STANDING AGAINST CANADIAN LAW:

Naming Omissions of Race, Culture and Gender[1]

by
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I have grown very impatient with Canadian law as a solution to problems that Aboriginal Peoples, both as nations and as individuals, face in the Canadian mosaic. In order to understand my conclusions and concerns about Canadian law and the impact it has had on Aboriginal lives, there is a need to understand the way I situate myself against Canadian law as a Mohawk woman. First of all, there is no single "Indian" reality. This is a formidable myth. It is a myth that has been accepted by all "mainstream"[2] disciplines who have an interest in studying "Indians". Professor Devon Mihesuah (Oklahoma Choctaw) articulates in her essay on American Indian women and history:

> There was and is no such thing as a monolithic, essential Indian woman. Nor has there ever been a unitary "world-view" among tribes, especially after contact and interaction with non-Indians, not even among members of the same group. Cultural ambiguity was and is common among Indians. Traditional Native women were as different from progressive tribeswomen as they were from white women, and often they still are. (1998: 37-38)

This discussion is, therefore, only one comment on the ideas (or story) of one person, a Mohawk woman.

My impatience is also grounded in the fact that, as a Mohawk woman, I do not accept Canadian law as *the* single, viable and legitimate way of resolving disputes. In fact, my understanding is that Canadian law operates to perpetuate disputes. Consider how many Aboriginal claims

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1 I am grateful to the Legal Research Foundation of New Zealand whose visiting fellow program created the opportunity and space for me to again revise this paper. This paper was first published as a chapter from the book: Cormack, Elizabeth (ed) *Locating Law: Race/Class/Gender Connections* (Halifax: Fernland Publishing, 1999) The section of this paper that deals with resistance was also published as "Resisting the Boundaries of Academic Thought: Aboriginal Women, Justice and Decolonization" in 12(1) *Native Studies Review*.

2 I hesitate to use the word "mainstream" as by doing so I cooperate in the marginalization of my own people.

- almost all the decisions recently heard by the Supreme Court of Canada - are resolved by the courts by sending them back to trial for a second time. This list includes cases heralded as great victories, such as *Sparrow* and *Delgamuukw*. Further, and more importantly, Canadian law from my standpoint is not the only option. I come from a peoples and a tradition that had rules and processes about dispute resolution that I experience as legitimate and viable. These rules and processes of dispute resolution are not simple, romantic visions of the past. They are present and viable in our communities today. I do not defer to the Canadian system any legitimacy solely because it is the only choice, as from my position it is not. Indigenous citizens of our nations have choices about dispute resolution traditions and mechanisms that are not necessarily available to Canadians.

As a Mohawk Woman who came to study Canadian law, I am forever balancing the teaching, rules and principles of both systems. This balancing act probably avails for me different understandings about the structure and shape of Canadian law. This is not a visibility that operates solely because I come from a "different" culture. It becomes visible because of both my tradition and gender, realities that operate concurrently in interlocking ways. Sherene Razack concurs with this observation and explains how misunderstanding that culture and gender are not separate realities has some serious consequences:

> When women from non-dominant groups talk about culture, we are often heard to be articulating a false dichotomy between culture and gender; in articulating our difference, we inadvertently also confirm our relegation to the margins. Culture talk is clearly a double-edged sword. It packages difference as inferiority and obscures both gender-based and racial domination, yet cultural considerations are important for contextualizing oppressed groups' claims for justice, for improving their access to services, and for requiring dominant groups to examine the invisible cultural advantages you enjoy. (1998: 58)

Understanding law from a place that is cultured and gendered offers advantages in my own understanding, but at the same time operates to the detriment in our position in the "mainstream" dialogue.

Part of the reason I feel I feel advantaged is because I have a choice about legal systems. This has several further consequences. I have never presumed that the Canadian system is *the* only system. Because I often "stand against" the principles on which Canadian law is founded, by it's very nature, then, my position is critical. I do not

take the principles of Canadian law for granted. Nor do I fail to see that the principles on which Canadian law is based are not absolutes. These principles were chosen. However, it is equally important to note that I will always defer to the standards of my first way to determine the value of participating in the Canadian legal system. At the same time I recognize that the choice I exercise is not always possible. This choice is a reflection of the privilege of my legal education. A person facing criminal charges, child welfare actions or defending Aboriginal lands does not exercise such a privilege (nor would I if I were in any of those circumstances). At the same time that I engage in legal method, I am constantly assessing that law against my Mohawk understanding of law. It is not that I expect courts to become suddenly Mohawk, I am just looking for a significant degree of respect built on an understanding that is at least bicultural and gendered.

This is contrary to how I see Canadian courts and non-Aboriginal academics using Aboriginal legal discourse. When quoted (which is entirely all too infrequently) my words, as well as the words of other Aboriginal scholars, are used as cultural evidence and not legal method.[3] This reminds me of the caution I recently read:

> When racism and genocide are denied and cultural difference replaces it, the net effect for Aboriginal peoples is a denial of their right to exist as sovereign nations and viable communities. (Razack 1998: 61)

When reading the Supreme Court of Canada's decision in *Delgamuukw*, I did not fail to notice that the imminent scholars the Court chose to quote were (significantly) all white men.[4] The failure to broaden the scope of their reading and reference (Matsudi 1988: 4-5) is likely a reflection of the factums the lawyers presented to the courts. It is not that I think the Supreme Court of Canada should quote me. In fact, on a very personal level, I dread the day that this should ever occur.[5] It is, however, one of the notable but subtle ways in which Canadian law operates to exclude, omit and deny difference. Or, if

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3 The most recent example (with all due respect) I have come across is in the work of Kent McNeil 1998: 37.

