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### Women in Prison: Liberty, Equality, and Thinking Outside the Bars

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## Women in Prison: Liberty, Equality, and Thinking Outside the Bars

Debra Parkes

On July 24, 2014, a judge of the Saskatchewan Provincial Court dismissed an application by the Crown to have Marlene Carter declared a Dangerous Offender.<sup>1</sup> Marlene is Cree, a member of the Onion Lake First Nation. She experienced horrific physical and sexual abuse as a child. At 13, she tried to shoot herself. Since then, she has attempted suicide several times, once by stabbing herself in the stomach. She has spent much of her adult life in prison, having received her first custodial sentence for robbery of a convenience store at the age of 17. Like too many Indigenous women, she accumulated numerous new charges from incidents in prison, thereby lengthening her sentence. In seeking the dangerous offender designation, the Crown relied on numerous charges of assault, all committed while Marlene was in prison. Only one of the assaults resulted in serious injuries. In corrections-speak, Marlene has very poor “institutional adjustment,” meaning she did not become compliant in prison, but rather, engaged in resistance including repeated acts of self-harm.<sup>2</sup> She has a history of drug and alcohol abuse. Her mental health deteriorated sharply in prison to the point that Marlene compulsively bangs her head violently. Correctional staff use force, restraint, and extended periods of segregation to control her. As reported by the CBC on the day of the Provincial Court decision, Marlene “appeared via video link, strapped in a chair to keep her from harming herself. There was also a square patch of gauze covering her forehead. At one point, [she] used a free hand to remove the gauze. Beneath it there was a large red sore.”<sup>3</sup> After the court ruling, Marlene was transferred to a psychiatric hospital

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<sup>1</sup> *R v Carter*, 2014 SKPC 150 (Whelan J). A person who is designated a Dangerous Offender by a sentencing judge, in accordance with the requirements of s. 753 of the *Criminal Code*, receives an indefinite prison sentence with limited eligibility for parole. It is an extreme sanction and only a handful of women have been declared Dangerous Offenders since the provision’s enactment in the 1970s. See Dominique Valiquet, “The Dangerous Offender and Long-term Offender Regime,” Parliamentary Information and Research Service (4 November 2008), online: <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0613-e.htm>; Laura Stone, “Women behind bars: Canada’s only female dangerous offender,” *Calgary Herald* (12 October 2011), online: <http://www.calgaryherald.com/Women+Behind+Bars+Canada+only+female+dangerous+offender/5547732/story.html>.

<sup>2</sup> According to Mandy Wesley, *Marginalized: The Aboriginal Women’s Experience in Federal Corrections* (Ottawa: Public Safety Canada, 2012) at 30, online: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/mrgnlzd-eng.pdf>. “Women are more likely to have their classification increased on the basis of ‘Institutional Adjustment.’ Self-harm incidents are considered to be institutional incidents, although the largest risk of harm posed is to the individual by the individual. Nevertheless, the category increases the level of security based on the amount of institutional resources required to manage an inmate.”

<sup>3</sup> Maureen Brosnahan, “Marlene Carter not a dangerous offender, judge rules,” CBC News (23 July 2014), online: <http://www.cbc.ca/news/canada/saskatchewan/marlene-carter-not-a-dangerous-offender-judge-rules-1.2716254>

in Brockville Ont. where her condition improved considerably. The Crown originally stated an intention to appeal the decision,<sup>4</sup> later abandoning its appeal.<sup>5</sup>

This paper locates reports of the experience of Marlene Carter and other incarcerated women in the context of recent punitive changes to Canadian law and a history of women’s imprisonment that has been the site of reform, as well as high profile abuses (including, for example, the death of 19 year-old Ashley Smith in a federal prison’s segregation cell while correctional officers watched, a death that has been ruled a homicide by a coroner’s inquest jury<sup>6</sup>). For women like Ashley and Marlene, prison has been a prolonged, violent encounter with the state.<sup>7</sup> While theirs may be extreme cases, they are not unique and their experiences should be kept in view as we think about the increasing number of women in Canada who are criminalized and imprisoned, and the work of feminist advocacy on their behalf.

