Women and the Canadian Legal System

Examining Situations of Hyper-Responsibility

DISCUSSION PAPER BY THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES (CAEFS) AND THE NATIVE WOMEN'S ASSOCIATION OF CANADA (NWAC)

Les sociétés Elizabeth Fry du Canada et l'Association des femmes autochtones du Canada ont identifié un certain nombre de scénarios qui démontrent qu'une discrimination systémique est faite aux femmes dans la législation canadienne. Ces scénarios sont problématiques dans le cas des femmes marginalisées de par leur éthnie, de leur classe, de leur pauvreté, de leur langue, leurs habilités et leur orientation sexuelle. La loi canadienne s'attend à ce que la personne soit responsable de ses actes. Rien n'est plus vrai qu'au criminel. Cet article démontre que pour les femmes, (surtout celles d'éthnies différentes, celles qui souffrent de maladie mentale ou sont handicapées, pauvres ou d'une minorité sexuelle), la législation s'attend à ce qu'elles soient plus responsables que les autres, une situation que l'auteure appelle "hyper-responsabilité."

In the advocacy work of the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada (NWAC), we have noticed the emergence of a number of patterns that demonstrate the degree to which women face systemic discrimination in the Canadian legal system. These patterns are especially problematic when women are marginalized in intersectional ways across race, class, poverty, language, ability and sexual orientation. Taking the opportunity to share and compare stories and experiences of advocacy activities allows us to learn more about the systemic nature of the ways women are experiencing Canadian legal processes and the degree to which rights paradigms (such as the Charter) are not yet able to provide full remedies for women.

Canadian law is often built around expectations that individuals take responsibility for their actions and nowhere is this truer than in matters of criminal law. What we have noticed over the years is a number of situations where women (particularly when they are racialized, have a disability or a mental illness, are poor or a sexual minority) are expected by the legal system to take more responsibility than others. This is the situation we are referring to as hyper-responsibility.

Situations of hyper-responsibility of women through Canadian law often occur when women resist violence. Violence in our view, is a broad term which extends to all situations where harm is done to a person. Violence is, then, not just about physical harming but in our definition also includes psychological, emotional, sexual, economic and spiritual woundings. Both individuals and the state perpetuate violence against women. Secondary violence is experienced by the women who are in support or advocacy roles and is often evidenced in our growing frustration with the denial of justice to women in this country.

With monies secured from the Court Challenges Program (CCP), CAEFS and NWAC were able to convene a two and a half day meeting in Winnipeg at the end of February 2008. It was a first opportunity to have a focused discussion beyond the small discussions one has with activist friends on the situations of hyper- responsibility of women demanded by the legal system. One of the principles that the meeting proceeded on was the need to move from talk to action. The goal of this discussion paper is to extend the conversation and examination of hyper-responsibilization of women in the Canadian legal system beyond the circle of twenty who were able to meet in Winnipeg. It is clear to us that there is much work that remains to be done to protect women's human rights and their right to live in a just, safe and peaceful society.

It has now been 26 years since the *Charter of Rights and Freedoms* became the supreme law of the land. Although sometimes, through small incremental steps, the *Charter* has improved the circumstances for women in Canada through the anti-discrimination provisions found in section 15(1) and (2), our continued work with women who stand up for their rights, despite the consequences, is now pointing to some

of the limitations that section 15 presents. It is clear that we need to move beyond incidental advocacy and challenge the systemic and structural barriers that still exist in Canadian law for women.

Patterns of Hyper-Responsibility

Women's advocates began to see the issues that surround the hyper-responsibilization of women in Canadian law through their individual attempts at supporting women charged with offences, often when they had protected themselves from batterers. Since the Ratushny review was completed:

> … researchers have noted that women are increasingly vulnerable to criminalization when they use violence in self-defence and, under rigorous zero tolerance policies, women continue to be countercharged for domestic assault—even when they call the police for help (Balfour 2000a: 294).

Throughout our discussions one predominant theme emerged. Women who are experiencing and responding to the violence around them are not receiving adequate protection from the Canadian legal system. We were able to correlate our concerns about patterns of hyper-responsibility under several headings.

