

FEMALE CRIMINALITY VS LEGAL RHETORIC:  
AN EXPLORATION INTO THE LEGAL DISCOURSE  
SURROUNDING CANADIAN FEMALE OFFENDERS

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## ABSTRACT

An increase in feminist writing within the area of women's criminalization and public concern about the plight of incarcerated women, challenges criminological research to expand its focus on women's experiences in prison and women's reintegration into society to include earlier legal processes, such as their experiences through the court process. The purpose of this research is to examine the discursive constructions, which inform the legal portrayals of women in the criminal courts, to uncover the larger themes that impact the legal representations of these women. I employ a postmodern feminist analysis and a thematic discourse analysis of ten Saskatchewan criminal trial transcripts to highlight a feminist-informed perspective on the legal portrayals of criminalized women. The major themes emerging from the analysis pertained to: gender roles and regulated lifestyles; victimization and dependency; racial images and Aboriginal stereotypes; and, the medicalization of female activity and the criminalization of medical issues. My findings suggest that the themes revealed in the legal discourse contained within the trial transcripts highlight the social constraints affecting women's activities and roles. This study points to the potential of uniting feminist approaches into an epistemology that fosters collaboration among researchers and activists to amplify the voices of women within the criminal court system.

## DEDICATION

This thesis is dedicated to the women who were at the heart of this study, whose voices could not be included, but whose voices are key to understanding their stories and to unlocking knowledge about the world around us.

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I want to thank the feminist and anti oppressive writers who have blazed the path for students of social science to identify with their research and to find meaning in the research process.

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## TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION.....	1
1.1 INTRODUCTION.....	1
1.1.1 THE MOTIVATION.....	6
1.2 OUTLINE OF THE RESEARCH .....	7
CHAPTER 2: UNDERSTANDING CRIMINOLOGY’S PERCEPTION OF CRIMINALIZED WOMEN: FROM CLASSIC STUDIES TO FEMINIST RE-DIRECTION .....	10
2.1 FEMINISM AND THE TRANSFORMATION OF WOMEN IN CRIMINOLOGICAL RESEARCH.....	10
2.2 FEMINIST PERSPECTIVES IN CRIMINOLOGY .....	14
2.2.1 STANDPOINT FEMINIST EPISTEMOLOGY AND CRIMINOLOGY .....	15
2.2.2 POSTMODERNIST FEMINISM IN CRIMINOLOGY.....	18
2.2.3 THE DEBATE BETWEEN STANDPOINT FEMINISM AND POSTMODERN FEMINISM .....	20
2.3 ANTI OPPRESSIVE FEMINIST THEORIES: ANTI-RACISM AND POSTCOLONIAL FEMINISM.....	22
2.3.1 ANTI RACISM, CRITICAL RACE FEMINISM, POSTCOLONIAL INDIGENOUS THEORY AND POSTCOLONIAL FEMINISM.....	25
2.4 MAKING THE CASE FOR COOPERATIVE FEMINIST CRIMINOLOGY.....	27
CHAPTER 3: METHODS AND REFLECTIONS: A DISCOURSE ANALYSIS OF SASKATCHEWAN CRIMINAL COURT TRANSCRIPTS INVOLVING WOMEN AS THE PRIMARY DEFENDANT .....	30
3.1 FEMINIST METHODS: POSTMODERN DISCOURSE ANALYSIS .....	30
3.2 USING A DISCOURSE ANALYSIS – SEARCHING FOR THEMES IN COURT TRANSCRIPTS.....	34
3.2.1 THE DATA.....	35
3.2.2 THE PROCESS.....	38
3.3 A THEMATIC DISCOURSE ANALYSIS AND LEGAL PORTRAYALS OF WOMEN’S: HYPOTHESIZING THE DISCURSIVE CONSTRUCTIONS OF CRIMINALIZED WOMEN .....	41
CHAPTER 4: GENDER ROLES, REGULATION AND VICTIMIZED WOMEN .....	43
4.1 THEMES EMERGING THROUGH THE CRIMINALIZATION DISCOURSE.....	44
4.2 GENDER ROLES AND REGULATED LIFESTYLES.....	45
4.3 VICTIMIZATION AND DEPENDENCY.....	56
4.4 DISCUSSION.....	61
CHAPTER 5: ABORIGINAL STEREOTYPES AND MEDICALIZED WOMEN.....	67
5.1 RACIAL IMAGERY AND ABORIGINAL STEREOTYPES .....	67
5.2 MEDICALIZATION OF FEMALE ACTIVITY AND CRIMINALIZATION OF MEDICAL ISSUES .....	78
5.3 DISCUSSION.....	83
CHAPTER 6: CONCLUDING REMARKS.....	88
REFERENCES .....	96
CASES.....	110

## **Chapter One: Introduction**

### **1.1 Introduction**

Since the early 1980s, feminist research has highlighted the disparity between our understanding of criminalized women and the male-centric arena of criminology (Burgess-Proctor, 2006; Flavin, 2001; Morash, 1999; Riger, 1992; Daly & Chesney-Lind, 1988). Resulting from the increase in feminist writing within the area of women's criminalization (Smart, 1976; Comack & Balfour, 2006, 2004; Hannah-Moffat, 2004) and public concern about the plight of incarcerated women, the voices of women in the system are becoming louder. In Canada, theorists have accelerated the work in feminist criminology boosted by government studies such as: "Creating Choices: The Report of the Task Force on Federally Sentenced Women (1990)", the "Ten Year Status Report on Women's Corrections, 1996-2006", and numerous programs within the Correctional Service of Canada that discuss women's issues such as anger and abuse and parenting (Comack & Balfour, 2006, 2004).

To develop the understanding of female criminalization, criminological research must expand its focus on women's experiences in prison and women's reintegration into society to include earlier legal processes, such as their arrests, their introduction into the legal system, and their experiences through the court process. The main goal of my thesis is to provide an in-depth analysis of the criminalization of women in Canada through the legal process by examining the legal representations of women within criminal courts. I utilize a postmodern feminist analysis and a thematic discourse analysis of ten trial transcripts to highlight a feminist-informed perspective on the legal portrayals of criminalized women. I examine the discursive constructions, which inform the legal portrayals of women in the criminal courts, to uncover the

larger themes that impact the legal representations of these women. My findings suggest that the themes revealed in the legal discourse contained within ten Saskatchewan trial transcripts highlight the social constraints affecting women's activities and roles.

By employing a thematic discourse analysis, this thesis engages the postmodern assumption that researchers gain insight into social realities by analyzing the text and discourses present in social structures. Discourse is defined here as 'language-use that focuses around common social assumptions' and links to a postmodern Foucauldian understanding of the ability of certain groups to have the power to define how such language-use is controlled and shaped (Seibold, 2006; Foucault, 1980). Specifically, this thesis investigates the dominant discourses within the legal discursive interplay among courtroom officials.

Originally, this thesis set out to explore a more complex feminist engagement with criminological research and to identify the various approaches that feminism employs to understand the experiences and portrayals of women in the criminal justice system. While I advocate a feminist theory and method which combines the insights of standpoint feminism (Brooks, 2007; Hartsock, 1998; Comack, 2006, 1996), postmodern feminism (Comack & Balfour, 2006; Comack & Brickey, 2007) and anti-oppressive theories, such as post-colonial feminism (Moosa-Mitha, 2005, Brooks, 2009) towards a more complete investigation of intersectionality of oppressions (such as race, class, gender, age and sexuality) and women's agency and resistance, this thesis limits itself to the postmodern feminist theory and the method of deconstruction. The postmodern feminist theory allowed me to investigate the dominant discourses informing the representations of women within the criminal court system, focussing on the legal actors in the courtroom. Future work may incorporate standpoint and anti-oppressive feminist work, towards recognizing the intersectionalities of oppressions, such as

race, gender, class, age and sexuality, as well as women's agency and resistance by realizing/including women's voice, agency and empowerment. Potential extensions from my findings include qualitative research, which aims to presents women's narratives of their criminalized experiences and focus on women's experience and their resistance that may also be evident in the court transcripts. Ultimately, the unification of feminist theories, through the incorporation of postmodern feminism, standpoint feminism and anti oppressive theories, is acknowledged as key to expanding on this criminological research and promoting social change.

The data examined in this thesis consists of Saskatchewan-based criminal court cases involving women as the primary defendants. The cases, ranging from 1998 to 2005, were accessed through a database on the *Law Society of Saskatchewan* website and were purchased through *Transcript Services* at the Saskatchewan Court Services Division. The cases fit into three categories of criminal trials, which involved death, financial crimes and prostitution. The specific breakdown of cases within these categories is as follows: six cases involved charges of murder, or attempted murder, and manslaughter; two cases involved charges related to prostitution, including communicating for the purpose of prostitution and living off the avails of prostitution; and, finally, two cases involved fraud and theft over five thousand dollars. The court locations ranged from large urban centres, such as Saskatoon and Regina, to smaller regional court locations including Prince Albert, Melfort, Yorkton and Wynyard. In all ten cases, the primary defendants were adult women between the ages of 18 and 62 years. Among these women, six were of Aboriginal descent and eight were mothers. While the names of the defendants and courtroom participants are not used within this thesis out of respect for the women and their families, these court transcripts are a matter of public record and are available for public viewing.

In 2004/2005, women accounted for 4,745 cases within the adult criminal courts in Saskatchewan. With the number of criminal cases heard in Saskatchewan that year totalling 22,623 (Statistics Canada, Table 252-0044), women make up a small percentage of the populations experiencing criminal trials in the province. This thesis focuses on uncovering themes within courtroom language used by lawyers, witnesses and judges that reflect dominant scripts about criminalized women. These portrayals of criminalized women that emerge through the language of agents within the criminal court process mirror dominant perceptions of women in society more generally.

Canada's courts interpret and establish law, set standards, and raise questions that affect all aspects of Canadian society (Department of Justice, 2009). The courtroom is a concentrated social institution that involves formalized processes and social interactions that are connected to conscious legal strategies (Comack & Balfour, 2004). While legal processes are guided by formal rules, officials must decide on strategies for defending and prosecuting individuals using their understanding of how the judge perceives the evidence and material (Comack & Balfour, 2004). There is a level of subjectivity that is embedded into the legal process, which allows social variables to inform decisions that ultimately affect the life of the accused.

The criminal court process comprises several elements that play a role in the delegation of justice. In Canada, both the Crown Attorney and the police can lay charges, but the Crown Attorney's office decides whether to proceed with prosecuting the charges or whether the police must continue their investigation (Courts of Saskatchewan, 2010). The prosecuting lawyer must prove a case against an accused to a legal standard known as "beyond a reasonable doubt". Defence lawyers attempt to ensure that individuals are not convicted improperly and that the fundamentals of justice outlined in the Canadian Charter of Rights and Freedoms are maintained

(Courts of Saskatchewan, 2010; Comack & Balfour, 2004). The Defence raises doubt about the Prosecution's case through strategies that question the credibility of the Crown's witnesses or that raise doubt by introducing a recognized defence strategy, such as self-defence, for the individual's action (Comack & Balfour, 2004). The Judge's role is to impartially discern the legally relevant facts and determine guilt or innocence of the accused (Comack & Balfour, 2004). The Judge is also responsible for maintaining safety and decorum within the courtroom (Courts of Saskatchewan, 2010). Other people who play an active role within a criminal trial include the witnesses, both eyewitnesses to the criminal incident and expert witnesses who decipher the evidence, and the defendant herself. The interaction among these legal players constructs discursive patterns and legal procedures that will affect the experiences and possible outcome for the accused (Comack & Balfour, 2004).

The following study carefully considers the legal strategies that lawyers employ to prosecute or defend each case, particularly those used by Defence lawyers to raise reasonable doubt about the Prosecution's case. These legal strategies are structured around dominant social expectations and characterizations (Comack & Balfour, 2004). By investigating the emergence of discursive themes that inform the interactions among legal players, this research seeks to identify what influences the courtroom portrayals of criminalized women in the Canadian criminal courts. The findings demonstrate that these core themes and discourses are embedded within the questions posed to witnesses. Further, they show that legal players understand these dominant social discourses and draw on them in the strategies used to prove their cases. The existence of extralegal variables, such as race and gender, emerging in courtroom linguistic patterns and perceptions, reflect on the portrayals of the women, which become formalized into the judicial process and accepted as legally relevant. Both the Prosecution and the Defence draw

on dominant social scripts and stereotypes when they seek to characterize the accused and her actions (Comack & Balfour, 2004). Inevitably, the existence of dominant themes in the legal strategies and rhetoric leads one to conclude that these themes impacting the representations of women continue to do so because they are framed as methods used by lawyers to prove their case.

### 1.1.1 *The motivation*

A large body of literature focuses on the experiences of incarcerated women in correctional institutions, particularly the use of male-based systems in women's institutions (For risk prediction and assessment see Bonta, LaPrairie & Wallace-Capretta, 1997; Webster & Doob, 2004; Walklate, 1999). This current study serves to introduce the social constructions of women in criminal court proceedings as an important and required realm for the overall emancipation of women in trouble with the law. It follows the research of Elizabeth Comack and Gillian Balfour (2006, 2004), who refocused the gaze of Canadian criminological study onto the criminalization of women. In *The Power to Criminalize* (2004), Comack and Balfour present a study of 90 violent crime cases between 1996-1999, made up of 45 cases involving women defendants and a random sample of 45 men. Their study provides a discourse analysis on the criminalization of women within the legal process. They reveal the constructive processes found in legal processes that serve to reproduce gender, race and class inequalities (p. 173). Further, they link the legal processes to social perceptions and character formulations, such as the 'drugged up hooker' and the 'battered woman', and show how "over time, these constructions have come to constitute lawyers' understandings of 'normal crime'" (p. 173). While Comack and Balfour focus their study on the experience of 'violent' women in contrast to male defendants, my study presents a feminist discourse analysis of criminal court cases and deconstructs the legal portrayals of

criminalized women with a comparison to the representations of other criminalized women. Comparing the portrayals of the women with each other uncovers commonalities in the scripts, character references, legal strategies and discursive constructions of their criminalized identities.

## **1.2 Outline of the Research**

Chapter two elaborates on the theoretical approach taken in this thesis. Beginning with a discussion about how criminology has represented women, and specifically identifying the classical representations of women by Cesare Lombroso and Guglielmo Ferrero, this chapter then presents how feminism has influenced the discipline. By referencing classical criminology's portrayal of criminalized women, the importance of feminist research and critique are credited for introducing women's perspectives into the discipline. Standpoint feminism and postmodern feminism are each explored to understand their contributions in elevating the representations of women and for realigning the gaze of criminology to study how women are criminalized. The debate between these two feminist philosophies is also discussed to showcase the strengths and limitations of remaining embedded within each particular theory. Finally, I discuss anti oppressive theories (such as postcolonial feminism), which incorporate insights from postmodern, standpoint, anti-racist and other critical feminist theories towards identifying the intersectionality of race/class/gender as well as women's agency, and power/resistance from the margins (Moosa-Mitha, 2005). The postcolonial feminist theory is an anti-oppressive theory which combines feminist, anti-racist and postcolonial discourse and questions the link between colonialism, neo-colonialism and the impact of race(ism) on women's lives (Anderson, 2004; cited in Brooks, 2009). This theory is important for future work with Saskatchewan transcripts because it is able to realize the influence colonial histories, while acknowledging the heterogeneity of women's experiences. The benefits of integrating feminist perspectives into

criminological research, demonstrated by the incorporation of postmodern feminist assumptions in this thesis, highlights the importance of a framework which realizes women's diverse experiences of intersecting oppressions (Moosa-Mitha, 2005).

The third chapter focuses on the feminist methodology and data presented in this study. A postmodern thematic discourse analysis allows the researcher to unveil dominant themes incorporated into the portrayals of female defendants within the ten criminal court transcripts. The research process involved examining the transcripts to reveal patterns of language and characterizations, then cross-referencing these portrayals to highlight similarities and commonalities of the themes and legal strategies surrounding female defendants. The benefits and limitations of analysing previously transcribed court proceedings, including the overall researcher perceptions of the transcripts themselves, are discussed with a focus on their impacts on the parameters of this thesis. The researcher maintains a postmodern feminist approach that keeps the defendant's representations at the forefront of this process while investigating the criminalization of women through the court system. Chapter three concludes by discussing law as a constructive process that reproduces dominant social discourses, which are revealed through courtroom discussions and discursive patterns within the court transcripts.

Chapter four and five present the major findings of this research by analyzing four dominant themes that emerge from the ten trial transcripts. Chapter four demonstrates the legal strategies and language patterns that characterize women into specific roles, such as mothers, victims and emotional women. Chapter five continues the analysis by revealing racialization and medicalized discourses reflected in the language patterns of legal processes involving female defendants. Key points that surface in this analysis include stereotyped portrayals of Aboriginal peoples that inform the understandings, and ultimately the language of legal officials, and

emerge as persistent discussions about abuses, dependencies and therapies. The analysis suggests that gender, victimization, race and medical discourses are all prevailing themes imposed on the representations of women in the legal system. Furthermore, the legal process and law's role in the social control of women are linked to these themes, as they are part of the framework, or discourse, that serves to criminalize women.

The final chapter reflects on the research findings by connecting law's role in the construction of women's criminalization to the presence of extralegal variables within the strategies, language and perceptions of courtroom players. It focuses on the position of law within society and the power that legal processes have in the construction and reinforcement of identities and gender roles. Engaging feminist methodologies to explore law's reproductive role in creating these gendered frameworks provides a platform for unveiling discourses surrounding criminalized women. Ultimately, by uncovering the discourses that inform the understandings of criminalized women and acknowledging the legal strategies that incorporate these gendered and racialized representations, feminist epistemology reveals alternative realities about the criminal justice system, leading to altered perceptions on the productive nature of the current legal process.