4 There is one scholar who's work I am not familiar with and cannot determine gender from the name.

5 Being quoted is a fear because, as it presently stands, it would locate my scholarship within what I experience as the rigid judicial framework that presently exists which is both conservative and gendered away from me.

you prefer, it is how courts participate in perpetuating colonialism while ensuring that power - their power - continues to vest in the status quo.

The oppression embedded in legal process ranges from the subtle, as discussed above, to the overt and obvious. Several recent cases in Canada have criminalized the actions of pregnant women, one of them an Aboriginal woman, who were abusing alcohol or drugs. The social realities, including the historic oppression of Aboriginal people, are not realities which courts readily consider in their decision making process. In a detailed analysis of the *Big Pipe Case*, in the United States where a Dakota woman found herself before the courts in just these circumstances, Elizabeth Cook-Lynn (Dakota) argues:

> There is evidence that women, thought by the tribes to be the backbone of Native society and the bearers of sacred children and repositors of cultural values, are now thought to pose a significant threat to tribal survival. Indeed, the intrusive federal government now interprets the law on Indian reservations in ways which sanction *indicting* Indian women as though they alone are responsible for the fragmentation of the social fabric of Indian lives. As infants with fetal alcohol syndrome (FAS) and fetal alcohol effect (FAE) are born in increasing numbers, it is said that women's' recalcitrant behavior (consuming alcohol and other drugs during pregnancy and nursing) needs to be legally criminalized by the federal system to make it a felony for a women to commit such acts. (Cook-Lynn 1996: 114-115).

The fact that the result of the tribal (that is collective) oppression of Aboriginal peoples is now individualized within legal relations *and* that a greater burden is being placed on women for problems of social disorder and the resulting harms, also points to the inadequacy of an individualized system of law to resolve Aboriginal issues. The impact of the individualization of our legal relations moves Aboriginal nations further away from our traditions which are kinship based and collective. That women are the focus of these trends cannot escape our attention.

My impatience with law, it's theory and method, is grounded as well in the practical realization that long term solutions are not presently available in Canadian law because of the very structure of that legal system. Granted, Aboriginal people are sometimes able to avail themselves of immediate solutions for the topical problems faced.

Being represented by counsel[6] who understands the history and being of an Aboriginal person may make a difference in a child welfare matter or the defense of a criminal charge. However, the consequence of being able to address immediate solutions is deceiving. It conceals that no significant change is occurring. I refuse to be satisfied with being better able to defend ourselves in small ways in particular circumstances as all that we can hope for.[7] This is one of the fundamental characteristics of oppression by assimilation. It appears as though change has occurred when it has not. This concern is even more pressing for women, especially for Aboriginal women who carry the weight of discrimination (race/culture) wound within discrimination (gender).

This impatience with Canadian law, conditioned on my understanding that it remains a problem for Aboriginal Peoples and especially for Aboriginal women, is not a conclusion that is widely shared. It is essential, therefore, to share the reasons why I have reached this conclusion.[8] I spent a good five years of my life as a student of law and another five years as a law professor. Despite leaving the law school a little more than four years ago, I am still reading cases and teaching about law. A preliminary examination of legal structure and theory clearly identifies that there are certain "groups" that have not had an equal opportunity to participate in the process of defining social and state relations (including the law). Women, Aboriginal people and other so-called minorities have not shared in the power to define the relationships of the institutions of this country (including the university, the law, courts, criminal justice, social services and so on).

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6 It is more likely that an Aboriginal person will be able to put themselves in this position. However, there is no guarantee that an Aboriginal person has learned the necessary things in a Canadian law school to carry this awareness with them. Perhaps this is a failing of the way in which we educate lawyers in Canadian law schools or perhaps Aboriginal "culture and tradition" do not belong in a Canadian institution. (This is a complicated issue. Perhaps, it is a topic for another paper.) It is also possible that a non-Aboriginal person may be able to situate their ability to practice law in such a way that they embrace the "difference" of an Aboriginal client. In fact, I think Canadian universities (including law schools) have done a much better job of developing education programs that assist non-Aboriginal people in accessing significant amounts of Aboriginal culture, tradition and *knowledge that they are able to do precisely* this.

7 I mean no disrespect to the Aboriginal people who are able to sustain themselves in the daily practice of law. My point is simply to articulate one of the reasons, the structural reason, why I do not have the patience for this kind of work.

8 I do not mean to suggest that I am the only "minority" scholar who has reached this conclusion. Please see, for example, the collection of papers edited by Adrien Katherine Wing 1997.

Considering Change: Aboriginal People and the Canadian Criminal Justice System

I am interested in transformative change of the Canadian legal system and this is the kind of change that I consider significant. In Canada, much has been made of the many initiatives "for" Aboriginal people in the justice system. There are court workers, hiring programs, Native liaison workers in prisons, Elder assisted parole board hearings, sentencing circles and so on. All of these programs are mere "add-ons" to the "mainstream" justice system which all operate on a shared presumption: if we can only teach Aboriginal people more about our system then that system will work for them and they will accept it. Many of the programs and developments are packaged as cultural accommodations. This should be recognized for what it is, a misappropriation of culture. The programs are really based on the notion of Aboriginal inferiority and if we Aboriginal people are just more knowledgeable about the Canadian system, then the problem is solved. Culture has been used to obscure the structural racism in the Canadian criminal justice system. In this explanation, the failure is placed squarely on the shoulders of Aboriginal people and not on the system where it really belongs. This is not transformative change, as transformative change requires structural change in the system when it is required and necessary.