Women in Prison

Prisoners are among the most disadvantaged members of society in countries around the world (Stern 2006) and this is as true for women. When we cast our gaze on the experiences of the most disadvantaged, the range and scope of the inequalities women in Canada face becomes illuminated. If we cannot improve the situation of women serving sentences, either provincially or federally, then there is very little chance that we have ameliorated the disadvantages women face in Canadian society. When the scope of our inquiry is the violence that is perpetrated against women, then examining the individual circumstances where women have resisted enhances our understanding of inequalities that remain embedded in Canadian law. As many of these women are criminalized for their resistance, we access their stories through our anti-prison activism.

Especially since the 1990s, the situation of women in prisons and jails in this country has received more scholarly and research attention than it did in the past (Balfour 2006b; Balfour and Comack 2004, 2006; Hannah-Moffat 2000, 2001; Hannah-Moffat and Shaw; Monture 2000, 2006; Neve and Pate; Pate 1999a, 1999b, 2005). A number of reports have raised concerns about inequalities women in custody face and these include the lack of access to gender-relevant programming; the lack of community-based release options; the lack of opportunity to serve their sentences in minimum security facility and the likelihood of being over-classified resulting in a maximum security conditions (CHRC; Auditor General of Canada). Women have been forced to engage in litigation to close the women's maximum-security units in prisons for men as well as to ensure that the only minimum security for women in Canada remains open. It is our view that this kind of litigation is a drain of women's energy as well as the financial resources of the state. Our view of equality demands that the state take positive and progressive action when state officials are aware that their conduct discriminates against women.

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Despite the report of the Task Force on Federally Sentenced Women, which was implemented in part in the 1990s, women are still being treated more harshly than men in the prison. The five principles the Task Force articulated (empowerment; meaningful and responsible choices; respect and dignity; supportive environment; and shared responsibility) have been divested of their feminist and collective meanings and used by the system to demand from women a level of accountability for their crimes not expected of men (Hannah-Moffat 2001; Hayman). These philosophical shifts have become even more problematic in these neoliberal times, which produce the law and order environment currently prevalent in Canada.

One of our most pressing concerns is the super-maximum-security management protocol to which three Aboriginal women are currently subjected. The conditions of confinement under the protocol are more stringent than those of men in "Special Handling Units" and too many of the behavioural standards set in these protocols are impossible to meet. For instance, the Correctional Service of Canada (CSC) has demanded that women "not swear" or "demonstrate anger

or disrespectful behaviour" (emotions we believe help the women cope in a super-maximum-security environment) and has then attached a six month time frame for the assessment of "appropriate and expected behaviour." These are conditions that we believe would be seen as ridiculous if suggested in a male correctional environment but because women continue to be cast stereotypically by the penal regime it is not challenged. This introduces another theme. Women in prison have received equality with a vengeance.

Over the years we have seen an increase in the attempts to label women as dangerous offenders. The best-known case is Lisa Neve (Neve and Pate). An examination of her criminal record reveals the negligible risk she posed to society. This exposes a glaring gender difference when that record is compared against the records men who have been signified as dangerous offenders. Currently, a woman who started a three-year sentence is now serving more than 20 years in prison and is facing this court process as a result of charges incurred *inside* the institution. Information such as this makes the category "dangerous" a suspicious one and also points to the fact that the women's prison environment begets violence rather than "correction."

With the patterns of state oppression and violence directed at women we see within the prison regime in Canada, there is another pattern of criminalization of Aboriginal women (and other women of colour). All of the women on the optional protocols, for example, are Aboriginal women. Many have noted with alarm the over-representation of Aboriginal women in federal custody (in 2004, 29 percent of the federally sentenced woman population were Aboriginal and a full 46 percent of the maximum security population (CHRC) and once in prison, an Aboriginal woman is more likely to serve her sentence in a maximum-security environment (Monture 2000). These facts demonstrate the point that started this discussion on women in prison. It is the most disadvantaged who find their way to prison or jail.

Criminal Justice Resources

Resources in the community, particularly local resources (such as court workers and Elders), at times, are not meeting women's needs. We acknowledge that this is a very difficult topic to discuss and we are not laying blame. The problem is particularly acute for women who are charged with serious offences. We are concerned that the implications that flow from individualized systems of legal responsibility (such as those that provide the foundation for Canada's criminal law) may not be well understood by individuals who come from more community-focused and collective cultures. When such persons offer advice to an accused person that might be appropriate in a collective culture (e.g. accept responsibility or heal the family), the woman accepting such advice might become more vulnerable in the courts. We acknowledge that this is a very difficult topic to discuss because of the ease to which any comment is seen as criticism of Aboriginal ways and that is clearly not our intent. What we see is the pattern of continued conflict between Canadian legal practices and Aboriginal ways which continues to have a negative impact on Aboriginal women's lives.

