which are not traditionally associated with its philosophy, providing support to proponents of the Maximalist camp in RJ theory who believe such a path to be the only viable option for the expansion of Restorative Justice in the CJS (Walgrave, 1999; 2008).

In Chapter 1 of this work, Jaccoud was cited, speaking about an “innovation complémentaire” versus “une innovation de substitution”. This work has shown that, although Restorative Justice has clearly been shown to complement the criminal justice system, that is not *all* it is doing. Crowns are forced to make it complementary to the system or risk not being permitted to use it at all. In this way, Restorative Justice is helping to support various philosophies which underpin criminal justice. However, this research has also shown that certain aspects of RJ which are not necessarily *as* complementary are still valued by prosecutors. In such a way, this research shows a desire on the part of Crowns to make use of an approach that they *do* perceive of as different but not irreconcilably so. They simply must toe the line in order to attain benefits that, as discussed, are considered to be perks in terms of justifying the use of Restorative Justice.

As with all research though, conclusions must take into consideration potential limitations. While some of these were undertaken in Chapter 2, its consequences will be elaborated more fully here. Indeed, this research, given that it specifically sought out those Crown attorneys with experience referring (or actively not referring cases to Restorative Justice-inspired programs), these results likely apply better to those with experience using RJ-inspired programs. This is not to say other Crowns do not share the same ethnomethods but rather that it is possible they place greater emphasis on a particular instruction that others might.

Nevertheless, this research was still able to interview participants from several locations, performing in-depth interviews with them so as to produce rich, descriptive data. Furthermore,

given EM's approach to research, it is quite possible that the ethnomethods, though from a restricted group of prosecutors, might still hold for other members given that the approach holds that members of a certain group share a certain language and understanding; moreover, some ethnomethodological studies undertaken by Garfinkel (1967) involved but a single participant, permitting the author the ability to generalize to other, larger groups nevertheless given the fact that this theoretical approach seeks rationales and thought processes rather than absolute truths. Indeed, even speaking with a single individual would allow a researcher access to general rationales or ethnomethods of a population because members are knowledgeable about the appropriate actions to take, regardless if they actually follow through with these actions. Such conclusions are evidenced by informal conversations with other prosecutors regarding my findings as well as the literature explored in the conclusions of the previous chapters which demonstrated marked similarities despite the different premise of the current study.

Regardless of these potential shortcomings, various questions arose during the course of this research that merit further study. Indeed, one such area not broached was the effect of public opinion on the use of RJ by Crowns. Indeed, while the public's views of the justice system, and ultimately the confidence they place in it, have been shown to form part of the world for Crown attorneys, it is unclear if the use of Restorative Justice might be detrimental to public perceptions of the criminal justice system. While Crown attorneys mention that they must ensure public protection and that a proper sanction is administered, if RJ does not interfere as most Crowns hold, would the use of such measures affect public confidence? If so, what repercussions might this have on Crowns and their use of RJ? Furthermore, a larger study including different regions and more participants would be useful to investigate whether these ethnomethods hold when considering

other actions undertaken by the Crown attorney. In this way, they could be verified and used to describe in greater detail the world created by the prosecution.

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APPENDICES:**Appendix A – Participant Info****Interview Participants**

Name	Crown Experience (Years)	Other Experience type	Crown Location	Observation Possible
Abby	10-19	Litigation	1	No
Claudia	0-5	Litigation	4	No
Jay	20-30 (Retired)	Judge	2,4	No
Jean	20-30 (Retired)	Judge	4	No
Nick	10-19		3,4	No
Ron	20-30		4	No
Shannon	10-19		4	No
Shelby	20-30 (Retired)		4	No
Tony	10-20		2	No
Xavier	20-30		4	No

Observation Participants

Name	Crown	Location	Interview Possible
R. v. E.	Martin	4	No
R. v. G.	Tyler	4	No
R. v. Pogrebennyk	Connor	4	No

Sites

Site	Population	Rural/Urban
1	70,000-100,000	Urban
2	700,000+	Urban
3	75,000-100,000	Urban
4	700,000+	Urban

Appendix B: Ethics Approval

File Number: 03-17-06

Date (mm/dd/yyyy): 04/26/2017



Université d'Ottawa **University of Ottawa**
 Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

