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# Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada

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# THE 2006 FRIEDMAN & GILBERT CRIMINAL JUSTICE FORUM

## PUNISHING WOMEN: THE PROMISE AND PERILS OF CONTEXTUALIZED SENTENCING FOR ABORIGINAL WOMEN IN CANADA

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The last twenty-five years marked an era of rapid and dramatic change in criminal justice policy as states throughout the industrialized world embarked on reforms intended radically to restructure aspects of criminalization and crime control practice. During this era, decisions about punishment—what kind, how much, and under what conditions—came under intense professional and popular scrutiny. The attacks of the early 1970s on the “lawlessness” of indeterminate sentencing, primarily because of the role played by judges’ personal views and the resulting

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\* Toni Williams holds a chair in law at Kent Law School in the UK. This essay was written while I was a faculty member at Osgoode Hall Law School, York University, Toronto Canada, and chair-elect at Kent Law School. It is a revised version of a lecture delivered in the Criminal Justice Law Forum of Cleveland-Marshall College of Law, Cleveland State University, on November 14, 2006. In seeking to retain the more direct and informal tone of a lecture, I have pared down the footnotes to a minimum and tried to avoid including unnecessary information and claims. The lecture builds on an article that I have published with Sonia Lawrence, which is entitled *Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing*, and draws extensively on a chapter titled “Intersectionality analysis in the sentencing of Aboriginal women in Canada: what difference does it make” in a forthcoming book titled *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond*. See Sonia N. Lawrence & Toni Williams, *Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing*, 56 U. TORONTO L.J. 285 (2006); DAVINA COOPER ET AL., *INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION* (forthcoming 2008). Thanks to Jarvis Héту, LLB class of 2008, Osgoode Hall Law School, for his excellent research assistance on this project and to Iain Ramsay for very useful comments on an earlier draft. This chapter developed out of my collaboration with Sonia Lawrence on research into the sentencing of black women convicted of importing drugs, and I would like to thank Sonia for stimulating me to think in different ways about the role of social context analysis in judicial proceedings. I am responsible for any remaining errors. I welcome your comments at G.A.Williams@kent.ac.uk.

extreme disparity of outcomes,<sup>1</sup> and on the failures of rehabilitative sanctions to achieve their goals, eroded confidence in the legitimacy of established practices.<sup>2</sup> With the breakdown of old ways of thinking about and performing punishment, space appeared to reform sentencing processes: to re-examine who makes critical decisions about sanctions, how they are made and what factors influence them.

Seizing the opportunity for change, reformers have shifted decision-making power from judges to legislators and prosecutors; they have restructured old punishments and introduced new ones, intended to meet complex and often inconsistent goals.<sup>3</sup> Notable innovations include the transformation of complainants into “victims” and the apparent empowerment of this new juridical subject with standing and participation rights in sentencing and parole hearings; the re-emergence of penal practices that link criminality more to character than to capacity,<sup>4</sup> and the development or, perhaps revival, of a risk-based model of law enforcement practice. This forward-looking probabilistic model draws on actuarial methods to define risk pools and profiling to populate them. Its focus is prediction of future behavior and management of problematized populations rather than a particularized response to an instance of individual wrongdoing.<sup>5</sup>

Superficially, at least, it appears that Canada’s main sentencing reforms of the past ten years have little connection with the development of actuarialism and the emergence of risk-based governance of criminal justice.<sup>6</sup> Changes to the sentencing regime ostensibly were intended to stem an increase in imprisonment that had occurred during the 1980s and early 1990s. In this respect, Canadian policies differ from those of similar states such as the United Kingdom, Australia and, of course, the United States, where sentencing reform has contributed to an extraordinary

<sup>1</sup>See generally JOHN HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Michael Mandel, *Rethinking Parole*, 13 OSGOODE HALL L.J. 501 (1975).

<sup>2</sup>See generally SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard S. Frase eds., 2001) [hereinafter SENTENCING AND SANCTIONS]; Robert Martinson, *What works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974); Robert Martinson, *New findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

<sup>3</sup>See generally SENTENCING AND SANCTIONS, *supra* note 2; SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE (Michael Tonry & Kathleen Hatlestad eds., 1997) [hereinafter SENTENCING REFORM].

<sup>4</sup>For historical analysis of changing conceptions of responsibility in criminal law, see generally Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249 (2001); Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 350 (2001).

<sup>5</sup>See generally Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC’Y 321 (2002); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); Pat O’Malley, *Globalizing Risk? Distinguishing Styles of “Neo-liberal” Criminal Justice in Australia and the USA*, 2 CRIM. JUST. 205 (2002).

<sup>6</sup>See generally O’Malley, *supra* note 5 (providing thoughtful analysis of different modes of risk-based governance and a critique of claims that full-bodied actuarialism has been exported from the United States to other Western countries).

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“imprisonment binge.”<sup>7</sup> A decline in Canada’s total incarceration rate suggests that the reforms may have gone some way toward achieving the objectives of less reliance on the prison, but further analysis shows significant and troubling variations among different populations, with Aboriginal women being imprisoned disproportionately and at higher rates than in the past.<sup>8</sup> This finding is consistent with evidence elsewhere that the imprisonment of women has risen rapidly and substantially during the past two decades; however, jurisdictions reporting such increases typically have deliberately chosen to expand the role of imprisonment within their repertoire of penal sanctions. Growth in the incarceration of women in those places may be lamentable but it is not unexpected. Since Canada has made the opposite policy choice—and appears to have implemented it with some success—questions arise about why women from its most marginalized population have fared so poorly.

This article examines the failure of the reforms to remedy the over-incarceration of Aboriginal woman through exploration of a sentencing methodology that judges may employ to give effect to the reforms: the social contextualization of women’s lawbreaking. Social context analysis developed as a critique of how the state controls and punishes women and as a way to expose failures of justice.<sup>9</sup> More recently, commentators have suggested that the insertion of social context analysis into the sentencing process might allow courts to find new and more robust justifications for lowering the penalties they impose on women lawbreakers from marginalized

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<sup>7</sup>See SENTENCING AND SANCTIONS, *supra* note 2 (providing discussion of comparative sentencing reform); see also MARC MAUER, RACE TO INCARCERATE (2d ed. 2006); JOHN IRWIN & JAMES AUSTIN, IT’S ABOUT TIME: AMERICA’S IMPRISONMENT BINGE (2d ed. 1997). The per capita incarceration rate in the United States is the highest of any country able to report such data. See INT’L CTR. FOR PRISON STUD., ENTIRE WORLD—PRISON POPULATION RATES PER 100,000 OF THE NAT’L POPULATION, [http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest\\_to\\_lowest\\_rates.php](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.php) (then select “Entire World;” then select “Prison population rates”) (last visited Apr. 16, 2007). At least two million men and women are incarcerated in prisons and jails and another five million are subject to the correctional supervision while on probation or parole. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STAT. CORRECTIONAL SURVEYS., <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last visited Aug. 22, 2007). People of African ancestry are vastly over-represented among prisoners and those under correctional supervision, along with other minorities. See The Sentencing Project: Research and Advocacy for Reform, <http://www.sentencingproject.org> (then follow “Racial Disparity” hyperlink) (last visited Apr. 16, 2007). For data on prison and correctional supervision populations in the United States, see BUREAU OF JUSTICE STAT. CORRECTIONAL SURVEYS., *supra* (providing data from 1980 through 2005). For up-to-date commentary and analysis of United States sentencing data, see generally The Sentencing Project Home Page, <http://www.sentencingproject.org> (last visited Apr. 16, 2007). For specific, up-to-date data see THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH (2006), [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc\\_newfigures.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_newfigures.pdf).