## **Chapter 2: Understanding Criminology's Perception of Criminalized Women: From Classic Studies to Feminist Re-direction**

*"The female offender has been portrayed as "poor and unfortunate" on the one hand, and "lazy and worthless" on the other. She needs protection, yet can be a very destructive and scheming temptress" (Sheelagh Cooper, 1993, p.33).*

From a largely ignored population to a vehemently vilified group, criminalized women experience a unique place in criminological literature. This chapter outlines feminist writers' engagement with criminological literature by discussing their critiques of classical "male-centred" criminology theory and highlighting their differing approaches to the criminalization of women. Investigating the criminalization of women through a feminist perspective is fundamental to this thesis. This literature review pays particular attention to standpoint feminist epistemology and feminist postmodernism, as well as emerging anti oppressive theories, as they acknowledge the multiplicity and differences of social experience, through a focus on women-centred research, and they illuminate the existence of dominant discourses that reflect gendered, classed and racialized power relations in society. This thesis explicitly incorporates a postmodern approach in analysing the discourses surrounding women in criminal trials; however, I acknowledge the debates surrounding feminist theoretical perspectives and the importance of unifying these feminist philosophies for accomplishing future emancipatory research.

### **2.1 Feminism and the Transformation of Women in Criminological Research**

The introduction of feminist scholarship reframed society's understanding of social interaction by identifying patriarchal systems enveloping women's experiences and informing the process of how we understand women's social experiences. Abigail Brooks (2007) explains how, during the 1960 and 1970s, the engagement of women in university social science

programs introduced a platform for critiquing the traditional process for understanding society. She explains that female students questioned the way academia presented knowledge because the research did not coincide with their personal experiences (p.56). This investigation into women's place in academia flourished into a question of where women fit into research and how their experience was excluded from social inquiry. Brooks (2007) writes that, "Women began to draw attention to the omission and exclusion of their voices and experiences in multiple arenas – politics; public policy; the professions of law, medicine, and business; and the disciplines of science, social science, and the humanities, to name a few" (p. 55). The question of women's place in academia expands to a feminist focus on how women are situated in society as a whole and how we can understand gender relationships within social structure. Within criminology, the introduction of feminism allowed for the investigations into the criminalization of women and what analyzed women's experiences reveal about broader social structures.

Early feminist writers in criminology, such as Carol Smart, highlighted a weakness within classical criminological understandings of women. Smart noted that classical studies tended to limit women to culturally prescribed generalizations of what it means to be "female" within a male-centric system of control (Smart, 1976). Up until this point, little scholarship focused on women and crime. Early criminological researchers that did involve women as a study population focused heavily on the "abnormal" female physiology as a means to explain an "erring female", referring to a woman who does not prescribe to her gender or familial norms (Smart, 1976; Comack, 2006; Minaker, 2006). Carol Smart (1976) identified this gap in female criminology and addressed the deficit by describing how the classical approaches to understanding the criminalized behaviour of women were based upon "a particular (mis)conception of the innate character and nature of women" (Smart, 1976, p.27).

The perception that crime was primarily a male phenomenon grounded early representations of women in classical criminological literature; therefore, the portrayal of early female criminals indicated that they were unnatural and affronts to their gender (Feeley & Aviram, 2010; Peter, 2006). Studies of women in classical criminology included works by Lombroso & Ferrero (1895), W.I. Thomas (1967), Glueck & Glueck (1934) and Otto Pollak (1961), each contrasting women against men by connecting the criminal behaviour of women to their diminished biological reality or “inherent femininity” (Comack, 2006, p.24). These classical approaches believed they could attain the truth about human criminal action using a positivist scientific process that inevitably offered the social scientific world a snapshot of the activity within the criminal justice world (Bohm, 2001; Burtch, 1992; Comack, 2006).

Classical criminologists working in a biological framework, such as Lombroso and Ferrero, defined the female criminal based on their understanding of woman as inactive, less intelligent and less evolved than men (Smart, 1976; Comack, 2006). These scholars reasoned that certain women were criminal because of their biological make-up; their bodies and physical form were primitive. Thus, these writers posited that women who acted criminally were predestined to be criminals based on physical features and biological indicators such as physical beauty for prostitutes and heightened physical strength for violent women (Smart, 1976, p.31). During Lombroso and Ferrero’s study of “criminal women”, they identified that they were limited to a small female prison population compared to the higher numbers of men in prison. They reasoned that it was women’s “childlike” biological features and their lowered evolvment, compared to the characteristics of their male counterparts, that kept women from engaging in criminal behaviour (Lombroso & Ferrero, 2004). Criminalized women were traditionally presented as lacking maternal instincts, as being sexually accelerated and, ultimately, less

advanced based on Lombroso and Ferrero's understanding of human development. According to Smart, "Within this paradigm, deviant individuals are not considered to be social critics, rebels or even members of a counter culture, rather they are treated as biological anomalies or as psychologically 'sick' individuals" (Smart, 1976, p. 29). Although Lombroso and Ferrero's research, based on atavism and social Darwinism, is generally considered scientifically defunct, the underpinnings of their work continually creep into current discourses about female offenders (Smart, 1976, p. 37), and variants of these approaches are identified within the transcripts studied in this thesis.

The legal perception of gender identified men and the "masculine" with the mind and reason, whereas women were associated with the body and emotions. These linkages of men with the mind and women with emotion inevitably constructed women as non-standard subjects of the rationalist discourse of criminal law (Lacey, 2000). The criminal female was classically located on the periphery of criminological study as the categorical 'other' in a discipline that focused on the complexity of male behaviour (Franklin, 2008; Hughes, 2005). Early criminological theorists shared a common theme in that they located women's involvement in crime as an extension to their inherent sexual nature (Comack, 2006; Franklin, 2008). Promiscuity was considered amoral for women and "for these early criminologists, sex (a biological difference) and gender (a cultural prescription) were equated as one and the same, with the 'ladylike' qualities of the middle-class and upper-class white woman used as the measuring rod for what is inherently female" (Comack, 2006, p. 28). A woman's diversion from this feminine role, as exemplified by the upper class white woman, was met with quick social recourse in the form of social stigma and, in the case of prostitutes, in the form of criminalization. "Women who were involved in crime were presented as naturally pre-disposed

to their wayward acts because they were “monsters, misfits or manipulators” (Comack, 2006, p.27).

## **2.2 Feminist Perspectives in Criminology**

Feminist criminology emerged as a critique to the classical approaches to crime studies. After Carol Smart published “Women, Crime and Criminology”, a flourish of activity emerged surrounding the representation of women in crime-related scholarship. A host of researchers have tackled the representation of women within criminology (Britton, 2000; Balfour & Comack, 2006, 2004; Comack & Brickey, 2007; Hughes, 2005). These feminist writers took issue with the confining structure of positivist science and favoured women-centred narrative styles (some examples are: Shoshana Pollack, 2006; Elizabeth Comack and Gillian Balfour, 2006, 2004; and Patricia Monture-Angus, 1999, who discusses the colonial effect on Aboriginal Women’s voices within the Correctional Service of Canada). In particular, these writers cautioned against the white, male-centred research approaches to understand female criminalization (Smart, 1976, Comack and Balfour, 2006, 2004).

To draw attention to the voices and experiences of oppressed women, feminists began to creatively redesign research methods or seek alternative research designs (Brooks, 2007, p. 57). There have been numerous feminist responses and theories, which offer a critique and alternative to mainstream criminology. Some feminists’ engagement, particularly the first wave of feminism, focused on addressing the lack of attention and the oppression of women within the discipline (Burgess-Proctor, 2006; Daly and Chesney-Lind, 1988; Flavin, 2001; Morash, 1999; Riger, 1992). Other feminist criminologists look to an entirely different process to separate from what they consider a patriarchal process that does not allow for the emergence of women’s voices. The growth of both feminist postmodernism and standpoint feminist epistemology

within criminology, as well as the emergence of anti oppressive theories, introduced new approaches that focus on women's perspectives on their multifaceted experiences in the criminal justice system.

### *2.2.1 Standpoint Feminist Epistemology and Criminology*

The emergence of feminist standpoint epistemology provides a different tool for social research by offering both a distinct theoretical perspective and an alternative methodological approach for research. Brooks (2007) explains it as a unique philosophical approach, that “challenges us to (1) see and understand the world through the eyes and experiences of oppressed women and (2) apply the vision and knowledge of oppressed women to social activism and social change” (p. 55). As a separation from the classical positivist theories for social research, feminist standpoint epistemology offers criminological study a new lens to refocus the study of criminalized women. The following section examines the use of standpoint epistemology to gain insight into the experience of women.

Standpoint epistemology is a derivation from Marxist theory, which identifies a group's social experience based on systematic domination (Hartsock, 1998; Naples, 2000; Smith, 2004). Marxist theory identifies an economic class separation that places one social status, the ‘bourgeoisie’, in a more affluent position with more power, greater access to social resources and louder voices in all social spheres. This theory of domination transfers to feminist thought in the sense that women are a systematically dominated group within a patriarchal society. It hypothesizes that to understand this experience of women; researchers must go straight to the experts, who are the women who experience the domination (Comack, 2006; Brooks, 2007).

Feminist standpoint epistemology proposes that the creation of social knowledge, particularly knowledge about the experience of women, must be obtained from the source.

Women are identified as the ‘knowers’ and are placed at the centre of inquiry (Comack, 2006) rather than revering the researcher as the source of knowledge. For example, to understand a woman’s experience of criminal justice, a standpoint feminist gathers the woman’s stories and her recollection of personal experiences. It is from these stories that knowledge is derived. Thus, the oppressed woman is the central source of knowledge from which the researcher can learn. At the same time, the researcher becomes part of the process by participating in the process that seeks a truthful understanding of the oppressed woman’s narrative.

Standpoint feminist work within criminology offers narratives that are rich with information and have the benefit of gaining direct insight from the woman who is telling her story. In *Women in Trouble*, Comack (1996) highlighted the stories of 24 incarcerated women to reveal the connections between their legal challenges and their histories of abuse. Using a qualitative methodology, her research highlighted connections between the experiences of the women including their histories of violence, life experiences and ultimate path through the criminal justice system (Comack, 2006, 1996). Comack explains that the narratives of the women allow for the connection between her history and her law violation. Using *Merideth* as an example, Comack is able to illuminate the connection between her charge of fraud<sup>1</sup> as a means to keep her mind off past abuses including her father sexually assaulting her as a young child and a series of several violent relationships with the men in her life (Comack, 1996, 2006). This connection is unavailable to researchers who remain embedded in official statistics.

The knowledge gained through standpoint feminist criminology is further expanded to provide the substance for activism and social change. “Some feminist standpoint scholars argue that women’s subordinate status in society, and their capacity for double consciousness that

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<sup>1</sup> Merideth was imprisoned for bouncing cheques (Comack, 1996, p. 86).

evolves from it, places them in a privileged position from which to generate knowledge about the world” (Brooks, 2007, p. 66). That is, women are situated at a social position where they experience a marginalized space within an overarching dominant society that they must fit within. Standpoint feminists explain that dominant groups, arguably white males, control knowledge that reflects their interests and values to ensure they maintain their place in society. Marginalized groups, conversely, have a clearer view of social experience through their periphery perspective. Many postmodern and critical thinkers would argue that there is no such thing as one version of “reality”. The next section discusses this postmodern criticism of grand narratives and a scientific search for a single truth.

The debate between who has an accurate view of reality plays out within the recent controversy over the future of *Insite*, Vancouver’s safe injection site. Central to the legal controversy surrounding the future of *Insite* is the question about “community consensus” and whose contextual social understanding takes precedence in the “burden of proof”. The question arises as to whether the federal government’s view, that supports the closure of the *Insite* centre, should prevail over a worldview that provides community consensus to keep the centre open (Cochrane, 2011). For standpoint feminists, the perspective of those who experience the process, such as the users, medical officials and experts in the *Insite* Centre, become the most appropriate knowledge sources.

Criminalized women, as an oppressed population, interpret society through a less “filtered” lens (borrowing the term from Chomsky’s propaganda theory) (Goodwin, 1994) because they have no reason to manipulate or misconstrue reality (Brooks, 2007). This direct link to woman’s experience is expanded as a more accurate view of the social interactions and structures in society. Thus, theorists working in this philosophy posit that knowledge gained

through standpoint narratives is the key to positive social change for everyone, but in particular for the emancipation of women as an oppressed gender.

### *2.2.2 Postmodernist Feminism in Criminology*

Postmodernists also focus on the direct experiences of social actors, but they seek to remove the claims to truth sought through classical scientific method (Comack, 2006; Flavin, 2001; Harding, 1990). Rather than focusing on the search for the single perfect truth, postmodernists point out a messy, multifaceted society that presents multiple truths and realities. Postmodernists look towards the various realities that are present in varieties of discourses in social experiences and, as such, they are skeptical of attempts to challenge male-centred criminology with a more accurate feminine approach (Comack, 2006, p. 41).

Michel Foucault (1995, 1979) blazed a path for postmodernism through his theory on power. Comack (2006) explains how Foucault rejects the notion of power as an entity that can be owned and focuses on the mechanism of power, accessible through discourses, that emerges in a “disciplinary society” (p. 43). He looks to the political nature of knowledge, and the production of knowledge as fundamental to power; that is, “power is productive of knowledge, and knowledge is productive of power” (Comack, 2006, p. 43). Closed structures, such as prison and hospitals, offer a concentrated glimpse into the processes and realities that are present throughout society and investigating the discourses found within these systems reveal realities that exist outside of the closed systems. While feminists, such as Nancy Hartsock (1990) question the relevance of Foucault’s ideas of power and the applicability to women’s oppression, one cannot ignore his influence on the development of postmodern feminism within criminology.

The postmodern impact on feminist criminology, and representations of women in criminological research, was the redirection of methodology and ultimately the re-definition of

the research question away from a search for an ultimate truth about women's criminal behaviour. Postmodern feminists working within criminology separate from the question of where women are located in criminology and why they are in conflict with the law, and focus more on the processes surrounding women's criminalized experiences:

“Not interested so much in the task of explaining *why* women come into conflict with the law, those who work in this area raise important *how* questions, such as how women and girls are constituted or defined by professional discourses, and how particular techniques of governance (in a number of different sites) work to contain, control, or exclude those who are marginalized in society” (Comack, 2006, p.43).

Rather than attempting to capture a perfect grand narrative, postmodernists pay attention to the importance of discourse and the historical systems of meanings that affect subjects and objects (Comack, 2006; Howarth, 2000). Unravelling the discourses and power structures enveloping women within the criminal justice system translates the experiences of marginalized female populations into an understanding of how society criminalizes women. Courts and the criminal justice system as a whole are platforms that offer a convergence of social rules and practices that play out in a way that directly affects marginalized populations. With a postmodern perspective, women's experiences in the criminal courts are analyzed through the various discourses present in court interactions, formalized procedures and documentation.

Comack and Brickey (2007) work within a postmodern backdrop when using interviews with criminalized women to uncover the identities that are reflected and represented within their stories. Their study extracted when and how violence was positioned in the lives of criminalized women, and how these women signify this violence themselves. These authors identified discourses that highlighted the prevailing characterizations of these women as being “victimized, mad and bad”. “[T]he women interviewed for this study are struggling to make sense of their circumstances and their own use of violence, particularly as these bear on who they are. In the

process, they draw upon (and resist) the discourses available to them” (Comack & Brickey, 2007, p. 25). As an example, the discussion with Kelly presents this complex struggle, where Kelly discussed her turn to alcohol and drugs to “forget about her father” who beat and sexually abused her. Further in her interview, Kelly discussed the importance of being a good mother and invariably lived a double life where she stayed out and engaged in drug activity all night before coming home in time to get her children ready for school. Comack and Brickey (2007) drew out multiple identities and realities from the women they interviewed, and concluded that the criminalized women did not lack agency; rather, these women did engage in choice, albeit under distressing conditions. Thus, the researchers purport that multiple realities and understandings exist and, “the emphasis on patriarchy – without due attention to other forms of oppression – has undercut the explanatory power of feminist theorizing about women and violence” (Comack & Brickey, 2007, p. 25).

### *2.2.3 The Debate between Standpoint Feminism and Postmodern Feminism*

Both feminist postmodernism and feminist standpoint epistemology offer criminology a process to engage with criminalized women in an effort to understand their reality and experiences. However, these two perspectives engage in a debate with one another based on philosophical differences in their approaches. Postmodernist feminists criticize standpoint feminist epistemology for what they consider “essentialist views of women where standpoint theory limits women into a group that is “fixed, determined and foundational” (Cosgrove, 2003, p.88). Postmodernists are skeptical of replacing “male-centred approaches by counterposing them with a more accurate or correct version of women’s lives” (Comack, 2006, p.41). They argue that women are not a homogeneous group whose experiences define all women, but rather,

that women are multi-experiential and multifaceted. One woman's experience will be uniquely her own based on her distinctive socially defined space and time.

Standpoint feminist epistemology defends its theory by explaining that it does not attempt to blanket women based on essentialist methods. Brooks (2007) argues that standpoint epistemology has the capacity to accommodate differences such as race, class and sexual preference, but that they must identify commonalities to give a unified approach for feminist activism. “[B]y valuing the diversity of women's experiences and perspectives equally, feminist standpoint scholars must be careful to avoid a kind of paralysis that hinders women from moving forward together and taking a stand on social issues” (Brooks, 2007, p.75). Therefore, the equal and open sharing of differing experiences and standpoints provides for the multiplicity of women's voices so that they can converge and promote the potential for social change.

Standpoint feminists question the usefulness of postmodernism given the infinite differences produced through a postmodern approach. “Some charge that postmodernism basically amounts to a ‘call to inaction’” (Tong, 1989, p.232; Flavin, 2001, p.274). When no similarities in the experiences of women's oppression are identified within criminological research, feminists are unable to formulate a case to support social change. The creation of a better society for all through the empowerment of women is one of the major goals of feminism. In other words, if no common points of feminine experience are identified; the potential for activism is diminished.

