

## Mothers, Babies and Jail

Rebecca Johnson

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## MOTHERS, BABIES AND JAIL

REBECCA JOHNSON\*

In his classic article *Nomos and Narrative*, Robert Cover pressed readers to acknowledge the centrality of “story” to the world in which we live.<sup>1</sup> Ours is a nomos,<sup>2</sup> he argued, marked by the inseparability of law and narrative:

The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.<sup>3</sup>

Certainly, in the context of criminal law, Cover’s observations have incredible resonance. We use our deeply engrained cultural narratives regarding gender, race, and class to make sense of criminal acts and those who commit them.<sup>4</sup> These cultural narratives provide

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\* Associate Professor, Faculty of Law, University of Victoria. This article was prepared for a panel titled *Storytelling: Law and Narrative Meets Law and Film* as part of the symposium *What Documentary Films Teach Us about the Criminal Justice System: Dialogues Among Filmmakers, Formerly Incarcerated Persons, Service Providers, Law Teachers and Law Students*, held at the University of Maryland School of Law on February 29–March 1, 2008. I am very grateful to Taunya Lovell Banks and Michael Pinard for the opportunity to participate in such a stimulating and thought-provoking encounter.

1. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). In this article, Cover explores the relationship of narrative to law making, arguing that the creation of legal meaning is always a collective or social process. *Id.* He considers differences in the creation of legal meaning through unity-based (often religious) and diversity-based (often civic) narratives, drawing attention not only to the ways real communities give meaning to law through narrative, but also reminding us of the ways that legal interpretation “always takes place in the shadow of coercion.” *Id.* at 40.

2. The Greek term “nomos” has a broader meaning than the English word “law.” It captures formal law, but also unwritten law, authoritative customs, traditions, and habits. *See* THOMAS L. PANGLE, *THE LAWS OF PLATO* 511 (Univ. of Chi. Press 1980). Robert Cover’s use of the term focuses attention on the socially constructed ordering of experience through law and convention. His description of it is, however, much more poetic: “A nomos is a present world constituted by a system of tension between reality and vision. Our visions hold our reality up to us as unredeemed.” Cover, *supra* note 1, at 9.

3. Cover, *supra* note 1, at 4.

4. *See* W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* ix (Rutgers Univ. Press 1981).

scripts by which we measure the guilt or innocence of the accused.<sup>5</sup> Even the most extreme forms of violence are not judged independently of a narrative. We use our various cultural narratives to evaluate the facts and determine which violent actions can be excused, justified, or even forgiven. As Sheriff Little Bill makes visible in Clint Eastwood's 1992 Oscar-winning movie *Unforgiven*,<sup>6</sup> cultural narratives help us know whether we are considering men "given over to wickedness in a regular way," or just "hard working boys who were foolish."<sup>7</sup>

When women kill, we have stories to help us distinguish between the culpable figures of the drug addicted, sexually promiscuous, or unfit mother and the far less culpable, even sympathetic, victims of domestic violence who finally fought back.<sup>8</sup> Our narratives weave together discourses of race, class and gender in ways that do not simply provide descriptions of criminal behavior, but also define what constitutes a crime and whose actions are truly criminal.<sup>9</sup>

## I. THE CASE OF LISA WHITFORD

Like many others on the west coast of British Columbia in early 2008, I was captured by a flurry of national media attention<sup>10</sup>

5. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 111 (Harvard Univ. Press 2000).

6. UNFORGIVEN (Malpasio Productions & Warner Bros. Pictures 1992).

7. DAVID WEBB PEOPLES, UNFORGIVEN: A TRANSCRIPT 5 (Malpasio Productions & Warner Bros. Pictures 1992) available at <http://www.clinteastwood.net/filmography/unforgiven/script/unforgivenscript.txt>, 5. Sheriff Little Bill explains why he is not whipping a cowboy who savagely slashed the face of woman in a brothel. *Id.* Using language resonant with contemporary sentencing principles, he purports to consider not only the nature of the offence, but the character of the offenders. *Id.*; See also Ruth Buchanan & Rebecca Johnson, *The 'Unforgiven' Sources of International Law: Nation-Building, Violence, and Gender in the West(ern)*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* 131, 147 (Doris Buss & Ambreena Manji eds., Hart Publishing 2005), available at [http://www.law.uvic.ca/rjohnson/documents/Unforgiven\\_Sources\\_of\\_International\\_Law.pdf](http://www.law.uvic.ca/rjohnson/documents/Unforgiven_Sources_of_International_Law.pdf); Rebecca Johnson, *Law and the Leaky Woman: The Saloon, the Liquor License, and Narratives of Containment*, 19:2 *CONTINUUM: J MEDIA & CULT. STUD.* 181 (2005).

8. See generally SUSAN C. BOYD, *FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY* (Carolina Academic Press 2004).

9. See ELIZABETH COMACK & GILLIAN BALFOUR, *THE POWER TO CRIMINALIZE: VIOLENCE, INEQUALITY AND THE LAW* 9 (Fernwood Publishing 2004).

10. See, e.g., Jon Woodward, *Newborn Goes to Prison in B.C. First*, CTV BRITISH COLUMBIA, Feb. 6, 2008; Paul Wilcocks, *Day is Wrong: Kids Need Their Moms, Even in Prison*, <http://willcocks.blogspot.com/2008/03/day-is-wrong-kids-need-their-moms-even.html> (Mar. 9, 2008); *Woman Will Raise Child While in Federal Pen*, *OPINION* 250 NEWS, INC., Feb. 6, 2008,

surrounding a local manslaughter case.<sup>11</sup> The *Vancouver Sun* used the attention grabbing headline: *Killer to Raise Baby in Prison*.<sup>12</sup> Below the headline, there was a color photo of a happy and healthy-looking baby sitting in a stroller, wearing a ruffled sunbonnet, lacy pants, and a pink t-shirt emblazoned with the phrase, “Prison Justice Day.”<sup>13</sup> With a slight smile on her face, the child’s plump bare feet were stretched out towards the viewer, and the image practically invited viewers to smile back. The news report below the photo provided this account:

Lisa Whitford gave birth in March 2007 while in detention awaiting trial on charges of killing her common-law husband. She was abused and abandoned as a child, raped and left for dead in the woods as a teen, and lost custody of her children as an adult struggling with violence and a drug addiction. So at age 33, when Lisa Whitford found herself pregnant in jail, awaiting a murder trial, she scared herself straight— weaning herself off illegal and prescription drugs to stay clean. She delivered a healthy baby girl last March and has successfully raised the infant in a provincial remand centre. And now—with the help of a University of B.C. law professor and two caring lawyers—she will become the first woman in B.C. to keep her baby in a federal prison.<sup>14</sup>

What cultural resources were available to help the public make sense of the headline *Killer to Raise Baby in Prison*? By what criteria was Lisa to be judged? How were guilt, innocence, and justice to be measured? Because facts never speak for themselves, but are always

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[http://www.ottawamenscentre.com/news/20080207\\_prison.htm](http://www.opinion250.com/blog/view/8333/3/woman+will+raise+child+while+in+federal+pen; Paul Strickland, <i>Mother Allowed to Serve Prison Time with Baby</i>, GLOBE & MAIL (Prince George, B.C.), Feb. 7, 2008; <i>Mom Can Take Baby to Prison</i>, UNITED PRESS INT’L (Prince George, B.C.), Feb. 7, 2008, available at <a href=); Judith Lavoie, *Half-Sister Wants Custody of Prison-Bound Baby: Child’s Mother Serving Four-Year Sentence for Manslaughter*, VICTORIA TIMES COLONIST, Feb. 14, 2008; *News Brief*, TORONTO STAR, Feb 16, 2008. at A18; *The Littlest Prisoner*, MACLEAN’S, Feb. 25, 2008, at 10; *Sins of the Mother*, THE OTTAWA CITIZEN, Feb. 12, 2008, at A12.