Not only are the present reforms to the criminal justice system in Canada not transformative, they have not been fully successful. Because of my work in Canadian prisons (both men's and women's institutions), I do not question that the reforms have changed the experience of Aboriginal people of their incarceration. This is an ameliorative and individual change in matters of criminal justice that is essential. However, real success would be demonstrated in decreased incarceration rates of Aboriginal people. This is not occurring. Aboriginal incarceration rates continue to increase, despite the new programs and accommodations. The collective experience of the justice system has not been transformed.

Much has been made of the establishment of sentencing circles in Canada. These circles, under the discretion of the judge, offer to the Aboriginal accused the opportunity to be sentenced in a community process (Ross 1996: 192-198; 246-247). However, there is nothing intrinsically Aboriginal about these processes. We did not "sentence"

and merely rearranging the furniture so we are sitting in a circle does not accomplish systematic or transformative change. Granted, a sentencing circle does borrow from Aboriginal traditions of dispute resolution as well as healing. Sentencing circles are accommodations of the mainstream process that may hold a better opportunity to provide a degree of comfort to community members, (Aboriginal) victims and/or the Aboriginal accused. The sentencing circle may change the momentary experience of the Aboriginal person of criminal justice. However, it does not really hold greater potential.

The concern that transformative progress is not being made is also visible in recent Canadian court decisions. In December of 1997, the Supreme Court of Canada released the decision in the *Delgamuukw* case. The central claim in this case was the Aboriginal title of fifty-one hereditary chiefs of the Gitskan and Wet'suwet'en peoples. The decision was heralded as a great victory. I have difficulty with this conclusion, as the Supreme Court's decision was to return for re-trial, a case that originally was 374 days at trial and 141 days were spent taking evidence out of court (Miller 1992, 3).[9] It is true that significant progress was made in the evidentiary rules which previously had preferred the written document to oral history. These rules of evidence previously operated in Canadian law as a serious structural barrier to success in litigation which was brought by Aboriginal peoples.

This diminishing of Aboriginal forms of history against non-Aboriginal written ways was a significant detriment in being able to bring Aboriginal claims forward. The court opined:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be *adapted* in order that this type of evidence can be *accommodated* and placed on an equal footing with the types of historical evidence that courts are familiar with which largely consists of historical documents. (1997: 49-50, emphasis added)

Granted, the Court's benevolent respect for the consequences of the exclusion of oral history and the accommodation of the rules of evidence is a great victory. However, when the language of the

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9 Please see 95 *BC Studies: A Quarterly Journal of the Humanities and Social Sciences* (Autumn 1992). This volume is a special issue titled, "A Theme Issue: Anthropology and History in the Courts". It's focus is the *Delgamuukw* decision at trial. Another excellent analysis of this case, Canadian law and the discipline of anthropology is presented by Dara Culhane 1998.

judiciary is examined, a different picture emerges. The Court has "adapted" their own rules of evidence to "accommodate" oral history. This is the same pattern of nominal change that was noted in the discussion of the recent reforms to the criminal justice system. Here, the overall structure is not challenged, just one unfortunate consequence of the evidentiary rules. If I believed that the only evidentiary rule that operated to the disadvantage of Aboriginal persons was this one, perhaps I would be more satisfied. The end result is that Aboriginal people walk away from this decision with lots more work to do. Every place where evidentiary rules do not fit with our ways must be brought to the courts for review. This will be both a time consuming and money consuming process. Nonetheless, I recognize that the decision in *Delgamuukw* may make this change easier to accomplish. Regardless, it still leaves the burden on Aboriginal people continually to challenge the system forced on us. Transformative change would require that courts or legislatures take it upon themselves to complete an ameliorative review which documents with the intent to remove all such barriers which presently exist in Canadian law.

Understanding Oppression and Resistance

This analysis of the problems with the structure of Canadian law has thus far has been more significantly focused on a race/culture analysis. However, it is essential that gender (both male and female) be wound into this story. By the time I reached law school, I understood that much of my identity was shaped on the recognition that I was oppressed. I was oppressed as an "Indian".[10] I was oppressed as a woman. I was oppressed as an "Indian" woman. I do not experience these categories "Indian" and "woman" as singular and unrelated experiences. The experience of Indian and woman is layered. My choice to go to law school was premised on my desire to fight back against the oppression and violence I had lived with as an Indian

10 Elsewhere I have explained: "I tell this story about naming because it is symbolic. Growing up "Indian" in this country is very much about not having the power to define yourself or your own reality. It is being denied the right to say, "I am!" - instead, always finding yourself saying, "I am not!". In some places in the book, I have chosen to use the word Indian or First Nations, even recognizing that they can be viewed as excluding others. My experience is the experience of a person entitled to be registered under the *Indian Act*. Further, I have never been denied that right. These facts shape how I understand life, law and politics" (Monture-Angus 1995, 3).

woman.[11] It was a journey of seeking solutions of both the immediate consequences and long term impact of the criminal justice system on the lives of Aboriginal people I knew.

A decade ago, I thought that ending my personal oppression only required the ability to fight back. I then saw that the best place for me to fight oppression Canadian style was in law. I wanted to be a criminal defense counsel. What I learned during my law school years (and it has been a lesson frequently reinforced in the last few years) is that I am just too impatient for this kind of fighting back. Fighting back frequently only perpetuates the oppression, as all of your energy is directed at a "problem" you did not construct. When all of your energy is consumed fighting back, transformative change remains elusive. This is one of the very real personal consequences of our inability to affect changes to the Canadian legal system which would makes it truly inclusive.

