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Presented by
Kim Pate, B.A., B.Ed. (P.D.P.P.), LL.B.
Executive Director of the Canadian Association of Elizabeth Fry Societies
A lawyer and teacher by training, Kim has worked with and on behalf of
criminalized youth, men and women for the past two decades.

First of all, I would like to acknowledge the traditional First Nations people of this occupied territory. It is a privilege to be on this land. Thank you.

I also want to thank all of you, especially Justice Shamai for inviting my co-panellists, Peter and Bill, and me here to speak with you this afternoon.

Context of Limitations to Access to Justice

The organization, with which I currently work, the Canadian Association of Elizabeth Fry Societies (CAEFS), has a mandate to work with and on behalf of criminalized women and girls. We use the term, "criminalized" purposefully, to try to draw attention to the reality that increasingly, it is law and policy that is coming into conflict with people's lives more so than the widely held notion that all who end up charged, convicted and sentenced to prison are there as a result of their own deliberate, intentional and knowledgeable decision to commit a criminal act or offence.

The increasing trend to criminalize women and girls is not just a Canadian, but also a global reality. The escalating numbers of women and young people, especially those who are poor and/or racialized and those with disabilities, in prison is clearly linked to the evisceration of health, education and social services. We also know that the cycle intensifies in times of economic downturn. It is very clear where we are sending the people who are experiencing the worst in the downturn in the economy and social trends. Jails are our most comprehensive homelessness initiative.

Aboriginal women continue to suffer the shameful and devastating impact of colonization. From residential school, to child welfare seizure, to juvenile and adult detention, Aboriginal women and girls are vastly over-represented in institutions under state control. Although Aboriginal women make up 1-2% of the Canadian population, they make up 27% of the federal prison population, and generally represent half of the women classified as maximum-security prisoners.

Indeed, even as we work to deinstitutionalize and decarcerate, we are fearful that "treatment" will be the next colonial control of choice. Indeed, we are already seeing this, as exemplified by what happened in the case of G, the pregnant young woman who was institutionalised for forced treatment.

The focus on FAS/FAE is a gendered, classed and racist in approach and we must venture forth very carefully. Consider for a moment the reality that diagnoses of FAS, FAE, ARND [alcohol-related neurological disorders] et cetera, are most prevalent in countries that have high rates of criminalized indigenous populations. Even although the shopping lists of symptoms or characteristics of foetal alcohol labels overlap significantly with other conditions ranging from inadequate nutrition, oxygen depletion, learning disabilities, attention deficit, et cetera, the labels are persistently utilized in places such as Canada, New Zealand, Australia and the United States. It is not coincidental that these are also countries with high rates of criminalization of racialized indigenous peoples.

In the European Union, on the other hand, this approach is not seen as particularly helpful – they consider the symptoms and impact of other toxins, be they pollution, bad water, insufficient nutrients, lack of prenatal and postnatal supports, accidental brain injuries, lack of oxygen, et cetera, as equally important. After all, despite the rhetoric that it is 100% preventable, since many women do not know they are pregnant before the apparently crucial day 17 of gestation, the only way to make it so would be to not allow any women of child bearing ages drink. Moreover, since we don't really know what the impact of alcohol is on male sperm, then likely it should also be illegal for men to drink too. Obviously, we all want to limit the impact of alcohol and other toxins on foetal development, but we know that criminalizing behaviour is only likely to end up with a focus on those least able to defend themselves against it and with current access to justice issues being what they are, is likely to continue to result in the disproportionate application of the law against the poorest, racialized women.

How many fewer diagnoses of FAS, FAE, et cetera would there be if that label meant that the recipients thereof could/would <u>not</u> be relegated to the most isolating prison conditions? If such a label meant that someone could not be criminalized but must be found to be in need of community supports because their disability renders them incapable of forming criminal intent, we predict that the diagnoses might virtually evaporate.

In terms of the rate at which women are charged, however, there has been a 7% decrease overall in the number of women charged with criminal offences. In particular, we are seeing a decrease in the number of violent crimes committed by women. It must also be borne in mind that all these increases have occurred within the context of increased cuts to expenditures for social services, health and education throughout the country. The result has been that women prisoners in Canada, like women prisoners worldwide, are the fastest growing prison population.

We also know that increased numbers of young women with mental and cognitive disabilities, women who used to fill psychiatric and mental health facilities, are now increasingly being criminalized. Progressive trends of the past to de-institutionalize those with cognitive and mental disabilities have been subverted by resource depletion, attitudes and policies occasioned by the deficit dementia of the last decade. The result is that more and more people are literally being dumped into the streets.

Their attempts to survive, their attempts to self-medicate, their attempts to cope with their situations as well as the behavior that then evolves from being in a situation where they are increasingly disenfranchised, have led to their increased criminalization and imprisonment. Once in prison, these women are considered difficult to manage and consequently spend a disproportionate amount of their time classified as maximum-security prisoners. This means that in addition to serving most of their sentence in the segregated maximum-security units in men's prisons, they are also most likely to be placed in segregation. They also tend to attract a number of psychiatric labels, and tend to be characterized by the Correctional Service of Canada as among the most difficult prisoners to manage by Correctional Services Canada.