Certificate of Ethics Approval**Social Science and Humanities REB****Principal Investigator / Supervisor / Co-investigator(s) / Student(s)**

<u>First Name</u>	<u>Last Name</u>	<u>Affiliation</u>	<u>Role</u>
Véronique	Strimelle	Social Sciences / Criminology	Supervisor
Françoise	Vanhamme	Social Sciences / Criminology	Co-Supervisor
Brendyn	Johnson	Social Sciences / Criminology	Student Researcher

File Number: 03-17-06**Type of Project:** Master's Thesis**Title:** Making Sense of Restorative Justice in the Criminal Justice System: A Study on Crown Attorneys**Approval Date (mm/dd/yyyy)**

04/26/2017

Expiry Date (mm/dd/yyyy)

04/25/2018

Special Conditions / Comments:

N/A

Appendix C: Consent Form

Title of the Study: Making Sense of Restorative Justice in the Criminal Justice System: A Study on Crown Attorneys

Name of Researcher:

Brendyn Johnson

Department of Criminology

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Supervisors

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Invitation to Participate: I am invited to participate in the abovementioned research study conducted by Brendyn Johnson and supervised by Véronique Strimelle and Françoise Vanhamme in partial fulfilment of the degree Masters of Arts in Criminology. This research is partially funded by the Government of Ontario through the Ontario Graduate Scholarship.

Purpose of the Study: The purpose of the study is to understand how Restorative Justice comes to be used within the criminal justice system. Specifically, this research intends to understand how Crown attorneys decide to make use of a Restorative Justice program when handling a criminal file and how such a case is subsequently closed. In this way, it will be possible to better understand the position of the Crown attorney and their associated daily activities; furthermore this will help shed light on the organization of this profession.

Participation: My participation will consist of a single period of observation conducted by the researcher in which he will observe me as I represent a case which has made use of Restorative Justice; this observation will last the duration of this appearance. My participation will also consist of an interview of approximately one hour during which I will discuss my use of Restorative Justice as it pertains to my position as Crown attorney. This interview may also address the aforementioned observations conducted by the Principal Investigator at the Courthouse in which I work as a Crown Prosecutor.

The interview is scheduled for _____, and will take place at

_____. These interviews will be recorded unless participants wish that recording not take place. In this case, notes will be taken. Additionally, recordings may be quoted in the research unless participants wish not to be quoted.

I content to the use of audio recording of the interview mentioned above:

- Yes
- No

I consent to the use of my anonymous quotes collected from the interview mentioned above:

- Yes
- No

I consent to the use of my anonymous quotes collected from the observations undertaken by the researcher as I represented a case using Restorative Justice in court:

- Yes
- No

Risks and Benefits: My participation in this study may contribute to my practical understanding of the current use of Restorative Justice within my role as Crown attorney and also provide an opportunity to discuss potential difficulties I may have in implementing it in this environment. If at any time I feel any difficulties in speaking about this matter for any reason, I understand that I can voice these concerns with the researcher and/or his supervisors listed above. Additionally I understand that despite a respect for confidentiality and anonymity, it may be possible for an individual to guess which Crown attorney's office a participant works within. It is also possible that colleagues may be able to identify one another from quotations used; thus the complete protection of my identity cannot be guaranteed.

Confidentiality and Anonymity: I have received assurance from the researcher that the information I will share will remain strictly confidential. I understand that the contents will be used only for the writing of his Master's thesis and any publication that results from this thesis. I understand that my confidentiality will be protected through the use of encrypted storage devices to store any notes and audio files created during the interviews. Additionally, these files will use pseudonyms and will not bear any identifying personal information.

Anonymity will be protected through the use of pseudonyms if I am quoted in the research and in any file created. Additionally, this research will only refer to a Crown attorney's office in Eastern Canada so as to mask the true location of the participants. In this way, individual identities will not be divulged.

Conservation of data: The data collected on _____ will be kept in a secure manner. Any audio files will be stored on an encrypted USB memory stick and kept in the home office of the researcher. Any written notes will also be kept in a locked filing cabinet in the researcher's home office. A copy of these files will be stored in the locked office of the researcher's supervisor (Véronique Strimelle) at the University of Ottawa. The lead researcher will have access to these files along with his supervisors. This data will be kept for five (5) years, after which all files will be securely deleted and any physical copies will be shredded.