Women have long been “correctional afterthoughts”<sup>8</sup> given their small numbers relative to men. For example, in 1977, the Parliamentary Sub-Committee Report on the Penitentiary System in Canada made the following statement about the Prison for Women in Kingston, which opened in 1934 (before that federally sentenced women were incarcerated in the Female Unit at Kingston Penitentiary, a men’s prison<sup>9</sup>):

One area in which women have equality in Canada - without trying - is in the national system of punishment. The nominal equality translates itself into injustice. But lest the injustice fail to be absolute, the equality ends and reverts to outright discrimination when it comes time to provide constructive positives - recreation, programs, basic facilities and space - for women.<sup>10</sup>

Numerous reports and inquiries have identified the correctional afterthought problem, while advocating an approach more tailored to women. Notable among

<sup>4</sup> Anna Mehler Paperny, “Crown fights to designate mentally ill, suicidal inmate dangerous offender,” Global News (6 October 2014), online: <http://globalnews.ca/news/1600745/crown-fights-to-designate-mentally-ill-suicidal-inmate-dangerous-offender/>.

<sup>5</sup> Kenneth Jackson, “How the federal government failed Marlene Carter – one of the most dangerous female inmates in Canada,” APTN National News (20 January 2016), online: <http://aptn.ca/news/2016/01/20/how-the-federal-government-failed-marlene-carter-one-of-the-most-dangerous-female-inmates-in-canada/>.

<sup>6</sup> “Ashley Smith death ruled a homicide by inquest jury,” *National Post* (19 December 2013), online: <http://news.nationalpost.com/2013/12/19/ashley-smith-death-ruled-a-homicide-by-inquest-jury/#2> (with link to jury verdict and recommendations).

<sup>7</sup> Vicki Chartrand, “Landscapes of Violence: Women and Canadian Prisons,” (2015) 12 *Champ Pénal / Penal Field*, online: <https://champpenal.revues.org/9158>.

<sup>8</sup> Correctional Service of Canada, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (Ottawa: Correctional Service of Canada, 1990), ch IV.

<sup>9</sup> Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and the Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001) at 71.

<sup>10</sup> House of Commons, Standing Committee on Justice and Legal Affairs, *Report to Parliament: The Sub-Committee on the Penitentiary System in Canada* (1977) at 135 (Chair: Mark MacGuigan).

these is the 1990 Report of the Task Force on Federally Sentenced Women, *Creating Choices*, which identified the following “perennial dilemmas,” among others: confinement in conditions that are more secure than required; geographic dislocation; programming inequities; few community-based alternatives; non-recognition of unique realities of Indigenous women; and lack of community involvement.<sup>11</sup> All of these problems – and more – persist in the wake of *Creating Choices*, despite substantial reforms and the building of new, regional prisons.<sup>12</sup> In addition, attempts to make corrections “women-centered”<sup>13</sup> have corresponded with an increased focus on risk assessment, leading to higher security classifications and harsher conditions for some women, particularly Indigenous women.<sup>14</sup>

At the same time, the number of women in prison is rising (both in absolute terms and at a rate faster than that of men),<sup>15</sup> a phenomenon that is reflected globally.<sup>16</sup> Indigenous women, in particular, are the fastest growing segment of the Canadian prison population and are over-represented at a rate even higher than Indigenous men. Indigenous women accounted for 43% of women admitted to provincial/territorial sentenced custody and 37% of women admitted to remand.<sup>17</sup> For Indigenous men, the numbers are 27% and 23% respectively.<sup>18</sup>

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<sup>11</sup> *Creating Choices*, *supra* note 8, ch VI. See also The Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996) (“Arbour Report”), discussed *infra*.

<sup>12</sup> Discussed *infra*. See Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Women’s Imprisonment in Canada* (Toronto: University of Toronto Press, 2001) and Stephanie Hayman, *Imprisoning Our Sisters: The New Federal Women’s Prisons in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006).

<sup>13</sup> See generally, *Creating Choices*, *supra* note 8, ch. XI, which identifies principles of empowerment, meaningful choices, respect and dignity, supportive environment, and shared responsibility, in attempting to make imprisonment more responsive to women.

<sup>14</sup> See, e.g., Lisa Kerr’s study of the Management Protocol (a policy of prolonged segregation that was applied primarily to Indigenous women), discussed *infra* text accompanying note 46.

<sup>15</sup> Samuel Perreault, “Admissions to adult correctional services in Canada, 2011/2012,” *Juristat* 85-002-X (20 March 2014), online: <http://www.statcan.gc.ca/pub/85-002-x/2014001/article/11918-eng.htm>.