Through the course of my legal education, I began to learn that oppression is not of unitary character. I experience it as both personal and collective (that is directed at me not as an individual but as part of a people). I also experience oppression as layered. I now understand the way I looked at the world back when I began to study law as naive or overly simple. Canadian law does not hold the hope or power to solve many of the issues that must be struggled with in our communities as the result of oppression at the hands of the Canadian state. Although this discussion has focused on oppression, because oppression is what I feel as well as see in my daily life, it is essential to recognize that the oppression I have survived (and continue to struggle to survive on a daily basis) is the result of colonial beliefs and relationships. Colonialism is very easily understood. It is the belief in the superiority of your ways, values and beliefs *over* the ways, values and beliefs of other peoples. Colonialism is the legacy that the so-called discovery of the Americas has left to the peoples who are indigenous to these territories. Colonialism is the theory of power while oppression is the result of the lived experience of colonialism.

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11 Looking back, I understand both why "Flint Woman" (this is the Mohawk title of my first article which has been republished as the first chapter of my book, *Thunder in My Soul*) emerged during my last years at law school and why a few years after leaving law school I wanted to move beyond the image I had created. "Flint Woman" is the one who fights back. However, more than a decade after graduating from law school, fighting back is no longer enough.

As a result of these colonial relationships, resistance became a key concept in understanding the relationship I held with law, and particularly institutions of criminal justice, around and during the time of my law school days. I know that dictionary reading is not a very sound academic pursuit or research methodology. But I thought it just might prove interesting (or an act of resistance/rebellion) and therefore would be a really good place to start to understand resistance. Maybe I just wanted or needed the idea of resistance to be simple. I have lived resistance for a long time. I have a lot of complicated thoughts, ideas and feelings conjured up by that word because so much of my life experiences are about resisting. I have often understood my life in terms of resistance. A lot of what I do presently in the university is about resistance.

The *Concise Oxford Dictionary* provided me with four beautifully simple definitions of resistance:

1. refusing to comply.
2. hindrance.
3. impeding or stopping.
4. opposition. (Fowler 1974: 1059)

These definitional standards of "refusing to comply," "hindrance," "impeding" or "opposition," those are not the concepts that I want to build my life on. They are not the concepts I would choose, if I had choice. I know I deserve more than refusing, hindering or opposing. Mere resistance is not transformative. It often acts solely to reinforce colonial and oppressive relationships, not to destroy them. This is because resistance can be no more than a response to the power someone else holds. Responding to that colonial power actually can operate to affirm and further entrench it.

Sometimes resistance is a necessary part of the First Nations' bag of survival tricks in the 1990s. I am not disputing that. But resistance only gains mere survival and often the survival gained is only individual. I cannot - and I suppose will not - believe that the Creator gave us the walk, gave us life, to have nothing more than mere resistance. In my mind, resistance is only the first step, and it is a small step in recovering who we are as original peoples. Resistance is only a first step away from being a victim.

I have a particular understanding of being victim and of being victimized. Like too many other Aboriginal people, I have been a victim. I was a victim of child sexual abuse, of a battering relationship, of rape.[12] In the First Nations women's community, that does not make me exceptional. I can tell you the name of only one Aboriginal woman in this country that I know for sure has not survived incest, child sexual abuse, rape *or* battering. It is worse than that because most of us do not survive just one single incident of abuse or violence. Our lives are about the experience of violence from birth to death, be it overt physical violence or be it psychological and emotional violence.

I also understand racism to be psychological and emotional violence.[13] Focusing solely on the physical aspects of violence both diminishes and disappears the full impact that violence has in the lives of Aboriginal women. This is an important concept and my hope is that it will be understood contextually. I offer this long quotation from the Task Force on Federally Sentenced Women,[14] for just that purpose:

> This survey report was prepared by two Aboriginal women *(Lana Fox and Fran Sugar)* who have been through the Canadian prison system. They gathered information for the study through interviews with 39 federally sentenced Aboriginal women in the community.
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> The women spoke of violence, of racism, and of the meaning of being female, Aboriginal and imprisoned. They spoke of systematic violence throughout their lives by those they lived with, those they depended on and those they loved and trusted. Twenty-seven of the 39 women interviewed described experiences of childhood violence, rape, regular sexual abuse, the witnessing of a murder, watching their mothers repeatedly beaten, and beatings in juvenile detention centers at the hands of staff and other children.

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12 Although I have written and spoken about the abuse in my life on other occasions, I continue to do this with increased hesitation. My hesitation grows from the recognition that it can potentially result in stereotypical personalized responses. At the same time it creates (I create) a diminishing of my scholarship in the eyes of some people. I continue to offer up the truth only because I believe it helps other women feel and be empowered to take the risks necessary to succeed in their in own lives.

13 See Patricia Monture-Okanee 1993.

14 It is not my intention to appropriate the experience of Aboriginal women who are federally sentenced. This study was the first comprehensive study that collects and gives voice to the stories of Aboriginal women and what they have survived. Further, I do not see a lot of difference between the lives of Aboriginal prisoners who are women and my life when the measure is what we survived growing up. Therefore, I do not judge their present circumstances nor allow it to be an obstacle in creating friendships.

> For many of the women, this childhood violence became an ongoing feature of life, and continued through adolescence into adulthood. Twenty-one had been raped or sexually assaulted either as children or as adults. Twenty-seven of the 39 had experienced violence during adolescence. However to these experiences were added the violence of tricks, rape and assaults on the streets. In addition, 34 of the 39 had been the victims of tricks who had beaten and/or raped them (12 of 39 had shared this experience and 9 had been violent toward tricks), some from police or prison guards. The violence experienced by these women is typically at the hands of men.
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> The women also spoke of living with racism. Racism and oppression are the preconditions of the violence these women experience throughout their lives. (Correctional Service of Canada 1990: 63-64)

Both the forms of violence (physical, sexual, spiritual, emotional and verbal) and the way violence is inflicted on Aboriginal women is multifaceted. It is not generally experienced as single incidents. The violence is cyclical. All too often, violence describes most of our lives. Even when we manage to create a safe environment in which to live our individual lives, the violence still surrounds us. Our friends, sisters, aunties and nieces still suffer. The violence becomes a fact of life and it is inescapable.