<sup>8</sup>See *infra* Part II.C.

<sup>9</sup>See generally Sonia N. Lawrence & Toni Williams, *Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing*, 56 U. TORONTO L.J. 285 (2006) (providing more in depth discussion of social context analysis in relation to criminalization of women).

communities.<sup>10</sup> This article also considers whether the emergence of risk as a rationale for penal intervention and control has made it more difficult for judges to realize the promise of contextualized analysis as a foundation for less harsh sentencing of Aboriginal women.

#### I. SOCIAL CONTEXTUALIZATION IN THE SENTENCING PROCESS

Contextualized sentencing is not a term of art, but rather a label for the particular ways in which sentencing policy and practice may respond to feminist, anti-colonial and anti-racist critiques of criminal justice processes and decision-making. With respect to female lawbreakers, social context analysis engages with one of the more enduring and consistent observations about criminal justice—that, although crime is highly gendered as a male occupation, a very small number of women whose circumstances seem very similar are consistently found in criminal courts and prisons.<sup>11</sup> Historically, the small number of women in the criminal justice system tended to be overlooked, attracting little scholarly attention and having virtually no impact on how officials thought about responding to crime and managing punishment.<sup>12</sup> Consequently, mainstream penal practices and institutions, although presented as neutral and of universal application, were developed on the basis of gendered theories of lawbreaking, theories that assume male agency.

Social context analysis seeks to explain the apparently atypical behavior of women who break the law by situating women's crimes in the social settings of women's lives, linking their offending to vulnerabilities attributable to the oppressive

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<sup>10</sup>See, e.g., BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); Eda Katharine Tinto, Note, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906 (2001).

<sup>11</sup>Although some of the gaps between recorded instances of male and female participation are smaller now than in the past, women still comprise only about one in five adults charged in Canada, about one in ten admissions to provincial/territorial prisons, and one in twenty admissions to federal prisons. See CAN. CTR. FOR JUST. STAT., *CANADIAN CRIME STATISTICS 2002* (2003), available at <http://dsp-psd.communication.gc.ca/Pilot/Statcan/85-205-XIE/0000285-205-XIE.pdf>; CAN. CTR. FOR JUST. STAT., *ADULT CORRECTIONAL SERVICES IN CANADA, 2001-2002* (2003), available at <http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-211-XIE/0000285-211-XIE.pdf>; PUB. SAFETY & EMERGENCY PREPAREDNESS PORTFOLIO CORRECTIONS STAT. COMM., *CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW: 2003* (2003) (on file with author).

<sup>12</sup>The outpouring of official and critical literature on women offenders in the last twenty years shows how much that situation has changed. See MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME*, 1-8 (1997); Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion Into Street Crime*, 4 *WOMEN & CRIM. JUST.* 63 (1992); Judith Rungay, *Policies of Neglect: Female Offenders and the Probation Service*, in *USER INVOLVEMENT AND PARTICIPATION IN SOCIAL CARE: RESEARCH INFORMING PRACTICE* 193, 193 (Hazel Kemshall & Rosemary Littlechild eds., 2000); DEBORAH R. BASKIN & IRA B. SOMMERS, *CASUALTIES OF COMMUNITY DISORDER: WOMEN'S CAREERS IN VIOLENT CRIME* (1998). For an overview of the literature, see also Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 *ANN. REV. SOC.* 459 (1996); KELLY HANNAH-MOFFAT, *PUNISHMENT IN DISGUISE: PENAL GOVERNANCE AND FEDERAL IMPRISONMENT OF WOMEN IN CANADA* (2000); TASK FORCE ON FEDERALLY SENTENCED WOMEN, *CREATING CHOICES* (1990), [http://www.csc-scc.gc.ca/text/prgrm/fsw/choices/toce\\_e.shtml](http://www.csc-scc.gc.ca/text/prgrm/fsw/choices/toce_e.shtml).

social relations, exclusionary social practices and victimization. Thus, advocates of social context analysis argue that women's lawbreaking tends to be differently motivated than that of men: driven by need not greed, a product of fear and the instinct to protect self or child rather than aggression. Because of these characteristics of her offending, the female lawbreaker has been considered less dangerous than the male; she is thought less likely to need penal sanctions to communicate society's disgust for her conduct and to create incentives toward good behavior and more likely to respond to socially inclusionary and reintegrative measures than to correctional interventions premised on exclusion from society. In addition to these claims about the futility or unsuitability of imprisonment, the social context theorists might point to women's responsibilities for primary care of children and elders, one effect of which is that the relational losses and social costs of imprisoning women are substantial.

If the reactive, defensive, or protective nature of women's crime serves as a foundation for social context analysis, sentencing factors, such as those that mitigate penalty, ostensibly offer the means to integrate a contextualized account of a woman's offense into the sentencing process.<sup>13</sup> Judges are accustomed to adjusting penalties by reference to the circumstances of the offense and the exigencies of defendants' lives. While judges have traditionally considered circumstances deemed immediate and pressing or sought to reward defendants for their co-operation with the criminal process, the social conditions of a defendant's life, such as his standing in the community or positive employment history, also may function to reduce sanction severity.<sup>14</sup> Such willingness to consider factors unrelated to culpability suggests that the sentencing process should be able to accommodate and respond progressively to claims about the significance of a woman's social context to her offending behavior. But not all contextual factors operate in the same way. In particular, an individual's experience of hardship or needs may be subordinated to the perceived demands of social protection if that hardship or need is constituted as a risk, as in effect situating the individual among the "dangerous classes."<sup>15</sup>

## II. 1996 SENTENCING REFORMS

### A. Rationales

In September 1996, Canada enacted a new sentencing regime when amendments to part XXIII of the Criminal Code came into effect.<sup>16</sup> These amendments responded

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<sup>13</sup>See, e.g., Lawrence & Williams, *supra* note 9; ELIZABETH COMACK & GILLIAN BALFOUR, *THE POWER TO CRIMINALIZE: VIOLENCE, INEQUALITY AND THE LAW* (2004).

<sup>14</sup>See generally ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 151-80 (Cambridge Univ. Press 4th ed. 2005).

<sup>15</sup>See generally JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (6th ed. 2001); Kelly Hannah-Moffat, *Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty*, 7 *PUNISHMENT & SOC'Y* 29 (2005); Kelly Hannah-Moffat, *Empowering Risk: The Nature of Gender-Responsive Strategies*, in *CRIMINALIZING WOMEN: GENDER AND (IN)JUSTICE IN NEO-LIBERAL TIMES* 250 (Gillian Balfour & Elizabeth Comack eds., 2006) [hereinafter *Empowering Risk*].