11. Transcript of Oral Reasons for Sentence, *Regina v. Whitford*, No. 22645-3 (S.C.B.C. February 6, 2008) [hereinafter Transcript of Oral Decision].

12. Gerry Bellett, *Killer to Raise Baby in Prison*, VANCOUVER SUN, Feb. 7, 2008.

13. *Id.*

14. *Id.*

interpreted through the lens of deeply ingrained cultural narratives,<sup>15</sup> it was inevitable that media accounts of “the facts” would evoke multiple and conflicting answers to questions regarding the appropriate judgment for Lisa Whitford. For example, newspapers reported that Lisa Whitford had been admitted to the Regional Hospital forty-one times in recent years, five of those times with a broken jaw.<sup>16</sup> While no journalist made the explicit claim that Lisa’s now-dead common-law partner was responsible for these injuries, the sheer frequency and nature of her hospital visits resonated with narratives of domestic violence<sup>17</sup> and legal tales of battered women.<sup>18</sup> In such a story, Lisa would occupy the role of the victim, the killing would be understood as an act of self-defense, and the tale might end with forgiveness or exoneration rather than jail time.

However, stories regarding battered women have their constituent parts, and Lisa did not fit easily into the role of sympathetic victim.<sup>19</sup> The media accounts also reported that Lisa had a significant criminal record, a history of substance abuse, and the state had previously removed three of her other children from her care.<sup>20</sup> In pointing to the involvement of the University of British Columbia Native Law Centre, the media accounts also obliquely announced Lisa’s status as an aboriginal woman. These references meant that “the

15. See BENNETT & FELDMAN, *supra* note 4.

16. *Woman Will Raise Child While in Federal Pen*, *supra* note 10.

17. See ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (Yale Univ. Press 2000). While the term “domestic violence” is still common in the literature, many Canadian legal feminists prefer the term “intimate violence” to capture abuse by adult males of adult females, regardless of their marital status (in lieu of terms like wife battering, family violence, or spousal assault). *Id.*; see also ANNE MCGILLIVRAY & BRENDA COMASKEY, *BLACK EYES ALL OF THE TIME: INTIMATE VIOLENCE, ABORIGINAL WOMEN, AND THE JUSTICE SYSTEM* xiv (Univ. of Toronto Press 1999). For statistics on intimate violence in Canada, see generally CANADIAN CENTRE FOR JUSTICE STATISTICS, *FAMILY VIOLENCE IN CANADA: A STATISTICAL PROFILE 2002* (2002), available at <http://www.statcan.gc.ca/pub/85-224-x/85-224-x2000002-eng.pdf>.

18. See, e.g., *R. v. Lavallee*, [1990] 1 S.C.R. 852 (overruling *R. v. Whynot*, [1983] 61 N.S.R.2d 33, by eradicating the requirement of immediacy for self-defense). The story of Jane Whynot (Stafford) achieved national fame in Brian Vallée’s 1989 best-selling non-fiction book, *Life with Billy* and was made into an award-winning TV movie of the same name in 1994. BRIAN VALLÉE, *LIFE WITH BILLY* (Pocket Star Books 1989); *LIFE WITH BILLY* (Canadian Broadcasting Co., et al. 1994).

19. *R. v. Lavallee* was an important victory for feminists; however, feminist theorists also pointed to problematic aspects of the decision, including the application of the defense in the context of a racist justice system in which black and aboriginal women are over-represented and over-incarcerated. See, e.g., Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after R. v. Lavallee*, 47 U. TORONTO L.J. 1, 14 (1997). See generally *R. v. Lavallee*, [1990] 1 S.C.R. 852.

20. See Bellett, *supra* note 12.

facts” would also resonate with darker Canadian histories which characterize aboriginal women as degenerate, squalid, and immoral.<sup>21</sup> Such histories rest on deeply stereotyped narratives about aboriginal women,<sup>22</sup> narratives which were available to help the public judge Lisa through divergent lenses: as a victim deserving of support in her role as mother or as a violent, degenerate, drug addicted criminal who was a danger to both society and her own child.<sup>23</sup>

## II. CHILDREN IN PRISONS

The headline, *Killer to Raise Baby in Prison*, invited readers to judge not only a person, but also a place. Indeed, the question was not simply whether baby Jordyn should be with her mother, but whether prison was a fit environment for a child to live in. In Canada, prisoners in remand (awaiting trial), and those with sentences of less than two years, spend their time in the provincial institutions, while those with sentences over two years serve their time in federal prisons.<sup>24</sup> Newspaper reports asserted that Canadian provincial prisons—and some U.S. state prisons—allow female inmates to keep their infants while in custody, but the two countries diverged with respect to federal prisons. The *Vancouver Sun* reported that pregnant women in U.S. federal institutions had the option of terminating the pregnancy or giving the child up for adoption.<sup>25</sup> Canadian federal prisons, however, have a mother-baby program in which children under the age of four can stay with their mothers in prison.<sup>26</sup> Though infrequently used,<sup>27</sup>

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21. See Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, in RACE, SPACE AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 121 (Sherene H. Razack ed., Between the Lines 2002).

22. See JANICE ACOOSE, *ISKWEWAK—KAH' KI YAW NI WAHKOMAKANAK: NEITHER INDIAN PRINCESSES NOR EASY SQUAWS* (Women's Press 1995); see also M. ELISE MARUBBIO, *KILLING THE INDIAN MAIDEN: IMAGES OF NATIVE AMERICAN WOMEN IN FILM* 20 (Univ. Press of Ky. 2006).

23. See, e.g., Bellet, *supra* note 12; Wilcocks, *supra* note 10.

24. Until recent times, there was only one federal prison for women in Canada: the infamous “P4W” (short for “Prison For Women”) in Kingston, Ontario. The P4W in Kingston Ontario was closed following a highly public inquiry into conditions for women there. See P4W PRISON FOR WOMEN (Spectrum Films 1981) (documenting conditions in the P4W facility).

25. Gerry Bellett, *Mother-Child Prison Program Investigated*, VANCOUVER SUN, Feb 7, 2008.

26. CORRECTIONAL SERVICE CANADA, COMMISSIONER'S DIRECTIVE NO. 768: INSTITUTIONAL MOTHER-CHILD PROGRAM, Feb. 27, 2003, available at <http://www.csc-scc.gc.ca/text/plcy/cdshtm/768cd-eng.shtml>. The program was established under Commissioner's Directive 768 (Institutional Mother-Child Program), issued pursuant to the Corrections and Conditional Release Act, 1992 S.C., ch. 20 s. 77 (Can.), which authorizes

these mother-baby programs provide mothers with access to pre- and post-natal services from public health authorities.<sup>28</sup> While the program requires participating mothers and children to be under constant supervision, the mothers would have full-time responsibility for the care of their children.<sup>29</sup>

Newspapers reported that Lisa Whitford pled guilty to a manslaughter charge because she was determined to keep her child.<sup>30</sup> She knew the plea would likely result in a transfer to a federal prison where the little-used mother-baby program was available.<sup>31</sup> Initially, the British Columbia Ministry for Children and Families indicated that it would seize the baby if Lisa was transferred to the federal penitentiary.<sup>32</sup> However, after the warden of the British Columbia federal prison supported Lisa's admission to the mother-baby program, the Ministry changed its position.<sup>33</sup> The corrections authorities made the arrangements and after a lot of discussion and media attention, it was finally settled: Lisa Whitford and her child would live together in a condominium unit on prison grounds where they would have cooking facilities and Lisa would learn how to create a budget and order healthy food.

The possibility of mothers keeping their babies even when imprisoned is not a completely novel concept.<sup>34</sup> But this particular

programs to address the needs of female offenders. Information on the Mother-Child Program can be found on the Correctional Service of Canada's website, <http://www.csc-ccc.gc.ca/text/prgrm/fsw/pro02-5-eng.shtml>. After age four, a child can no longer remain in prison with the mother, but can participate in a part-time live-in program on weekends, holidays, and summer vacations until the age of twelve. See CORRECTIONAL SERVICE CANADA, *supra* note 26.