The methodology utilized by the Task Force on Federally Sentenced Women was an important component of the work that distinguished it from previous research on Aboriginal women. Culture was a significant concern of task force members involved in commissioning this research. As a result, the interviewers were not only Aboriginal women (of the same culture - Cree - as the majority of Aboriginal women who were serving federal sentences), but they were also women who had previously served federal sentences. They, therefore, possessed a "credibility" amongst the population to be researched that most (academically trained) interviews do not. Further, the research instrument was open ended, which allowed the women interviewed to shape and tell their own stories. This was viewed as essential so as not to influence the research with non-Aboriginal and "straight"[15] views of incarcerated Aboriginal women. The interviewers were also central to the process of interpretation of the data as they were able to

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15 Intended to be a reference to individuals who have not been arrested and have never served terms of incarceration.

contextualize the women's comments in their own experiences of incarceration. This methodology has been adopted in further research on Aboriginal women who have survived violence (McGillivray and Comaskey 1996).

Looking back, I now see how naive I was during the task force years. The philosophy of choices which I was fully supportive of and thought was quite revolutionary, did not work. The words changed, but in my opinion, the values and philosophy of "corrections" (that is having the right to change a person because they committed a crime) was dumped into the new idea, "choices". Further, I now see that this choices philosophy is basically a middle class concept.[16] Not all women incarcerated federally have equal access to the means required to exercise good choices. This is particularly true for Aboriginal women who have the least access to socio-economic resources of any group of women in this country. The fact that, with the exception of chapter two in the report, it was written by white women with at least middle class access to services and middle class experiences of the world. Although I do still think that the work of the task force held revolutionary potential, I would not agree to participate in future work in the same way.

The methodology I advocate is an attempt to create a space (or spaces) for Aboriginal ways of knowing and understanding to occupy a valid space within more mainstream methodologies. Storytelling is a significant component of Aboriginal epistemologies.[17] How I understand Canadian law is influenced by the fact that I was a victim. This methodology does not advocate "objective" knowledge (if, in fact, such a thing exists) but holds that personal experience, when contributed carefully to research agendas, adds both quality and authenticity.

I led part of my life as a victim. I used drugs and alcohol to hide from how I felt and the memories of the individual acts of violence. In a way, for part of my life, I agreed to be victim. Then I learned how to resist - just a little - that violence that surrounded me. Eventually, I moved beyond the victim place and learned how to be a survivor. Victims (as juxtaposed to survivors) often allow things to happen to

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16 I am grateful to Stephanie Hayman of the Centre for Crime and justice Studies in London, England for bringing this concern to my attention.

17 Please see Kiera Ladner 1996.

them (and therefore, research on Aboriginal women should not revictimize them). This is not an argument that alleges that victims are responsible for the violence done to them. They are not. Survivors, however, have begun to take care of themselves and have begun taking charge of their lives. Recovery, moving from victim to survivor, is a gradual process. Unfortunately, there are still moments when racism, sexism and/or colonialism continues to have the power to turn me into a victim again and I am immobilized.

Several years ago, maybe a little more, I got really tired of being a survivor. Just like I got tired of being a victim. I wondered for a long time, "isn't there something more to life than victimization? Do I always have to be a survivor?" Just like I am not satisfied with resistance being the most I can expect from life, with fighting back being the only mode of my existence, I was not satisfied with being a survivor. (Monture-Angus 1995: 53-70). Through reflection (and, of course, the support of and many conversations with Elders and friends), I learned that we move beyond surviving to become warriors. This is the next "stage". I know this is not a linear process. Movement is not from one stage to the next with no going back. There is no graduation ceremony where the robes of victimization are shed for life. In my mind, I see it as a medicine wheel. The fourth stage is that of teacher. Teachers not only speak to the truth but they also offers ways in which we may change the reality that we are living in.[18] As I am only beginning to see that there is a fourth stage, I am unable to comment on it fully.

Many of the women that I know in my life are warriors, as they are able to stand up and speak their truth. There are some men, fewer than the women (in my experience), who are "true" warriors. That statement is not meant to amaze or anger. It is the truth as I see it in my community. It is with a great hesitation that I even use this word, "warrior".[19] I have used the word because I have not been able to find one in English that is better. At the same time I realize that in my language there is no word for "warrior". In 1990, in the *Indian Times*

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18 I have a problem with a portion of the academic literature written by Aboriginal scholars (many of whom fit in this category, I would note, are men). Many of these scholars offer excellent critiques of colonialism, of where we have been, but offer little comment on where we should go.

19 I am not the first academic to borrow the imagery from our cultural experiences and contexts. Please see Gloria Valencia Weber and Christine Zuni 1995.

published in the Mohawk territory of Akwesasne, the following was said (and I sadly do not know what the equivalent woman's word in the language is or if in fact there is a need for one):

> We do not have a word for warrior [in the Mohawk language]. The men are called *Hodiskengehdah*. It means 'all the men who carry the bones, the burden of their ancestors, on their backs. (Johansen 1993: 66)[20]

For me, warrior is both an image of responsibility and commitment. Warriors live to protect, yes, but, more importantly, to give honour to the people. Being a warrior means living your life for more than yourself.