<sup>16</sup>See Canada Criminal Code, R.S.C., ch. C-46 (1985).

to three main concerns about established practices: the broad scope of judicial discretion at sentencing; general over-use of incarceration as a penal sanction; and the disproportionate representation of Aboriginal people in Canadian prisons.

Sentencing law in Canada had historically shown considerable deference to sentencing judges, offering them virtually no guidance and demanding little by way of accountability. Parliament established maximum and (more rarely) minimum sanctions for offenses, but judges played the primary role in deciding general policy matters such as the goals of sentencing and the importance of various goals to penalization of different offenses as well as the more specific questions about the application of goals and selection of sanction in relation to a particular offense/offender dyad.<sup>17</sup> By the mid-1990s, a pincer movement of political demands for more accountability in sentencing and experts committed to modernizing the criminal justice system had discredited the lack of transparency and inconsistent decision-making of Canadian sentencing practices. Criticism of these weaknesses by an independent commission of inquiry, parliamentary committees, academics and practitioners gave rise to reform proposals that were intended to provide a consistent framework of sentencing policy and practice, enhance democratic accountability, and improve public access to sentencing law.<sup>18</sup>

Reforms that targeted the general over-use of imprisonment were fueled by administrative, fiscal and political concerns.<sup>19</sup> During the early to mid-1990s, Canada reported high incarceration rates relative to those of other Western democratic states. For example, according to one often-repeated statistic a 1995 imprisonment rate of 132 per 100,000 of its adult population ranked Canada as the third most punitive nation among a group of fifteen comparator states.<sup>20</sup> More important than a data point from a single year was the growth in the prison population during the early 1990s, a growth that seemed inconsistent with falling rates of police-recorded crime and a declining number of criminally-charged adults.<sup>21</sup> Absent any plausible claim of a causal relationship between sanction severity and crime rate, this combination of less crime and harsher punishments challenged the Canadian state in at least two ways. Symbolically, the large and growing prison population conflicted with

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<sup>17</sup>See generally MAKING SENSE OF SENTENCING (Julian V. Roberts & David P. Cole eds., 1999) (providing useful essays on sentencing in Canada); Anthony N. Doob, *Sentencing Reform in Canada*, in SENTENCING REFORM, *supra* note 3, at 168.

<sup>18</sup>This history is briefly outlined in David Daubney & Gordon Parry, *An Overview of Bill C-41 (The Sentencing Reform Act)*, in MAKING SENSE OF SENTENCING, *supra* note 17, at 31.

<sup>19</sup>UB. SAFETY CAN., CORRECTIONS POPULATION GROWTH: FIRST REPORT ON PROGRESS FOR FEDERAL/PROVINCIAL/TERRITORIAL MINISTERS RESPONSIBLE FOR JUSTICE (1997), available at [http://ww2.ps-sp.gc.ca/publications/corrections/pdf/corr\\_pop\\_growth\\_1997\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/corr_pop_growth_1997_e.pdf).

<sup>20</sup>CORR. STAT. COMM., CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW: 2005 (2005) (on file with author).

<sup>21</sup>From 1991 to 1995, the police-recorded crime rate dropped by 13%, and the number of adults charged fell by 15%. Over the same period, however, admissions to federal and provincial prisons grew by 15% and the incarceration rate of charged persons increased by 36%. CORR. STAT. COMM., CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW: 2006 (2006), available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/FINAL%20English%20CCRSO%202006.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/FINAL%20English%20CCRSO%202006.pdf) [hereinafter RELEASE STATISTICAL OVERVIEW: 2006].

Canada's sense of itself and its place in the world as a beacon of progressive social policy. More pragmatically, by the mid-1990s, correctional administrators and political elites had begun to view imprisonment as an expensive and ineffective form of crime control.<sup>22</sup>

Unlike countries such as the United States and the United Kingdom, Canada did not embark on large-scale expansion of its prisons for men, although it did increase the number of spaces available for federally incarcerated women. Rapid expansion of the number of prisoners therefore exerted considerable pressure on the prison estate, creating unsafe and unpleasant living and working environments. In an era of stringent fiscal restraint, reducing reliance on a costly, ineffective institution such as imprisonment presented itself as a rational political choice.

Less pervasive but perhaps more entrenched than the general problem of over-reliance on incarceration was Canada's record of incarcerating Aboriginal people at much higher rates than non-Aboriginal people, a record that by the mid-1990s was well-documented and incontrovertible. One influential late 1980s study reported, for example, that Aboriginal people, then about 2% of the national population, constituted about 10% of the federal prison population.<sup>23</sup> Focusing specifically on the over-representation of Aboriginal women among prisoners, one study showed that in the early 1990s, when Aboriginal people amounted to about 3% of the Canadian population, Aboriginal women accounted for 11% of all female prisoners in the federal system, and "nearly half" of the women admitted to provincial prisons.<sup>24</sup>

### B. The Reforms

Several aspects of the 1996 reforms respond to the problems of untrammelled judicial discretion and over-use of incarceration: a statutory statement of the purpose and principles of sentencing purports to guide judges;<sup>25</sup> a statutory duty to give reasons for sentence seeks to enhance transparency;<sup>26</sup> and codified considerations for decision-making include parity.<sup>27</sup> As well as refining the decision-making procedures, Parliament enacted changes relating to sanctions. It enabled diversion of

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<sup>22</sup>See PUB. SAFETY CAN., *supra* note 19.

<sup>23</sup>See Michael Jackson, *Locking up Natives in Canada*, 23 U.BRIT.COLUM. L. REV. 215, 215 (1989). In the Prairie region of the country, which has a relatively large Aboriginal population, the over-representation was much worse. Estimated to comprise about 6% of the general population of Manitoba and Saskatchewan, Aboriginal people amounted to 46% of admissions to provincial prisons in Manitoba and a staggering 66% of provincial prison admissions in Saskatchewan. *Id.* at 216. For a more recent review and synthesis of empirical and policy literatures on over-incarceration of Aboriginal peoples in Canada, see ROYAL COMM'N ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE AND CRIMINAL JUSTICE IN CANADA (1996) [hereinafter RCAP].

<sup>24</sup>CAROL LAPRAIRIE, EXAMINING ABORIGINAL CORRECTIONS IN CANADA 33-34 (1996), available at [http://ww2.ps-sp.gc.ca/publications/abor\\_corrections/199614\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/abor_corrections/199614_e.pdf).

<sup>25</sup>Canada Criminal Code, R.S.C., ch. C-46, § 718 (1985).

<sup>26</sup>*Id.* § 726.2.

<sup>27</sup>*Id.* § 718.2(b).



adult defendants,<sup>28</sup> modified the procedures governing the use of the fine to reduce the risk of imprisonment for default,<sup>29</sup> and created a new sanction—the conditional sentence—which suspends execution of a prison term of less than two years.<sup>30</sup> Other measures intended generally to reduce the use of incarceration appear in the adoption of objectives that ostensibly represent a restorative model of justice alongside more established retributive, deterrent, and rehabilitative goals,<sup>31</sup> and the inclusion of two parsimony or restraint provisions among the factors judges must consider when making decisions. One such provision, § 718.2(d), is uncontroversial: few object to the proposition that judges consider not incarcerating defendants when “less restrictive sanctions may be appropriate.” Section 718.2(e), by contrast, has proven highly contentious. This provision states 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.”