27. See H. Bruce Kaun, *Judge Not Part of Baby Decision*, PRINCE GEORGE CITIZEN, Feb 11, 2008. Only a handful of women have accessed the program, and Lisa Whitford was the first BC woman admitted to the program. *Id.*

28. See CORRECTIONAL SERVICE CANADA, *supra* note 26, at 2.

29. *Id.* at 4–5. The Directive dictates that “[a]ll monies received for child care expenses shall be deposited into the inmate’s savings account[, and E]xpensures that the mother makes directly for her child shall not be included in the calculation of the annual permitted expenditures of the inmate mother for herself.” *Id.* at 12.

30. See, e.g., Bellett, *supra* note 12.

31. All sentences of more than two years must be served in a federal prison. Ann Curry, et al., *Canadian Federal Prison Libraries: A National Survey*, 35 J. LIBRARIANSHIP & INFO. SCI. 141 (2003), available at [http://www.slais.ubc.ca/PEOPLE/faculty/curry-p/pdf/JOLIS\\_July11.pdf](http://www.slais.ubc.ca/PEOPLE/faculty/curry-p/pdf/JOLIS_July11.pdf).

32. See Kaun, *supra* note 27.

33. Interview with Sara Rausch, Director, UBC first Nations Legal Clinic and Lisa Whitford's attorney (February 2008).

34. See, e.g., Richard D. Palmer, *The Prisoner-Mother and Her Child*, 1 CAP. U. L. REV. 127 (1972) (exploring the difficulties for the state posed by the need to place the children of prisoner-mothers with their mothers, and proposing legislative reforms that would include

story captured public attention because of the manner in which the media couched Lisa Whitford's story. There are many lessons that this story can teach, not the least of which is the legal story. Since the legal story demands attention to the particularities of the people and places involved, we must consider that this tale took place within the jurisdiction of the Canadian legal order, on the west coast of British Columbia, and involved an aboriginal woman. Each factor indicates that the Lisa Whitford's story cannot be fully understood without considering the narratives that derived from British colonial history.

### III. THE HISTORICAL TREATMENT OF INDIGENOUS WOMEN IN BRITISH COLUMBIA

Just as patterns of colonization (whether British, French, Dutch, U.S., or Canadian) converge and diverge in a number of ways,<sup>35</sup> British Columbia's colonial history has its own inflections because of its unique characteristics. Because it was so far west and the surrounding mountains presented such an imposing barrier, colonization came relatively late to British Columbia,<sup>36</sup> where a great diversity of First Nations communities populated the territory.<sup>37</sup> Though the federal and provincial governments asserted their sovereignty over the land, such claims have always rested on tenuous grounds: they negotiated very few treaties, and the doctrines of conquest and terra nullis were not possible grounds for government claims to sovereignty over British Columbia's land and resources.<sup>38</sup>

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placement of a child with the child's mother in quarters separate from the main prison population).

35. See generally ROBERT J. C. YOUNG, *POSTCOLONIALISM: AN HISTORICAL INTRODUCTION* (Blackwell Publishers 2001).

36. See generally COLE HARRIS, *THE RESETTLEMENT OF BRITISH COLUMBIA: ESSAYS ON COLONIALISM AND GEOGRAPHICAL CHANGE* (UBC Press 1997).

37. See First Peoples' Language Map of British Columbia, <http://maps.fphlcc.ca> (last visited Oct. 28, 2008). The Nootka, Coast Salish and Kwak'wala speaking peoples have been three of the prominent First Nations groups in the Pacific Northwest. British Columbia is home to Kootenay, Carrier, Tsimshian, Tlingit, Sekani, Beaver, Haida, and Shuswap peoples. *Id.* Indeed, British Columbia is home to 203 First Nations communities and a rich diversity of indigenous languages. *Id.* In Canadian discourse, the term "First Nations" has generally displaced the term "Indian" and is often preferred to "Aboriginal." *Id.* The term "First Nations" (or "First Peoples") has the advantage of more clearly acknowledging the wide diversity of differing indigenous peoples, each with their own languages, cultures, and legal orderings. *Id.*

38. Indeed, efforts are still ongoing to complete treaties between the government and the many First Nations in the province. Following an agreement between the federal government, provincial government, and the First Nations Summit in 1992, a Treaty Commission was established to deal with conflicts over the land through an ongoing treaty process. See BC Treaty Commission, <http://www.bctreaty.net> (last visited Oct. 23, 2008); see also Andrew



Nonetheless, lands were expropriated, and native peoples were displaced. In addition, First Nations in British Columbia faced the same assimilative laws and policies that were imposed on aboriginal peoples across Canada.<sup>39</sup> For instance, they were subjected to laws that prohibited aboriginal cultural practices such as the “potlatch,”<sup>40</sup> restricted traditional hunting and fishing practices,<sup>41</sup> and prevented aboriginal people from taking legal action to pursue their land claims.<sup>42</sup> Other policies forcibly removed aboriginal children from their families<sup>43</sup> and placed them in residential schools which attempted to “train” the indigenous culture out of them.<sup>44</sup> These attempts to break intergenerational connections had a devastating effect on aboriginal communities, the results of which are still felt today.<sup>45</sup> At the same time that the Federal government was preparing to issue a formal apology for the devastation wrought by these residential school

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Woolford, *Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process*, 29 CAN. J. SOCIOLOGY 111, 114, 121 (2004).

39. See generally JOHN J. BORROWS & LEONARD I. ROTMAN, *ABORIGINAL LEGAL ISSUES: CASES, MATERIALS & COMMENTARY* 101–02 (LexisNexis Canada 2nd ed. 2003).

40. The potlatch is a ceremony practiced by indigenous peoples in the Pacific Northwest that encompasses ideas of reciprocity and redistribution of wealth. The Potlatch was outlawed by the Canadian Government in the late 1800s. Indian Act Amendment, 1884, 46 & 47 Vict., c. 27, § 3; see DOUGLAS COLE & IRA CHAIKIN, *AN IRON HAND UPON THE PEOPLE: THE LAW AGAINST THE POTLATCH ON THE NORTHWEST COAST* (Univ. of Washington Press 1990); see also FORREST E. LAVIOLETTE, *THE STRUGGLE FOR SURVIVAL: INDIAN CULTURES AND THE PROTESTANT ETHIC IN BRITISH COLUMBIA* 43 (Univ. of Toronto Press 1973); E. BRIAN TITLEY, *A NARROW VISION: DUNCAN CAMPBELL SCOTT AND THE ADMINISTRATION OF INDIAN AFFAIRS IN CANADA* 15 (Univ. of B.C. Press 1986) (1988).

41. See PARNESH SHARMA, *ABORIGINAL FISHING RIGHTS: LAW, COURTS, POLITICS* (Fernwood Publishing 2006); see also PETER KULCHYSKI AND FRANK JAMES TESTER, *KIUMAJUT (TALKING BACK): GAME MANAGEMENT AND INUIT RIGHTS 1900–70* (UBC Press 2007).

42. Joe Mathias & Gary R. Yabsley, *Conspiracy of Legislation: The Suppression of Indian Rights in Canada*, 89 BC STUDIES: THE B.C. Q. 34 (1991).

43. See Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women*, 18:2 QUEEN’S LAW JOURNAL 306, 329, 340 (1993). Marlee Klein’s work focuses attention on the disproportionate removal of indigenous children from their families and communities. *Id.* Kline’s article was later reproduced in a multi-piece collection examining motherhood’s role and position in society. Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 119 (Martha Albertson Fineman & Isabel Karpin eds., Colum. Univ. Press 1995).