Resources in the community, particularly local resources, are not meeting women's needs in other ways as well. For example, chronic lack of affordable housing and temporary shelter beds limit women's ability to be released on bail.

One particular case in the prairie region of the country was discussed at length. During a house party on a reserve about an hour from a major urban centre, a young man was killed. This story is not unlike many other stories we heard during the course of our meetings or that we are familiar with because of our advocacy work.

During the work on this case of several of the advocates who attended the Winnipeg meeting, it became clear to them that the woman who had been charged had not murdered the young man. This was disturbing because the court process had already been underway for about a year. The police stopped investigating immediately because they had a "confession." After it was determined that she may not have been the appropriate person charged, it was too late. Valuable evidence at the scene had already been lost. Despite the best efforts of advocates and lawyers, the woman eventually pled guilty to manslaughter.

On the videotape recorded immediately after her arrest, the women did say she was responsible for the young man's death. The woman took responsibility because the young man was her nephew, she had helped raise him and on the evening in question she knew he was about to receive some troubling news. In Aboriginal ways, Auntie's are responsible for their nephews. She had given him a drink even though she knew he had drinking problems. Her admission of responsibility was *not* an admission that properly supported the conclusion that she was criminally responsible.

This is not the end of the troubling facets of this case. When the nephew received the bad news, he started fighting. The police were called and they did *not* respond. The police were called a second time after the young man was stabbed. The police did not respond until there was a dead body. This communicates a loud message to Aboriginal people: our lives are not valuable in the eyes of the police. The work of organizations such as NWAC and Amnesty International on the number of murdered and missing Aboriginal women in this country also emphasizes the many missed op-

portunities for the police to respond appropriately to Aboriginal concerns for their family members or for their own individual safety. This concern on its own should be cause for action. However, the impact on Aboriginal people is even greater. We see that the state has effectively trained many Aboriginal women to believe they are on their own in circumstances where they face violence. Women are then faced with the prospect of no hope and likely death or the need to fight. When women are forced to meet violence with violence, the travesty is they are then susceptible to facing criminal charges. The lack of response by the police thus becomes a self-fulfilling prophecy and the stereotype that Aboriginal people are criminal is reinforced.[1]

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In our advocacy efforts we have also noted that women are susceptible to entering guilty pleas at a very high rate. Concerns were also raised that women face additional pressures in plea-bargaining. Often women, especially when the context is a battering relationship, plead guilty to protect their children and sometimes to protect the batterer. Overcharging also results in women pleading guilty to more serious charges (such as second degree murder instead of manslaughter). Unfortunately, as statistics are not readily available on these concerns, systemic arguments cannot be made in courts that would assist women who have faced or are facing these circumstances. We believe that a government funded review, developed in true partnership with NWAC and CAEFS, should occur for women who have pled guilty to serious offences. We see it as essential that the state begin to take responsibility for the circumstances where women are facing inequalities in the legal system.

Additional concerns were raised about the sentencing process. Section 718.2(e) of the *Canadian Criminal Code* first acknowledges that Canada over-relies on sentences of incarceration and that this has had a particular impact on Aboriginal peoples. The section then directs sentencing judges to consider alternatives to incarcerations, particularly for Aboriginal peoples. The *Gladue* decision provides further guidance on this matter (see Turpel Lafond 1999). What is not known is the degree to which the *Criminal Code* and the *Gladue* decision are of assistance to women. This is an area where further research is recommended to determine if women receive access to the *Gladue* provisions and the degree to which the court's analysis of race that *Gladue* demands is coupled with a gendered analysis.

Mothers and Children

The consequences for women facing criminal charges include the loss of their children to child welfare authorities. When charges are dropped, women are found not guilty or wrongful convictions are reversed, it is often too late as the children are already lost to the system. Racialized women are more likely to lose their children, especially Aboriginal women.

We are particularly concerned with the ways in which the state interferes with Aboriginal women's parenting. Even when the woman is not involved in the legal process, she may lose her children because she is seen as not having fulfilled her responsibilities to them because they are living in poverty or there is violence in the home. However, what is actually happening is that the state is looking to the mother to correct the systemic conditions of poverty and violence affecting Aboriginal families and punishing her with the loss of her children if she fails (Kline). These conditions are systemic and they require systemic solutions, not an allocation of individual blame. It has been noted that the lion's share of federal funding to First Nations child welfare authorities is heavily weighted toward removal of the children (Fontaine), and does not fund assistance to the family to improve parental strategies or life circumstances.