*R. v. Gladue*, the first Canadian Supreme Court decision on any aspect of the new sentencing regime, presented an opportunity for the Court to interpret § 718.2(e) and to guide judges as to its application.<sup>32</sup> The decision concerned an appeal from a three year prison term imposed on a young Aboriginal woman convicted of manslaughter after killing an emotionally, and sometimes physically, abusive common law spouse.<sup>33</sup> The sentencing judge had taken into account a wide range of mitigating factors, but held that there were no special circumstances to bring § 718.2(e) into play because the defendant and victim lived in an urban setting not on-reserve and

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<sup>28</sup>*Id.* § 717.

<sup>29</sup>*Id.* §§ 734-734.8, 736.

<sup>30</sup>Canada Criminal Code, R.S.C., ch. C-46, § 742-742.7. This sanction closely resembles probation, the primary form of which in Canada suspends the *passing* of sentence. *Id.* § 731. During the ten years since enactment of the 1996 reforms, the courts have sought to distinguish the two sanctions more sharply, both to facilitate administration of the new sentencing regime and also to buttress the legitimacy of the prison term served in the community. To this end, the courts have developed a norm of attaching punitive conditions to the conditional sentence, while maintaining that the conditions attached to a probation order should be primarily rehabilitative. A second difference between the two sanctions is the presumption that breach of a conditional sentence results in the defendant spending the remainder of the term in a prison; breach of probation order is a criminal offense in Canada, but it does not automatically result in a prison sentence. As an attempted safeguard against the possibility of a net-widening effect, in the sense of courts ordering the relatively severe penalty of a suspended prison term when the less restrictive measure of probation is appropriate, a judge may not impose a conditional sentence without first determining that the appropriate sanction is a prison term of up to two years. After making that decision, the judge then considers whether the defendant may serve her sentence in the community rather than in an institution, taking into account at this point matters such as the risk that the defendant's freedom may pose to the community and consistency with the new statutory sentencing objectives and principles. *R. v. Proulx*, [2000] 140 CCC (3d) 449 (SCC).

<sup>31</sup>*Id.* § 718 (1985).

<sup>32</sup>*R. v. Gladue*, [1999] 1 S.C.R. 688 (Can.).

<sup>33</sup>There is more discussion of the history of abuse in the Court of Appeal decision than in the Supreme Court's decision. See *R. v. Gladue*, [1997] 98 B.C.A.C. 120, ¶¶ 36-42 (Can.).

therefore were not “within the Aboriginal community as such.”<sup>34</sup> On appeal, the defendant challenged, *inter alia*, the underlying assumptions about authentic Aboriginal experience that this view seemed to reflect.

The Court interpreted the reach of § 718.2(e) expansively, holding that it “applies to all Aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area.”<sup>35</sup> More generally, it articulated the twin purposes of the section as establishing a general norm that imprisonment “should be the penal sanction of last resort,” reducing over-incarceration of Aboriginal persons.<sup>36</sup> When determining a sentence, judges should interpret the section “as Parliament’s direction to members of the judiciary to inquire into the causes of the problem [of over-incarceration of Aboriginal people] and to endeavor to remedy it, to the extent that a remedy is possible through the sentencing process.”<sup>37</sup>

According to the Court, the justification for judges playing this remedial role is not that judges cause over-representation of Aboriginal people in prison by performing sentencing in a discriminatory manner. While acknowledging that there is some evidence of “an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for Aboriginal offenders,”<sup>38</sup> the Court regards over-representation as primarily attributable to “dislocation” and “economic [under-] development” of the Aboriginal society.<sup>39</sup> Even if judicial decisions are not the primary reason for over-representation, however, the power of sentencing judges over sanctions positions them to play a limited part in “remedying injustice against Aboriginal peoples in Canada.”<sup>40</sup> To exercise this power effectively, judges must adopt a “different methodology,” based on § 718.2(e), whenever they sentence an Aboriginal defendant.<sup>41</sup>

For the purposes of this “different methodology,” judges must consider “[t]he unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts . . . and . . . [what] types of sentencing procedures . . . [are] appropriate . . . for the offender . . . [given] her particular Aboriginal heritage or connection.”<sup>42</sup> “Unique systemic or background factors” refers to the history and contemporary social context of Aboriginal people’s lives, and, more particularly, to how the effects of that context may have contributed to the defendant’s offending. The Court classifies knowledge of the general consequences for Aboriginal persons and communities of Canada’s colonial history as within the realm of judicial notice,<sup>43</sup> but requires specific evidence of the

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<sup>34</sup>*Gladue*, 1 S.C.R. 688, ¶18.

<sup>35</sup>*Id.* ¶ 93, pt. 11.

<sup>36</sup>*Id.* ¶ 36.

<sup>37</sup>*Id.* ¶ 64.

<sup>38</sup>*Id.* ¶ 65.

<sup>39</sup>*Gladue*, 1 S.C.R. 688, ¶ 67.

<sup>40</sup>*Id.* ¶65.

<sup>41</sup>*Id.* ¶ 71-74.

<sup>42</sup>*Id.* ¶ 66.

<sup>43</sup>The Court does not use the term “colonialism.” *Id.* ¶ 69.

relationships between such consequences and the defendant's appearance before the court, evidence of the defendant's experiences of abuse and victimization, discrimination, poverty, unemployment, substance abuse, family and community fragmentation and so on. A judge who finds that such experiences have contributed significantly to the defendant's appearance before the court must then consider if imprisonment is capable of communicating deterrence or denunciation to the defendant and her Aboriginal community, or if a sentence oriented toward healing and based on the new restorative justice objectives would be more meaningful and appropriate.<sup>44</sup>

Thus, the *Gladue* decision essentially requires judges to consider the social context of an Aboriginal defendant when passing sentence and assumes that such consideration makes it less likely that an Aboriginal defendant will receive a prison sentence. It also holds that where a judge concludes that a prison term is necessary, social context might help justify a shorter sentence as fit.<sup>45</sup> Other aspects of the decision, by contrast, reveal ambivalence about the substantive equality project of sentencing Aboriginal people differently to reduce their over-incarceration. The Court expresses this ambivalence most clearly when it indicates that the sanctions imposed on Aboriginal and non-Aboriginal defendants convicted of more serious offenses should not differ much, if at all, in type or duration regardless of whether incarceration effectively communicates a punitive objective to the defendant and her Aboriginal community.<sup>46</sup> This position apparently restricts the scope of § 718.2(e) to less serious offenses—those where one might perhaps expect judges to justify non-carceral sanctions without resorting to a special methodology for decision-making.

### C. *The Impact of the Sentencing Reforms*

Section 718.2(e) and the *Gladue* decision were hailed by some commentators as “an important watershed in Canadian criminal law,”<sup>47</sup> and criticized by others for allegedly making faulty assumptions about the causes of Aboriginal over-representation and adopting a “reverse discrimination” methodology to favor Aboriginal defendants.<sup>48</sup> Another response expressed skepticism about the viability of the new sentencing methodology, questioning the willingness or ability of judges to apply it to Aboriginal defendants.<sup>49</sup> Notwithstanding their very different

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<sup>44</sup>*Gladue*, 1 S.C.R. 688. ¶ 69.