Standpoint feminists such as Elizabeth Comack (1999) and Maureen Cain (1990) attest that feminism does not aim for absolute universal truths, but to produce representations of the truth that are less biased or partial. Part of providing these truths is a form of reflexivity on behalf of the researcher, acknowledging that the truth is founded on the social placement of the

research subjects and researchers (Brooks, 2007; Mauthner & Doucet, 2003; Comack, 1999). The researcher becomes a participant in the research rather than the expert (Comack, 1999). Comack metaphorically describes this process as creating a patchwork quilt. She points to the multiplicity of narratives from her book *Women in Trouble* and the culmination of these different stories sewn together to reveal intricate patterns; their narratives connecting with the reflections of the researcher to uncover the structure and design of the varied experiences of each woman (Comack, 1999).

The importance of reflexivity on the part of the researcher, who participates in the creation of knowledge along with research subjects, provides a response for the postmodern philosophical criticisms by acknowledging the multiple sources of knowledge and reality. The legal portrayals and characterizations by legal players are recognized as a source of knowledge about the social construction of criminalized women. It is a partial knowledge that is linked to the perceptions of the lawyers, who construct the representations in their legal strategies, and the researcher who interprets the discourse and textual interplay contained in the trial transcripts. Reflecting on my own perceptions and understandings, I am careful to acknowledge that this thesis presents a piece of the multifaceted and interconnected social perceptions that impact women in the criminal courts.

### **2.3 Anti Oppressive Feminist Theories: Anti-Racism and Postcolonial Feminism**

Anti oppressive theories emerged in response to the critiques of postmodern and standpoint feminist perspectives. These anti oppressive theories also stem from “social identity theories”, which are grounded within oppositional social movements that are organized around social identities such as race and sexual orientation (Moosa-Mitha, 2005). Anti oppressive theories express a difference-centred analysis that encompasses anti-racist, critical race

feminism, and postcolonial theorists who acknowledge that there are multiple sites of oppression (Brooks, 2009). Ultimately, anti oppressive theories are identified through their acknowledgment of experiential differences, their critical approach and their emancipation goals for research (Moosa-Mitha, 2005; Brooks, 2009).

Similar to postmodern and standpoint feminism, anti oppressive theories endorse the argument against universalist enlightenment thought, and purport that there is no single, essential truth to social experience. They engage with postmodern theory in its recognition of the multiplicity and differences in social experiences, and appreciate the postmodern position that discourse becomes power (Brooks, 2009). Anti oppression theories are similarly rooted in the ‘subjective and specific’ of postmodernism and they acknowledge particular socio-historical experiences of people that are simultaneously multiply positioned (Moosa-Mitha, 2005). While they recognize the specific and differential experiences of oppression, they are critical of negating the sense of collective experiences of oppression (Moosa-Mitha, 2005).

In recognizing the lived experiences of multiple sites of oppression, including gender, class and race, anti oppressive theorists introduced the concept of “intersectionality” of oppression. Intersectionality is defined as the interweaving of oppressions on the basis of multiple social identities as well as marginalization that was both relational and structural (Phoenix, 2004). Anti oppressive theories recognize that the experiences of oppressions cannot be singled out due to the interrelations amongst oppressions. These theories acknowledge that we have different experiences and that experiences of oppression intersect, giving the potential to understand the similarities of collective experiences of communities (Brooks, 2009).

To accomplish their epistemological goals, anti oppressive theorists deconstruct the dichotomy of oppressed and oppressor and recognize that people can speak from both locations

simultaneously and there is power found within the margins (Razack, 1998, Brooks, 2009). The marginalized are privileged in their understanding of both their experiences and mainstream society, and are represented as active and “owning agency” (Dominelli, 2002, Moosa-Mitha, 2005). Thus, an Aboriginal woman in the justice system understands her historical and cultural realities and her everyday experiences, but she also understands and actively participates in mainstream social processes.

Anti oppressive theories understand knowledge as situated, partial and multiple. Knowledge is understood as situated by one’s position in time and space, which is impacted by the privilege and oppression one experiences. Thus, one cannot know what it feels like to be a criminalized woman unless one has had the experience of being a criminalized woman and even then, there are differences in those experiences. Following this understanding of knowledge, the insight of anti oppressive theories rests on the idea that not everything is knowable and that the particular marginalized communities own their knowledge of oppression (Burke and Harrison, 1998, Dominelli, 2002, Moosa-Mitha, 2005). Researchers are positioned as outsiders who remain as learners from the privileged “knowers” who are the marginalized and oppressed. Researchers can, however, gain a sense of what the marginalized ‘Other’ knows through the act of empathetic imagination and by possessing critical self-consciousness (Moosa-Mitha, 2005). The researcher must stay in this position as a learner “asking for the privilege of learning” (Brooks, 2009, p. 77). Knowledge derived in this manner becomes emancipatory in that it is not perceived as neutral or abstract, but is situated and created from a previously unrecognized place leading to a new appreciation of differences (Moosa-Mitha, 2005, Brooks, 2009).

### *2.3.1 Anti Racism, Critical Race Feminism, Postcolonial Indigenous Theory and Postcolonial Feminism*

Anti race theories and critical race feminism incorporate the epistemological assumptions of anti oppressive theories in their understandings of the intersectionality of oppressions, the importance of difference, heterogeneity, subjectivity, situated knowledge and multiple voices (Brooks, 2009). Anti race theory focuses directly on race, beginning with centralizing the understanding of the impact of racism and the importance of incorporating multiple voices and stories. Critical race feminism concentrates on the interaction of race and gender and acknowledges that the realities of one form of oppression cannot take precedence over the other. This process aims to raise the silenced voices within experiential research (Okolie, 2005; Brooks, 2009). Any essentialism of gender oppression or race oppression fragments the knowledge and unnecessarily separates interrelated experiences in the women's lives (Harris, 2003).

These perspectives point to the importance of placing marginalized peoples at the centre of the research process and including multiple experiential accounts in a way that is holistic and includes spirituality rather than maintaining a linear story-telling approach (Brooks, 2009). Further, anti racist research demands that experiential accounts of racist oppression be expanded to incorporate broader social and structural levels. This move to incorporate both the individual experiences and the structural experiences of racism reflects an understanding that racism is experienced individually, relationally, societally and politically (Okolie, 2005; Brooks, 2009). Anti racist and critical race theories understand the multiplicity and interconnectedness of oppression, and insist on the centralization of marginalized peoples' experiential voices in their challenge against "complacency and in developing a counter-hegemony critical of dominant discourses (Brooks, 2009, p. 79).

Anti oppression theories, postcolonial indigenous theory and postcolonial feminism also have transformative social change as a goal. Paramount to these perspectives is their concern of colonialism, neo-colonialism and its continued impact on people's lives (Reimer and Anderson, 2002; Brooks, 2009). These theories illuminate the connections between gendered positioning with class and racialization while acknowledging colonial histories, neo-colonialism and the effects on current lives, choices and opportunities (Anderson, 2000; 2004; Brooks, 2009). Carolyn Brooks explains the continuation of colonial impacts in her reflections on the 1876 Indian act, which resulted in the forced assimilation of Aboriginal peoples through the appropriation of their lands, the outlawing of their spiritual and cultural practices, the forced incorporation into dominant cultural practices through residential schools, and the forced marginalization onto reserves. 'Status' or 'Registered' First Nations continue to be governed under the Indian Act- and Aboriginal women arguably experience fewer "fundamental rights than men" (Fiske, 2006; cited in Browne, Smye and Varcoe, 2007, p.131; and Brooks, 2009, p.80). Under the Indian Act and the amendment to Bill C-31, Aboriginal women, who married non-Status Indian men or non-Indian men, lost their status and rights, which affected their ability to own property invariably impacting their rates of poverty (Monture Angus, 1995; Cannon 2007; 2008; Brooks, 2009).

In congruence with other anti oppressive theories, postcolonial feminists place the perspectives of marginalized peoples at the centre as a starting point of developing knowledge and deconstructing dominant constructs of race, culture, and "Other" (Brooks, 2009). However, in their focus on specific racial groups, they are careful to warn against the reinforcement of stereotypical assumptions and cultural essentialism. Brooks (2009) describes how colonizing images of Aboriginal women are both part of history and present day. In reflecting on the

example of colonized understandings of Aboriginal women, Canadian research glosses over heterogeneity, linking Aboriginal ‘culture’ with social problems related to poverty, dependency, addiction and poor health (Browne and Fiske, 2001; Brown, Smye and Varcoe, 2007; Brooks, 2009).

Postcolonial theories emphasize critical and inclusive analysis of marginalized voices, especially those who have suffered effects of colonized histories, with the ultimate goal for social change (Brooks, 2009). They emphasize a centralization of the marginalized voice in relation to the historical and structural oppressive imbalances that situates marginalized peoples. Theorists engaging in postcolonial research incorporate the concept of “cultural safety” into their process for endorsing postcolonial social change. Cultural safety requires researchers and health officials to ensure that the effect of history, especially colonization, is understood when addressing Aboriginal health concerns (Browne and Fiske, 2001; Brooks, 2009). “Cultural safety moves beyond notions of cultural sensitivity to an analysis of power imbalances, institutional discrimination, and the nature of the relationships between the colonized and colonizers” (Browne and Fiske, 2000, p.8-9; cited in Brooks, 2009, p. 83).

#### **2.4 Making the Case for Cooperative Feminist Criminology**

Despite the tensions between standpoint feminism and postmodern approaches, it is false to believe that these theories cannot work together to offer a feminist insight into women’s experiences and unify these feminist standpoints for social change. Both postmodern feminism and standpoint feminist epistemology agree that women have uniquely different social experiences than men and these experiences can be understood through research by engaging directly with the women. The unification of postmodernism’s separation from grand narratives and promotion of multiple realities offers the multiple standpoints that rounds out each theory.

Thus, “pluralizing the term to feminist *standpoints* allows the recognition of difference, particularity, and context while also putting certain parameters on what can count as *feminist* standpoint” (Hirschmann, 2004, p.320). The feminist standpoints allow for multiple experiences at differing times by different women of different backgrounds, but their standpoints united become a multifaceted *feminist* standpoint (Hirschmann, 2004). The unification of these paradigms highlights how critical it is to understand each as both a theory and a methodology.

Anti oppressive theories demonstrate the value of incorporating both standpoint and postmodern concepts into criminological research. These theories recognize the importance of acknowledging multiple standpoints and experiential differences without losing sight of the intersectionality of experiences that present commonalities within communities. Anti oppressive theories successfully bridge the gap between the philosophical differences of postmodernism and standpoint theory by presenting a unified postmodern standpoint epistemology that is focused on bringing about emancipation from oppression. However, the confining nature of the legal process, as it is demonstrated in the ten transcripts that are the subject of this study, has limited my ability to access the women’s own perceptions of their legal experiences. The regulated procedures within the legal system place the women in a process that restricts their responses and expressions during courtroom interactions. As such, the women’s perspectives on their own situations is circumvented by the strategic legal questions presented by lawyers.

The criminalization of women continues to be an area of research and discussion in many theoretical circles. The feminist engagement in criminology, particularly through the postmodern, standpoint feminist and anti oppressive paradigms, offers a new pathway for understanding the experiences of women in the legal and correctional systems. The criminalization of women acts as a backdrop for this research in its attempt to extract the

discourses surrounding women's experiences within Canada's courts. By starting with a postmodern discourse analysis and acknowledging the importance for continued research that unifies these feminist approaches, the following study is able to account for the intra-gender differences and commonalities among the discursive portrayals of the women while simultaneously promoting an argument for social change, particularly through the connection between law's structure and the criminalization of women. As Jaggar (2004) points out, "women who can theorize together can work together politically; indeed, in theorizing together they are already doing one kind of political work" (p.64).

### **Chapter 3: Methods and Reflections: A Discourse Analysis of Saskatchewan Criminal Court Transcripts involving Women as the Primary Defendant**

This thesis investigates the criminalization of women by exploring the themes revealed within the verbal interplay between the courtroom officials, such as lawyers, witnesses and judges, and the women charged through the Saskatchewan Court of Queen's Bench. This chapter explains both the benefits and critiques of using a postmodern discourse analysis to uncover the characterizations and social rules that envelop women who are judged within the criminal court process. The chapter then describes the transcripts and the process of unveiling themes through a discourse analysis to uncover commonalities among the portrayals surrounding women within the legal process. Finally, the impetus behind this research is explained to provide context for the characterization of women who are criminalized through a formal court process.

#### **3.1 Feminist Methods: Postmodern Discourse Analysis**

This thesis incorporates postmodern theory and methodology by undertaking a discourse analysis of court transcripts. Reflecting the postmodern theoretical focus on the social construction of discourse, and its embedded historic meanings that impact social subjects (Comack, 2006; Howarth, 2000), a postmodern discourse analysis deconstructs the language and text that impact and shape social identity. By analysing socially constructed language, symbols, texts and discourse, postmodern researchers uncover patterns of meanings and hierarchies that are imbedded within them (Brooks, 2009). Employing this deconstructive analysis provides insight into the impacts that their meanings and relationships have with the identities and experiences of discursively constructed subjects (Brooks, 2009). For example, in this thesis, the

patterns of meanings and the discursive portrayals of women within criminal trial interactions uncover socially constructed characterizations and understandings about criminalized women.

Discourse, and by extension, discourse analysis, are complex terms that evoke different ideas depending on what discipline a researcher works within. Webster's online dictionary gives a variety of definitions for discourse ranging from "a: formal and orderly and usually extended expression of thought on a subject", to "b: connected speech or writing", or "c: a linguistic unit (as a conversation or a story) larger than a sentence" (Merriam-Webster's online dictionary). For linguists it is a process resulting in a communicative act, generally taking the form of text (written, spoken, signed or printed) (Chimombo & Roseberry, 1998). For the purposes of this study, discourse is understood as a term that identifies both the language and the structural use of language to create social knowledge and meaning. It follows the explanation by Nicola Gavey (1989), where discourse is understood as "a way of constituting meaning which is specific to particular groups, culture, and historical periods, and is always changing" (p. 464). By combining the aforementioned definitions for the purpose of this study, the term discourse specifically refers to the patterned ways of understanding the character formulations of criminalized women in Canada.

Discourse analysis is an umbrella term that encapsulates a range of research motivations. Linguists utilize a discourse analysis as 'an ends to itself', by focusing on discourse to study the multifaceted structures and mechanisms of socially situated language use (Cameron, 2001). Alternatively, it is used within the social sciences for the production of discursive data, where discourse is understood as a source of evidence or insight about social life and the mechanisms that sustain inequalities (Cameron, 2001; Silverman, 2001). The latter expression of discourse

analysis as a tool for uncovering insight about social life is the approach developed in this study on criminalized women.

Defining a process for undertaking a discourse analysis perpetuates the ambiguity surrounding the attempt to define discourse analysis. As Gavey (1989) quips, “there are no recipes or formulae” (p. 467). However, Gavey does provide a clear base for understanding the practical approach to performing a discourse analysis. She explains that it involves the careful reading of texts -- including transcripts of conversations or interviews, existing documents or records, or even more general social practices such as signs or media-- and scrutinizing them to detect discursive patterns of meanings, contradictions and inconsistencies (Gavey, 1989). David Silverman (2001) expands on this procedural discussion by identifying three concepts that are used within discourse analysis research including: 1) interpretive repertoires, 2) stake and 3) scripts (p. 179). Interpretive repertoires are described as systematically related terms that are often organized around central metaphors that link to one’s interpretation of a social situation (Silverman, 2001; Potter, 1996). Stake is explained as a concept where individuals discount or rework the significance of their expressions based on their understanding that other people have desires, motives, allegiances, etc. and have a stake in their actions (Silverman, 2001; Potter, 1997). Finally, script is understood as the way individuals construct situations based on their perceptions. Silverman (2001) defines script in discourse analysis as “a way of invoking the *routine* character of described events in order to imply that they are features of some (approved or disapproved) general pattern” (p. 184). Discourse analysis is concerned with these three concepts to gain insight into how individuals construct and perceive their social surroundings. This thesis involves the process of identifying patterns in the language and strategic

characterizations of women that reflect interpretive repertoires, stake and scripts that are embedded into the legal discourse.

Similar to the criticisms of postmodernism discussed in the previous chapter, the use of discourse analysis elucidates criticisms within feminist criminology. Gavey (1989) clearly outlines three concerns with using discourse analysis including: 1) a problem of de-centring the individual, 2) a problem of elitism and 3) a problem of relativism. The first criticism focuses on the postmodern de-centring of individuals, which is fundamental to many feminists who purport to place women in the centre of women's knowledge (Comack & Balfour, 2006; Gavey, 1989). Postmodernism holds that female experience is never independent of social and linguistic processes and, in fact, it is comprised of these outside processes (Gavey, 1989). This de-centred approach to understanding how social actors experience and perceive society does not necessarily stand in contrast to standpoint feminist views. Women are situated in a social world that is informed both by other actors and by the women themselves.

The second criticism focuses on a problem of elitism where postmodernism is accused of being complicated and ambiguous, which renders it inaccessible to untrained readers (Gavey, 1989). Postmodern scholars use non-traditional methods to analyze new and unfamiliar discourses they find within the social structures that they study. These unconventional research processes create unfamiliar and confusing knowledge for readers who do not have a postmodern theoretical background or the time to unravel these new understandings (Gavey, 1989; Belsey, 1980). Gavey does not see any simple solution to this critique due to the value postmodernist's place on challenging familiar social assumptions. As such, elitism remains a concern for postmodern feminist writers who seek wider acceptance of their research and its use to promote social change.