While incarcerated, women are separated from their children except in rare circumstances. The mother and child program at the Okimaw Ohci Healing Lodge has been closed for several years now. Recently, in British Columbia a woman convicted of manslaughter and now serving a four-year sentence was allowed to have her child with her at the new federal facility in that province (Culbert and Bellett). However, this permission was only secured with the activism of several lawyers and community groups. Programs and options for women and their children should not rely on individual cases of advocacy but should exist as a matter of policy.

Again, concern was raised that they are very few, if any, resources for women who are facing state-

sanctioned removal of their children. While the Supreme Court of Canada has recognized that a woman may be entitled to legal assistance from the state in these cases (*New Brunswick (Minister of Health and Community Services)* v. *G.(J.)* 1999), there are no systems in place to provide such assistance. A complex individual application to the very court hearing the proceedings is the only way to seek such assistance, and it will not be granted in every case. This remains an ongoing problem that needs further state redress. Perhaps, the court-worker system developed in the criminal law could also be provided for child welfare matters.

Resisting State Violence

In ways similar to the treatment of women who resist personal violence, Aboriginal people who acknowledge their traditional responsibilities as caretakers of the land are increasingly being criminalized by the Canadian state. Canada, in fact, has a long history of criminalizing the traditional practices and ceremonies of Aboriginal peoples. The outlawing of the potlatch and the sun dance, through criminal provisions in the *Indian Act*[2] failed to obliterate these practices, thanks to the peoples who continued them at great personal risk during the period of interdict (Backhouse). Although the criminal sanctions against potlatch and sun dance were removed decades ago,[3] Canada continues to criminalize the assertion of traditional rights and the exercise of traditional duties to protect Mother Earth. The state awards to corporations permits for the exploration or development of "Crown" land without regard for the rights and claims of First Peoples to that land, and then will use the Criminal Code, with its provisions against trespass, intimidation and public mischief, to punish the Aboriginal protesters who challenge defilement of the land and overriding of Aboriginal rights and title. Moreover, corporations holding such permits successfully apply to court for injunctions to stop protests against development, and courts are now readily convicting and imposing heavy sentences on Aboriginal leaders and activists for "contempt of court" when they resist the courts' commands to respect the corporations' rights over Aboriginal land. State practices, actualized by bureaucrats, police, and courts, thus amount to a form of legalized violence against Aboriginal peoples who assert stewardship over their traditional lands.

Examples of this deployment of state power to privilege corporate development of traditional lands, and punish efforts to protect it, are numerous. Women have been in the forefront of opposition to development, and have figured prominently among those incarcerated for alleged violations of the Criminal Code or "contempt of court" for defying injunctions secured to protect corporate interests. Women are also in the forefront of the legal movement to resist criminalization for fulfilling their traditional duties toward the land.

Recent Ontario cases where protesters were jailed for contempt of court for ignoring injunctions protecting permits granted for mineral exploration and development highlight the adverse consequences to Aboriginal people of accepting responsibility for one's actions, within the context of the legal system. Demonstrators from the Ardoch Algonquin First Nation and the Kitchenuhmaykoosib Inninuwug First Nation accepted responsibility for barring resource companies' access to their traditional lands, pursuant to their traditional duty to protect the land (see *Frontenac Ventures Corporation* v. *Ardoch Algonquin First Nations* 2008 and *Platinex* v. *Kitchenuhmaykoosib Inninuwug First Nation* 2008). However, in both cases, the courts saw this open acceptance of responsibility for the Earth, and for their actions, as demonstrators' aggravated defiance of court orders allowing the companies access to the land. Heavy jail sentences were imposed for contempt of court.