<sup>45</sup>*Id.* ¶ 79.

<sup>46</sup>*Id.* ¶ 33, ¶¶ 78-79; see also *R. v. Wells*, [2000] 141 C.C.C. 3d 368, ¶ 42.

<sup>47</sup>Mary-Ellen Turpel-Lafond, *Sentencing Within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue*, 43 CRIM. L. Q. 34, 35 (1999); see also Jonathan Rudin & Kent Roach, *Broken Promises: A Response to Stenning and Roberts' Empty Promises*, 65 SASK. L. REV. 1, 3 (2002).

<sup>48</sup>Philip Stenning & Julian V. Roberts, *Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders*, 64 SASK. L. REV. 137, 161 (2001).

<sup>49</sup>See Susan Haslip, *Aboriginal Sentencing Reform in Canada—Prospects for Success: Standing Tall With Both Feet Planted Firmly in the Air*, 7 MURDOCK U. ELECTRONIC J. L. 1 (2000), <http://www.murdoch.edu.au/elaw/issues/v7n1/haslip71.html>; Dawn Y. Anderson,

conclusions on the legitimacy of § 718.2(e) as a remedy for the over-incarceration of Aboriginal persons, detractors and supporters alike tend to assume that the new sentencing regime has the intended effect of reducing the incarceration of Aboriginal defendants relative to the past and relative to the incarceration of non-Aboriginal persons.

Data on the use of imprisonment in the last ten years do not support this assumption, as is illustrated by comparison of changes in the total imprisonment rate with changes in the incarceration of Aboriginal women. Canada has significantly reduced its reliance on incarceration since enactment of the sentencing reforms, cutting the adult incarceration rate from 132 prisoners per 100,000 adults in 1995, to 107 per 100,000 in 2006, a drop of almost 20%.<sup>50</sup> This finding indicates that changes in sentencing policy and practice may have had the intended effect on the size of the prison population, a noteworthy achievement when most comparator states have increased their incarceration rates and prison populations.<sup>51</sup>

In contrast to this downward trend, however, the number of Aboriginal women—and men—in prisons has increased. The data show, first, that the last ten years has witnessed a much larger rise in the number of federally incarcerated Aboriginal women than non-Aboriginal women in federal institutions. Specifically, the Aboriginal female population of the federal prisons has doubled, (from 64 women in 1996 to 128 women in 2006) since 1996, whereas the non-Aboriginal female population has increased by 14%, (from 244 women to 280 women).<sup>52</sup> As a result of this difference, Aboriginal women represented close to one in three (31%) federal female prisoners in 2006, up from one in five (21%) in 1996.<sup>53</sup>

Relatively few women lawbreakers receive federal prison terms, however, since these are reserved for the most serious offenses and offenders. In relation to changes in the populations of provincial prisons, there are substantial differences between

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After *Gladue*: Are Judges Sentencing Aboriginal Offenders Differently? (2004) (unpublished Ph.D. dissertation, York University) (on file with author).

<sup>50</sup>RELEASE STATISTICAL OVERVIEW: 2006, *supra* note 21, at 5; ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 3 (2007), <http://www.kcl.ac.uk/depsta/rel/icps/world-prison-pop-seventh.pdf>.

<sup>51</sup>Note that Anthony Doob and Cheryl Webster argue that long-term data essentially show stability in Canadian incarceration rates for the past forty years. Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 LAW & SOC'Y REV. 325, 326 (2006). Their analysis raises questions about the urgent need for change expressed by correctional administrators during the early to mid-1990s. *Id.* at 327. They also point to a dramatic shift away from sentencing towards remand custody more recently. *Id.* at 352-53. Thus, a drop in the use of imprisonment post-conviction may indicate that more defendants are receiving non-custodial sanctions at sentencing because they have already served their prison terms on remand. *Id.* at 353.

<sup>52</sup>See ROBERTA LYNN SINCLAIR & ROGER BOE, CANADIAN FEDERAL WOMEN OFFENDER PROFILES: TRENDS FROM 1981 TO 2002 (REVISED) (2002), at 46, [http://www.csc-scc.gc.ca/text/tsrch/reports/r131/r131\\_e.pdf](http://www.csc-scc.gc.ca/text/tsrch/reports/r131/r131_e.pdf) (providing statistics from 1996); RELEASE STATISTICAL OVERVIEW: 2006, *supra* note 21, at 58 (providing statistics from 2006).

<sup>53</sup>See SINCLAIR & BOE, *supra* note 52, at 46; RELEASE STATISTICAL OVERVIEW: 2006, *supra* note 21, at 58. Federal imprisonment of Aboriginal men has also increased since the 1996 reforms, although not to the same extent. RELEASE STATISTICAL OVERVIEW: 2006, *supra* note 21, at 58.

Aboriginal and non-Aboriginal admissions to both sentenced and remand custody. Specifically, the number of Aboriginal women admitted to sentenced custody in provincial/territorial prisons has not declined to the same extent as has the number of non-Aboriginal women in provincial/territorial custody,<sup>54</sup> and the remand admission rates of Aboriginal women across the country have increased even more rapidly than other remand admissions.<sup>55</sup> Thus, ten years after enactment of sentencing reforms designed to reduce incarceration, and eight years after *Gladue* characterized the reforms as a remedy for over-incarceration of Aboriginal persons, Aboriginal women are still over-represented in both federal and provincial prisons. Moreover, the extent of that over-representation has worsened: there are now more Aboriginal women in federal and provincial/territorial prisons (including remand prisons) than before the reforms; Aboriginal women represent a much higher proportion of women prisoners than before the changes; and they are significantly more over-represented in Canadian prisons than are Aboriginal men.

The contradiction between a declining total incarceration rate and increasing imprisonment of Aboriginal women raises questions about how judges apply § 718.2(e) and *Gladue's* remedial sentencing methodology and why the results are so unfavorable to Aboriginal women.<sup>56</sup> Analysis of recent sentencing decisions

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<sup>54</sup>In 1994-95, the 2,447 sentenced Aboriginal women admitted to provincial and territorial prisons accounted for about one in five (21%) of all female admissions, while the 2,123 Aboriginal women admitted in 2003-04 accounted more than one in four (29%) of all female admissions sentenced to custody in provincial/territorial prisons. Jodi-Anne Brzozowski et al., *Victimization and Offending Among the Aboriginal Population in Canada*, 26 STAT. CAN. 1, 28 (2006). More specifically, the data show that the number of Aboriginal women admitted to sentenced custody in Canada's provinces and territories dropped during the first few years after the 1996 reforms (from 2,447 in 1994-95 to 1,894 in 2000-01, a 23% decline), but began to climb in 2001-02, shortly after the *Gladue* decision, reaching 2,123 in 2003-04, an increase of 12%. *Id.* Aboriginal men constituted 21% of admissions to sentenced custody in the provinces and territories. Karen Beattie, *Adult Correctional Services in Canada, 2004/2005*, 26 STAT. CAN. 1, 17 (2006).