Some women have been sentenced to prison – federal terms of two years or more in some cases – in the hopes that they will receive the "treatment" they need in prison. Approximately 10 years ago, we noted that the trend was starting in the Atlantic region, especially in Newfoundland, where we first saw the signs and implications of economic downturn. The trend is now national in nature.

We have met with judges, prosecutors, the defence bar, correctional authorities and

mental health professionals. Mental health and youth workers in particular have lamented the reality that the evisceration of their resources, combined with the advent of zero tolerance to violence policies have resulted in policy directives that instruct them to call the police and urge the pursuit of criminal prosecution in cases where those with mental and/or cognitive disabilities are assaultive or abusive. Although the behaviour might previously (and still be) have been considered to be symptomatic of the psychiatric label, reduced resources and priorities mean that they are usually without the requisite supports to handle the most challenging folk. There is a long line-up of others in the community who are not criminalized awaiting treatment options, so they are seen as legally and ethically justified in making such decisions.

The reflex of corrections to develop mental health service in prisons, is only serving to exacerbate the trend to increasingly criminalize women with mental and cognitive disabilities. Developing such services in prisons at a time when they are increasingly non-existent in the community is resulting in more women receiving federal sentences because there will be a presumption that there is an ability to access services in prison that are not available in community settings. Prisons are not and cannot be treatment centres.

In fact, however, those subject to federal terms of imprisonment are too often then relegated to the most isolating conditions and may end up with additional charges and often end up serving many more years in prison as a result of behaviour and charges arising in prison largely as a result of the conditions of confinement to which they are subject. Unlike the sentiment expressed by mental health workers, corrections staff necessarily categorizes the mental health considerations as secondary. Because they are dealing with people who have been criminalized, the behaviour is generally labelled as bad – manipulative, attention-getting, capable of control -- and mental health issues almost always take a back seat to punitive responses.

Most of the women (and men) end up serving longer sentences and too often end up released on their statutory release dates or detained until the expiration of their sentences. Anyone sentenced to life in prison may never be well enough to jump through the behavioural hoops required for them to achieve conditional release and so may spend many more years than their sentencing judge intended in prison. One example of this has now been chronicled in a documentary movie entitled,

Sentenced to Life. The real issues are that the lack of mental health and community supports in the community are resulting in more people in prison for longer periods of time as a result of a failure to accommodate their mental and/or cognitive disabilities in the community. This year, we have started to see more long-term supervision orders (LTOs) being given to those with disabilities, in conjunction with federal and provincial prison sentences. The federal Correctional Service of Canada has the responsibility to supervise those with the long-term offender (LTO) designation. As such, provincial correctional authorities can further off load resourcing responsibilities to the federal government.

Some judges have refused to participate in such facades however. In addition, at least one judge that we know of, after recognizing that prisoners, especially those with mental health and cognitive disabilities, are too often subjected to double punishment by correctional authorities, has routinely refused to proceed with charges in provincial court in circumstances where the prisoners have also been subjected to significant administrative penalties of extended periods in segregation. As the Supreme Court of Canada has recognized, segregated conditions are not the conditions of confinement contemplated by the courts when they sentence individuals, especially those with mental disabilities, to terms of imprisonment. Other judges have sentenced prisoners who insist on pleading guilty to “offences” with which they are charged in prison to minimal and/or concurrent terms of imprisonment, in attempts to send clear messages to correctional authorities.

We are also seeing the increased feminization and criminalization of poverty. Welfare fraud is one example of how poor women are increasingly likely to be criminalized. Their attempts to survive poverty too often results in charges ranging from fraud (including welfare fraud), soliciting, pimping, living off the avails, or, as in the Hamilton and Brown cases, importing and trafficking. Increasingly we are seeing these as means utilized by people, especially women, to make the rent and/or feed their children/families. It used to be that we might see women resorting to such means to address extraordinary expenses such as birthdays Christmas and/or other holidays, camp, et cetera. Now, it is increasingly the manner in which basic living costs are being covered.

Here in Ontario, we have the tragic reality of the life and death of Kim Rogers. Kim was criminalized in the first place because of "welfare fraud". This label and resulting punishment were applied because Kim attempted to return to school as an

adult in order to obtain an education while still on welfare. As part of the process, she also sought and received student loans. Although everyone knows that it is impossible to live on welfare without some supplemental income/support, to be caught doing so means an almost certainty of criminal prosecution. We question why those responsible for the development of such harmful social policies and legislation are not held legally responsible for the human and social costs of criminalizing the most marginalized, vulnerable and oppressed.

In Kim Rogers' circumstances, her death was a result of criminal negligence and complicit political, economic, legal and social policy decisions, yet only she was held accountable. We should all examine the realities regarding who benefits from the discrepancy in monitoring, charging, prosecuting and sentencing of tax ***evasion***, unemployment fraud, OHIP/doctors' ***over-billing***, GST fraud versus the demonization of the poor exemplified by the criminalization and pursuit of welfare recipients. We should also question why some behaviour is characterized as almost benign omission versus purposeful criminally intended fraud?