Similar cases have proceeded in British Columbia as well. Nicole and Beverly Manuel are members of the Secwepemc (Shuswap) First Nation and the Neskonlith Indian Band. They participated in a roadblock on Sun Peaks Road near Kamloops, B.C. in August 2001. They were convicted in Provincial Court on September 16, 2002 of unlawfully obstructing a highway and mischief, contrary to sections 423(1) and 430(1)(c) of the Criminal Code. Nicole, the mother of young children, was sentenced to 45 days in jail, and put on probation for 12 months, and her mother Beverly received a suspended sentence and one year's probation. The imposition of probation is itself a way of inhibiting protest, as breach of the conditions of probation by further protesting will attract a jail term. These convictions were upheld on appeal to the Supreme Court of British Columbia on November 12, 2004. (*R.* v *Manuel* 2007 para. 2; Canadian Press).

Nicole and Beverly Manuel appealed their convictions to the British Columbia Court of Appeal. Here, they asserted once again the arguments which had been rejected by the first two courts: namely, that they had a legal right to block Sun Peaks Road under the natural laws of their people and the laws of the Creator, which imposed a duty on the Manuels and other members of their Nation to take care of and preserve the land. In the technical language of the law of trespass, this defence was that they had a "colour of right" to be on the road they had been accused of blocking and a right to keep others off it. In the court below, and in other courts dealing with charges against other demonstrators, the belief asserted by the Manuels had been characterized as a "moral" belief that was insufficient to justify a breach of the law (*R.* v

Manuel 2007, paragraphs 4-6).

At the next level of Manuels' appeal, the BC Court of Appeal recognized that their beliefs in their people's title to the land and the obligations imposed by the law of Creator were beliefs in legal rights, because Aboriginal law is not a separate legal system, or moral code. It is part of Canadian law. The Court of Appeal thus ruled that it was incorrect to characterize the Manuels' beliefs as beliefs only in moral rights (*Manuel* 2008).

Although this ruling is important in the overall development of the law, the Court of Appeal's final decision was very disturbing. A person must have an honest belief about her legal rights in order to claim a "colour of right" defence, and the Court ruled that to be characterized as honest, a belief must be reasonable. Then it went on to hold that the Manuels' belief that their Aboriginal legal rights gave them the right to block the road was not reasonable (and thus not honest) because they knew that the federal government had refused to recognize their land claim for reserve lands lost, and the status of their Aboriginal title to the land was unclear because their had been no litigation to settle it (*Manuel*).

The decision leaves First Nations totally at the mercy of the government. Government can deny in negotiation, or delay in litigation, the resolution of Aboriginal claims, and at the same time issue to corporations permits to develop Crown land affected by those claims. Even if the First Nations are successful in the long run, the land will have been devastated by the development permitted in the short run. There is an urgent need to challenge the ultimate ruling on reasonableness/honesty arrived at by the BC Court of Appeal. Until that is done, First Nations and individual protesters may be able to benefit from the Court's acceptance of Aboriginal law as part of Canadian law, not just a system of "moral beliefs," and each protest will have to be backgrounded with a clear legal opinion setting out Aboriginal title and the right to the land.

The risks for Aboriginal women who demonstrate to protect their peoples' traditional lands are very high. Mothers are separated from their children by jail sentences, and thus run the risk of child welfare authorities' involvement. On January 25, 2007, Harriet Nahanee, a Squamish Elder aged 71, was sentenced to 14 days in the Surrey Pretrial Centre, a men's prison with two segregated maximum units for women, for her role in the Eagleridge protest. Fellow demonstrator Betty Krawczyk advised Justice Brenda Brown of Ms. Nahanee's frail health to no result. Shortly after her release from prison, Ms. Nahanee was hospitalized with pneumonia, and she died February 24, 2007. It is clear that Aboriginal people are experiencing serious consequences when the state fails to take a balanced approach (including their legal duty to consult First Nations) to economic development on reserve lands.

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Media

The media do not cover well issues of concern to women. For example, most of the wrongful conviction cases highlighted in the media involve men. Even after the Rathushny review the wrongful conviction cases involving women receive scant attention. The media pay little attention, if any, when Aboriginal people go missing.

When the media response is not silence then the image of women the media portrays are problematic in various ways (Faith 256). Concerns were also raised at the Winnipeg meetings about the stereotyping of Aboriginal peoples involvement in criminal activity. The best example is the discussion of gang members in the prairies as though there were only Aboriginal gangs. It was also noted anecdotally that in prairie papers, only the race of Aboriginal persons are noted in stories about arrests, convictions or offences.