44. CELIA HAIG-BROWN, *RESISTANCE AND RENEWAL: SURVIVING THE INDIAN RESIDENTIAL SCHOOL* 53–54 (Arsenal Pulp Press 1988).

45. See, e.g., LAURENCE KIRMAYER, ET AL., *SUICIDE AMONG ABORIGINAL PEOPLE IN CANADA* 64–65 (Aboriginal Healing Foundation 2007) (a special report on suicide released by The Royal Commission on Aboriginal People).

policies, Lisa Whitford's case had come before the judiciary for consideration.<sup>46</sup>

By the time Lisa Whitford's story gained national attention, the government had begun acknowledging a less favorable account of its own history. The historical practices of colonialism<sup>47</sup>—which had effected great harm and produced grievous inequities—were becoming increasingly visible.<sup>48</sup> In modern times, many aboriginal peoples live in extreme poverty<sup>49</sup> and experience high rates of violence: indigenous women in particular are five times more likely to die as a result of violence than other Canadian women.<sup>50</sup> Historically, the government

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46. See First Nations Summit, <http://www.fns.bc.ca/pdf/TextofApology.pdf> (providing full text of Prime Minister Stephen Harper's June 11, 2008 formal apology address in the House of Commons); see also Tom Hanson, *PM Cites 'Sad Chapter' in Apology for Residential Schools*, CBC NEWS, June 11, 2008. The Canadian government also entered into an Indian Residential Schools Settlement Agreement, which included the formation of a Truth and Reconciliation Commission to understand how people were affected by the residential school experience, create a historical account, help people heal, and encourage reconciliation. See Indian Residential Schools Settlement Agreement, Schedule "N": Mandate for the Truth and Reconciliation Commission, [http://www.residentialschoolsettlement.ca/SCHEDULE\\_N.pdf](http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf).

47. These practices include theft of land, criminalization of indigenous traditions, abolishment of fishing and hunting rights, disrespect for aboriginal peoples and their cultures, and apprehension of their children for placement in residential schools.

48. See, e.g., INDIAN AND NORTHERN AFFAIRS CANADA, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996), available at <http://www.ainc-inac.gc.ca/ap/pubs/sg/sg-eng.asp>.

49. See Kevin K. Lee, CANADIAN COUNCIL ON SOCIAL DEVELOPMENT, URBAN POVERTY IN CANADA: A STATISTICAL PROFILE (2000); John Anderson, *Notes for Presentation to Subcommittee on Children and Youth at Risk, of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities*, Mar. 19, 2003, available at <http://www.ccsd.ca/pr/2003/aboriginal.htm>; see also ONTARIO FEDERATION OF INDIAN FRIENDSHIP CENTRES, URBAN ABORIGINAL CHILD POVERTY: A STATUS REPORT ON ABORIGINAL CHILDREN AND THEIR FAMILIES IN ONTARIO, available at <http://www.ofifc.org/page/notes.htm> [hereinafter INDIAN FRIENDSHIP CENTRES]. Aboriginal peoples in urban areas were more than twice as likely to live in poverty as non-Aboriginal people. See Lee, *supra* note 49; Anderson, *supra* note 49; INDIAN FRIENDSHIP CENTRES, *supra* note 49. The median pre-tax income of all persons indicating Aboriginal identity is sixty-one percent lower than the median income for all Canadians. See Lee, *supra* note 49; Anderson, *supra* note 49; INDIAN FRIENDSHIP CENTRES, *supra* note 49. More than fifty percent of all Aboriginal children are poor. See Lee, *supra* note 49; Anderson, *supra* note 49; INDIAN FRIENDSHIP CENTRES, *supra* note 49. Aboriginal people have a disability rate that is more than twice the Canadian national average. See Lee, *supra* note 49; Anderson, *supra* note 49; INDIAN FRIENDSHIP CENTRES, *supra* note 49. Aboriginal people are at least four times more likely to report experiencing hunger than any other ethnic group in Canada. See Lee, *supra* note 49; Anderson, *supra* note 49; INDIAN FRIENDSHIP CENTRES, *supra* note 49.

50. Amnesty International reported that "young Indigenous women are five times more likely than other women of the same age to die as the result of violence." AMNESTY INTERNATIONAL CANADA, STOLEN SISTERS: DISCRIMINATION AND VIOLENCE AGAINST INDIGENOUS WOMEN IN CANADA (2004), available at [http://www.amnesty.ca/campaigns/sister\\_overview.php](http://www.amnesty.ca/campaigns/sister_overview.php).

has treated the murders of indigenous women, particularly those characterized as drunks or prostitutes, all too lightly.<sup>51</sup> For example, the public was hardly alarmed when more than sixty women—thought to be prostitutes, and a high proportion of them aboriginal—vanished from Vancouver’s East End in 2000.<sup>52</sup> Yet this attitude changed in 2004 when officials discovered the remains of at least twenty of those women on a pig farm owned by serial killer Robert Willie Pickton.<sup>53</sup>

While indigenous people are ignored by the government in many ways, they are hyper-visible in the eyes of the law: they are incarcerated at rates completely disproportionate to their numbers in the general population. In 2001, for example, Statistics Canada reported that Aboriginal peoples made up three percent of the total Canadian adult population, but constituted twenty-two percent of admissions to provincial custody, seventeen percent of admissions to federal prisons, twenty-one percent of the male prisoner population, and thirty percent of the female prisoner population.<sup>54</sup> The disproportion is particularly visible with aboriginal women who, in the province of Saskatchewan alone, accounted for eighty-seven percent

51. Razack, *supra* note 21.

52. For a website dedicated to the women missing from the Vancouver Downtown Eastside, see <http://www.missingpeople.net/home.html>

53. *Robert William Pickton: The Missing Women of Vancouver*, CBC NEWS, January 19, 2007, available at <http://www.cbc.ca/news/background/pickton/history.html>. The Pickton case is the largest serial killer investigation in Canadian history. Investigators going through top levels of dirt on the ten acres of the Pickton farm located about three thousand pieces of evidence linking Pickton to twenty-six of the women who had vanished from Vancouver’s eastside. *Id.* In a trial that lasted a year, Pickton was charged and convicted for the first degree murder of six of those women. *Id.* It remains uncertain whether or not the Crown will proceed with a second trial on the remaining charges. *Id.*; see also *No Purpose in 2nd Pickton Trial: B.C. Attorney General*, CBC News, February 26, 2008, available at <http://www.cbc.ca/canada/british-columbia/story/2008/02/26/bc-picktonoppal.html>.

54. See Karen Beattie, *Adult Correctional Services in Canada, 2004/2005*, in 26 JURISTAT 15–16 (Canadian Centre for Justice Statistics, Catalogue no. 85-002-XIE, 2005), available at <http://dsp-psd.tpsgc.gc.ca/Collection-R/Statcan/85-002-XIE/85-002-XIE2006005.pdf>. There are variations across Canada. In Saskatchewan, Aboriginal adults are incarcerated at thirty-five times the rate of non-aboriginals, where they make up seventy-seven percent of the total prisoner population (ten percent of outside population). *Id.* at 16. In the Yukon, Aboriginal adults make up seventy-four percent of the total prisoner population (twenty percent of outside population). *Id.* In Manitoba, Aboriginal adults make up seventy percent of the total prisoner population (eleven percent of outside population). *Id.* In Alberta, Aboriginal adults make up thirty-eight percent of the total prisoner population (four percent of outside population). *Id.* In Ontario, Aboriginal adults make up nine percent of the total prisoner population (one percent of outside population). *Id.* In British Columbia, Aboriginal adults make up twenty percent of the total prisoner population (four percent of outside population). *Id.*

of all female admissions.<sup>55</sup> Once lawmakers began acknowledging this phenomenon, they began using the history of colonization to not only hear, but also to tell a different story.