After the introduction of Ontario's regressive welfare policies, many people believed that things could not get worse for poor people in Canada. That was until British Columbia introduced its new anti-social welfare policies. In less than one year, on April 1st, 2004, thousands and thousands of people will be dumped off the welfare rolls. B.C. has determined that the poor in that province are only entitled to social assistance for two out of every five years. The policy was introduced April 1st, 2002.

The policies will result in a further downloading of responsibility for the social and economic needs of many communities that will not have the requisite resources to assist those impacted by the cuts, especially women and children. We have been contacted by women who are sole-support mothers who fear that they will face the street, death or jail as a result of the impact of the new policies, and are consequently concerned about the future of their children.

Some have even indicated that they believe that they should voluntarily surrender their children to the state before they are cut off of assistance, so that their children may be certain to have access to adequate food, housing and clothing via child welfare resources, in advance of those who may be placed or taken into care following the April 1st, 2004 policy implementation date. To make matters worse,

the B.C. cuts also include a 40% reduction in child welfare resources. We can only imagine the inevitable tragedies that are being set up by these policies.

The federal government should and could have predicted these types of results following its decision in 1996 to eliminate the Canada Assistance Plan and the consequent direction to provinces and territories regarding the manner in which federal resources might be allocated and utilized.

In addition, to these attacks and the war on the poor, we are seeing the so called "war on drugs" really becoming a war on the most dispossessed, especially women, as we see increased numbers of women resorting to using, selling, or otherwise dealing in legal or illegal drugs, in order to cope with everyday life and/or to allow them to gain extra financial resources in order to cope and survive.

We are also seeing the increased likelihood that progressive trends that were developed by women to address misogynist violence by men have increasingly been used against women. At the same time as we are seeing decreases in the number of women who are actually willing to seek protection from the system, we are also seeing a backlash in the form of so-called gender neutral, zero tolerance policies. As a result, battered women, most of whom have called the police themselves after being battered, are increasingly being counter-charged. This is especially true in circumstances where women have defended themselves against the abuse. In too many such situations, both are charged with assault and in the worse situations, both the abusive man and the abused women are ending up in the same anger management programs.

We are also seeing increased numbers of women who have used lethal force pleading guilty to manslaughter or second-degree murder. In most such cases, the women were charged with first-degree murder despite the fact that they were responding defensively. Many women are counseled to plead guilty to either second degree or manslaughter, so women experience that backlash as well.

The Story of Jane Doe, written by the woman who challenged the systemic bias of the Toronto police after she was raped, provides an excellent, respectful, knowledgeable and principled challenge to the legal profession, police, judges and the rest of us who work within the criminal justice system and rarely challenge the 'traditional' practices, rules, et cetera of this most intrusive, expensive and least

effective social intervention. I encourage all who have not already done so, to read it soon.

Over the next several years, we anticipate further regressive policy and law reform and initiatives aimed at appeasing calls for longer and more punitive sanctions. We need to continually question who benefits from such approaches. The off-loading of responsibility without requisite resources, the lack of appreciation by many of the impact of resource cuts, and the apparent belief that someone else will address issues, is resulting in the reality that increasingly, we are witnessing the abandonment of social problems to the courts to rectify.

The pre-existing lack of trust, connection and communication (too often further exacerbated by literacy and English as a second language issues) between 'client' and 'counsel' will only serve to further isolate the most marginalized. Similarly, limited access to justice, especially as a result of cuts to legal aid, and the concurrent vilification of those left standing and/or advocating with and on behalf of the most marginalized means that the last ones left standing with the kids and without resources continue to be vilified for their inadequacy to make things work.

<u>So, where do we go from here?</u>

We want to continue to challenge lawyers and judges to throw out cases that bring the administration of justice into disrepute. How can this not be the case for welfare fraud for instance? Why have those responsible for the regressive legislative and policy decisions not been called to account? Why do the provincial and federal governments routinely intervene to restrict access to justice by the oppressed, rather than assist them by intervening on behalf of and in support of progressive laws and policies?

We also need to challenge current definitions of ***mens rea*** and theories regarding definitions of what is a crime? The opportunity for this is currently available via the work that the Law Commission of Canada has undertaken regarding the definition of what is considered to be a crime…

Resources are always an issue when it comes to access to justice issues, so we also need to ensure that adequate and flexible resources exist for the providers of legal aid across the country. We need funded legal clinics, certificates to enable the retention of the private bar when necessary, as well as resources to assist grassroots

groups and those living the oppression to secure counsel to mount legal challenges.

For copies of CAEFS' position papers or additional information, please contact Kim Pate directly at kpate@web.ca, visit the CAEFS' home page at http://www.elizabethfry.ca, telephone us at (613) 298-2422, or fax us at (613) 232-7130.