Sociologists have long noted that the media play a significant role in creating public perceptions about crime (Schneider). In 1978, Mark Fishman noted the mass media have often produced "crime waves" despite the fact that statistics reveal that crime was actually decreasing (cited in Schneider). Schneider notes that crime news is good news because people are interested and it is a "cheap, easy to get hold of" news which sells papers. Since the Task Force on Federally Sentenced Women which was brokered on the fact that women were not as dangerous men, we have seen the media in Canada capitalize through reporting of stories that cast women as dangerous. Furthermore, Laureen Snider points out: "in a neo-liberal, punishment-obsessed culture, any evidence of "leniency" will instantly

be seized by sensationalistic media eager both to foment and capitalize on anti-feminist backlash" (Balfour and Comack 324). Unfortunately, little scholarly attention has been paid to the way the media portray women, particularly women involved in crime.

Other Concerns

There are also other situations that need to be examined and these include: prostitution and sexual exploitation of girls and young women, who are too often blamed and disrespected; the number of murdered and missing Aboriginal women (as a particular way that Aboriginal women experience violence and victimization); lack of or delayed police responses to situations of violence against women; forced addiction treatment for pregnant women; and, the way the *Indian Act* encouraged and still encourages violence against women. There are a number of ways these issues in Canada have international overlaps. More work needs to be done to fully examine all of the situations of hyper-responsibility and prepare responses to the situations of discrimination they produce.

Academic Literature

Since the mid-1990s, academics have been developing theories around the concepts of responsibilization and governmentality. These are tools that help us understand the structure and functioning of the neo-liberal state. In 1996, British scholar David Garland published a paper, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society." Garland's argument begins by noting that most contemporary western societies have, since the 1960s and extending at least into the late 1990s, experienced increasing crime rates. In some countries (including Canada), this trend has now reversed. Equally the fear of crime has become widespread as a result of media representations and the politicization of crime control. Garland also notes that crime "has an uneven social distribution." The dispossessed are more likely to be victimized. Yet, "… for most people, crime is no longer an aberration or an unexpected, abnormal event" (446).

The shift in how crime is experienced as an everyday phenomenon has cyclical impacts on the actions of the state and the ways crime control is justified. Within this new mode of governing, Garland argues, the central government is "seeking to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work, etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizations" (1996: 452). Thus, as a result of the state's responsibilization strategy, what was previously a sovereign power of the state is now a responsibility of the citizen. This downloading strategy is couched in terms of the freedom of the citizens to choose to act in an appropriate way. This shift in accountability from state to citizen (and community group or organization) must make suspect recent strategies and funding for prevention.

Looking specifically at the way Great Britain's laws on youth crime control have recently changed, John Muncie notes that:

> What is clear is that traditional justice versus welfare or welfare versus punishment debates are particularly inadequate in unraveling how youth justice acts on an amalgam of rationales, oscillating around, but also beyond, the caring ethos of social services, the neo-liberal legalistic ethos of responsibility and the neoconservative ethos of coercion and punishment (771).

Debates about when punishment is justified in criminal justice systems are now more complex and it is more difficult to determine the underlying rationales under a neo-liberal system of governance. Canada too has experienced recent periods of rapid change in its youth justice laws since 1983, first enacting a new law called the *Young Offenders Act* (proclaimed into force in 1984) and then the *Youth Criminal Justice Act* (2002 and revised in 2004). The experiences of girls and young women are far too often absent from these academic debates and articles; thus, their experiences of hyper-responsibility or their treatment under responsibilization strategies are not as clearly visible.

The Canadian literature on responsibilization in crime control sectors of society focuses on studies of examples of the state's ability to make citizens responsible for their own "correction." Kelly Hannah Moffat (2000) argues that the implementation strategies of the federal crown regarding the work of the Task Force on Federally Sentenced Women have turned the feminist concept of empowerment inside out. It becomes a way of holding women prisoners accountable for their criminogenic factors and offending, a standard much higher than male prisoners are held accountable to. Steven Bittle considers anti-prostitution in Alberta while Patrick Paranby analyzes risk as the new justification for intervention. What is key in the responsibilization discourse is the illumination of a new "freedom" individuals have to make responsible choices away from poverty, addiction and criminal behaviour rather than having a government provide a social safety net.[4] Canadian scholars have not been discussing in the academic literature either the theoretical framework of responsibilization and governmentality in a national context nor have they been asking questions about the impacts that this shift in policy has had on those who are criminalized and imprisoned, including young men and women. Women and gender are again not central in the discussion.