<sup>55</sup>Remand imprisonment has increased substantially in Canada since the mid 1990s. Once again, Aboriginal women have fared badly, with almost twice as many admitted to remand custody (2,751) in 2003-04 as in 1995-96 (1,403). Brzozowski, *supra* note 54, at 28. Aboriginal women represented 23% of adult female admissions to remand custody, up from 14% in 1995-96. *Id.* Remand decision-making is not based on the same factors as sentencing, and, in theory, detention before sentencing ought to reduce the likelihood or the length of carceral sentences. Empirical studies have shown, however, that individuals incarcerated before trial are more likely to receive prison sentences than those convicted of the same offenses but released on bail. *See, e.g.*, JOANNA KERR, CAN. FOUND. FOR DRUG POL'Y REPORT OF THE COMMISSION ON SYSTEMIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM 275 (1995). The quantitative data presented here do not show interactions between imprisonment decisions taken at different stages, but the high levels of both remand and sentenced incarceration of Aboriginal women indicates that other factors conducive to incarceration at sentencing tend to outweigh the discount that courts apply for time served.

<sup>56</sup>Note that Anderson's study, based on cases decided up to 2003, found that judges often did not apply § 728.2(e) either because they did not have the necessary information before them or because they did not think that the defendant's Aboriginal ancestry was sufficiently authentic to invoke § 718.2(e). *See* Anderson, *supra* note 49. Sentencing appeals, such as in *R. v. Kakekagamick*, indicate that compliance with the *Gladue* methodology is far from universal. *See* *R. v. Kakekagamick*, C43843, [2006] O.J. No. 3346 (O.C.A. Feb. 24, 2006),

involving Aboriginal women illuminates some of the perils as well as the promise of resorting to social context analysis in this setting. The following table summarizes recent first instance cases in which an Aboriginal woman was sentenced for an offence that caused death or injury. Of these fourteen decisions, five resulted in a federal prison term of at least two years, one in a provincial prison term of eighteen months, seven imposed conditional sentences and one case imposed probation terms on two women defendants.

**2005 & 2006 Sentencing Decisions About Aboriginal Women  
Convicted of Offenses Causing Death or Personal Injury<sup>57</sup>**

Case	Most serious offense	Sanction
<i>R. v. Spence</i> [2006] M.J. No. 238.	Impaired driving causing death	2 years less 1 day conditional sentence.
<i>R. v. S.O.S.</i> [2006] M.J. No. 146.	Infanticide	18 months conditional sentence
<i>R. v. Schoenthal</i> [2006] S.J. No. 242.	Criminal negligence causing death (23 month old son)	30 months (federal) prison term.
<i>R. v. Pawis</i> [2006] O.J. No. 4158.	Aggravated assault (on nine-month old son)	2 years less 1 day conditional sentence + 3 years probation
<i>R. v. Kahypeasewat</i> [2006] S.J. No. 587.	Manslaughter	2 years less 1 day conditional sentence + 2 years probation
<i>R. v. Heavenfire</i> [2006] A.J. No. 1062.	Uttering threats + forcible entry (home invasion with 3 co-defendants)	Time served (eight months remand custody), 1 day + 12 months probation.
<i>R. v. Lisa Gladue</i> [2006] A.J. No 1196.	Aggravated assault	18 months (provincial) prison term
<i>R. v. Diamond</i> [2006]	Aggravated assault	18 months conditional

available at 2006 ON.C. LEXIS 3206 (finding that both counsel and the trial judge failed to give appropriate consideration to legal requirements in *Gladue*).

<sup>57</sup> For purposes of this research, I retrieved from one of the major electronic databases (Quicklaw Lexis-Nexis, *Canadian judgments database* cases decided in 2005 and 2006 in which an adult aboriginal woman appeared as the defendant. The search looked for cases in 2005 and 2006 in which the terms “718.2” and “Aboriginal” and “words beginning ‘senten’” appeared, and 148 cases in 2006 and 146 cases in 2005 were retrieved. After eliminating cases about men and one case about a female Aboriginal youth, the sample consisted of 36 cases, 23 in 2006 and 13 in 2005. I then reviewed these cases to select only those decided at first instance where the defendant was Aboriginal, which yielded 11 cases in 2006 and 7 in 2005. Finally, I eliminated 4 cases where the offense did not cause death or personal injury. Not all sentencing decisions are published in the database; thus, the cases are presented as illustrative of themes rather than representative of sentencing decisions about Aboriginal women. It seems that databases typically publish all of the cases they receive from first instance courts and from lawyers or court reporters, but judges, courts, lawyers, and court reporters do not send every case decided to the database.

Q.J. No.2711.		sentence (after deducting 6 months for remand custody)
<i>R. v. Byrd</i> [2006] M.J. No. 102.	Manslaughter	2 years less 1 day conditional sentence + 2 years probation
<i>R. v. W.L.Q.</i> [2005] S.J. No. 13.	Manslaughter	36 months (federal) prison term after deducting 12 months for remand custody
<i>R. v. Pépabano</i> [2005] QJ. No. 19000.	Impaired driving causing death	42 months (federal) prison term
<i>R. v. Goodstoney</i> <sup>58</sup> [2005] A.J. No. 1454.	Second degree Murder	Mandatory life imprisonment, 15 year parole ineligibility period
<i>R. v. C.M.A.</i> [2005] Y.J. No. 98.	Manslaughter	36 months (federal) prison term, after deducting 24 months for remand custody.
<i>R. v. Bone</i> [2005] M.J. No. 75.	Impaired driving causing death	2 years less 1 day conditional sentence.

As is apparent from the table, similar offenses may result in very different sanctions. Each of the five federally sentenced women had killed someone, and so had five women who received a conditional sentence. Of these ten cases: two women convicted of manslaughter received federal sentences<sup>59</sup> and two received conditional sentences;<sup>60</sup> one federally sentenced<sup>61</sup> and one conditionally sentenced<sup>62</sup>

<sup>58</sup>*R. v. Goodstoney* involved a mandatory life imprisonment term imposed on a defendant convicted of second degree murder. It was the only decision to be made at sentencing that concerned the minimum time the defendant had to serve before becoming eligible for parole consideration. *R. v. Goodstoney*, No. 040193500-Q1, [2005] A.J. No. 1454, ¶ 23 (A.C.Q.B. June 20, 2005), available at 2005 AB.C. LEXIS 1771.

<sup>59</sup>See *R. v. C.M.A.*, No. 04-01527A, [2005] Y.J. No. 98 (Y.T.S.C. Nov. 4, 2005), available at 2005 BC.C. LEXIS 3671; *R. v. W.L.Q.*, Nos. 1982 & 1983, [2005] S.J. No. 13 (S.C.Q.B. Jan. 7, 2005), available at 2005 SK.C. LEXIS 13.

<sup>60</sup>See *R. v. Byrd*, CR 04-01-25268, [2006] M.J. No. 102 (M.C.Q.B. Feb. 27, 2006), available at 2006 MB.C. LEXIS 102; *R. v. Kahypeasewat*, No. 43722164, [2006] S.J. No. 587 (S.P.C. Aug. 24, 2006), available at 2006 SK.C. LEXIS 576).