Gavey's third criticism of using a postmodern discourse analysis is identified as a problem of relativism, which parallels the "call to inaction" critique discussed in chapter two. Here, postmodernism abandons absolutisms in favour of multiple realities. This exposes a fear that feminists would need to abandon feminist knowledge and values (Fraser & Nicholson, 1990; Gavey, 1989). However, this fear is misplaced and can be accommodated by maintaining that there is not a guarantee that any knowledge or truth will be understood or accepted. Inevitably, the avoidance of postmodern methods, including discourse analysis, on the basis of relativism simply paralyzes feminists and unreasonably limits their engagement with a process that allows for "analyzing the subjectivities of women and men in relation to language, other cultural practices, and the material conditions of our lives" (Gavey, 1989, p. 472). The use of discourse analysis provides a means of engaging with texts, including verbal exchanges, writing and symbols, to identify the social structures that inform and affect individuals' perceptions and social experiences. Its deconstruction of systematic processes, language patterns and social discourses offers insight and understanding of social structures that allow for active resistance, which is crucial for feminism (Brooks, 2007; Gavey, 1989).

### **3.2 Using a Discourse Analysis – Searching for Themes in Court Transcripts**

Using a thematic discourse analysis, this study investigates the discourse of legal actors within ten Saskatchewan criminal trials involving women as the defendant. This analysis identifies related categories of patterned understandings, or 'themes' derived through the cross-referencing of trial texts and the legal representations of female defendants. Thus, this study incorporates the legal discourses impacting the representations of women within each case and cross-references these portrayals of female defendants to identify common themes informing the 'criminalization of women' discourse.

### 3.2.1 *The data*

This current study reviews ten criminal court transcripts, transcribed by the court stenographer, representing a diverse array of criminal charges against adult women between 1998 and 2005. The transcripts were expensive, costing \$1256.41 through the Saskatchewan Ministry of Justice - *Transcript Services*, which limited the inclusion of additional cases due to my limited student budget. When the data arrived, I was amazed and daunted by the immense volume of data, encompassing 3,702 pages within 23 volumes. These transcripts represent proceedings from Saskatchewan criminal courts with five cases presented in Provincial Court, and five cases in the Saskatchewan Court of Queen's Bench. At the time of their arrest, all of the women were living in various Saskatchewan communities including large urban centres, such as Saskatoon, along with smaller communities and Aboriginal Reservations. Six out of the ten of the defendants were Aboriginal women and eight out of ten were mothers at the time of their arrest.

The charges in these cases represent a range of Criminal Code offences. They include a variety of charges ranging from fraud and theft to communicating for the purpose of prostitution, manslaughter and murder. Regarding the women who were accused of Criminal Code violations stemming from the death of another person, four of the women were charged with second-degree murder, one woman was charged with several counts of dangerous driving causing death and bodily harm, and one woman was charged with attempted murder. Three out of four of the women who were charged with second-degree murder ultimately plead guilty to a lesser charge of manslaughter. Two of the women's charges linked them to criminal activity involving prostitution. The first woman was charged with several Criminal Code violations involving a central charge of living off the avails of prostitution while the other woman was charged with

communicating for the purpose of prostitution. The final two women were charged with financially-based offences including one woman who was charged with theft over five thousand dollars and another woman who was charged with several offences related to a pyramid scheme, contrary to section 206(1) of the Criminal Code of Canada. Six of the women had previous criminal records so, in addition to the major Criminal Code charges, several of the charges against these women included smaller charges stemming from breeches in probation. Ultimately, all of the women in these criminal trials were found guilty of their charges.

The choice of these cases was based first on the availability of transcribed court proceedings. Since women make up a small percentage of defendants in Saskatchewan criminal courts, in 2004/2005 women represented 21 percent of Saskatchewan adult criminal court cases (Statistics Canada, Table 252-0044), accessing previously transcribed proceedings places further limitations on the availability of data. Court proceedings are only transcribed when required by legal officials; otherwise, most court processes remain on record as sound recordings. Second, these cases represent a variety of criminal offence charges in order to offer a broader range of courtroom discussions based on differences in: the location of the criminal offences and the courts; the types of witnesses; the variety of charges; and the types of strategies that were connected to the charges. However, the use of transcripts that were previously transcribed by the Court's stenographer posed challenges in the overall process. Having women as the primary defendant is paramount to investigating the portrayals of women through the legal system. Since "sex" is not a search parameter in the Saskatchewan Law Society database, identifying cases with women at the centre of the trial process proved difficult. Once twenty-five cases involving women were identified through the database, by searching for gender labels in names within the

case decisions on a case-by-case basis, they were further filtered by their availability as transcribed documents.

The use of transcribed legal proceedings also poses challenges to the types of knowledge that are ultimately derived from this discourse analysis process, as it does not allow for the inclusion of the woman's perspectives. The women at the heart of these criminal trials were not given the chance to reflect on their experiences or explain their perceptions of those experiences. As a result, this thesis offers partial knowledge into the criminalization of women in Saskatchewan by identifying the discursive themes that are present within the court proceedings surrounding these women's legal experiences. While the limitations of the court transcripts impact the ability to incorporate women's standpoints into this thesis, it does set the groundwork for future research by providing knowledge about the discursive portrayals that impact the criminalization of these women.

The language found within the 23 volumes of transcribed data ranged from very technical presentations to procedural processes. During examinations of expert witnesses including the coroners and investigating officers, the discussions surrounding evidence and crime scene reconstructions became very detailed and technical. For example, when explaining that the suspect fled the scene of the crime, an investigative officer describes, "I went down into the ditch in a southwesterly direction to the pedestal and noted that there was a small footprint in the sand, more than one footprint, several footprints leading off again in a – in a south – southwesterly direction into – into the trees" (Case 4). In other sections of the data, particularly during discussions between the lawyers and judges that take place outside of witness examinations, the discussions became conversational, with the lawyers addressing each other as "my friend" (Case 1). Additionally, the transcript text includes routine procedural interactions where lawyers and

the judge discuss various legal processes that are related to the cases but that do not involve examinations of witnesses. During these exchanges, the expressions of the courtroom players are formalized and directed to legal officials where the defendant is the topic but she has no active participation in the conversation. For example, in an exchange about the inability for a court officer to place an electronic monitoring device on the defendant, the lawyers and the judge discuss the parameters of the woman's release before her fate is decided:

Prosecution – She'd be -- she is in – if she was to be released on an electronic monitor she would be -- she would stay in custody until Monday morning.

The Court – Okay.

Prosecution – I guess there might be a way you can order her to attend on Monday morning to get it set up, but --

Defence – Maybe I'm putting the cart before the horse, but my position I would advance, My Lady, is that if the court decides to release my client there is no hard and fast rule that she has to be on a monitor to be released.

(Case 8)

Overall, the majority of the interactions within these transcripts presented examinations of witnesses, which involved very strategic questions that were specific to what the witness saw and felt during the time of the incident or during the interactions they had with the accused woman. The discursive interplay among lawyers and witnesses are reflected in numerous examples throughout chapters four and five.

### 3.2.2 *The process.*

Exploring the discursive practices presented in these cases of female defendants involved closely reviewing the courtroom discussions, identifying the legal strategies used by lawyers and drawing out the character formulations of the accused women by the various legal officials. To accomplish this task, close attention was paid to the language choice of the judges, lawyers and the witnesses. Norman Fairclough (1992) argues that something becomes social reality only in

its linguistic representation and the use of language to describe defendants who pass through the courtroom doors. An important area of concern is the discursive restraints placed on witnesses and the discursive mannerisms afforded to witnesses questioned by counsel (Beaman, 1998). The transcripts were searched for the presence, or absence, of themes.

The research process included several careful reviews of the court transcripts and a cross-referencing of texts to discover any commonalities in discursive themes. A preliminary review of the data provided a familiarization with the transcripts, a glimpse into the way the women were presented in the cases, and a general understanding of these women's stories. This step included identifying the specific charges, highlighting the locations of the incidents and the courts, and learning about the various courtroom players in connection to the overall story unveiled through the examinations of witnesses and the defendants. The next step included reviewing the separate cases and identifying the character formulations of the women and the indicators attached to these formulations. This step sought indications and examples of 'interpretive repertoires', 'stakes' and 'scripts' that formulate a legal understanding of the women (Silverman, 2001). In the instance of one case, the accused was a 23-year-old Aboriginal female charged with second-degree murder. In this second review process, the text characterizes the accused as a young woman in her twenties who was happy and regularly engaged in youthful activities such as going to 7-11 for "Big Gulps" (Case 1).

The next stage included reviewing the transcripts and identifying themes in the text that are connected to beliefs about the accused woman, her experience and her environment. The detection of themes included the identification of reoccurring concepts and verbal cues that allude to ideas that are focused on within the legal discussion but do not directly link to the woman's formal criminal charge. For example, references to the existence of children in the

defendant's life and how she cared for her children highlights a specific motherhood role that links to a gender role theme. Once the separate cases were reviewed to identify the themes arising in each woman's situation, these themes were cross-referenced with those found in the other cases and consolidated to reveal several commonalities among the experiences of the women. At this point, it was critical to return to the literature to examine the current work that is connected to the 'criminalization of women' discourse to analyze the four core themes that arise in the ten court transcripts reviewed in this study.

This research undertakes an investigation into an underdeveloped area of study. Rather than offering a single absolute truth on a unified female experience in the criminal courts, a debate is offered for feminists, policy analysts, and all actors interested in the state of the criminal justice process in Canada. The interpretation of the data is not meant to be viewed as an ultimate truth about the experiences of criminalized women or legal construction of women's identities in the criminal courts. Rather it is a product of how the researcher understands and creates knowledge as a feminist sociologist. My background and values, as a white, married and educated woman from Saskatchewan, impacts my perceptions and interpretations of the discourse and legal interplay within the transcripts. As such, the process involves my constant self-reflection regarding expectations and understandings of the discourse, selection of the themes, selection of examples and interpretation of the findings. Each step in this research method is determinant of the subjective experience and personal understanding of the social reality of which the primary researcher is a part. For example, the selection of the themes is partially a product of the reconceptualization of the understandings of gender and role expectations due to the advancement of feminist philosophy. The intention is to present a partial,

(Comack, 1996, 1999) reflexive, interpretive and open-ended source of understanding that will contribute to feminist criminological knowledge.

### **3.3 A Thematic Discourse Analysis and Legal Portrayals of Women's: Hypothesizing the Discursive Constructions of Criminalized Women**

The dominant understanding of the legal system is that it is a blind and balanced process with no regard for race, gender, socio-economic status, or any other characterizing feature: the same law formally applies to everybody (Canada's System of Justice, 2009). It is founded on a concept of judicial independence from the state and any political interference. "Canadians expect their cases in the courts to be heard before a judiciary that is fair, impartial and not subject to political pressure" (Ramsharan, de Lint & Fleming, 2001). The acknowledgement of bias in the system threatens the legal institution thereby attacking a fundamental and cherished aspect of progressive society. A separate and fair justice system is paramount to a democratic and free society.

Alternatively, feminist criminologists, including Smart, Comack and Balfour, argue that law is not blind in its practice of justice, but presents a "site in society for the reproduction of gender, race and class inequalities" (Comack & Balfour, 2004, p. 20). The actors within the legal system and those involved in enforcing the criminal law are human, with human interests and human fallacies and, therefore, they are influenced by gender in deciding the outcomes at each stage of the legal process (Nicolson, 2000). Given that the law is made up of human actors, ranging in position, rank, and status, the law cannot be bias-free in practice. Furthermore, the differences in race, gender, economic status, and historical background serve to place legal subjects in different playing fields within the legal process. That is, the differences that make up

the legal subject serve to outline different powers and forces acting upon their experiences in the legal setting.

The following chapters outline the legal portrayals of female defendants within Canada's criminal courts and support the feminist position that justice is not a blind process. The analysis of courtroom transcripts details legal strategies, roles of legal counsel, and legal processes, uncovering the characterizations and labels of criminalized women, which reflect gender, race, and normalized feminine action. The courtroom processes and legal rhetoric, such as the strategies used by lawyers to either defend or prosecute the women, incorporate social labels and feminine portrayals that link to a larger discourse of the criminalization of women. Themes related to 1) gender roles and regulated lifestyles, 2) victimization and dependency, 3) racial images and Aboriginal stereotypes and 4) the medicalization of female activity and the criminalization of medical issues, emerge and interrelate throughout the linguistic patterns found in courtroom transcripts, which inform the discursive construction of criminalized women.

#### **Chapter 4: Gender roles, regulation and victimized women**

This chapter introduces the first two dominant themes that emerge within ten court transcripts of criminalized women in Saskatchewan. These themes are 1) gender roles and regulated lifestyles and 2) victimization and dependency. Chapter five expands this analysis by presenting two more themes that are identified as racist stereotypes and the medicalization of female activity. Each theme is revealed and explored through the deconstruction of the linguistic patterns, the legal strategies and verbal tactics, the witness perceptions and accounts, and the first-hand presentations from the female defendants found within each transcript and supported through a cross-comparison between the ten cases. These themes do not emerge independently of one another; rather, are interrelated and inform broader social understandings of the woman. The themes surrounding the women's identities and legal experiences are paralleled in current criminological literature, which demonstrate how legal strategies replicate and reinforce feminized roles such as motherhood and morality (Jenkins & Davidson, 1990).

The analysis in this chapter reflects the understanding that the subjective perceptions of each courtroom player, including lawyers, judges, witnesses and the women themselves, are framed in the courtroom environment. Thus, the players express themselves based on the formalized courtroom rules and each individual's awareness of how they will be perceived by others. This connects with the previous discussion on interpretive repertoires, stake and scripts (Silverman, 2001) and acknowledges the presence of subjective understanding of how each individual within these transcripts understands their situation and position within the courtroom structure.

The themes that emerged from these ten court transcripts identify extralegal variables<sup>2</sup>, including aspects of the woman's life that are not legally relevant to the cases, within the courtroom legal strategies. That is, they involve characterizations and roles that do not play a part in the crime that was committed or the specific actions of the accused (Franklin & Fearn, 2008). Extralegal variables, or variables that are not legally relevant (such as race or social status), include the legal strategies, social rules and patriarchal dogma that surface in the transcripts (Lichtenstein, 1982). In the past two decades, volumes of work have investigated the effects of these extralegal variables on sentencing outcomes (Spohn & Halleran, 2000), with very little focus on their effects on earlier stages in the legal process (Freiburger & Hilinski, 2010). Up to this point, the research has pointed to the significance of these extralegal variables, such as race, age and gender, within legal decisions. The identification of dominant themes in these transcripts lends support to the presence of extralegal variables affecting the experiences of women throughout the criminal court process.

#### **4.1 Themes Emerging Through the Criminalization Discourse**

The themes presented in the following analysis are based on normative understandings of a female offender and her characterizations within the courts based on her association, or disassociation, with traditional feminine ideals where she is passive, nurturing, maternal and good (Brock 2000; Faith, 1993; Menzies & Chunn 2006; Naffine, 1990). These feminine formulations do not carry uniformly over all women as a generic group. The human experience

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<sup>2</sup> The Supreme Court's decision in Gladue (1999) recognizes the overrepresentation of Aboriginal offenders in the Canadian criminal justice system and acknowledges that sentencing must account for life circumstances, particularly in cases involving Aboriginal offenders. This landmark case led to a requirement for sentencing judges to consider the "unique systematic factors that may have brought a particular Aboriginal offender before the courts" (Roach & Rodin, 2000). While the Gladue (1999) case identifies the purpose of incorporating life experience and Aboriginal offender histories during sentencing, this study focuses on the pre-sentencing experiences of female offenders. Prior to conviction and sentencing, the emergence of extra-legal variables, such as gender and race, potentially impacts how the courtroom perceives the accused prior to the decision.

is diverse and circumstantial; therefore, the task is to unravel the intra-gendered experience of female defendants. The chief contentious area in the criminal trial procedure is founded in the character creation posed by both the Defence and the Crown Prosecution in the framing of their arguments.

The extents to which these categories exist indicate important realities regarding the experiences of women and the law. Further, the cross-comparison of the experiences of different women highlights the unbalanced procedure of law in the Saskatchewan courts. For Comack and Balfour, “The practices by which gender, race and class are ‘made’ do not occur in a vacuum; they are influenced by social-structural constraints” (2004). The legal process is one of these formalized constraints that regulate and channel the cultural understandings of gender, race and class. The first themes uncover the cultural understandings of gender and victimization as they emerge recurrently throughout the transcripts.

#### **4.2 Gender roles and regulated lifestyles**

*“Both the prosecution and the defence counsel may use such gender assumptions in the trial process for different purposes. While the prosecution’s characterizations are generally expressed in an overt fashion to discredit the defendant, the defence counsel’s use of gender assumptions is often more subtle and paternalistic in nature; in other words, ‘for her own good’”*

(Jenkins & Davidson, 1990, p. 163).

The identification of a feminized social role for women is guided by a set of social expectations. These expectations regulate the ways in which women are thought to experience the world. Women who fit into their normalized gender roles, such as a good mother who is moral, caring and chaste, are looked upon favourably. Conversely, those who fit outside of these gender stereotypes are considered abnormal (Brennan & Vanderberg, 2009). Defensive and prosecutorial strategies embrace normalized feminine images using sub-themes that are reflective

of gender, such as “good and bad” motherhood, caretaking moralities and gendered assumptions regarding female emotional states (Brennan & Vanderberg, 2009; Comack & Balfour, 2004). This gendered view of social roles emerged throughout the courtroom discussions for all cases reviewed in this study. Specifically, this section examines stereotypes of women’s roles as mothers, and women’s perceived emotional nature.

The role of motherhood becomes an important conversation within the court process. The accused woman’s association with her motherhood role became a legal strategy that both the Prosecution and Defence utilized. The accused women were identified as mothers in eight out of the ten cases reviewed in this study. Out of the other two cases, one woman was not a mother and the other was a 62-year-old widow and the text did not reveal whether or not she was a mother.