Absent from Garland's work is the presence of women as well as young persons. "The treatment of women with in the criminal justice system has been closely tied to their social characteristics… " (Gelsthorpe 77) or in other words the way women are socially constructed. In terms of Garland's own work this is unfortunate as "the recent huge increases in the number of women sentenced to imprisonment are simply inexplicable and point to a paradox that well exemplifies the situation Garland is trying to explain (Gelsthorpe 77). It is more than disappointing to note that the consideration of feminist theories of criminalization are absent from the literature written about responsibilization within the criminal justice system.

Feminist criminologists in Canada have indeed noted their frustration with their ability to positively influence the inequalities women continue to face in the Canadian legal system (see for example Balfour 2006a; Comack; Monture 2000, 2006; Snider). These criticisms grow not just from theoretical positions but also from the activism that good feminist praxis demands be joined to theorizing. It is worth quoting Laureen Snider at length on the realizations that have been gained:

> The criminal justice system in the modern democratic state is structurally ill equipped to deliver empowerment or amelioration…. Criminal justice does not have a Janus-like quality, a legitimating, positive or life-affirming mission to balance its repressive side. The official role of institutions of criminal justice is to discipline those designated as lawbreakers, to control them legally and equally, regardless of race, class or gender. This means that institutions of criminal justice are not like other institutions—schools, for example are charged with educating, hospitals with healing—because they are charged only with delivering "equal-opportunity social control." The favoured consciousness raising strategy of progressive groups—calling institutions to account for not delivering on their official promises—has limited potential here. Police, prisons, and courts cannot be named, blamed or shamed for failing to empower women or failing to provide them with life-affirming choices. They can only be castigated for failing to punish women equally with men (324).

Laws, which have as their goal social control, are equally implicit in this conclusion. Following Snider's argument, further reforming the prison in the best interest of women will not take us to a true form of equality.

Understanding the rate at which feminist criminology has progressed in the last four decades, is informative to the considerations of women's legal inequality which brought us together in Winnipeg. The first wave of feminist criminology began to emerge in the 1970s and had as its focus a critique of the exclusion of women from "malestream" criminology (Comack 28). But critiques neither solve the problems women encounter in the legal system nor do they provide a sound theoretical basis for feminist (or any other) theory. The 1980s were "heady times … as they watched decades of activism finally begin to pay off" (Balfour 2006a: 737). Reforms were underway in the federal correctional system, domestic violence seemed to be taken more seriously and important changes were made to the rape laws, which became known as sexual assault to reinforce that the crime was indeed one of violence. The most recent wave of feminist criminology began as a response to the recognition that many of the gains perceived by feminists in the 1980s were double-edged as seen in the charges and countercharges brought against women who were merely defending themselves against violence, often the violence of their partners. In fact, some have concluded that reliance on the law including the criminal law is misguided (cited in Snider 323). Laureen Snider, however, concludes that the "first and most obvious lesson of the reform efforts of the past is that making change is a complex and complicated activity" (325). This acknowledgement brings us to the place where the literature on responsibilization can compliment our thinking as feminists.

The literature on responsibilization and governmentality illuminates certain realities on the prairies. First, applying Garland's recognition that "crime has an unequal social distribution," we can acknowledge that not only those committing crimes are more likely to be poor, socially excluded and racialized but that the victims are more likely to come from this same social grouping. In the west, Aboriginal persons are even more disproportionately both the victims and the perpetrators (Aboriginal Justice Inquiry of Manitoba; Monture 2006). A second realization should be emphasized. Despite decreasing crime rates in the province, we do not yet seem to be experiencing a reduced fear of crime, a decrease on the "tough on crime" policy and political frameworks or a reduction in police demands for more officers and resources to fulfill the "tough on crime" mandate. As a result, policy and government funding allocations to crime are no longer driven by statistical evidence. Third, looking to the academic literature, the position of women and girls is not an emphasis. The same exclusion exists in what grants are funded and not. There is a need to ensure that more scholarly and other research endeavors incorporate gender into their analysis. Often one of the problems we face as advocates is a lack of research, which supports gendered understandings of the struggles women continue to face.

The literature on responsibilization within criminal justice systems does parallel our concerns about the hyper-responsibility being demanded of women. However, the conversation about hyper-responsibility may not necessarily fit squarely within the academic discussion on responsibilization. Our challenge, and our priority, is to bring the lived experience of women to the debate and find ways to advance our understandings while providing real opportunities to end the hyper-responsibilization of women in Canadian law.