<sup>61</sup>See *R. v. Schoenthal*, CRIM643/2004, [2006] S.J. No. 242 (S.C.Q.B. Apr. 13, 2006), available at 2006 SK.C. LEXIS 241). The court does not regard Ms. Schoenthal as an Aboriginal defendant, even though it notes that Ms. Schoenthal's father is a Métis, one of the groups classified as Aboriginal in Canada. *Id.* at ¶ 17. Moreover, the circumstances of the offence are intertwined with Ms. Schoenthal's relationship to members of an Aboriginal community. *Id.*

<sup>62</sup>See *R. v. S.O.S.*, CR 03-01-24696, [2006] M.J. No. 146 (M.C.Q.B. Mar. 27, 2006), available at 2006 MB.C. LEXIS 144.

woman had killed her child; and one federally sentenced<sup>63</sup> and two conditionally sentenced<sup>64</sup> women had been convicted of impaired driving causing death. One woman convicted of aggravated assault received a fairly lengthy provincial prison term;<sup>65</sup> two others were conditionally sentenced.<sup>66</sup> Finally, two women convicted for their participation in a violent home invasion were credited with time already served in remand custody and placed on probation.<sup>67</sup>

All of the defendants convicted of homicides and assaults knew the victims, as did at least two of the three impaired drivers.<sup>68</sup> Most of the victims of violence were spouses or children, a finding consistent with numerous studies showing that women's violence tends to be inflicted on family members.<sup>69</sup> In some decisions, the relationship of the defendant to the victim, as spouse or parent, was specifically cited as an aggravating factor as per the Criminal Code.<sup>70</sup>

Whether or not they imposed incarceration, most judges referred to the presence (or absence) of "unique systemic or background factors" as shaping the defendant's identity and influencing the course of her life.<sup>71</sup> The decisions catalog the defendant's experiences of adult and childhood victimization, substance dependency, educational disadvantage, under or unemployment, dislocation, parental abandonment and family dysfunction. Such background information typically is taken from a supplement to the traditional pre-sentence report, satisfying the *Gladue* requirement that the particular circumstances of the individual Aboriginal defendant be specifically adduced and linked to the offense.

More challenging for the courts than procedural dimensions of *Gladue* is the extent to which the "unique systematic or background factors" also represent aspects of identity and circumstances that penal practitioners classify as sources of criminogenic risks and needs.<sup>72</sup> When presented as "*Gladue* factors," considerations

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<sup>63</sup>See *R. v. Pépabano*, No. 200-10-001838-056, 70 W.C.B. (2d) 883 (Q.C.A. Apr. 11, 2006), available at 2006 W.C.B.J. LEXIS 1798. .

<sup>64</sup>See *R. v. Bone*, CR04-01-25525, [2005] M.J. No. 75 (M.C.Q.B. Feb. 22, 2005), available at 2005 MB.C. LEXIS 94; *R. v. Spence*, [2006] M.J. No. 238 (M.P.C. June 2, 2006), available at 2006 MB.C. LEXIS 234.

<sup>65</sup>See *R. v. Lisa Gladue*, No. 041043068P1, [2006] A.J. No 1196 (A.P.C. July 18, 2006), available at 2006 AB.C. LEXIS 1267.

<sup>66</sup>See *R. v. Diamond*, [2006] Q.J. No.2711; *R. v. Pawis*, No. 04-10006413-00, [2006] O.J. No. 4158 (O.C.J. Oct. 16, 2006), available at 2006 ON.C. LEXIS 4071.

<sup>67</sup>See *R. v. Heavenfire*, No. 060419140P10101, [2006] A.J. No. 1062 (A.P.C. Aug. 22, 2006), available at 2006 AB.C. LEXIS 1036.

<sup>68</sup>See *Pépabano*, 70 W.C.B. (2d) at 883; *Bone*, [2005] M.J. No. 75.

<sup>69</sup>See Brzozowski, *supra* note 54, at 6. See generally ELIZABETH COMACK, *WOMEN IN TROUBLE: CONNECTING WOMEN'S LAW VIOLATIONS TO THEIR HISTORIES OF ABUSE* (1996).

<sup>70</sup>Canada Criminal Code, R.S.C., ch. C-46, §§.718.2(a)(ii), (ii)(1) (1985).

<sup>71</sup>Sentencing appeals, however, suggest that compliance with the *Gladue* sentencing methodology is still not universal. See, e.g., *R. v. Kakekagamick*, [2006] O.J. No. 3346.

<sup>72</sup>See *Empowering Risk*, *supra* note 15, at 250-66; KELLY HANNAH-MOFFAT & MARGARET SHAW, *TAKING RISKS: INCORPORATING GENDER AND CULTURE INTO THE CLASSIFICATION AND*



such as unemployment, under-education, family dysfunction, and substance dependency function as a reason not to incarcerate Aboriginal defendants, but when regarded as criminogenic risk/needs they may serve as justifications for prison terms to contain the threat the defendant poses and custodial correctional programming to ameliorate it.

Cases in which judges imposed a non-carceral sanction illustrate different ways of resolving the conflicting demands of decision-making based on risk/need and the requirement to respond to the defendant's experience of life located at the intersections of multiple subordinating relations. One case construed the sanction as a form of healing rather than a punitive intervention in the defendant's life, with the judge holding that a conditional sentence aimed at accomplishing restorative justice would facilitate the defendant's reintegration, reduce the risk that she poses, and enhance community safety.<sup>73</sup> This judge did not impose punitive restrictions on the defendant's liberty, and the decision limited the discretionary requirements of the conditional sentence to programs that were believed to be conducive to rehabilitation of the defendant in the community. This case may have viewed the defendant's social context as indicative of elevated criminogenic risk/need, but the judge followed the *Gladue* approach of finding that a restorative sanction is more suitable than a punitive one in part because it is more likely to reduce risk.

A more common strategy involved emphasizing the capacity of the non-carceral sanction to punish, rather than its healing potential, and in these cases judges tend to focus more specifically on how the risk the defendant reputedly posed would be managed in the community. Judges employing this approach often constructed the defendant as less dangerous than the risk factors seemed to suggest, deciding that regardless of the nature of the offense and no matter what the defendant's social context appeared to indicate about her level of criminogenic risk/need, her behavior generally did not mark her as a threat to society. Some of these judges found ways to treat the offense as an aberration, often linking it to an unhealthy, dangerous relationship,<sup>74</sup> and they noted where defendants had avoided significant lawbreaking until the offense for which she was sentenced<sup>75</sup> or even for a substantial period of time, such as during a lengthy interval between charge and trial.<sup>76</sup> In other cases, judges imposed a conditional sentence despite finding that the defendant's social context signified a non-trivial level of risk, justifying the decision on the basis of the capacity of the community, through close watching and monitoring, to contain the risk that the defendant posed.<sup>77</sup>

When responding to a construction of the defendant as a containable risk, judges generally characterized the non-carceral sanction as meeting punitive objectives of

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ASSESSMENT OF FEDERALLY SENTENCED WOMEN IN CANADA (2001), available at [http://www.swc-cfc.gc.ca/pubs/pubspr/0662654323/200103\\_0662654323\\_e.pdf](http://www.swc-cfc.gc.ca/pubs/pubspr/0662654323/200103_0662654323_e.pdf).