The inclusion of children within the characterization of the woman highlights this gendered approach by imposing western-dominant perspectives on motherhood, family orientation, and morality. One case involves a 33-year-old Aboriginal woman who is charged with second-degree murder in the death of her common-law partner. She has three children aged 6, 8 and 12. The deceased common-law partner fathered two of the children. Text found within the case reveals that both the accused and her partner were drinking substantial quantities of alcohol on the evening of the incident. Furthermore, the text identifies that all three of the woman’s children were present at the time of the murder.

Within this particular transcript, the Defence utilizes the dominant view on a woman’s role to position the defendant as a caring mother. The defence lawyer sets up a line of questioning that examines her relationship with her children based on a socially prescribed familial position or motherhood role. This tactic separates the defendant from her relationship with the deceased and

serves to formulate a specific understanding of her character or personality. In particular, it takes her motherhood role and prioritizes it as her defining character.

Defence – All right. Okay. You have three children?

Female Accused – Yeah.

Defence – And what are their names?

Female Accused – J., R., and D.

Defence – Okay. How old is J.?

Female Accused – She's 12.

Defence – And is M. her father?

Female Accused – No.

Defence – How did M. and J. get along?

Female Accused – He had a hard time accepting her for his own daughter.

Defence – Is that because she wasn't his daughter?

Female Accused – Yeah.

Defence – Is there any other reason other than the fact that she wasn't his daughter?

Female Accused – Not that I can think of, no.

Defence – Okay.

Female Accused – He couldn't accept her.

Defence – Now, the other two children, just, I'll lead you through this a bit, you have another daughter. R. who is eight years old and another one, D., who is six; correct?

Female Accused – Yeah.

Defence – And both of those girls are M.'s daughters; isn't that right?

Female Accused – Yeah.

Defence – Okay. And how is your relationship with these three girls?

Female Accused – I – I feel I'm close to them. I -- I really -- I sleep with my baby. Like, I didn't let -- didn't trust the crib for them. I -- I slept with them since, like -- I -- I'm close to them. That's all I can say. I love them. I need them.

Defence – And how are you and your children getting along at this time, after M.'s death? How are you getting along with your children?

Female Accused – I know they must be -- they -- they need me. I need them.

Defence – Are they -- are you close to your children at this time?

Female Accused – No, I -- I can't even phone. I didn't phone.

(Case 8)

The above section is from a show cause hearing,<sup>3</sup> which sets the stage for a discussion on the character of the accused. The key question in this hearing asks whether the accused is fit to remain in custody or if she can remain in the community to await trial.

This line of questioning sets up a strong dichotomy between motherhood and fatherhood, where the father is presented as an external figure and the mother is understood as an invested and caring figure. Although the children do not directly link to the criminal charges, the female offender's motherhood skills are the focus of the discussion. The Defence draws out strong motherhood imagery and characterizes the accused as a loving and nurturing woman. She "sleeps with her baby because she doesn't trust a crib" (Case 8). This stands in contrast to the presentation of her common-law partner, who she described as having a tough time accepting one of the children because he was not the child's biological father.

In this same line of questioning, the defence counsel's strategy continues to frame the defendant as a loving mother using western dominant values.

Defence – You sleep with both of them?

Female Accused – No, I say – I say their prayer with them when we're together. They know the Lord's prayer, and I make sure that I say it with them, and I go to bed with them when I am with them every night, that I make sure I – like, that I am there, when I am there.

(Case 8)

This defensive strategy highlights a close, individualized relationship between a mother and her children that is consistent with a dominant westernized Christian-based understanding of

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<sup>3</sup> A show cause hearing is a hearing where the Crown's counsel tries to convince the court that the accused should be held in custody until the trial. This is also known as a bail hearing. (Saskatchewan Justice, [http://www.saskjustice.gov.sk.ca/courts/court\\_terms/court\\_terms.shtml](http://www.saskjustice.gov.sk.ca/courts/court_terms/court_terms.shtml)).

motherhood. This mother-centred approach is generally understood within the courtroom setting and serves to place the accused in a more positive light when she stands before those who will judge her. If she can successfully convince the Judge that she is the most important person to her children, then she will more easily appear to be better suited to return to the community. This legal strategy is highly effective in this case, with the Judge ruling to release the woman back to her community.

The point of this discussion is not to question whether the specific decision was correct or not, but rather to flush out the underlying strategy of the Defence and why it worked. The strategy centred on one of the most culturally embedded and assumed natural female roles found in western culture - the woman is a mother and, thus, is most needed in her motherhood role.

In this same case, the Prosecution sets out to tarnish the defendant's reputation by attacking her motherhood abilities. In the following excerpt, the Prosecution focuses on the woman's actions as a mother after the incident resulting in criminal charges. The charges against this woman surround the death of her partner; however, it is her motherhood role that stands trial when her character is questioned.

Prosecution – Yeah, have your daughters been to counselling?

Female Accused – Not yet, we were in the process. She was waiting for an opening for the lady in her – in her building to, so we could make arrangements to have a meeting, to have meetings.

Prosecution – Well, I guess I'm concerned. After – I assume this has been a very traumatic experience for your children?

Female Accused – Yes

Prosecution – And yet you haven't arranged or organized any counselling?

Female Accused – Yes, I have. I'm in the – I was in the process of going to meet with them. We were going on the next – the next week. It was already in the process. I had to go see this – another lady for two of them to work with us as a family.

Prosecution – So how long was it going to be before they would eventually see a counsellor?

(Case 8)

In a separate case, children are defined as the primary victims of the offence. The female defendant is a young, single, childless, white woman who admittedly finds herself in a state of financial distress leading her to steal from her workplace. The breach of trust with her employer and theft from the preschool community doubly demonizes her in front of the Court. First, the woman is chastised for her inability to control her financial wellbeing. Second, the Court focuses on, and is appalled by, the location of the theft. The theft becomes redefined as theft “from children”.

Justice – I guess, I’m – I’m struggling to get my mind around how you came up with such a – get yourself into such debt, that would force you to, in effect, rob from children.

(Case 6)

The Judge responds to this case in a confused manner and expresses this incredulity by directly inquiring how she could possibly steal from children. The physical location of this crime, a children’s day care, separates this woman from a normalized understanding of women as caretakers and protectors of children.

The presentation of the woman in this theft case stands in stark contrast to the presentation of the woman charged with murder. These two women come from different backgrounds, different races, and different regions, but they do share the same gender. The difference in their court experiences hinges on their accommodation to the feminine gender role or motherhood. In the first case, the woman is framed as a loving mother who is “needed” by her children. The court understands this characterization and uses it as a background for legal strategies. In the second case, the woman steals from a day care, ultimately disconnecting her

from a general understanding of a woman's role of child-protector, which leads to a confused response by the judge. Her separation from the caretaking motherhood role forces her to adopt a different defensive strategy that will reconnect her actions to an understood feminine situation.

The reactions and emotional state that women express during the time of the criminalized incidents are laden with gender-specific notions and ideals and become important sources of discussion in each case. The Defence's questions to witnesses construct images of reactionary and emotional women. Emotive descriptions of women, such as "W. was upset", "she was a miserable lady", "she was enraged" are used by Judges, attorneys, and witnesses to connect the women to an appropriate level of emotion. The following courtroom discussions highlight these emotive labels, which present a woman who is not in control of her emotional state. This links to early criminology theories that frame women as emotional based on a male-centric perspective.

In the cases involving manslaughter or murder, discussions focus on the emotional state of the accused female. Through the questions posed to witnesses, the Defence seeks responses that show how the accused woman displayed sorrow and regret. The witness accounts of the crime serve to formulate the woman's state of mind by highlighting the presence of her tears or defining her actions as an expression of how upset she was at the time of the incident.

In one of the cases, the accused is a 24-year-old Aboriginal woman who is charged with Arson under section 433a of the Criminal Code of Canada<sup>4</sup> and second-degree murder under section 235 of the Criminal Code of Canada in the death of her uncle. The incident involved a

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<sup>4</sup> Section 433. Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where (a) The person knows that or is reckless with respect to whether the property is inhabited or occupied (Criminal Code, 2010).

trailer fire where the woman's uncle was sleeping. Here, the responses by two separate witnesses emphasize an emotionally charged response of a woman to the traumatic incident.

Defence – Okay. What can you tell me about her or her emotional state while she was talking? How did she seem?

Witness 1 – She was upset and crying.

Witness 2 – I saw no tears. I couldn't see any visual signs of her crying, but she was distraught and trembling a bit.

(Case 1)

The Defence sets up a line of questions that serve to highlight the emotional state of the woman. In their responses, the witnesses are discussing the emotional response of a female who has just left a burning building, while a family member remains inside. On both accounts, the identification of tears and crying are used to describe the emotional response of the defendant. On the one hand, the first witness positively indicates the presence of a highly emotional female who is crying. Separately, a second witness describes the female defendant as acting emotional; however, in this description the witness takes careful consideration to highlight a lack of tears in the woman's emotional response.

Defence – Now, you say they – they were consoling her. Again, I'd ask you if I can if you – If you can comment on what – on what C.'s emotional state was like at that point in time

Witness 2 – When I reached her, D. had her arms, I believe, around the young lady's shoulders. M. was standing close by. I cannot remember her crying. She was distraught but relatively calm.

(Case 1)

Understanding that the witnesses are describing a woman who has just experienced trauma and loss, these questions potentially highlight a common sense response that serves no purpose. Why is it important to highlight that a woman in trauma is upset? The potential answer lies in the level of conscious understanding about the importance of connecting women to their normal

social roles and reactions. The identification between a woman and emotional responses to a trauma become a defensive legal strategy in the courtroom.

The defence lawyer quickly returns to questions that further demonstrate the emotions that the defendant displayed at the time of the incident. The concentration of questions surrounding this woman's emotional state depicts a strategy that capitalizes on the normal feminine response to a traumatic experience. In the recording of the woman's discussion with police, she identifies that her relationship with her uncle was strained because he was regularly mean to her. Although the knowledge that the woman was treated poorly could have served to gain the Court's sympathy as a defensive strategy, the Defence chooses a different route that, arguably, characterizes her as feminine rather than malicious. Her level of emotional reaction is correlated to her level of remorse, or potentially her level of guilt, based on a feminized understanding of emotional trauma. Given her traumatizing experience, her natural response is assumed to be one connected to her gender: her natural response is to be emotional.

Connected to the legal understanding of 'emotional' women is the term hysterics, which is laden with gendered perceptions. The term itself is rooted in a gendered understanding of the female anatomy and the perceived emotional nature of women. The medical history of female malady is underpinned by a certain disconnect between femininity and reason. While masculinity was linked to reason and rational action, normalized femininity was equated with emotional behaviour and dependency (Showalter, 1997). Elaine Showalter's work on hysteria identifies the historical medicalization of feminine independency and assertiveness as a woman's disconnect from her 'normal' role.

Hysterics continues to creep into modern perceptions of femininity. In the courtroom, it becomes more evident in the discourse as it is connected to legal strategies. In the case of the

woman who is charged with the second-degree murder of her uncle in a trailer fire, the term is identified in the witness recollections.

Defence – How did she react to that? Again, what’s – paraphrase, if you can, her – what you were thinking about her – her emotional state.

Witness 2 – She was – she was upset but by no – like, I didn’t feel that she was hysterical or – it was very much a question, do you think my uncle got out.

(Case 1)

The witness chooses the term hysterical as a characterization for the accused woman to direct the Court’s understanding on the defendant’s level of emotional duress. Here, the witness is focusing on the lack of hysterics that the woman displays. The Defence picks up on this discussion at a later time with a witness who confirms that the accused is not associated with the term hysterical.

Prosecution – On page three you were asked by – by counsel for the Crown your dealings with C. later and you said you put your arm around her shoulders, standing on her left side. Now, in your notes here you said she’s crying softly, so your memory at that time would be better than it is today?

(Case 1)

Prosecution – Okay. So it’s possible that in fact she was crying. Well, that’s what you said. You said she was crying, she was crying softly.

Prosecution – She wasn’t hysterical.

Witness 2 – - hard sobbing.

Prosecution – Yeah, she wasn’t hysterical.

Witness 2 – No, not that I recall.

(Case 1)

The connection between hysterics and a state of being ‘out of control’ leads the Defence to ensure that the court understands that the woman was emotional but not out of control. She still fits into a normal presentation of a woman, albeit an upset normal woman.

The female emotional identification stands in contrast to the rationalized male responses presented by witnesses. In the homicide cases involving male victims, the witness characterizations involve rationality-based labels. In the following case, the accused is a 22-year-old Aboriginal woman who is charged with second-degree murder in the death of her common-law partner. This case highlights the difference in association between emotional expressions displayed by men as compared to the above discussion of the normalized emotional female. In the following excerpt, the Defence is questioning one of the Emergency Medical Technicians (E.M.T.s), who responded to the scene. The E.M.T. recounts the emotional behaviour of a male bystander who describes the deceased's actions before the stabbing as, "he just went crazy."

Defence – Okay. Was – did you note that he was acting in a rather irrational manner?

Witness – Somewhat yes. He was upset also, he was very upset, crying.

Defence – Okay, and did he interfere with you or your partner at any time while you were trying to perform CPR on this person?

Witness – No. I had asked before I started CPR if he knew what had happened, and he just said to me; he went crazy, he just went crazy.

Defence – He went crazy?

(Case 7)

The use of the terms 'crazy' and 'rational' contrast the emotional-based characterizations used for the accused women in these cases. Where the emotional response of women is appropriate, the emotional response of men is out of character. The negative reactions presented by men are formulated as being outside of their normal state. Further, the labels serve to connect to the individual man rather than acting as determiners for the entire male gender (Comack & Balfour, 2004).

The presence of gendered discourse, shown through the difference in how men and women connect to their normalized gender roles, is supported by legal strategies that seek to extract the level of association men and women have to their respective gender roles (Comack & Balfour, 2004). Throughout the transcripts reviewed, a feminized emotional state is presented as a normal state of being for the accused women where she expresses an emotional response in the form of tears, but she is not overly emotional to the level of hysterics. Women who are hysterical fall outside of the expected norm. Thus, the normal woman is appropriately emotional but still in control of her actions. The legal strategies, revealed through the questions posed to witnesses and experts, focus heavily on characterizing the women as normal and remorseful based on their appropriate emotional response. Conversely, when a man reacts in an emotionally charged manner, his actions are understood as being out of character and, arguably, unnatural for his usual level of balanced emotional control (Gerber, 2009).

Gendered patterns of normalized feminine action reflect the Court's expectations regarding the women's emotional responses and her association with female roles, such as motherhood. These patterns frame how the women in these transcripts are perceived in the court process and, conversely, how the court constructs the women's experiences. Gendered frameworks interrelate with the next theme that includes patterns of feminized victimization and a perception of women's dependency.

#### **4.3 Victimization and dependency**

The defendant's gender links to her economic status and personal challenges to construct a victimization and dependency framework or discourse. The women's past experiences of various abuses and their reliance on welfare programming brands them in the criminal justice

system as victims and/or poor dependents. This theme of victimization and dependency includes activities and experiences that position the women as a weaker and more dependent sex.

A major defensive strategy running throughout the courtroom transcripts centres on the formulation of the woman's history of victimization. The woman's history of sexual exploitation including rape, prostitution or abuse, characterizes her as a victim and presents the possibility of lower culpability for her actions. Furthermore, a woman's association with physical violence and a history of abuse solidifies her victim role. This victim role separates her from the accused position she is experiencing in court. The connection to sexual exploitation combines with a framework of dependency to complete a defensive victimization framework.

The discourse surrounding the women's victimization in these case transcripts often presented itself in conjunction with a feminine dependency role. For the accused to be identifiable as a victim, given that she is being charged with a criminal offence, she must also be characterized as dependent on a stronger source such as a dominant male partner or spouse. In the court cases that utilize this framework as a defensive strategy, the women are dependant on their male spouses prior to the incident.

In all three of the cases that include a domestic relationship between the accused and the injured party, the Defence's legal strategy centres on the victimization of the woman at the hands of the men in her life and her deceased male partner in particular. While the type of victimization ranges from experiences of sexual and physical violence to emotional abuse and psychological control, the women in all of these cases similarly experience a victimization role at the hands of their partner. In a case that involves a 34-year-old Aboriginal woman, who eventually pleads guilty to manslaughter in the death of her common-law partner, an account of

physical and emotional abuse at the hands of her partner is underscored in a witness account of the incident.

Witness – That afternoon W. was complaining of – of abdominal pains and was taken to the hospital by Constable G. and the matron, K.T. The doctor she saw at the time was Dr. D.. Dr. D. asked W. what had happened to M. and she advised Dr. D. they had been drinking and M. was getting mean to her, and she stated M. had a knife. W. said they were fighting about a break-up and not being together. M. told W. that if -- if they wouldn't be together he would just kill himself now. W. told Dr. D. she doesn't remember stabbing him or holding on to the knife because she had been drinking as well.”

(Case 8)

Here the witness describes an abusive relationship between the accused and her deceased partner. The Defence builds on the victimization of the accused by depicting the history of violence within her past. This construction of the victimization defence is accomplished through the inclusion of law enforcement personnel testimonies to confirm any past domestic disturbances. It also includes testimonies from personal acquaintances describing the personal relationship between the accused female and abusive male influences in her life.

Defence – How did M. treat W.?

Witness – He -- he was kind of -- he had control of her. Like, she did whatever he wanted her to, I guess.

(Case 8)

The combination between a history of abuse and victimization between the accused woman and her partner is important in formulating a framework of victimization that will characterize the woman as the rightful owner of a victim label. A woman's victimization is an easily identifiable feminine trait that lowers her association to any type of dominating or strong characterization as the offender.