As part of this new story, Parliament amended the sentencing provisions of the Criminal Code; section 718.2(e) of the Code now provides that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>56</sup> In *R v. Gladue*, the Supreme Court of Canada considered the meaning of the words, “with particular attention to the circumstances of aboriginal offenders.”<sup>57</sup> The Court concluded that the section was part of a new understanding of the plight of aboriginal people:

Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision’s remedial purpose real force.<sup>58</sup>

#### IV. CRIMINAL JUDICIAL DECISIONS AND THE TREATMENT OF INDIGENOUS PEOPLE

This story of colonial history and legal reform contributes a context for Lisa Whitford’s tale. Newspapers reported that she was abused and abandoned as a child, suffered repeated sexual and physical violence throughout her life, developed an addiction to drugs, amassed an extensive criminal record, and lost custody of her three children.<sup>59</sup> This story is common among aboriginal women, and the link to colonial practices is all too evident. Justice Glen Parrett, the judge who presided over Lisa’s sentencing hearing, had the task of

55. *Id.* at 18. In Manitoba and the Yukon, Aboriginal women account for eighty-three percent of all female admissions. *Id.* In Alberta, Aboriginal women account for fifty-four percent of all female admissions. *Id.* In British Columbia, Aboriginal women account for twenty-nine percent of all female admissions. *Id.*

56. Purpose and Principles of Sentencing, R.S.C., ch. 46 § 718.2(e) (1985), available at <http://www.ijcan.org/ca/sta/c-46/sec718.2.html>.

57. *R. v. Gladue*, 1 S.C.R. 688 (1999) (considering the statutory language in Purpose and Principles of Sentencing, R.S.C., ch. 46 § 718.2(e) (1985)).

58. *Id.* para. 93.

59. See Bellett, *supra* note 12; Wilcocks, *supra* note 10.

giving remedial force to Section 718.2(e). The statute directed him to take account of Lisa's story against the background of these colonizing stories, and to participate in making a different, better story. The judge understood the job he had been given and made that clear in his sentencing remarks: "I am obligated under Section 718 of the criminal code to deal with an aboriginal person differently . . . Parliament has told us that they want fewer people incarcerated and I am governed by the act."<sup>60</sup>

What did this mean for Lisa and baby Jordyn? What might the restorative approach to sentencing look like? Clearly, for those who supported Lisa, fostering the mother-baby relationship was an important step in this restorative approach.<sup>61</sup> Losing a fourth child to the State was a possibility, but Lisa chose to fight for a different result. Lisa did not seek release pending trial even though the evidence of her medical history strongly hinted at a history of domestic violence and a defense against a manslaughter charge.<sup>62</sup> Instead, she focused her attention on cultivating her ability to care for the child growing inside of her: she remained in prison, where she received support while she weaned herself from drugs, and could access good pre- and post-natal medical care.

This type of support would not be available to Lisa outside of prison because few of the state's economic resources are targeted directly at the support of aboriginal women and their children.<sup>63</sup> Yet, ironically, the state spends \$175,000–\$250,000 per year to house one woman in federal prison, and many of these women are aboriginal.<sup>64</sup> The state's economic power, expended primarily for the purpose of effecting punishment through incarceration, could be mobilized to support Lisa's ability to care for her fourth child. There is further irony in the fact that while seeking bail and asserting self-defense might have brought Lisa freedom, those avenues would have precluded access to resources that would allow her to maintain her relationship with Jordyn.

Justice Parrett, in his role as sentencing judge, did not have the ability to determine whether Lisa Whitford should be allowed to keep

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60. See *Woman Will Raise Child While in Federal Pen*, *supra* note 10.

61. Wilcocks, *supra* note 10.

62. See Bellett, *supra* note 12; Wilcocks, *supra* note 10.

63. See 5:2 INDIAN & NORTHERN AFFAIRS CANADA, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES: ECONOMIC DISPARITIES, GOVERNMENTAL EXPENDITURES AND THE COST OF THE STATUS QUO (1994), <http://www.ainc-inac.gc.ca/ap/pubs/sg/cg/ck2-eng.pdf>.

64. See ELIZABETH FRY SOCIETY, ELIZABETH FRY SOCIETY WEEK 2008 FACT SHEET: HUMAN & FISCAL COSTS OF PRISON (2008), <http://www.elizabethfry.ca/eweek08/pdf/costs.pdf>.

her baby; that was a decision for the corrections department.<sup>65</sup> However, in fashioning the sentence, Justice Parrett facilitated the work of others who were attempting to craft a more restorative approach—one that acknowledged the importance of fostering and supporting the relationship between mother and child.<sup>66</sup> Justice Parrett adjourned the first hearing to enable those working on the case to make all the arrangements necessary to ensure that Lisa and Jordyn would be able to stay together.<sup>67</sup> When the hearing was finally held, he sentenced Lisa to six years in prison, with two years of credit for time already served.<sup>68</sup> Realistically, this meant that Lisa would be eligible for release before Jordyn reached the age of four and became ineligible for the program; mother and child would be able to leave prison together.

Justice Parrett appeared to feel bound to work in conjunction with the prosecution, the ministry, and corrections—all of whom finally accepted Lisa's admission to the mother-baby program. When articulating his judgment, he stated: "I am obligated under section 718 of the Criminal Code to deal with an aboriginal person differently. I am also governed by the same section when it comes to sentencing." The words "I am obligated" and "I am governed" clearly indicate a language of constraint.<sup>69</sup> The language seems to indicate a reluctance to hand down Lisa's sentence. While he purports to deal "differently" with aboriginal persons, there is little in his verbal judgment that might point towards an understanding of how the circumstances of aboriginal offenders related to Lisa Whitford. Furthermore, in pronouncing her sentence, he expressed doubt about her ability to change her "destructive lifestyle": "this may be the last and best chance for you to achieve the near impossible."<sup>70</sup>

This is hardly language buoyant with a vision of restorative justice, redolent with the hope of a new path. Nor is it language that shows a judge grappling with ways to have the State participate in a different story, intervening to support both mother and child. In the face of the Canadian history of severing relationships between indigenous families and their children, a more hopeful or positive tone

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65. Kaun, *supra* note 27.

66. See Interview with Sara Rausch, *supra* note 33.

67. *Id.*

68. See *Woman Will Raise Child While in Federal Pen*, *supra* note 10; see also Transcript of Oral Decision, *supra* note 11, at 11–12.

69. See REBECCA JOHNSON, *TAXING CHOICES: THE INTERSECTION OF CLASS, GENDER, PARENTHOOD, AND THE LAW* 109 (UBC Press 2002) (discussing the deployment of the language of constraint by judges).

70. Transcript of Oral Decision, *supra* note 11, at 7–8.

might have been preferable. Yet, substantively, the judge nonetheless got it right: he agreed to an adjournment of the sentencing hearing, providing time for others to work behind the scenes and make it possible for Lisa to participate in the mother-baby program.<sup>71</sup> However reluctantly he worded it, he authorized a sentence such that Lisa's eligibility for release would coincide with the end of the mother-baby program. Indeed, a number of players worked together to arrive at a "just" sentence: the judge, the directors of the Ministry for Children and Families, the warden of the Federal prison, the Indigenous Legal Clinic at the University of British Columbia, and local lawyers all came together to craft a solution that would keep this indigenous mother together with her child.<sup>72</sup>

#### V. PUBLIC OPINION OF LISA WHITFORD'S STORY

That is the telling of the legal story. But what about the story as it played out in popular culture? How did the media report Lisa Whitford's case? Robert Gordon insightfully notes that the true power of a legal regime lies less in the relations of force it inscribes and brings to bear, than in "its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."<sup>73</sup> The law had already described a world in which a woman who had killed her common law husband could serve jail time in the company of her infant daughter. How did the public assess this story?

The headlines and articles following the criminal case invited readers to occupy the seat of judgment and determine whether justice had been served.<sup>74</sup> This act of judgment required joining two separate considerations: an assessment of the person and an assessment of the place associated with that person. The former consideration focused attention on Lisa Whitford herself. What kind of woman was she? Should she be understood as predominantly a mother or a killer? Was she the kind of woman who should be allowed to raise her own child? Should the mother-child bond be supported by the state, or severed? The latter consideration focused on prison. What kind of place was it?

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71. See Interview with Sara Rausch, *supra* note 33.

72. *Id.*

73. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

74. Orit Kamir argues that one of the functions of film is to train viewers in the processes of judgment. ORIT KAMIR, *FRAMED: WOMEN IN LAW AND FILM* 3 (Duke Univ. Press 2006).