Warrior, in my mind, is not a man's word. It is not a fighting word. It is not a war word. Given what I have been told about many Indian languages, that you cannot use "he" or "she" in the same way that you do in the english language, I suspect that the word warrior is not a gender specific one at all. Warrior is a 'knowing your place in your community', 'caring to speak your truth', 'being able to share your gift', 'being proud of who you are' word. Warrior, in the way I intend it, is not merely a resistance word. The way I have come to understand the warrior is someone who is beyond resisting. Survivors resist. Resistance is one of many skills that a warrior might use. It is not their only way. Warriors also have vision. They dream for their people's future.

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20 It is essential to note that, although Dr. Johansen is not a Mohawk nor is he Aboriginal, the people of the community have supported his work. Douglas M George (*Kanentiio*) states:

> What was sorely lacking in previous books was a command of the facts *as the Mohawk people saw them*. Until Professor Johansen began his research, *no author had the trust and confidence of the Mohawk people* necessary to write about the events that are as sensitive as they are terrifying (at page x, emphasis added).

This criteria is far too infrequently considered in academia and the research generated on Aboriginal Peoples. It is indeed *on* the people, it is on our backs as it is without our consent, knowledge and participation. Very few academics are even cognizant that their relationship with Aboriginal people and Aboriginal nations is a fact which must be considered. It is not as simple as returning the research to the community. This does nothing to displace the appropriation. Even well intentioned researchers do not develop sustaining relationships as the relationships are not in and of the community.

RESISTING THE INDIAN ACT

By offering the following discussion on the *Indian Act*, I hope to be able to offer an analysis that assists in understanding discrimination, oppression, colonialism and the forms of resistance can take. As long as the *Indian Act*[21] remains in force, then colonialism remains a vibrant force in Indian communities and I have the need for strategies of resistance. The *Indian Act* can never define who I am as a Mohawk woman, nor can it ever define who my children are as Mohawk and Cree. There is no identity in the *Indian* Act, only oppression and colonialism.

Looking at what the *Indian Act* has done to our identities as "tribal" people is an important idea. Bill C-31[22] is an excellent and recent example. I think the next time that somebody tells me that they are a Bill C-31 "Indian"[23] I am going to scream. There is no such thing as a Bill C-31 Indian. Once a bill passes into law it is not a bill anymore (maybe this is just a little quirk I have as a result of my legal education). Everyone running around calling themselves Bill C-31 Indians are saying (technically and legally) I am something that does not exist. If we have to be "Indians" then let's all just be "Indians". I would prefer if we could be Mohawk, or Cree, or Tinglit, or Mi'kmaq or Saulteaux. That is who we really are. That is the truth. It is important to reclaim who we are at least in our thoughts.

I want to reject the ideology of reserves as something "ours" and as something "Indian". Reserves were not dreamed up by Indians.

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21 Whenever I discuss these particular sections of the *Indian Act* and its impositions on Indian women, I am reminded of a poem written by Lenore Keeshig-Tobias. Her poem is called "(a found poem)". This poem was borrowed (in part) from the *Indian Act* and creatively reconstructs former ss 11 and 12(1)(b). These two sections contained the gender discriminatory provision which disenfranchised women on "marriage out". The poem can be found in the collection by Beth Brant (1983: 123-124).

22 Bill C-31 became law in 1985. It contains the provision which allows for the reinstatement of most individuals who were involuntarily disenfranchised by a variety of provisions in the Act (including the women who married out) and creates the ability for bands to assume some level of control over their membership.

23 As this discussion focuses on the *Indian Act*, I adopt the language (Indian) of that Act in this section of the paper. The *Indian Act* applies only to those entitled to be registered under s 6 of that Act.
It should also be noted the way I am using the quotation marks around words. It is not the intended grammatical usage (but I find I have to get a little creative with English to get it to do what I want). I use quotation marks to identify words I use with a healthy texture of cynicism.

Reserves were a step - a rather long step, in my opinion - down the colonial trail. What really troubles me about this is that we as Indian people respect that piece of postage stamp silliness. We need to ask ourselves (and then remember the answer): Where did that reserve come from? When the Creator, in her[24] infinite wisdom put us down in our territories, did she say: "OK here's your postage stamp, Trish. You get to go live at the Six Nations reserve." The Creator did not do that. She gave us territories. I am now living in Cree territory, territory that is shared with the Métis people. An Elder back home told me more than a decade ago to stop thinking and talking in terms of "reserves". Instead, he said, think about your territory.

Nowadays, the *Indian Act* also allows for this clever little distinction between if you live on this little square piece of land called a "reserve" and those "Indians" who do not. You get certain "rights" or "benefits" if you live on the reserve and only if you live on the reserve.[25] You can be tax free. You can have health benefits. You are eligible for education benefits. Even Indians now also measure "Indian-ness" based on the on-reserve/off-reserve criteria created by the *Indian Act*. When we think this way we are bought and paid for with those few trivial "rights" found in the legislation. If you live on 12th Street East in Saskatoon, forget it. You are not going to get any "rights" under the *Indian Act* because you do not live on the reserve. This is a problem that is not, at least initially, the fault of Indian people. One of the dangerous results of the federal government's *Indian Act* is the way it divides (and that is a strategy of colonialism, as divided peoples are more easily controlled) our people from each other and the land.

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24 Careful! This is not evidence that I have embraced feminist critiques of the English language (and it is a lesson in presumptions). I use the female pronoun because, as one Elder taught me, the word for Creator in our languages is neither male or female. As so many people use the male pronoun when talking about the Creator, I have elected to always use the female in an effort to restore some balance into how we talk about the spiritual realm. Nia:wen Art Solomon.