The victimization strategy extends to situations where the accused is not romantically involved with the victim in the case. This defensive strategy is also available where a framework of dependency and exploitation exists. The Defence seeks to create a role reversal by redefining the accused woman's experiences so she is viewed as a victim, thereby creating confusion with the 'offender label' applied to her. In one case, the accused is a pregnant, 18-year-old mother with a young child who is from an Aboriginal community, but now resides in a larger urban centre. She was originally charged with attempted murder, but later pleaded guilty to the lesser charge of manslaughter, stemming from an incident involving the death of a well-known drug dealer (according to the court transcripts) and the assault of another drug dealer. The accused woman had been connected to the victims for three years when they supplied her with drugs. In the discussion preceding the final judgement, the Defence identifies this relationship and directly repositions the woman as a 'victim'.

Defence - The very fact that one of the victims in this particular instance, Mr P., could easily be described as an individual that victimized Ms. T. himself.

(Case 10)

The Defence seeks to redefine the accused as the ultimate victim of her circumstance.

Interestingly, this woman was charged along with a male individual in the case. His defensive strategy did not paint him as a victim of the drug dealers even though he was also a regular customer along with the woman in question.

In another example of role reversal, the separation between the woman and the offender role is strongly reinforced by the separation between the deceased and a victim role. The defence lawyer quickly steps in to re-define the injured party in the conflict as 'deceased' rather than the victim. The Prosecution's use of the term victim when discussing the deceased party of this situation runs counter to the victimization of the woman in question. As such, the defence

lawyer must ensure that the woman's male partner is not labelled as the victim because his victimization label confuses the feminine victimization role.

The victimization of women is also associated with an overall dependency role. Not always is this dependency framed as a dependency on a strong male individual. The feminine dependency role is a culmination of variables that differ from case to case. In this case, the woman's socio-economic status advances the sympathetic discourse surrounding her situation.

“The focus is that she was in a trust situation and perhaps, in a sense, that's – that doesn't affect it in any way – in – in our view. Now, the pre-sentence report, your honour, it rates her as a medium risk to re-offend and that's an individual who has no criminal record, so I think there's some suggestion there, of course, that she doesn't completely have a handle on things at this stage. And so there's – the temptation for her at this time continues because she's not in a very healthy situation. And the reason that she gives is, her finances are at an out-of-control point.”

(Case 6)

The Court does not excuse her for her actions based on any external variable. However, the courtroom expectations and treatment of this woman resemble a dependency framework similar to a child. This woman has been judged guilty of criminal charges and she is labelled as a medium risk to re-offend, but she is not discussed as a bad individual. Rather, the conversation surrounding this woman includes empathetic conversational formulations including “she doesn't completely have a handle on things” and “she's not in a very healthy position” (Case 6). This conversation places the woman in a lower and dependent position where she is automatically assumed to lack personal and social control. As the text continues, she receives advice to seek help from the Family Support Centre because, “They deal with a – a wide range of – of situations for women, abuse, you know, sexual abuse, physical abuse and perhaps where their life is going, and which would not cost her anything” (Case 6). At this point, it is assumed that she has lost

her handle on things and she needs help as a woman. The conversation affirms a dependency framework where the woman requires external intervention for her own good.

Victimization as a defensive strategy has been legitimized and accepted by the legal process (Nolan & Westervelt, 2000). The Prosecution prepares for this argument and sets up a strategy to circumvent this defensive tactic by acknowledging the abuse history and presenting reasons for its exclusion or irrelevance in the current discussion. These strategic patterns strongly highlight the existence of determining factors affecting the decisions in Court. Further, it shows that the creation of feminine characterizations drawn from widely held beliefs on femininity is a consciously understood reality by courtroom players. In one case, the Prosecution's conscious understanding of female victimization as a defensive strategy is so strong that he raises the idea of the battered wife syndrome in an argument before it is even mentioned by the Defence. This pre-emptive strike against a defensive victimization framework further supports the existence of generalized gender formulations present in courtroom interplay, which are consciously understood and integrated into both the Prosecution and Defence's strategic positions.

#### **4.4 Discussion**

The emergence of gender patterns and victimization themes in these findings fits into a historical backdrop that connects women to a highly regulated set of gendered social expectations. Gender roles of motherhood link to feminine characterizations where women are normalized as emotional, nurturing and dependant beings. Feminist literature reveals that a woman's separation from these strongly held gendered constructs is met with regulatory responses that serve to correct or protect the woman from her erring actions.

The history of women as a criminalized group finds roots in reformation and the control of incorrigible girls. These women and girls were coded for their errant female sexuality, illegitimate motherhood, and miscegenation (Minaker, 2006, p. 79). The erring female is one who does not fall into the regulated roles discussed above. Her disassociation with these roles puts her in a situation where she is in need of reformation due to her moral weaknesses. At the same time, she is dependent on external powers to reform her moral weaknesses or her medical-based character flaws.

The dependency discourse finds a history with the reformation of female criminal justice. “For decades, it undergirded female offenders’ paternalistic treatment and their constructions as weak, ornery ‘girls’” (Haney, 2004, p.346). As Lynn Haney (2004) explains, these women went wrong because they rejected their feminine dependency role or they had connected themselves to the wrong male influence. While the institutional reformatories have been reconstituted, the presence of feminine ‘victimization’ and ‘dependency’ discourses remain embedded in legal strategies. Their presence underscores the base assumptions underlying current understandings of the female psyche and the legal reliance on treatment and control.

Identifying patterns of victimization and dependency within the texts reveals a law’s role in framing women’s experiences within the justice process. The way victimization is revealed in these cases, where the woman is the defendant, confounds the benefits of understanding women’s histories and experiences of abuse by using them as a defensive mechanisms to excuse her of criminal actions. Women’s victimization is simplified as a causal relationship for her criminal activity.

The victimization discourse arguably has a negative impact on the understandings of women in the courts. A dominant view of women as victims who are dependant on others

reinforces the social control mechanism of law for women. This victimization discourse seeks to highlight the negative experiences of women and their impaired cognitive abilities to cope with their life situations (Pollack, 2006), which, in turn, allows for greater education and services for women. A number of feminists, such as Shoshana Pollack, Kelley Hanna-Moffat and MaDonna Maidment, have identified the criminalization – victimization discourse as an oversimplified accommodation of women’s experiences. This oversimplification of criminalized women’s abusive experiences leads to legalized strategies for coping with these histories through their incarceration and prison programming (Balfour, 2006; Pollack 2000, 2004; Hannah-Moffat 2006).

Patterns of victimization and dependency within the transcripts connect to the regulation role encompassed in the legal process surrounding criminalized women. The historical presentation of law as a social control mechanism is revealed in historical representations of female sentencing. The reluctance to prosecute women through the legal process is linked to an understanding that women were a lesser threat and portrayed women as weak and of no consequence (Feeley and Aviram, 2010). The redirection of women who were historically charged with criminal offences or found to be ‘incorrigible girls’ (Minaker, 2006) were directed to reformatories or to work houses (Feeley & Aviram, 2010). The representation of law as a social control mechanism emerges through current legal practices that envelope criminalized women into a system of therapeutic programming. The findings in this study reflect a consistent reference to counselling and social programs that deal with “situations for women” (Case 6). The legal transcripts reflect this dependency discourse, which systematically incorporates therapeutic programming, and effectively constructs the “criminally dependent” woman (Pollack, 2006; McCorkel, 2004).

The gendered themes, supported in these research findings, encompass valued feminine characteristics, socially defined feminine roles, and expected responses and lifestyle choices based on gender-specific codes of conduct. In the literature and the transcripts, the feminine role is equated to a narrow set of character formulations that includes victimization, dependency, nurturing family connections and emotion-driven life choices. The woman's emotional stability and how she connects to a socially "assumed standard of appropriateness of emotional response" (Jenkins & Davidson, 1990; Keenan, 2000) are evaluated through questions posed by both the Defence and the Prosecution. Here, the woman's moral character is defined by her connection to, or appropriate diversion from, socially understood feminine actions (Brock 2000). Her inability to assume these roles and regulatory guidelines provides support for a prosecution of guilt. "Implications of the alleged inability of the defendant to be a good mother or wife, to be moral, to be appropriately responsive, served as tools of the Prosecution in establishing her guilt" (Jenkins & Davidson, 1990).

This central theme, underscoring the importance of the connection of a woman to her familial responsibilities, is also reflected in the wider feminist and criminological literature. As a wife or domestic partner and/or mother, the woman is expected to fit within a nurturing role that provides the moral glue for the family unit. Diversions from this character, in the form of unwed mothers, young mothers, divorcees, wives/mothers who party, and who are involved in immoral work or negative financial circumstances, are negatively viewed in society (Moe & Ferraro, 2007). These divergent women are presented in courtrooms as an affront to their gender (Litzke, 2004). The separation from the normal woman and her maternal instinct is linked to these discourses of familial responsibility and morality. Susan Boyd (2006) discusses the criminalization of maternal drug use and how discourses regarding unfit mothers, the

dangerousness of certain drugs, and the welfare of mothers who drain limited economic and social supports inform this criminalization process. The criminalization of women, through the discourses highlighted by Boyd, is legitimized as a means of protecting society and is supported by a discourse of feminized dependency and victimization.

The legal process, demonstrated within the strategies employed by the Defence and Prosecution, reflects and reproduces cultural understandings of gender roles. The language patterns that emerge in these criminal court transcripts reflect law's role in maintaining these cultural ideals of femininity and law's process of formalizing women's roles into accepted social convention. By introducing law as a formalizing environment where gender is revealed and reproduced, legal strategies and practices become processes where dominant social discourses are systematically reinforced (Comack & Balfour, 2004).

Elizabeth Comack and Gillian Balfour (2004) discuss law's role in the criminalization of women. They describe law as one of the discursive bodies of knowledge, along with science, medicine and psychology, as a historically significant system of making sense of the world. Thus, legal discourse is shaped by social practices, informed by cultural relationships, and reproduces social understandings. Comack and Balfour relate the processes of human agency (in the actions and strategies of lawyers) with broader social-structural conditions including race, class and gender (Comack & Balfour, 2002). In the transcripts reviewed in this study, lawyers incorporate their understandings of femininity to their approach in connecting (or distancing) the female defendants to accepted dominant gender roles and appropriate feminine responses.

Law is privileged as the process for identifying social truth through its formalized and structured process; it occupies "a given position in culture, to enact a range of measures and to define rights and wrongs" (Smart, 1990, p. 195). However, feminists, such as Carol Smart,

criticize law's claim to truth by arguing that it is a reflection of male interests and patriarchal values (Smart, 1990; Beaman, 1998). This criticism locates law's truth and claim to knowledge as a reflection of a male voice and a male conceptualization of social reality (Smart, 1990). Extralegal (legally non-relevant) gender constructions, revealed through the strong reliance on motherhood characterizations and emotionally based descriptions of women throughout the court transcripts, exposes an alternate perspective on legal processes. The reproduction of gender constructions discussed in this section reflects a legal structure that maintains and regulates a specific portrayal of what is acceptable female activity. By maintaining a focus on feminized constructions of gender roles, such as emotional women and caring mothers, and chastising separations from these constructions, law perpetuates the dominant understanding the acceptable actions of a woman (Minaker, 2006).

The patterns of gender and victimization do not emerge exclusive to one another within the legal interplay in these transcripts. They interrelate with a variety of culturally-held perceptions and constructions of normalized feminine behaviour. The next chapter highlights two other dominant themes that interact with gender and victimization to characterize the women who are at the heart of this research. The language patterns revealed in these transcripts highlights how themes relating to racial imagery and Aboriginal stereotypes and the medicalization of women's actions reflect in the legal depictions of these women.

## **Chapter 5: Aboriginal Stereotypes and Medicalized Women**

This chapter introduces themes relating to 1) racial imagery and Aboriginal stereotypes and 2) the medicalization of female activity and the criminalization of medical issues. Similar to chapter four, these themes reveal normative understandings of female criminality that illuminate the importance of extralegal variables, such as race and gender, which are presented within defence and prosecution strategies. This continued analysis was also established through the linguistic patterns, the legal strategies and through both witness and first-hand accounts of the female defendants. These racial and medical-legal discourses interconnect with gendered and victimization themes to inform and reinforce the characterizations of female defendants within the legal system. The importance of these interconnections among the themes of gender, race, victimization and medicalization become apparent through the current research that links the discourses surrounding women's criminalization to broader normalized gender roles and stereotypes.

### **5.1 Racial Imagery and Aboriginal Stereotypes**

The theme of racist images and Aboriginal stereotypes includes sub-themes of 1) racialized poverty, 2) normalized violence and 3) substance abuse. These racist discourses within legal discussions become shaped and focused into presentations of racist imagery. As such, Aboriginal culture and lifestyles are understood in marginalized terms. Labels of poverty, violence, prostitution, and dependency are synonymous with spaces that are inhabited by Aboriginal peoples (Comack & Balfour, 2004 p.93; Razack, 2002). Classifications of women located in these racialized portrayals of Aboriginal communities results in the assignment of Aboriginal women as victims of their own race. Stories of abuse and neglect are normalized in

the legal portrayals of Aboriginal offenders. The findings suggest that for Aboriginal women, race becomes an important variable in the construction of her normalized characterizations in the criminal justice system. In particular, postcolonial constructions of an Aboriginal woman's history, culture and communities portray her through racialized images that serve to normalize her experiences of victimization or criminalization.

Racial stereotypes are intertwined throughout these recorded court proceedings. The identification of certain activities, including partying, drinking and drug use, normalizes criminal activity in the offender's life based on colonial presentations of her personal history and stereotyped versions of her Aboriginal communities. In these transcripts, the association between the woman's Aboriginal ancestry, her relationships and her criminal behaviour is inextricably linked to a racialized and stereotyped social perception of Aboriginal behaviours and realities. The discussions documented in the transcripts focus on substance abuse and negative constructions of out of control parties, which are linked to stereotyped understandings of Aboriginal reservations, or areas of higher Aboriginal populations located off reserve.

In the majority of questions by the Prosecution, in cases involving Aboriginal women, a strategic focus on the negative aspects of her social existence is evident, including a focus on violence and abuse. As the Prosecution outlines the events surrounding the incident in question, a heightened level of attention is placed on the physical location when the accused is of Aboriginal ancestry.

In a case involving a 34-year-old Aboriginal woman who lives in an Aboriginal community with her common-law partner (who is also described as Aboriginal in the text), the physical surroundings are linked to the defendant's race and character. Throughout the text, images of the physical environment are formulated through the various witness statements and

include the identification of drinking alcoholic beverages at various locations and various points in the night. At one point, the discussion becomes very specific with the identification of the types of alcoholic drinks that were consumed. They highlight that the accused consumes at least one beverage in a licensed drinking establishment followed by an appearance at a private residence where the consumption of alcohol continues.

“Shortly thereafter both individuals left the bar, M. and W., and sometime during the evening they show back up at the D. C. residence. Sometime in the late evening of December 22, at the D. C. residence, they are all there. There was W. and M. and approximately four other individuals who were consuming an alcoholic substance called Rubbies (ph), which is a – a Rubby is a combination of rubbing alcohol and water.”

(Case 8)

This line of questioning, directed at one of the investigating officers, focuses on the accurate recollection of events connected to the incident in question. However, the discussion quickly focuses on the consumption of alcoholic substances and activities associated with a party lifestyle. While chemical substance use is part of the investigation during this recount, the overall theme of questioning changes from a re-creation of the scene, including the layout of the room and the placement of key witnesses and pieces of evidence, to a display of poverty, and extreme levels of substance abuse by highlighting the number and types of alcoholic substances throughout the establishment. Counsel does not go into a lengthy discussion on the type of alcohol consumed in the licensed establishment, but does describe in detail about the homemade alcoholic substance located in the residence at the Aboriginal reservation. The relevance of this information is covered by the fact that alcohol was consumed, which was discussed earlier in the text during the identification of the blood-alcohol levels reported by police. In the sentencing hearing, this topic is revisited when the Prosecution reminds the court that the accused displayed extreme intoxication and that she was drinking Rubbies (rubbing alcohol) at the same time that

he reminds the court of her blood-alcohol level. Since the accused woman's blood-alcohol level is already known, the discussion on this homemade substance does not have direct legal relevance for the case other than to draw out characterizations of the individuals involved. It draws out imagery of extreme substance abuse, which is linked to the woman's behaviour and lifestyle.

This focus on a party lifestyle is not an unfortunate connection to stereotyped understandings, but rather it is a directed strategy by lawyers. Elizabeth Comack and Gillian Balfour's work explore this connection between Aboriginal environments and stereotyped views of socially unacceptable activities.

“It would appear that defence lawyers are keenly aware of the widely held biases towards Aboriginal men and women accused of violent crimes. Because drunkenness and belligerence are ‘expected’ of Aboriginal people, lawyers craft a defence that does not dispute the level of intoxication or violence in Aboriginal communities, but rather attempts to play upon those stereotypes.”

(Comack & Balfour, 2004, p.95)

There are numerous examples of this expectation for drunkenness, violence and drug abuse within the transcripts of this study. Some of these examples are represented through direct questions presented to Aboriginal witnesses, as in the line of questioning involving the grandmother of the accused:

Defence – Okay. Do you take any illicit Drugs?

Witness – Do I?

Defence – yes.

Witness – No.

(Case 8)

Examples of racial imagery also emerge in discussions with the accused women directly. Here the Prosecution is attempting to link the woman's past criminal history with a portrayal of alcohol abuse:

Prosecution – And you have a number of other charges on your criminal record; correct?

Accused – Yes. That’s –

Prosecution – And those -- sorry?

Accused – They’re thefts, stealing -- stealing clothes for my kids, clothes for myself, food, meat.

Prosecution – And a .08, correct? Is that correct?

Accused – Yes.