What would such an environment do to the development of a child? Could innocence survive in such a location?

Public response made it clear that not everyone believed that justice had been done. Consider the disapproval expressed in these four comments posted in a variety of forums in response to Lisa Whitford's story:

Comment 1: "Who would believe that putting a new born child in the permanent environment of prostitutes, murderers and robbers, would have a negative affect on a child . . . . Shame on the Canadian penal system."<sup>75</sup>

Comment 2: "I think this is absolutely ridiculous and something has to be done to stop this. No one is thinking of this child's welfare. This is a woman who has been in trouble with the law before. I strongly feel that this is not in the best interest of the child and I think that this HAS to be changed. We need to stop thinking of prisoners [sic] rights and start thinking of the rights of innocent children . . . ." <sup>76</sup>

Comment 3: "We're, um, not even sure what to say except is a prison really the right environment to raise a kid? Seems like that baby is off to a bad start, but at least she'll know at an early age how to shank somebody."<sup>77</sup>

Comment 4: "Why are they treated differently, this is crap, they get everything for nothing (Natives that is) [sic] It is time we stop what we doing things for them and make them work for something—like us white people . . . ." <sup>78</sup>

75. Posting of Jacinthe to [http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20080206/BC\\_Baby\\_In\\_Jail\\_080206?hub=BritishColumbiaHome](http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20080206/BC_Baby_In_Jail_080206?hub=BritishColumbiaHome) (Feb. 6, 2008, 2:45PM EST); Woodward, *supra* note 10.

76. Petition Against Lisa Ann Whitford Raising Baby in Prison, <http://www.ipetitions.com/petition/babysuffering/index.html> (last visited March 1, 2009). In addition, a discussion group on *Facebook* devoted solely this issue seeks to elicit signatures for this online petition. *Please sign the petition [sic] against Lisa Whitford Bringing Her Baby to Prison*, FACEBOOK, <http://www.facebook.com/posted.php?id=7988473285> (last visited March 1, 2009).

77. Mom to Raise Baby in Prison, <http://www.imperfectparent.com/topics/tag/lisa-whitford> (Feb. 8, 2008).

78. Posting of Unitas77 to <http://www.opinion250.com/blog/view/8333/1/woman+will+raise+child+while+in+federal+pen> (Feb. 6, 2008, 2:45PM EST); *Woman Will Raise Child While in Federal Pen*, *supra* note 10.



These responses are interesting for what they do and do not tell us. Certainly, they suggest a strong polarization of understandings. The mother is viewed as a bad influence (she has “been in trouble with the law before”), but the main focus seems to be on the impropriety of prison itself as a location for an innocent child. The public views prison as a place populated by “prostitutes, murderers and robbers,” all of whom will socialize the child to the ways of the prison, where “shanking” is an ever present risk, or worse, a skill to be acquired. Furthermore, the comments explicitly evoke the stereotype of the lazy undeserving Indian as a way of asserting that the ability to keep one’s child in prison is getting “everything for nothing.” Whatever the Supreme Court of Canada might think about the struggle of indigenous prisoners, some members of the public clearly view legal attention to indigenous people as evidence of ongoing preferential treatment.

One might say that these responses suggest that the law had a deeper understanding of the complexity of Lisa’s story than the public. Indigenous legal scholar Robert A. Williams Jr. argues that the only way for the public to gain a deeper understanding of this issue is through stories.<sup>79</sup> The four responses above suggest a paucity of publicly shared stories that resonate with the lives of mothers and children like Lisa and Jordyn; a paucity of stories that would give us a richer context for thinking about a mother and baby in jail.

Most members of the public have never stepped inside the walls of a jail. This does not mean, however, that the public does not have any notions about prisons and the people who occupy them. While there are rich academic studies of prison life, most cultural theorizing about prison rests on fictional stories.<sup>80</sup> And, at this juncture in time, the most broadly consumed source of contemporary storytelling is popular film. Film is a powerful repository for “maps of social life,” of “common sense knowledge,” and can give us insight into persistent contemporary struggles over race, gender, and criminal justice.<sup>81</sup> With its ability to create hyper-visible stories and characters,

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79. See generally Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

80. See, e.g., *AN IDEAL PRISON?: CRITICAL ESSAYS ON WOMEN’S IMPRISONMENT IN CANADA 15–17* (Kelly Hannah-Moffat & Margaret Shaw eds., Fernwood Publishing 2000) (noting the inadequacy of male-focused academic literature that analyzes prisons and punishment for men when applied to women and arguing that women’s prisons and punishment deserves a similarly rich focus).

81. See Rebecca Johnson, *The Persuasive Cartographer: Sexual Assault and Legal Discourse in R. v. Ewanchuck*, in *SOCIAL CONTEXT AND SOCIAL LOCATION IN THE SOCIOLOGY OF LAW 247* (Gayle MacDonald ed., Broadview Press 2002) (discussing the operation of the maps of commonsense knowledge).

film participates in the process of both constructing and challenging “the normal.”<sup>82</sup> It is a vehicle which trains us in the substance and techniques of judgment itself: through film, we learn how and who to judge. The question here is less about a statistical or empirical knowledge of risk and danger, but is about common sense knowledge of risk and danger that circulate in the stories we tell and retell.<sup>83</sup>

## VI. PORTRAYAL OF PRISON LIFE IN FILM

What then, do we see about prison life when we look to our popular culture repository? Plenty of Hollywood films take us inside the prison. Consider *The Shawshank Redemption*,<sup>84</sup> *The Green Mile*,<sup>85</sup> and *The Count of Monte Cristo*.<sup>86</sup> These are largely tales of wrongful incarceration involving clearly innocent prisoners whose suffering is eventually redeemed. There are also tales where the prisoner is guilty, but redemption comes nonetheless. For instance, in *Les Miserables*<sup>87</sup> redemption comes through religious conversion, and in *Dead Man Walking*<sup>88</sup> it comes through acceptance of the need to atone for crimes by accepting death. Furthermore, whether the prisoner is innocent or guilty, the prison itself is generally portrayed as a place of violence, abuse, and corruption. This is certainly the case in popular television series which purport to give us portraits of “life on the inside,” like Tom Fontana’s *Oz*,<sup>89</sup> Paul Scheuring’s *Prisonbreak*,<sup>90</sup> or the UK gender-reversed version, *Bad Girls*.<sup>91</sup>

While the majority of our filmic accounts involve male prisons and prisoners, there are female variations on the theme. For example, *Lady Vengeance*<sup>92</sup> is a Korean thriller about a wrongly imprisoned young woman who spends her time behind bars killing her cellmates

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82. Rebecca Johnson, *Leaving Normal: Constructing the Family at the Movies and in Law*, in *NEW PERSPECTIVES ON DEVIANCE: THE CONSTRUCTION OF DEVIANCE IN EVERYDAY LIFE* 163, 164 (Lori G. Beaman ed., Prentice Hall Allyn & Bacon Canada 2000).

83. See MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* (Princeton Univ. Press 2003).

84. *THE SHAWSHANK REDEMPTION* (Castle Rock Entm’t 1994).

85. *THE GREEN MILE* (Castle Rock Entm’t, Darkwoods Prod. & Warner Bros. Pictures 1999).

86. *THE COUNT OF MONTE CRISTO* (Touchstone Pictures 2002).

87. *LES MISERABLES* (Mandalay Entm’t & TriStar Pictures 1998).

88. *DEAD MAN WALKING* (Havoc, Polygram Filmed Entm’t & Working Title Films 1995).

89. *Oz* (HBO television broadcast 1997–2003).

90. *Prisonbreak* (Fox Broadcasting Co. television broadcast 2005–2009).

91. *Bad Girls* (ITV television broadcast 1999).