25 When my family made the decision to move to my partner's reserve, I do not recall considering one of these "rights" or benefits as a reason to settle ourselves on the reserve. We moved to Thunderchild so our children would be raised with more family than just mom and dad. We wanted our children to have a chance to learn the language. We moved to the reserve to free the children from the racism in the city so that they would have a place to be free and to be who they are. We moved back to the "reserve" to be in a relationship with our community in an effort to step away from the pattern of colonialism embedded in our life. We moved back to the "reserve" to establish a stronger relationship with the land of my partner's territory.

It is even more disturbing to me that some Indians are going to see you as less "Indian", as less "authentic," if you reside off reserve. This is incredibly narrow legal, social and political thinking. It is one of the absolute seeds of oppression I must survive. We are mesmerized away from seeing our oppression in our efforts to ensure access to the nominal "rights" we have. In my mind, this means that the cost far outweighs the benefits under the *Indian Act* system. We spend untold amounts of energy (and money) fighting in political arenas and Canadian courts for a few "tax free" and other assorted crumbs, rather than spending our energy shedding the shackles of our colonial oppression.[26]

Understanding the experience of women on the reserve exposes one way in which gender is important in this analysis. Many women have fled reserves because the amount of gendered victimization on the reserve. In trying to escape the violence, part of their identity and access to that identity is torn away from them. Many of these women have not found better lives in the city. (Hamilton and Sinclair 1991: 485; Dion Stout 1997)

There has been much literature written on the impact of the former section of the *Indian Act* which stripped Indian women of their status upon marriage to a non Indian.[27] In fact, a significant portion of the literature which considers the contemporary situations of Indian women examines this discrimination once contained in the *Indian Act*. This is disappointing. The majority of Indian women were never affected directly by this section of the *Indian Act*. By 1996, approximately 104,000 persons were added to the Indian register as a result of the 1985 amendments to the *Indian Act*. (Ponting 1997: 68) Not all of this number were women who were re-instated. Also included in this figure are the children (both male and female) of the women who "married out", those who "voluntarily" enfranchised, families of enfranchised men, until 1951 those who resided outside Canada for five years or more, as well as professionals and those who earned university degrees. It is even more interesting to note that I

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26 I do not "blame" Indians for this as the central experience of colonial oppression is the fight for daily survival. When you are busy trying to feed your children and just to make it to the next day, it is very difficult to see the "big picture" painted by our collective and individual oppression. This is one of the "privileges" I have in my life, I am no longer fighting for basic daily survival.

27 See for example Kathleen Jamieson 1978; Lilianne Krosenbrink-Gelissen 1991 and Native Women's Association of Canada 1986.

know of no study that considers the situation of non-Indian women who married into the community.[28] Perhaps, my view is skewed because I was never victimized by these provisions. However, in my experience, Indian women's lives have been more significantly impacted by overt violence, residential schools, child welfare agencies and so on than they have by s 12(1)(b). My comments are not intended to diminish what I am certain was a very painful experience of being removed from one's community. However, it is important to note that there remains little academic interest and research in the areas which continue to have a specific and negative impact on Indian women beyond s 12(1)(b).

It is curious to consider where the preoccupation with former s 12(1)(b) comes from. One could postulate, for example, that it has come to the fore because it neatly parallels, albeit superficially, the agenda of the feminist movement. Women activists have long pointed to the unequal treatment of women in Canadian law. The *Lavell* and *Bedard* cases, as they were cases that went to the highest court of the land, increased the visibility of this issue. Almost concurrently, national organizations of "Native" women were also forming. Many of these women were from urban areas and s 12(1)(b) had a negative effect on their lives.[29] The issue of loss of women's status was, therefore an issue that was available to the "mainstream" women's movement in a way that did not force non-Aboriginal women to step out of their comfort zones and directly into Indian women's lives and communities.[30]

Understanding the consequences of the feminist intervention in Indian women's lives is even more enlightening. Recently, I heard a CBC radio program where two leaders of the women's movement were interviewed about the last few decades of change for women in Canada. One of the interviewer's questions focused on the relationship between Aboriginal women and "*the* movement". My pleasure at this question being on the interviewer's list quickly evaporated as the response came. The women leaders bragged of the great success of the "coalition" in seeing the discriminatory provisions of the *Indian Act* removed and a

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28 I am grateful to Leona Sparrow for raising this issue with me.

29 The most comprehensive analysis of the Native Women's Association of Canada and their part in the lobby to see s 12(1)(b) repealed does not consider these factors. See the work of Lilianne Krosenbrink-Gelissen 1991.

30 For example, the Canadian Advisory Committee on the Status of Women funded a study produced by Kathleen Jamieson (an Indian woman) in 1978.

reinstatement of those women. The truth of the matter is that the discrimination against women has not been removed from the *Indian Act*. This realization exposes the degree to which a distance remains between the "mainstream" feminist or women's movement and Indian women.[31]

There are several reasons why the women's boast is not a reflection of what is for Indian women. First of all, the reinstatement process does not put Indian men and Indian women in the same position. Men who married out (largely because their wives gained status) continue to be able to pass their status on to the children and at least their grandchildren. Indian women who are reinstated only pass a limited form of status onto their children (under s 6(2) of the Act) and nothing remains for their grandchildren. The discrimination is not removed from the *Indian Act*, as many assert. It has merely been embedded into the Act in such a way that it is less visible. Secondly, the women who were involuntarily disenfranchised because of their marriage to non-Indians do not receive any compensation for their loss of access to culture, ceremony, language and so on during the years that they were prohibited from living on the reserve; nor was this ever considered, despite the fact a serious harm was often the result. Although not gender discrimination, the effect of the 1985 membership provisions has, in addition, the general result of membership being more difficult to gain such that the size of the status Indian population is likely to diminish into the future. I do not join in the celebration of the 1985 amendments. The cost of women's partial re-inclusion has been too great.