Prosecution – If you don’t remember I can provide you with a copy. That’s --

Accused – Yes, that’s correct.

Prosecution – Okay. A lot of those -- were most of those crimes related with alcohol?

Accused – No.

Prosecution – No?

(Case 8)

The following examples are all connected to cases where the primary accused woman is Aboriginal and these race-laden stereotypes surface in witness accounts of activity and people within her life.

Defence – What were they doing?

Witness – All drinking and talking.

(Case 1)

Defence – How many times a month would you see B. drunk or would you have seen B. drunk?

Witness – At least five times a month.

Defence – Okay. So based on your experience B – B drank quite regularly.

Witness – Yeah.

(Case 1)

Defence – Okay, and would it be fair to say that, from what you saw, that R. was pretty drunk?

Witness – Well, practically they were all drunk.

(Case 7)

The following discussion supports the courtroom characterization of Aboriginal communities as violent environments. A witness describes how the deceased (Aboriginal)

victim carried around a knife for protection. This knife does not play an integral role in the overall charge that is discussed in this case, but it becomes a focal point in a line of questions by the Defence.

Defence – Okay. Did he ever tell you why he was carrying it?

Witness – Well, he said for self-protection.

Defence – Okay. And did he say who he needed protection from?

Witness – No, just -- just, when he went downtown, like at night he -- he carried one just for self-protection.

(Case 8)

The crime scene is located in a private residence amongst individuals who have intimate relationships and familial ties. This discussion on the violent nature of the community at large loses relevance when reviewing the overall nature of the case. This case involves a domestic dispute, which is not linked to any community-wide events or violent situations. However, the level of violence becomes a topic for the Prosecution as well:

Prosecution – Okay. Now, I, of course, work in Kamsack, I don't live there, and Mr. C-- [defence lawyer] lives there and works there. How long have you lived in Kamsack?

Witness – All my life just about, say from – say about 30 years, 40.

Prosecution – Okay. So you'd commented on numerous times regarding this knife for protection. How would you describe crime in Kamsack?

Witness – It's – It's bad.

Prosecution – It's bad. Okay. And there is quite a bit of violent crime in Kamsack, too, isn't there?

Witness – Right

(Case 8)

After reviewing the entire transcript and understanding the case involves a domestic dispute that results in the death of the husband, the focus on the overall community crime levels highlights issues that are outside of the conflict in the case. Inevitably, these seemingly irrelevant lines of questions serve another purpose for legal strategies. One cannot conclude as to what purpose

this focus on violence serves; however, the presentation of these discussions does offer several indications for how this racialized discourse emerges in the courtroom. The lawyers follow the lines of questions to identify violence in the community but they do not question the validity of these claims. They are accepted as normal and correct without further enquiry.

During the examination of a witness located in an Aboriginal community<sup>5</sup>, the defence lawyer frames his questions by focusing on alcohol and drug use without any prior connection or reference to drugs and alcohol in the text:

Defence – Okay. You spent a fair bit of time with him when he was on the Reserve, or over the years?

Witness – So and so, not really though, but I see him here and there, and just a hi and –

Defence – Yeah. Do you remember if anybody was smoking dope that night at the house?

Witness – No, I don't remember any pot or anything at the house, because I never seen any that day.

Defence – Okay. You only had one or two beer while you were at the house?

Witness – Yah, I wasn't drunk that night.

Defence – Okay, and would it be fair to say that, from what you saw, that R. was pretty drunk?

Witness – Well, practically they were all drunk.

Defence – In fact you describe, I think, R. kind of nodding off in a chair?

Witness – Yeah. Well, he laid out because he didn't want nothing to do with that argument, he was just tired of – well, he was listening to me and S. talk, and then I looked over he was kind of like just laid out.

Defence – And have you ever seen that before when somebody's had a whole lot to drink?

Witness – Did I see that before?

Defence – Yes.

Witness – Yeah, I seen that before, but I don't see anybody wake up right away from a layout, what he did.

Defence – And from what you saw, S. was sure drinking that night, wasn't she?

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<sup>5</sup> The murder discussed in this trial took place in a First Nation reservation that is describes as being located six kilometres North of Kamsack in the transcripts.

Witness – Yeah.

Defence – Would you describe S. as being drunk that night?

Witness – Drunk – Well, intoxicated I guess, yeah.

(Case 7)

Once again, the discussions surrounding a case involving a domestic dispute is redirected to an extended focus on chemical abuse. The Crown Prosecutor inquires about the use of dope on the night of the incident without any prior discussion about drugs. This query has no evidentiary grounding and has no bearing on the issue; however, it is accepted as a legitimate question in the Prosecution’s case construction. At no point does anyone in the courtroom question the relevance of these questions. The identification of drugs and alcohol abuse are understood to be a typical occurrence in these social settings whereby allowing speculative questions.

The prevalence of questions that focus on these stereotypes indicates that the discourse surrounding postcolonial racist portrayals of Aboriginal people is normalized in the courtroom. In one case, this understanding is overtly expressed in a character assessment provided by the Defence lawyer. “Ms. T. as is common in our Aboriginal community, had not lead an easy life to that point” (Case 10). This discussion carries on to discuss the woman’s mother, a family history of drug and alcohol abuse, abandonment and her eventual involvement in drugs and prostitution.

Defence – As a result of her drug and alcohol habit and the instability in her mother’s home, M. turned to prostitution at a young age. She indicates that she started working the streets at roughly 14 years of age to provide money for living expenses as well as to supplement - - as well as to support her drug habit.

(Case 10)

Alcohol and drug abuse is linked to each case involving an Aboriginal woman within this study, whereas the cases involving non-Aboriginal women did not centralize substance abuse. Even when the accused Aboriginal woman denies alcohol use during the incident, the topic of alcohol and drug abuse lingers within subsequent questions to the accused and other witnesses. In one account, involving a second murder charge in the fire-related incident, a male witness to the account indicates that neither the accused nor he consumed alcohol on the evening in question. The accused and the persons of interest in this case are Aboriginal peoples living off reserve in one of Saskatchewan's larger urban centres. During the examination by the Defence Attorney, questions surrounding a drinking party become prominent for a young male Aboriginal witness who is acquainted with the young Aboriginal female accused.

The questions begin with a review of what was happening during the night of the fire. Here, the witness explains that a group of people were socializing at a private residence.

Defence – Okay. What were these people – those people doing when you were at – when you got to A. M.'s? What were they doing?

Witness – All drinking and talking

Defence – Okay. Could you see what they were drinking?

Witness – Whiskey and Beer

Defence – Okay. How did B. look?

Witness – He looked like he was drunk

Defence – Okay. Have you seen B. drunk before?

Witness – Lots of times

Defence – Okay. By lots of times how many times would you say? How many times a month would you see B. drunk or would you have seen B. drunk?

Witness – At least five times a month

Defence – Okay. So based on your experience B. – B. drank quite regularly

(Case 1)

The discussion then turns to one where the accused and the witness are analysed for their level of intoxication. Although the witness denies alcohol use, the line of questioning continues to seek out possible substance abuse activities.

Defence – Okay. You didn't have any alcohol –

Witness – No.

Defence – - up to that point, did you?

Witness – No.

Defence – Okay. Did you drink anything when you got to A. M.'s?

Witness – No.

Defence – Okay. How about C.? [accused] Did you see her drinking any alcohol?

Witness – No, she didn't.

Defence – Okay. Have you seen C. drunk before?

Witness – Yeah.

Defence – Okay. So when C. came back to your place that night did you have any – did you think – have any reason to think she was drunk?

Witness – No.

(Case 1)

Even though the lawyer continues to reframe the same question about alcohol consumption, the witness maintains that both he and the defendant were not drinking that night. The lawyer enquires about the possibility of the two consuming alcohol four different times in the same line of questions. This line of questioning identifies with the legal strategies discussed by Comack and Balfour (2004). In their assessment of legal considerations of violent acts located in Aboriginal communities, they explain, “the ‘drinking party’ provides the context for the ‘typical situation’ in which violent crime charges emerge for Aboriginal defendants, so much so that Crown attorneys will comment in cases where an accused was *not* drinking” (Comack & Balfour, 2004, p. 93).

While these are a few, very specific presentations of stereotyped activities in Aboriginal communities within the reviewed transcripts in this study, they show how race-laden discourse is presented within the courtroom setting. These transcripts reveal a legal acceptance for stereotyped versions of Aboriginal women's behaviour through the questions and responses of the courtroom players. Even as new ideas and laws are introduced to the practice of law, dominant ideologies formulate how new ideas become entrenched into the dominant system. Marlee Kline discusses how some instances of child welfare law practice appear to challenge<sup>6</sup> the ideology of Aboriginal representation by having the Court accommodate a separation from a "universal standard of care" that ultimately supports the success of a young Aboriginal mother (1994). However, these challenges remain within the greater system and are treated as "other" responses that do not fall into the "normal" practice of law. In her discussion, Kline highlights an example of a woman in British Columbia who had the potential to be a good mother within the confines of her small and bound First Nation community. According to Kline (1994), this experience challenges the ideology of Aboriginal homogeneity as it "takes into account differences among communities" (p.463). Arguably, this case remains as linked to generalizations of a homogenous "Indianness" because the discourse surrounding the Court's decision involved ethnocentric stereotypes of the 'drunken Indian' (Monture, 1989, p.14) while explaining the differences in Aboriginal communities in an attempt to achieve the ultimate goal of having the woman in question return to her Aboriginal community.

The marginalization of Aboriginal women, first in the mainstream Euro-Canadian context and then within their own peoples, binds Aboriginal women into a framework of racialized and

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<sup>6</sup> Marlee Kline's study seeks to provide insight into some of the ways "racism is reinforced and reproduced ideologically within law" (Kline, 1994, p.468). She does not present alternative legal strategies or emancipatory changes to address these representations of racism in law. She does close her thesis by indicating that the process of addressing questions of how First Nations can challenge the authority and legitimacy of dominant legal institutions must necessarily be guided by current First Nations strategies of self-government.

gendered understandings (Fontaine, 2006). The Aboriginal woman's actions and lifestyle are guided by dominant expectations including victimization, poverty and dependency. Conversely, her separation from her gender roles, demonstrated by assertiveness, independence and resistance, places her in a doubly demonized perspective: she is labelled as a dangerous or evil woman (Comack & Balfour, 2004).

## **5.2 Medicalization of female activity and criminalization of medical issues**

The medicalization of criminalized women involves defining feminine responses and activities as medical deficiencies in need of therapy or reformation, and interpreting women's behaviour as the product of psychological or medical pathology (Lacey, 2000). Abuse, in all of its forms, is constructed as a defensive mechanism that serves to label women as perpetual victims. Dependency and poverty are also reconstructed along medicalized terms, where women are defined as lacking control. Conversely, this theme includes the imposition of criminal labels onto medical realities. Here, the Prosecution seeks to disassemble self-defence arguments by demonizing abuse-excuses and psychological discourses (Comack & Balfour, 2004; Pearson, 1997).

The women who sit at the heart of these courtroom discussions have their personal lives investigated, often moving past the confines of the criminal act in question, to identify character cues or flaws that serve to excuse or expound her actions. Within the research realm, a growing interest centres on the experiences of medicalization. In the presented cases, the language draws on the formulation of medicalized actions, particularly on the part of the female accused. At one point the medicalization of women themes is verbalized outright in one lawyer's recommendation for her defendant, who is convicted of theft, to seek assistance at a support centre that deals with, "situations for women, abuse, you know, sexual abuse, physical abuse and

perhaps where their life is going“(Case 6). Two medicalized perspectives emanate from the courtroom interplay in these cases: first, medical discourses become synonymous with the characterizations and non-feminine actions of the defendant and, second, medical issues are framed as criminal actions. These two aspects of medical discourse found in the legal system are employed for very different strategic goals and, ultimately, lead to very different legal portrayals of the individual in question.

The first medical discourse perspective identified within the transcripts presents the woman’s actions, reactions, and feminine role under a medicalized microscope. Her predicament is first considered as a “feminine” situation as discussed in Chapter four and, then, it is questioned as a medical problem. This pathway reveals itself where the woman’s drug and alcohol use are presented as an abusive activity while her financial strain or dependency relationships are questioned as her lack of control and/or mental acuity. The woman’s lifestyle or actions give rise to court ordered counselling sessions, questions of mental fitness as a mother, and pro-active prosecution strategies to circumvent any syndrome defence.

Returning to a previously discussed case that involves theft, the female defendant is required to seek counselling services. The discussion reflects a generalized connection between abuse and women.

“They deal with a – a wide range of – of situations for women, abuse, you know, sexual abuse, physical abuse and perhaps where their life is going, and which would not cost her anything.”

(Case 6)

The accused woman’s financial distress and her inability to control her spending was the prominent theme in this courtroom discussion. However, the final discussions lead to a medicalization of the defendant where she is expected to seek medical treatment to help her deal

with what is defined as female situations. While sexual and physical abuses are not discussed as mitigating factors in her theft charges, they become part of the rehabilitation discussed at her sentencing. Rather than focusing on the action of theft and the eventual restitution to the day care that lost finances, the court looks into the woman's situation and recommends treatment for "where [her] life is going". Ultimately, her criminal act of theft is reformulated into a 'woman's situation' that can be treated.

In another formulation of the medicalization of the woman's actions, the discussion of drug and alcohol use is reviewed through the lens of abuse. In a case where a respected<sup>7</sup> Aboriginal woman is charged with several offenses stemming from a vehicle crash that killed an individual, it is appropriate that her alcohol use is critiqued since it is a factor in the case. Throughout the trial, various witnesses indicate that they did not notice the woman heavily drinking or recognize signs of intoxication, and none of the examinations of witnesses reveal a history of substance abuse. However, it is not until an expert witness completes a psychological exam of her that the discussion is finally ended. "My understanding is that Mrs. G. has consumed alcohol, from time to time, but that she did not have a substance abuse problem, nor was it something that she used to deal with emotion, stress, tension" (Case 4). Consuming alcohol is not generally a medical issue, but within the courtroom it becomes a medicalized topic even when it is shown as a non-issue with respect to the woman's history.

A second criminalized medical discourse defines activities and situations as criminal offenses when they, in fact, deal with medical and social issues. In this viewpoint, drug and alcohol abuses are demonized within the courtroom setting. In the Crown's arguments throughout the transcripts, the use of chemical substances, irreverent of its legal status, places the

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<sup>7</sup> The transcript includes several recommendation letters on behalf of the accused. She is described as "well-respected, professional and a dedicated educator" (Case 4).

woman in a criminal light. This identification between the woman and chemical use places a questionable label on the women even if the criminal charge does not include substance abuse aspects.

Prosecution – Okay. A lot of those – were most of those crimes related with alcohol?

Witness – No.

Prosecution – No?

Witness – The thefts, no. Alcohol, yeah, that -- that --yes.

Prosecution – The driving, of course, involved alcohol?

Witness – Yes.

Prosecution – The assault involved alcohol too?

Witness – Yes.

Prosecution – Okay. Did any of the thefts involve alcohol?

Witness – Some.

Prosecution – Some? Okay. How long have you had your alcohol problem?

Witness – Since I was about -- since I was, I guess, a teenager, I guess, I don't know, a teenager or – on and off all my life.

(Case 8)

Once the woman is judged as guilty and her involvement with alcohol becomes a characteristic of her criminalized nature. Her consumption of drugs or alcohol is represented as a medical flaw that can be defended as an excuse for her criminal behaviour.

The connection between women and medical defences is institutionalized in the courts (Comack & Balfour, 2004). The inclusion of syndromes within the courtroom lexicon highlights the power of medical discourse. These medical syndromes are linked to a gendered understanding of victims where women are victims even when they are placed in the defendant position. In one of the cases reviewed, the medicalized “syndromes” are called into question before the trial begins.

“I mean, it’s basically evidence of what M. has told some of his family members, my Lady, and I think it is important to get a history of the past, and I assume, and going first, that maybe we can return to this after Mr. C. calls his evidence, but if we’re dealing with the strength of the Crown’s case, if there is some argument as to self-defence, a victim of domestic abuse, the common term “Battered wife syndrome”, then I think it is important what their history is here, and that this is evidence that I think should be admitted to got to that.”

(Case 8)

Here, the Prosecution is so acutely aware of the medical syndrome defence that he seeks to include evidence to the contrary before the Defence even brings it into his strategy.

Counselling and rehabilitative treatments are discussed throughout all of the transcripts reviewed in this study. When applied to women, the discourse engages several aspects of the woman’s character, including roles of motherhood. A broad spectrum of therapy is recommended to the women in these cases including relationship counselling, substance abuse, self-esteem therapy, and financial counselling. One woman’s sister appeals to the court to get help for the accused in the form of therapy.

“I would just like an opportunity to – for my sister to have – you know, counselling and stuff for -- for her -- her grief, and for the children, and just that she would be able to look after her children as -- as they only have one parent now. “

(Case 8)

The courts expand their judgement of the woman’s particular case to assert controls over private life and motherhood roles.

The recognition of therapy and counselling for women in these court transcripts highlights the medical discourse that is present in law. The relationship between criminalized women and medical discourses reveals an intimate connection between the experiences of women and medical understandings of their character and actions. A woman’s association with personal counselling is a strategy that serves to benefit her in court. For one woman with no

prior criminal record and who pleaded guilty to manslaughter (Case 10), the judge chastises her for not utilizing the treatments available to her between her arrest and the sentencing hearing.

Justice – According to her grandfather, there are resources available in the community to deal with a drug abuse problem and for whatever reason, nothing has been done – nothing in particular has been done in that regard or in terms of continuing her education or things of that nature.

Interestingly, the man who was charged at the same time has no mention of treatments or counselling even though he has a long criminal record.