92. *Lady Vengeance* (CJ Entm’t 2005).

with kindness while plotting a scheme to visit brutal revenge upon her enemies. *CQ2*,<sup>93</sup> a Quebec film, centers on female prisoners who use dance as a means of liberation while incarcerated. There is also an entire genre of less mainstream, but far more prolific, women-in-prison films (“WIP” films).<sup>94</sup> In her study of these WIP films,<sup>95</sup> Suzanne Bouclin notes that they can be divided into two camps: the “social purpose” WIP film of the 1930s to 1950s, which claimed to depict life in prison,<sup>96</sup> and the “exploitation” WIP films of the 1970s, which offered “caged passions igniting in carnal confinement and exploding into violence.”<sup>97</sup> As Bouclin argues, “neither delivers exactly what it promises.”<sup>98</sup> Indeed, the WIP films do not, she argues, show us much about women’s prisons. They, like many men’s prison films, are better understood as allegories of good and evil.<sup>99</sup> Nevertheless, the films offer “considerable insight on how the women’s prison is imagined, upon which bodies the criminal law is enacted, and how some groups of women are labelled ‘criminal.’”<sup>100</sup>

And understanding this imagined prison matters. Our methods of punishment are—as British professor of criminology Pat Carlen notes—dependent on both political and cultural conditions.<sup>101</sup> It is society’s belief that prison is the most central and effective method of sentencing that empowers the state to impose it as a punishment. British anthropologist Mary Douglas argued that an “institutional grip” has been laid upon our minds.<sup>102</sup> The power of this grip leaves us with

93. *CQ2* (Seek You Too) (Toloda, Cité-Amérique & Les Prod. Laure 2004).

94. See BEV ZALCOCK, *RENEGADE SISTERS: GIRL GANGS ON FILM 19–38* (Creation Books Int’l 1998).

95. See generally, Suzanne Bouclin, *Caging Women: Punishment, Judgment, Reform, and Resistance in Women in Prison Films* (2007) (unpublished LL.M thesis, Univ. of Manitoba) (on file with author).

96. *CAGED* (Warner Bros. 1950) is an example of this genre, with its tagline claiming to show “the story of a women’s prison today.”

97. This is the tag line for the film *CAGED HEAT* (Artists Entm’t Complex & Renegade Women Co. 1974).

98. Bouclin, *supra* note 95, at 2.

99. See Angus MacDonald, *Endless Streets, Pursued by Ghosts*, in *LAW’S MOVING IMAGE 123* (Leslie J. Moran, et al., eds., Cavendish Publ’n. 2004) (discussing allegories in film).

100. Bouclin, *supra* note 95, at 2.

101. Pat Carlen, *New Discourses of Justification and Reform for Women’s Imprisonment in England*, in *WOMEN AND PUNISHMENT: THE STRUGGLE FOR JUSTICE* 220, 221 (Pat Carlen ed., Willan Publ’g 2002). Carlen says “the state’s power to continue to punish by imprisonment, though formally vested in the criminal law, is, in the neo-liberal state, politically dependent upon the maintenance of the popular legitimacy of prison as an institution which *should* and *can* keep people in custody.” *Id.* at 220.

102. Kelly Hannah-Moffat, *Creating Choices: Reflecting on Choices*, in *WOMEN AND PUNISHMENT: THE STRUGGLE FOR JUSTICE*, 199, 215 (Pat Carlen ed., Cavendish Publ’g. 2002).

an imaginative gap when it comes to thinking with more depth about the relationship of gender and children to prison—a gap that makes the problem of Lisa and Jordyn seem so intractable. There is not much in the way of current filmic narratives regarding women in prison that captures the sophisticated work that academics, Elizabeth Fry Societies, sociologists, or prison reformers have done. In spite of the rates at which both the U.S. and Canada rush to incarcerate, our cultures do not currently offer a robust range of stories about prison, prisoners, or post-prison life. Similarly, there are not many complex cinematic tales of indigenous peoples.<sup>103</sup> And if one was concerned with the experiences of indigenous women, one would have to say that our cultural stories maintain a profound silence exactly where comment is most called for. There is little in the world of cinema that presses back against these “structures of feeling”<sup>104</sup> which make it so difficult to grapple with a story like that of Lisa and Jordyn.

But how does this return us to questions about storytelling, questions about how and where babies should be raised? Law encourages us to imagine ourselves as spectators to a story which must end with a dichotomous choice: with or against the mother. Indeed, current popular stories largely involve similar dichotomies: questions of truth and falsehood, good and evil, danger and violence, duplicity and vengeance. But there are other tales that need to be told; ones that have much to teach us and which speak about more than the need to protect the innocent and punish the guilty. Unfortunately, these more nuanced stories infrequently appear as the subject of feature films.<sup>105</sup>

Of course, one is not restricted to feature film. Documentary filmmakers often seek to broaden the range of stories that are told.

103. See generally WARD CHURCHILL, *FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS* (City Light Books 1998); see also ACOOSE, *supra* note 22; MARUBBIO, *supra* note 22; PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* (New York Univ. Press 2003).

104. RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 131–32 (Oxford Univ. Press 1977). Williams argued that the material structures of our world condition our culture phenomenon and used the notion of “structures of feeling” to try to capture the “meaning-giving” side of culture. *Id.* Edward Said also used the term, arguing that stories of the past can tell us much about cultural attitudes of the present. EDWARD W. SAID, *CULTURE AND IMPERIALISM* 14 (Vintage Books 1994). In Said’s case, the question was about those “structures of feeling” in 19th century novels that gave effective support to continuing practice of empire. *Id.*

105. There are two prominent exceptions to the generally non-nuanced approach: *JUST ANOTHER GIRL ON THE I.R.T.* (Miramax Films & Truth 24 F.P.S. 1992) and *SET IT OFF* (New Line Cinema & Peak Films 1996). Of course, one might note that the description of *Set It Off* as a black version of *Thelma and Louise* did not bear out in terms of box-office or critical success. For more on *Set It Off*, see KAMIR, *supra* note 74, at 243.

*Finding Dawn*,<sup>106</sup> a documentary by acclaimed Canadian Métis filmmaker Christine Welsh,<sup>107</sup> is one example of a non-feature film that explores a more nuanced story. In this film, Welsh asks viewers to find meaning in the life and death of Dawn Crey. In 2000, Dawn's name was added to the growing list of largely aboriginal women who had disappeared from Vancouver's downtown eastside, disappearances the authorities did not vigorously pursue. In 2004, Dawn became the twenty-third woman whose remains were identified on accused serial killer Robert Willie Pickton's Port Coquitlam pig farm.<sup>108</sup>

In the film, Welsh looks for traces of Dawn. She asks how it is that five-hundred Aboriginal women have gone missing or been murdered in Canada in the past thirty years with little or no police response.<sup>109</sup> How is it, she asks, that these deaths and disappearances have gone unnoticed? This documentary provides little in the way of traditional answers, but the film clarifies the historical steps that led to officials ignoring these occurrences. The film shows us, in the context of one woman's life and death, the impact of dislocation, child apprehensions, colonialism, and abuse. The film exposes "the deep historical, social and economic factors that contribute to the epidemic of violence against Native women in [Canada]."<sup>110</sup> Through her film, Welsh urges others to realize that eradicating violence is a collective responsibility. She illuminates the difficulties of that responsibility, but does so in the context of a story that asks viewers not to judge, but to take action, take responsibility, and change their perspectives. This is a different kind of story than the classic dichotomy tale that feature films often tell.

Welsh's documentary cannot tell us whether baby Jordyn should be in jail with her mother. But the film does show us that there are many factors that lead the public to ask the wrong questions. One might debate the question of whether Lisa should have been admitted to the mother-baby program. But the harder questions are these: why have Jordyn and Lisa become visible to the public only in the punitive

106. *Finding Dawn* (Nat'l Film Board of Canada 2006).

107. Her other films include *Kuper Island: Return to the Healing Circle* (Baseline StudioSystems 1997) (the story of the survivors of an Indian residential school); *The Story of the Coast Salish Knitters* (Prairie Girl Films & Nat'l Film Board of Canada 2000); *Women in the Shadows* (Nat'l Film Board of Canada 1992) (an award-winning documentary about Welsh's search for her Métis grandmothers); and *Keepers of the Fire* (Omni Film Prod. 1994) (a tribute to the roles played by aboriginal women in the conflict at Oka).