Appendix D: Research Invitation

Hello,

My name is Brendyn Johnson and I am a current Master's student in the Department of Criminology at the University of Ottawa. For this reason I am searching for persons interested in participating in research on the use of Restorative Justice within the criminal justice system. The goal of this research is to understand the role Crown attorneys play in the implementation of Restorative Justice and the way this role manifests. Specifically, the goal of this study is to understand the manner in which Crown attorneys come to use Restorative Justice in the course of their work and how these cases unfold. Please note that, despite my affiliation with the Collaborative Justice Program, I undertake this research in a completely unrelated role and no identifying information will be shared directly with others involved in the program. There is no obligation whatsoever to participate.

For this research I will attend final court appearances of cases that have made use of Restorative Justice in order to observe your work as a Crown attorney in action. Additionally, an interview will be requested in order to speak of this court observation and other issues pertinent to the use of Restorative Justice in the criminal justice system that will last approximately one hour.

For this research I am seeking participants that are Crown attorneys in Canada. Additionally, participants are asked to have some experience with Restorative Justice in a criminal justice setting (excluding prisons); in this case experience refers to any interaction where the participant decides (after thought or simply in passing) on the use of Restorative Justice in the course of their work as a Crown attorney.

This research does not entail any known risk to the participants. They are not required to divulge any specific information of cases; if this does occur, any names, events and locations will be changed. Participants are only asked to discuss information they are comfortable divulging. If

you are interested in participating, please contact Brendyn Johnson by email at [REDACTED] or
by telephone at [REDACTED]. If you know of any possible participants who may wish to participate
in this study, please share this information. Volunteers who meet the inclusion criteria will be
selected on a first come, first served basis.

If you have any questions regarding the ethical conduct of this study, you may contact the
Protocol Officer for Ethics in Research, University of Ottawa, Tabaret Hall.

550 Cumberland Street, Room 154
Ottawa, ON
K1N 6N5
Tel.: (613) 562-5387
Email: ethics@uottawa.ca

Appendix E: Interview Guide

Interviewer: Brendyn

Interviewee:

Pseudonym:

Characteristics:

Sex:

Crown attorney for ___ years

Other legal experience: _____

Step 1: Context of Research and Topic Introduction

1. Research concerning the use of Restorative Justice (RJ) in the criminal justice system
2. The objective is to better understand the role Crown attorneys play in using RJ at various stages of the criminal justice system

Step 2: Obtain Informed Consent

1. Participation
2. Risks and Benefits
3. Confidentiality and Anonymity
4. Conservation of Data
5. Voluntary Participation

Step 3: Interview

This interview will be semi-structured and will ask broad questions in order to explore the experiences of participants as they relate to Restorative Justice thus giving them the ability to go into depth about their experiences. Furthermore, this interview will address court observations of the participant conducted by the researcher at the Ottawa courthouse.

Introduction:

Given the current use of Restorative Justice in the Canadian criminal justice system (whether or not you consider it to be growing or not), I would like to discuss your experience with these types of programs in the course of your work.

1. Could you describe to me how you come to use Restorative Justice in the course of your work as Crown attorney? When you decide to use or not use RJ, what goes through your head? Can you walk me through this process?

Themes

- i. Naturalness of Restorative Justice. That is, is RJ something natural or does the participant need to be reminded or persuaded to use it?
- ii. Conditions (case type, offender type, etc.) that may make it more or less likely to use Restorative Justice?
- iii. Is this what happened for the case you defended in court which was observed?

2. Once Restorative Justice has been decided upon, what happens next for you in relation to this case?

Themes

- i. Arguing this case before court (for adjournments or other appearances and also sentencing).
- ii. Do you represent these cases?

- iii. How do answers align with court observations?
- 3. Issues with using RJ?
 - a. Are there institutional rules?
- 4. What is RJ for? What purpose does it serve for you?
 - Themes:*
 - i. Duty to protect society? Help with court delays? Address weaknesses of the traditional system?
 - ii. Probe on idea of healing if it arises → is this something you look for in all cases? What is healing? Why would it work in this case?

Step 4: Synthesize Interview

Step 5: Thank Participant and Provide Follow-Up Information