Conclusion

What is required is action! For the part of CAEFS and NWAC, the organizations have committed to signing an agreement regarding their future work together on these issues. The group who met in Winnipeg agreed on the following objectives[5] that will guide the work to eliminate state and personal violence against women and their children:

1.Denounce, resist and eliminate criminalization of women who resist state and personal violence towards them and their children.
2. Denounce, resist and eliminate hyper-responsibilization of women who resist state and personal violence against them and their children.
3. Develop ways of acknowledging responsibility that do not criminalize women.

There is much work that needs to be done and funding will be a key issue. Projects discussed include:

•preparing a resource kit(s) for courtworkers, advocates and lawyers that discusses the situations women and their children face when resisting personal or state violence;
•accessing funds to ensure that adequate research is completed on the systemic inequalities women face in the Canadian legal system. Both quantitative and qualitative studies are needed to document the experiences of women, their children and their families;
•legal action, documentation and research is also needed. Concerns were raised about two specific instances: women's ability to access to the sentencing provisions of section 718.2(e) of the *Criminal Code* as interpreted in the *Gladue* ruling as well as the lack of privilege (legal confidentiality) accorded to Elders;
•develop public education strategies that show the multiple ways in which women are being treated unequally in Canada's legal system.

It was clear to the women gathered in Winnipeg, that there is a profound need to change the system's perception of women's resistance to personal and state violence. The goal is to prevent the criminalization of women who resist and prevent their continued hyper-responsibilization. There is a need to decriminalize and deinstitutionalize the response to women who resist violence. This requires a change in institutional practices such as police and prosecutorial guidelines. These aims will prevent more women from being criminalized in the Canadian legal system. However, we must not forget the cases presently before the courts or the women who are presently serving sentences. There is a need to find ways to interfere in these ongoing cases and to remedy the historic cases.

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[1]For a fuller discussion of how these factors operate in the justice system please see David M. Tanovich. Unfortunately, this work does not contain a gender analysis.
[2]The ban was originally enacted by *An Act further to amend the Indian Act 1880*, S.C. 1884, c. 27, s.3, which became R.S.C. 1886, c.43, s.114. The ban was enlarged by R.S.C. 1886, c.43, s.6, and this was included as s.149 of R.S.C. 1906, c.81. The ban was further enlarged by S.C. 1914, c. 35, s.8, and appeared in R.S.C. 1927, c. 98, as s.140.
[3]The ban contained in R.S.C. 1927, c. 98, s.140 was amended once, by S.C. 1932-33, c.42, s.l0, and continued until 1951. The *Indian Act* was substantially overhauled in 1951, and no ban appeared in the l951 Act: S.C. 1951, c. 29.
[4]This key element has been embraced by the Chief Justice of Canada, and the majority of the Court, in the decision in *Gosselin* v *Quebec (Attorney General)*, [2002] 4 *S.C.R.* 429. The Supreme Court upheld the constitutional validity of a Quebec workfare scheme for young adults, ruling that id did not violate their dignity because it gave them the opportunity to learn a skill and enter the workface. The decision was reached despite evidence that there were insufficient training opportunities attached to the program, and even those who wanted to "work" could not get it, and would thus continue to draw the below-subsistence allowances provided to those not participating in workfare.
[5]These objectives and commitments have not yet received the endorsement of the Boards of Directors of either organization.

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PATRICIA A. MONTURE

white man tell me

white man
tell me
"I had no idea"
white man, he,
tell me

white man hear me
I been
telling you 'bout
poverty
abuse
jail
foster care
residential schools
suicide
bottle abuse
rape
crime
battering

been telling you 'bout
privilege I carry
as employed,
teacher,
speaker,

all that, it,
don't change much
about
the pain
i carry
it surrounds me
downs me
with knowing death and
suicide
violence and rape
murder

spirit gone
woman gone

circle of sisters
growing smaller
not vanished

white man
what was that y'all was saying?

white man
ain't never
tole me
'bout nothing
i don't already know.

white man
don't tell me
hear me
voice crying in the wind.

white man listen:
wind is whistling
that wind
with promise of comfort
when white men
don't try tell me nothing.

as my grannies taught
the wind he promises
all them answers
in the land
this land
red land

white man listen
that wind,
he mocks you.

whistling

Patricia A. Monture's poetry appears earlier in this volume.