There are further reasons why it is premature to suggest that the gender discrimination has been removed from the *Indian Act*. There has yet to be completed a systematic gender review of the legislation and the effects of the operation of the legislation to determine if women are systematically excluded from other "benefits" in the Act. Certificates of possession, the system of property ownership on many reserves, are often only in the name of the male partner in a marriage. In the *Paul* and *Derrickson* cases, the Supreme Court of Canada disallowed

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31 I am not asserting that the involvement of all "feminists" or women's rights activists and Aboriginal women is inappropriate. An excellent bridge building discussion of the violence against all women is provided in Laureen Snider 1998: 1-39. The work of Constance Backhouse 1991 also stands out in my mind as an example of feminist work involving Aboriginal women in an appropriate way.

the application of provincial matrimonial property law regimes on reserves.[32] As the *Indian Act* is silent on the distribution of matrimonial property on marriage break down, no matrimonial property regimes apply on reserves. This is a serious disadvantage to women. The 1985 amendments to the *Indian Act* only removed the most obvious and blatant discrimination against Indian women from the face of the legislation. It is inaccurate to translate this into an assertion that gender discrimination has been fully removed from the Act.

The *Indian Act* has not just done damage to those of us entitled to be registered under that statute. It is because the *Indian Act* excluded from registration some people (such as the Métis) that some argue that those excluded groups do not have any rights. They do not have the *Indian Act* and it's colonized (twisted) form of thinking that a federal statute is the source of their rights. Rather, I think the Métis are "fortunate" because they do not have all that written colonization to hold them down. They, at least theoretically, have a clean "statutory" slate. The Métis have neither treaty[33] nor the *Indian Act* to confine them. Their rights have not been as whittled away or tarnished by Canadian laws under the guise of granting rights or becoming civilized.[34] The separation of Aboriginal peoples by the kind of rights we possess is a strategy of divide and conquer. This strategy is central in the process of colonization. The benefit from such a strategy flows to the colonizer as it is much too easy to control a people divided.[35] This is, in fact, an ancient strategy of colonialism.

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32 For a fuller discussion, see: Mary Ellen Turpel 1991: 17-40.

33 I mean no disrespect to the sacred nature of these alliances called treaties. However, one look at the situation of treaties in Canadian law and it becomes obvious why I hold such a view.

34 I do not believe that the individualized process for issuing script extinguished any "collective" land rights of the Métis. The script documents themselves are silent regarding extinguishment. In Canadian law, this is insufficient to create the extinguishment of land rights. With respect to our nation "lines", I will leave any further discussion for Métis citizens to write. To go further is to speak for the Métis (a distinct nation) and that is both unnecessary and improper.

35 This is not an argument in support of pan-Indianism. I have long believed we must organize around nation status (and/or perhaps treaty territories).

Closing this Circle

In conclusion, I wish to first return to a discussion on methodology. When I finished law school, I quite often described the feeling at graduation as the same feeling of relief combined with fear I had after leaving an abusive man. It felt like I had been just so battered for so long. Finishing law school is an accomplishment. Yet, I did not feel proud of myself. I just felt empty. This feeling forced me to begin considering why I felt the way I did. It was through this process that the ways in which law is fully oppressive to Aboriginal people began to be revealed. It is important to understand this process of self-reflection as an obligation that I have as a First Nations person trying to live according to the teachings and ways of my people. However, it is much more than a personal obligation. It is a fundamental concept essential to First Nations epistemology.[36] It is, in fact, a methodology.

The realization that law was the problem and not a solution of transformative quality was a difficult one for me to fully accept because it made the three years I had struggled through law school seem without purpose. I did not want to believe it. Think about everything that First Nations people have survived in this country - the taking of our land, the taking of our children, residential schools, the current criminal justice system, the outlawing of potlatches, sundances and other ceremonies, as well as the stripping of Indian women (and other Indian people) of their status. Everything that we survived as individuals or as "Indian" peoples: How was it delivered? The answer is simple, through law. Almost every single one of the oppressions I named, I can take you to the law library and I can show you where they wrote it down in the statutes and in the regulations. Sometimes the colonialism is express on the face of the statute books and other times it is hidden in the power of bureaucrats who take their authority from those same books. Still, so many think law is the answer.

The problem with why Canadian law just does not fully work for resolving Aboriginal claims, including those which fundamentally concern Aboriginal women, is actually quite simple. Canadian courts owe their origin to British notions of when a nation is sovereign. It is

36 Please see Willie Ermine 1995: 101-112.

from Canadian sovereignty that Canadian courts owe their existence. Courts, therefore, cannot question the very source of their own existence without fully jeopardizing their own being. Courts cannot be forced to look at issues about the legitimacy (or, more appropriately, the lack thereof) of Canadian sovereignty as against the claims of Aboriginal sovereignties. The result is that Aboriginal claimants (women, men and nations) can never hope to litigate the issue that is at the very heart of our claims. This is, in fact, what distinguishes much feminist/women's litigation from Aboriginal "rights" litigation.

It is not just that the decisions of Canadian law are often the wrong decisions. It is more complex than this. I am interested in having a place, including a place in Canadian law, that feels right and fits right. This requires a place free from oppression. I cannot accomplish this through acts of (or a life of) mere resistance. The place I seek would not only allows me the space[37] and place to be a Mohawk woman, but encourages me to be all that I am capable of being. It is a place that respects for who I am as woman but also for how I understand myself to be both a member of a nation as well as a confederacy. This is my dream.

37 I am not talking about a "safe space". That presumes that there is space outside the safe space that is not safe. Conceding that much space is not an acceptable parameter for me.