### **5.3 Discussion**

These findings suggest that themes of racial imagery and Aboriginal stereotypes and the medicalization of women interact to formulate a discourse that criminalizes women through a formalized legal process. Feminist criminological literature engages with these themes to show how law reproduces dominant and normalized constructions of gender, race and class. This discussion highlights the interconnections between these two themes with representations of gender and victimization that were presented in chapter four.

The use of medical defences and the construction of images of violent and evil women are the culmination of the coordination of legal and medical discourses. Medicine and law often work together to medicalize or ‘pathologize’ women in conflict with the criminal justice system (Menzies & Chunn, 2006; Comack & Balfour, 2006). Medical discourse within law includes a wide spectrum of syndromes including pre-menstrual syndrome and battered wife syndrome. Also found in this theme are various applications of substance and human abuses. The female defendant’s relationship with substance abuse or abusive partners becomes paramount in criminal proceedings. Here, the abuses are placed in a priority position reflecting against her moral being and her credibility as a woman.

From the classical studies of women and crime, “erring women” were portrayed as “sick” women. This pathology or “medicalization” discourse remains relevant in current studies as it emerges in the various discourses associated with criminalized women (Comack & Balfour, 2004; Lacey, 2000). Comack and Balfour (2004) elaborate on this emergence of medical criminalization of women in what they call the “abuse excuse”. Through defence strategies, women are now labelled with medical terminology to “excuse” their behaviour and expose them to new forms of social control by labelling their behaviour as pathological. Medicalized terms such as “battered wife syndrome” and diminished responsibility due to impaired “mental responsibility” enter the criminal law discourses and become legitimate legal defences for women (McColgan, 2000; Comack & Balfour, 2004). From legal strategies that depend on medical professionals to the “diminished responsibility” of women due to past abuse histories, criminalized women are a medicalized gender.

In Wright and Owen’s (2001) work on women’s experiences of mental illness, they identify two key themes that encapsulate women's experiences of mental illness. In particular, these writers explain how women experience psychiatry as a method of socially controlling them (p.144). The feminine role is firmly entrenched into social expectation. This role offers strongly defined characterizations, such as docility and familial responsibility, and deviation from these characterizations are met with formalized responses. When women act outside of this conditioned female role, they are clinically viewed as neurotic or psychotic (Wright & Owen, 2001). The formalized response is either the criminalization or medicalization of her behaviour, each resulting in an institutional intervention.

The medicalization of women and the criminalization of women converge within criminology (Menzie & Chunn, 2006). Criminalized women are labelled as “mad” with

alarming regularity and “their pathological minds are named as the cause for their troubles” (Comack & Brickey, 2007, p.14). This pathology of the criminalized woman draws upon her victim role derived through a history of abuse. Invariably, a female offender’s experience highlights a “victimization” role, but although her victim status is within the medicalized discourse, it is reformulated as a sign of her defective character (Comack & Brickey, 2007, p.15). Comack and Brickey (2007) discuss the medicalized notions surrounding criminalized women from the women’s standpoint. This study was conducted through semi-structured interviews with 18 women who were either incarcerated at the time of the interview or taking part in a Women and Anger group sponsored by the Elizabeth Fry Society. In this study, they find that although the women fit within a ‘psy’ discourse where their emotional states become part of the case discussion, these women do not identify with a “mad” label. In contrast, the women within this study identify their experiences as angry rather than insane (Comack & Brickey, 2007).

The relationship between law and of the medicalization of the women’s behaviour is a double-edged sword when played out in the criminal court system. The courtroom strategies that use medicalized understandings for women’s behaviour potentially offer greater understandings and enhancements to services for criminalized women once they enter the prison system. On the other hand, the exchangeable association between women’s issues and medical issues can serve as a social control mechanism (Smart, 1989; Beaman, 1998). When women’s histories of abuse become diagnosed in medical terms, it allows for the criminalization and containment of women so that they can access the therapies required to cope with their abusive experiences. The legal system becomes a protector or caregiver for women who cannot cope with their victimized histories. Franklin and Fearn’s work on the leniency of female offender’s in pre-trial processes offers support for what they call their “chivalry/paternal-ism hypotheses” (2008). They find that

women encounter higher leniency in sentencing at the pre-trial stage, compared to men, and that men who target women as their victims experience more severe legal sanctions. These authors propose that, “affording female offenders leniency in sentencing as compared to similarly situated males, and punishing offenders who target females as victims of violent crime more severely than those who victimize males underscores and institutionalizes messages about traditional gender roles that characterize women as childlike and helpless” (Franklin & Fearn, 2008, p.286).

The racial imagery and Aboriginal stereotypes discourse is perhaps the most insidious of all of the discourses revealed in the texts due to its incorporation into the individual portrayals of the woman and the broader postcolonial reflections of Aboriginal history, culture and communities. This discourse is not solely linked to women in the courts, but it is a dominant theme that emerges in this research. In the court proceedings examined in this chapter, the women’s racial background is included in her overall characterization and it ultimately influences the perspectives and direction of the Court. The benefit derived from the existence of this discourse rests with its potential for law to uncover and cater to a woman’s personalized needs. For example, the young Aboriginal woman with strong community ties in Case 10 may feel safe in her community thus offering the court system an alternative to placing her in an institution that is strange and unfamiliar. By understanding the diversity of individuals that come before the courts, society can potentially identify better methods to assist the creation of safer and more effective community development.

Unfortunately, the more dominant role of the racial imagery and Aboriginal stereotypes discourse emerging through the legal process is a stereotyping of Aboriginal communities. This discourse serves to accentuate imagery of violence, abusive drinking and a difficult lifestyle that,

as one of the lawyers in case 10 explains, “is so common in Aboriginal communities.” Racist imagery and Aboriginal stereotypes maintain a fringe experience for Aboriginal people, particularly those who are criminalized within the legal process.

The racial imagery and Aboriginal stereotypes theme developed above highlights the systematic integration of racist concepts and patterns imbedded in the legal process. Racism is interwoven in our legal system to the point where legal actors are embedded within a system engulfed by this strong and pervasive dominant ideology where representations and legal practices rest on a platform of racist discourse (Monture, 1989, p.8). Kline takes this issue further by indicating that the individual legal actors including judges may not be racist individuals. Instead, she puts forward the argument that “the appearance of racist ideological representations within judicial discourse may be more a reflection of the power and pervasiveness of such dominant ideology in the wider society and the particular susceptibility of legal discourse to it, than individual racial prejudice on the part of judges” (Kline, 1994, p.454).

Each of the dominant themes revealed in these findings work together to construct the criminalization of women discourse. The women in this discussion are strategically represented as mothers and as addicts; they are positioned as victims of their race and products of their own “women’s issues”. Throughout these transcripts, lawyers projected normalized perceptions of femininity onto the female defendants through their presentations of idealized motherhood, pathologized dependencies and feminized victimizations. Inevitably, the interactions among the themes presented in these findings reflect the reality that justice is neither neutral nor blind. Rather, the legal process reflects and reinforces dominantly held ideals and perceptions that ultimately interact to inform the portrayals of women in the criminal courts.

## **Chapter 6: Concluding Remarks**

This study analyzes the legal representations of criminalized women in Canada through a criminological lens that incorporates a postmodern feminist perspective. It identifies and discusses four dominant themes that surface within ten criminal court transcripts in cases that have women as the primary defendant. These themes are linked to the current feminist and criminological literature, which details the criminalization of women through representations of gender stereotypes, racial labels and feminized perceptions of women's activity.

Much of the current research on the criminalization of women focuses on their experiences post-conviction. The Correctional Service of Canada (CSC) has incorporated gender specific programming within the correctional institutions as a result of repeated studies and reports (such as the Task Force on Federally Sentenced Women, titled *Creating Choices*). Although the spotlight of these reports are paradigm shifts inside corrections, focussing on criminalized women may not get to the heart of the issue (Snider, 2006; Hannah-Moffat, 2004; Boyle et al, 2002).

The implementation of gender programming within the system does not fix the system itself. As Shoshana Pollack (2007) points out, "correctional discourses have been able to effectively adopt feminist rhetoric about women-centred programming without having the basic premises of penal policy threatened" (p.160). The system maintains the dominant paternalistic structure with a peppering of gendered understandings. That is, the dominant discourses of proper femininity and women's dependency remain consistent in legal practices. Furthermore, the legal process prior to incarceration remains un-reformed in its association with dominant ideologies. The dominant perspectives remain as the 'just' perspectives. Women remain viewed

as docile bodies (Foucault, 1995) needing reformation for their disordered lifestyles and negative social influences (Pollack, 2006).

The themes within the courtroom discussions show that the dominant gendered and racialized roles identified by feminists and anti-racist theorists remain relevant in modern legal circles. The level at which women associate themselves with their gender roles, as mothers, docile and obedient women, and good girls, the more successful they will be in manoeuvring the legal process. Within the courts, women are expected to conform to dominant ideals and their defensive strategies hinge on their ability to present the woman as a conforming and silenced woman (Smart, 1989; Comack & Balfour, 2004). This is seen by the reliance on feminine roles within the defensive strategies in these cases.

The themes that emerged throughout the research identify extralegal variables that influence the court process for female defendants. They involve characterizations and roles that do not directly play a part in the crime that was committed or the specific actions of the accused (Franklin & Fearn, 2008). For example, the presence of tears for the woman who just experienced a fire in her home where a family member perished (Case 1) or the attention to the ability of a mother to have her children meet with counsellors quickly after the death of her partner (Case 8). In the past two decades, volumes of work have investigated the effects of these extralegal variables on sentencing outcomes (Franklin, 2010; Spohn & Halleran, 2000), with very little focus on their effects in earlier stages in the legal process (Freiburger & Hilinski, 2010). Up to this point, the research has pointed to the significance of these extralegal variables, such as race, age and gender, within legal decisions. The identification of dominant themes in this current analysis of court transcripts lends support to the presence of extralegal variables affecting the experiences of women throughout the criminal court process.

The findings of this study suggest that themes of gender, victimization, race and medicalization interact within the criminal trial process to frame the legal experience of women. Each theme does not emerge alone; rather, the themes related to each other and are connected to present an overall picture of what a criminalized woman endures. For example, the intersection of gender and medicalization emerges in a defensive strategy to highlight the motherhood role of a mother who is careful to have her children receive emotional counselling (Case 8). Race and victimization intersect in the discussion of a young Aboriginal woman who grew up within an environment of drug and alcohol abuse (Case 10) to explain the woman's criminal activity. The intersections and relationships between the dominant discourses emerging in the transcripts highlight perceptions about criminalized women that are present in current society. The courtroom is a closed system that offers the potential to identify dominant discourses that exist around people and that persist through their interactions with each other. At the same time, the courtroom is a legal cornerstone in modern society where guilt and innocence are sought on a daily basis. While the courtroom seeks truth, it also creates truths (Beaman, 1999) framed by dominant social ideas and frameworks of dominant discourses such as gender (Comack & Balfour, 2004).

The interactions among legal players and the strategies used to both defend and condemn criminalized women reinforce the dominant discourses located in society. Lawyers retain a level of agency in their choices of questions, characterizations and language (Comack & Balfour, 2004). At the same time, legal strategies must adhere to discourses that resonate with the wider society by connecting with what is understood as realistic and reasonable to prevail (Comack & Balfour, 2004; Sudnow, 1968). In the courtroom, the potential exists for dominant discourses to reinforce the placement of certain groups in dominant positions in society. The concerns of

fringe populations and the marginalized groups remain unheard, or, conversely, privileged groups reframe these concerns and experiences based on their own understandings of society. The legal process retains the power to frame experiences and construct reality by deciding what characterizations and roles are appropriate.

To some extent, feminist work within criminology has been successful in bringing forward issues and challenges of female offenders as legal strategies now identify a uniquely feminine experience in society. Abuses in a woman's past are now discussed rather than dismissed or hidden. The introduction of concepts such as battered wife syndrome illuminates the inclusion of experiences into legal discourse (Beaman, 1998). However, this legal acknowledgement of feminine experiences also serves as a framework that pathologizes women's reactions to violence against them (Comack & Balfour, 2004; Pollack, 2006).

While feminists can celebrate their success of bringing women's issues to the mainstream, their successes may be undermined within the courtroom setting. The identification of uniquely feminine experiences filters through a dominant patriarchal system with potentially grim consequences. The victimization of women and her past abuses becomes rationale for greater control of women and femininity.

The legal process points to a social control mechanism revealed through victimization, gender and race labels for criminalized women. The trial transcripts examined in this thesis depict feminized characterizations and portrayals of normalized feminine action and racialized imagery and Aboriginal stereotypes, which are then linked to the strategies used to identify and criminalize the women. Conversely, the discourse connected to feminine, racialized and pathologized roles is also used as defensive strategies to excuse the actions of the women based on their weak or tainted view of the world gained through an abused past (Pollack, 2006).

A fifth theme emerged in the texts that centred on the social respectability of the women. The expressions used to engage with socially respectable women in the criminal courts are very different from the interactions with women who find themselves on the fringes of society; those areas of ill-repute and high poverty. On the surface, education and employment experience are highlighted as extralegal variables discussed in these cases. The interactions in these transcripts identify a discourse that revolves around the women's status and respectability leading to the question of how the respectability of the women affects her experience in court. If the respectability of the accused affects her experience in court, then how does it affect the ultimate outcome of her case? The transcripts reviewed in this thesis included a limited number of cases that presented indicators of social respectability, including lawyers working Pro Bono and status representations of offenders, within the text. This limitation disallowed the necessary cross-reference analysis to fully investigate this theme in this study, but its emergence reveals the potential for further research on the discourses influencing the criminalization of women.

This study points to the potential of uniting feminist approaches into an epistemology that fosters collaboration among researchers and activists to promote social change. The joining of a standpoint feminist approach, postmodern ideology and anti oppressive epistemologies enhances the overall goal of providing a voice for the silenced or neutralized population of women in criminology (Balfour, 2006; Smart, 1990). This combined methodological and theoretical approach affords a means of examining how a criminalization structure emerges within the legal process and the direct effects it has on the women who experience this criminalization discourse.

A postmodern feminist discourse analysis of criminal trial proceedings allows me to deconstruct the gendered and racialized discourses found within the legal strategies and characterizations surrounding female offenders. The critique of my work comes from more

integrated feminist approaches, including anti oppressive theory that combines, for example, standpoint feminism and postcolonial feminism, to promote social action by engaging Aboriginal women's knowledge and advancing cultural sensitivity into social policies (See Browne, Smye and Varcoe, 2007, for a discussion on postcolonial feminist perspectives in conjunction with their study on Aboriginal women's health care). My research and conclusions would benefit from drawing attention to the women's voices in the transcripts and their resistance to legal representations of their identities and criminalized experiences. However, without adding the women's perspectives, I risk essentializing their experiences. In order to realize women's experiences, I argue that the approach must include qualitative interviews with the women about their courtroom experience. The Anti-oppressive theory, combining insights from, for example standpoint feminism and postcolonial feminism, points to the importance of including women's voices and acknowledging a diversity of perspectives to recognize the potential of resistance and power from the margins.

The identification of the discursive themes that impact the portrayal of women in criminal courts throughout this study emerges from a review of criminal court transcripts rather than through a discussion with the women themselves. As such, the reflections and understandings are from my experience of engaging with the legal characterizations and portrayals of the women presented in the text. The importance of researcher reflexivity, the acknowledgment of the contribution of my participation in the selection of cases, textual examples and categories for analysis, and my position of interpreting the data throughout the process, is paramount in deconstructing the representations of women in the court system. A number of future studies would add to this analysis. For example, a qualitative study incorporating the voices of women experiencing the legal process would add depth to

understanding the standpoint of women's experiences in court. Her experiences of the legal process and her reflections on the themes presented in these findings will deepen these discoveries by incorporating her personalized understandings of her own reality. Further, adding in the narratives and understandings of lawyers who work with the women in the criminal courts would add another layer of knowledge from the legal standpoint. By using a postmodern and standpoint epistemology and linking it to anti oppressive theory to amplify the voices of women within the criminal court system, feminist criminology potentially reveals alternate realities of legal experiences.

By understanding dominant discourses that exist, and how they are endorsed in the courtroom, the legal system can understand the fundamental gender and racial divides that influence the experiences and identities of criminalized women. Acknowledging a gendered and racialized characterization of women is not enough to create fair treatment in the courts. Acknowledging gender must filter into a change in the process of law rather than becoming another strategy for controlling women (Beaman, 1999). In addition, the changes to the system must not result in greater protective discourses for women by treating them as a blanket group with common "woman issues".

Lawyers play a large part in framing the strategies that employ the discursive themes discussed in this thesis and offer the potential for creating changes within the legal system. Both the colonial history of Canada and the growing ethnic diversity of Canadian society create the impetus for implementing cultural training for lawyers that incorporates the anti oppressive and critical views. However, a threat exists that this cultural sensitivity training becomes co-opted, risking "culturalism", or cultural essentialism (Browne and Fiske, 2001; Browne, Smye and Varcoe, 2007), by reinforcing differences and stereotypical assumptions rather than providing

anti oppressive education. At the same time, lawyers remain positioned within the current legal structure that limits their ability to promote social change. Law is a highly regulated system that, arguably, functions on the strategic interplay of understood discourses. Reflecting on the reasons why these gendered and racialized discourses exist may rest in the reality that they accomplish the surface goals of proving guilt or innocence through the current systematic legal process.

Ultimately, Lady Justice should not be blind but, rather, acknowledge the varied experiences of people. Feminist criminological research ultimately seeks a balanced system of justice that engages women's voices, acknowledges cultural perceptions and recognizes reflexive relationship between the legal system and society as a whole. By acknowledging the inherent power structures and dominant discourses within the system itself, feminists point to the necessity of transforming the role of law so it becomes a system that works for everyone, not one that reproduces the loudest voices and reinforces the strongest discourses including gender, race, class and normalized social actions.

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