108. See *Robert William Pickton: The Missing Women of Vancouver*, *supra* note 53.

109. See AMNESTY INTERNATIONAL CANADA, *supra* note 50.

110. *Finding Dawn* (Nat'l Film Board of Canada 2006) (The quoted text is reproduced on the back of the video box for this film).

sentencing moments of a criminal trial? Why has society offered economic resources to this pair only after criminal proceedings have rendered them the responsibility of the state?

*Finding Dawn* and similar documentaries are powerful narratives that create and allow for different stories about criminal justice. The questions that they ask are not confined to issues of guilt or innocence, nor are they detective stories that seek an unambiguous truth. Instead, these films invite viewers to grapple with harder questions about how and why we punish and the power and limits of responsibility. These films ask viewers to see the relationships between race, class, and gender, and to test the strength and depth of public commitment to a wider range of strategies and solutions than those that have been employed in the past to punish.

## VII. RESPONSIBILITY TO THE STORY

As the power of law lies partly in its ability to persuade, part of the challenge for each of us is in taking more responsibility for speaking back to problematic and flattened representations of prisons and prisoners. We need to deny the legitimacy of such stories, engage in counter-telling, and press harder on the space of our own imaginations. The challenge is to better write ourselves into the stories—to compel the stories we hear to do more than issue statements on guilt and innocence, good and evil. It is time for more nuanced stories, ones that invite us to understand ourselves as part of those stories, not just as judges of the actions of others. It is time for stories that ask us to see the links between life “inside” and life “outside,” to see the continuities and connections.

This is one of the central lessons humanities studies offers to those concerned with law and criminal justice: “the story” is *all*. Amsterdam and Bruner aptly summarize:

Law lives on narrative, for reasons both banal and deep . . . stories are not just recipes for stringing together a set of “hard facts”; that, in some profound, often puzzling way, stories *construct* the facts that comprise them. For this reason, much of human reality and its “facts” are not merely recounted by narrative but *constituted* by it.<sup>111</sup>

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111. See AMSTERDAM & BRUNER, *supra* note 5, at 110–111.

Of course, it is just that insight that led Tom King, the indigenous writer and academic, to remind us: “You have to be careful with the stories you tell. And you have to watch out for the stories you are told.”<sup>112</sup> However, to be cautious does not mean to close one’s ears; the appropriate amount of caution should remind us that we are all implicated in storytelling. One overly cautious response would be to refuse to listen to mainstream stories and rely only upon alternative or documentary filmmakers for new and different stories. But this is an illusory approach. Whether we turn to the main or alternative streams, the challenge is the same: we must ask how the story works, what it helps us see, and what it obscures. We must ask how the story encourages us to judge and what more there is to be said and seen.

Indigenous cultures have much to teach in this regard because those cultures have lived and explained the workings of “story” in a different way.<sup>113</sup> In many indigenous cultures, it is not that law depends on narrative, rather narrative *is* law.<sup>114</sup> In many indigenous communities—and for many indigenous scholars—the key is the relationship of the story to those who tell it and those who hear it.<sup>115</sup> Tom King asserts that once told, the story becomes a responsibility of the listener.<sup>116</sup> Indeed, these cultures rethink the work of tellers and listeners so that the stories are meant to be worked with, puzzled over, and explored. The stories have pieces that do not fit in a simple fashion and approaching the story with the lens of true or false, innocent or guilty, would cause the listener to miss the point of the story entirely.<sup>117</sup>

The lessons that indigenous stories can teach us would be useless if we consume them like a new flavor of an old product. The point of the contrast is to remind us that stories can teach us many

112. THE TRUTH ABOUT STORIES: A NATIVE NARRATIVE (CBC Radio One: Massey Lectures 2003), available at <http://www.cbc.ca/ideas/massey/massey2003.html>.

113. See generally BARBARA BELYEA, DARK STORM MOVING WEST (Univ. of Calgary Press 2007) (discussing the place of narrative and storytelling in aboriginal and settler societies); see also JULIE CRUIKSHANK, THE SOCIAL LIFE OF STORIES: NARRATIVE AND KNOWLEDGE IN THE YUKON TERRITORY (Univ. of Neb. Press 1998) (positing that storytellers of the Yukon First Nations challenge conventional thinking by exercising continuous systems of knowledge).

114. JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 13 (Univ. of Toronto Press 2002).

115. Val Napoleon, *By Whom and By What Processes Is Restorative Justice Defined and What Bias Might this Introduce?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 33 (Howard Zehr & Barb Toews eds., Criminal Justice Press 2004).

116. See THE TRUTH ABOUT STORIES: A NATIVE NARRATIVE, *supra* note 112.

117. See Wendy Wickwire, *Stories from the Margins: Toward a More Inclusive British Columbia Historiography*, J. AM. FOLKLORE 453, 453–74 (2005).

things. Stories are not only representations of life, though they may also be that; and stories of truth and falsity are important stories, but they are not the only stories. Western cultures have also recognized this insight, and many scholars of the intersection of law and literature attend to the importance of the reader to the construction of meaning.<sup>118</sup> This insight recognizes that the importance of the story lies not only in its substance, but also in the relationship of the reader or listener to the story.

Robert A. Williams, Jr. shows us that stories are the way to gain a deep understanding of the complexity of people's histories.<sup>119</sup> But stories have certain requirements of their listeners. J.B. White reminds us of readers' responsibilities: "the writer always depends upon the capacity of his audience to understand and respond. Good writing always needs good reading."<sup>120</sup> Scholars who study the intersection of law and film also remind us about the importance of viewing practices.<sup>121</sup> In the end, perhaps the most powerful question for us—and for Lisa Whitford—focuses on the public as consumers and producers of meaning. In judging films—fictional and documentary—we need to ask not only about the truth valence of the film, but about how we are positioned to see ourselves as implicated in these stories. We need to examine how we are implicated not only in the roles of victims or perpetrators, but also as shapers and creators of meaning.

Lisa's story generated public discussion. It pressed some to action. Within days of Lisa's sentence, Public Safety Minister Stockwell Day announced that he would have the Correctional Service of Canada review the mother-baby program.<sup>122</sup> By the end of the summer, British Columbia cancelled its mother-baby prison program.<sup>123</sup> Again, the change pressed the case back into the public,

118. The work of James Boyd White has been influential in this area. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY* (Univ. of Chi. Press 1985). For a classic articulation of the theory, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 3* (Harvard Univ. Press 1980).

119. Williams, *supra* note 79.

120. JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 219 (Princeton Univ. Press 2006).

121. See, e.g., Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493 (2004) (discussing the viewing practices of judges).

122. See Bellett, *supra* note 12.

123. See *BC Tries to Quietly Cancel Mother and Baby in Prison Program: Critics Condemn B.C. Decision to Separate Moms from Babies in Jail*, CANADIAN PRESS, Aug. 13, 2008, available at [http://www.prisonjustice.ca/starkravenarticles/babies\\_jail\\_0808.html](http://www.prisonjustice.ca/starkravenarticles/babies_jail_0808.html).



with CBC Radio doing a long segment on Lisa Whitford's case on its national *Sounds Like Canada* program.<sup>124</sup>

The legal and filmic narratives we tell of women and crime are still largely straightforward stories that invite us to judge the innocent and the guilty. But they do more. They ask us to think, and they ask us to feel. And feeling—like thinking—is worthy of interrogation. Stories invite us to inhabit them, try them on, position ourselves inside them, and imagine living a different type of life. But perhaps the friction between what we know and what we feel should lead us to think longer and harder about the ways in which regulatory regimes and popular films—with all of the race, class, and gender disparities prevalent there—jointly participate in the construction and maintenance of the stories we are told and the stories by which we continue to live.

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124. BORN BEHIND BARS (CBC Radio August 27, 2008), available at <http://www.cbc.ca/soundslikecanada/interviews.html>.