<sup>73</sup>See *R. v. S.O.S.*, CR 03-01-24696, [2006] M.J. No. 146 (M.C.Q.B. Mar. 27, 2006), available at 2006 MB.C. LEXIS 144).

<sup>74</sup>See *Kahypeasewat*, [2006] S.J. No. 587; *Byrd*, [2006] M.J. No. 102; *Heavenfire*, [2006] A.J. No. 1062.

<sup>75</sup>See *Pawis*, [2006] O.J. No. 4158; *Bone*, [2005] M.J. No. 75.

<sup>76</sup>See *Spence*, [2006] M.J. No. 238.

<sup>77</sup>See *Byrd*, [2006] M.J. No. 102.

deterrence and denunciation and then reinforced the punitive dimension through long terms and the imposition of highly restrictive punitive conditions, such as substantial periods of home confinement. Thus, five of the seven conditional sentences in the sample are initially maximum terms of two-years-less-a-day, (with two somewhat reduced because of time served on remand) and one is an eighteen-month term;<sup>78</sup> all except one include a home confinement term. Most judges who imposed a conditional sentence added on a substantial period of probation, with the result that the defendant was to remain under state supervision for several years, certainly longer than if she had received a provincial prison term and likely for more time than if she had been sentenced to federal custody. Conditional sentences such as these potentially may result in more incarceration than the custodial sanctions they replace because the longer the conditional term and the more stringent its conditions, the greater the opportunity for the defendant to breach and the more likely it is that breach will occur. Custody does not automatically follow from breach but it is the presumed sanction and courts have held that defendants incarcerated for breach of a conditional sentence should serve the entire remaining term in custody without the benefit of parole or remission.

Unsurprisingly, criminogenic risks and punitive objectives tend to feature prominently in cases where the defendant received a custodial term rather than a conditional sentence. In some of these cases, the judges seemed to ignore or minimize the defendant's identity as an Aboriginal woman;<sup>79</sup> in others, the very same background factors that constituted the defendant's identity as an Aboriginal woman and explained her appearance before the court also rendered her risky and needy.<sup>80</sup> More interesting than the conventional approach of incarcerating the defendant to denounce and deter her and to keep society safe,<sup>81</sup> are decisions in which judges give significant weight to reintegration and restorative justice in their reasons for responding to the defendant's criminogenic/risk needs with a lengthy carceral term.<sup>82</sup> These cases construct the prison at least to some extent as a therapeutic environment, a place of safety, healing, and growth for a defendant whose life in the community marks her as both victimizer and victimized. This theme features prominently in *W.L.Q.*, a spousal manslaughter case in which the reasons for sentence describe Ms. W.L.Q.'s "highly dysfunctional" childhood, which included a long history of suffering extreme sexual abuse, and detail her adult experience of severe substance dependency and a long history of "mutual assaults" and other abuse that characterized her relationships with the man she killed.<sup>83</sup> Noting that Ms. W.L.Q.'s "family members are all in recovery themselves and would like to support W.L.Q. in her effort to do the same," the judge concludes that "W.L.Q.'s best opportunities to obtain the help that she needs to have is through the programs offered in the Federal Female Corrections Institution system including the Edmonton Institution for

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<sup>78</sup>See *S.O.S.*, [2006] M.J. No. 146.

<sup>79</sup>See *Schoenthal*, [2006] S.J. No. 242.

<sup>80</sup>See *Gladue*, [2006] A.J. No 1196.

<sup>81</sup>See, e.g., *Schoenthal*, [2006] S.J. No. 242; *Pépabano*, 70 W.C.B. (2d) 883.

<sup>82</sup>See *W.L.Q.*, [2005] S.J. No. 13; *C.M.A.*, [2005] Y.J. No. 98; *Gladue*, [2006] A.J. No 1196.

<sup>83</sup>*W.L.Q.*, [2005] S.J. No. 13, ¶ 12-22.

Women.”<sup>84</sup> According to this judge, federal imprisonment is not a punitive alternative to restorative justice but a means of achieving the restorative and re-integrative objectives of the defendant accepting responsibility, acknowledging harm, and achieving rehabilitation.<sup>85</sup>

### III. CONCLUSION

Clearly, more research and analysis are required before we have a fuller understanding of why § 718.2(e) and the *Gladue* sentencing methodology have failed Aboriginal women so abjectly. But this brief discussion has illuminated some critical issues. While this study has found that judges generally attempt to apply the *Gladue* methodology by situating the defendant and her offense in their social context, it also has shown that this type of analysis may have problematic effects. First, there is a danger of social context analysis portraying lawbreaking by Aboriginal women as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality that render the stereotyped group more vulnerable to criminalization. This focus on the Aboriginal woman’s personal history family, and community shifts attention away from questions about societal discrimination and exclusion and about the role of criminalization and penal practice in exacerbating the problems of Aboriginal societies and individuals. The social and economic relations and the legal regimes that maintain the subordination of Aboriginal peoples in Canada are no more than the faintest of backdrops to the decisions.

Second, the association of the “unique systemic and background factors” of the *Gladue* methodology with the criminogenic risk/needs of contemporary penal practice complicates the task of employing social contextualization to reduce the incarceration of Aboriginal women. When faced with an Aboriginal woman who embodies what are perceived to be significant criminogenic risk/needs, the sentencing judge is asked to justify a non-carceral sanction in terms of those same aspects of the defendant’s context that point to incarceration as necessary to contain and manage her risk of re-offending. While some judges may resolve the contradictory thrusts of risk and restraint in favor of community-based sanctions, social context analysis does not compel such a conclusion.

Although sentencing can play no more than a limited role in keeping Aboriginal people out of prison, a project that requires substantial investment in the social and economic development needs of Aboriginal individuals and societies, and may indeed not be fully realized until Aboriginal societies have achieved a greater measure of autonomy from the Canadian state,<sup>86</sup> one can expect penal practices including sentencing to make some contribution towards reduced incarceration, or at least to not make matters worse. If social context analysis cannot fulfill its promise of lowering incarceration rates, then we perhaps need to make space for new approaches that focus more explicitly on the failures of imprisonment than on the

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<sup>84</sup>*Id.* ¶¶ 34-35.

<sup>85</sup> *Id.* ¶ 33. In *C.M.A.*, another spousal manslaughter case featuring substance abuse, a mutually abusive relationship, and alcohol abuse by the defendant and the deceased, the judge also characterised the prison as a place of healing. *Id.* ¶ 20. However, in this case, the restorative objectives seem to be subordinated to the punitive objectives that the judge also cites. *Id.* ¶¶ 23-25.

<sup>86</sup>RCAP, *supra* note 23.

failings of the individual. In 2003, Jonathan Rudin and Kent Roach concluded their passionate defense of § 718.2(e) with the prediction that “[a]t some point in the future, it tragically may be necessary to criticize § 718.2(e) and *Gladue* as ineffectual in reducing Aboriginal over-representation in prison.”<sup>87</sup> That point in the future is now.

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<sup>87</sup>Rudin & Roach, *supra* note 47, at 34.