<sup>16</sup> Roy Walmsley, *World Female Imprisonment List*, 2<sup>nd</sup> ed. (2012), online: [http://www.prisonstudies.org/sites/default/files/resources/downloads/wfil\\_2nd\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wfil_2nd_edition.pdf) (documenting an increase in women’s imprisonment in all five continents, with the largest increases occurring in the Americas). See also the collection of essays, “Women, Gender, and Prison: National and Global Perspectives” (2013) 39:1 *Signs* and Julia Sudbury, *Global Lockdown: Race, Gender, and the Prison-Industrial Complex* (New York: Routledge, 2005).

<sup>17</sup> Perreault, *supra* note 15. Compared to our knowledge of the situation of federally sentenced women, we know relatively little about the experiences and conditions of confinement of a growing number of women incarcerated in 13 different provincial and territorial correctional systems. Reasons for the lack of information include the relatively short duration of provincial incarceration and barriers to research and accountability in these opaque systems. Our information is limited to occasional news stories or sporadic and troubling reports emanating from particularly tenacious Ombuds offices. See, e.g., Travis Lupick, “Disciplinary stats show B.C. inmates’ rights violated, advocate finds,” *The Georgia Straight* (28 May 2014) and Ontario Ombudsman, *The Code*, an investigation into the Ministry of Community Safety and Correctional Services’ response to allegations of excessive use of force against inmates (11 June 2013).

<sup>18</sup> Perrault, *supra* note 15.

This paper considers the potential of rights-based advocacy to respond to the troubling reality of a growing women’s prison population, and it makes an attempt to sketch out an approach to advocacy and scholarship that seeks both liberty and substantive equality for criminalized and imprisoned women. It proceeds in four parts. First, it documents some of the legislative and policy changes made to sentencing and penal law in the last decade.<sup>19</sup> Next it identifies some of the ways that these changes have an impact on women and on particular groups of women. It then suggests some ways that academics, lawyers, law students, and other feminist advocates might have a role in resisting the punishment agenda and seeking liberty and substantive equality for criminalized women. Finally, it returns to Marlene Carter and considers “thinking outside the bars” in the light of the exploding number of incarcerated Indigenous women in Canada.

Before proceeding, a brief note on terminology is in order. The concept of liberty invoked here is different from a classic civil libertarian distrust of the state (although there are elements of that). Rather, it is a penal abolitionist approach to liberty, one that is critical of the whole enterprise of punishment and incarceration<sup>20</sup> and one that attends to the ways the state metes out punishment differentially based on race, gender, and other axes of marginalization. As such, it incorporates an intersectional substantive equality analysis<sup>21</sup> which, for purposes of this paper, involves “look[ing] to forms of inequality that are routed through one another [such as race, gender, disability]” as well as “investigat[ing] how inequalities are produced... through structures, processes and techniques of governance.”<sup>22</sup> This

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<sup>19</sup> I have not set out to conduct an exhaustive survey of legislative changes, but I have tried to identify some significant changes across a range of criminal justice fields (pre-trial detention, sentencing, federal imprisonment, parole, and pardons).

<sup>20</sup> See generally the recent collection of essays edited by Nicolas Carrier and Justin Piché, “Abolitionnisme - Abolitionism,” (2015) 12 *Champ Pénal/ Penal Field*, online: <https://champpenal.revues.org/9008>. Carrier and Piché identify seven core logics underlying contemporary penal abolitionism: “First, criminalization hides the complexity of situations and problematizes them in a way that imposes third party retribution by the state as the primary victim as a condition of just resolution. Second, punishment meted-out by national criminal legal systems is harmful to victims, perpetrators and their communities. Moreover, criminalization and penalization result in neglecting the needs and interests of those in conflict. Third, the critique of heteronomy highlights that penal agents, institutions and policies take ownership of how some conflicts are to be conceptualized and responded to with little space afforded to the autonomy of the actors involved. Fourth, the moral justification of punishment is simply impossible. Fifth, it is irrational to continue the imprisonment and punishment experiment in light of its dismal track record as it relates to meeting its stated objectives. Sixth, contemporary processes of penal intensification testify to a strengthened capitalist order in which the deprivation of liberty, designed to maximize the accumulation of wealth and other forms of power, disproportionately targets populations marked by difference according to classist, racist, sexist, heteronormative, ageist and ableist lines. A final logic animating abolitionist work concerns the normalized use of confinement outside the realm of penalty, through a suspension or absence of law removing due process protections, as a significant emerging force that needs to be contended with in working towards a world without carceral logics, policies and practices.” Nicolas Carrier and Justin Piché, “Blind Spots of Abolitionist Thought in Academia,” (2015) 12 *Champ Pénal/ Penal Field* at para 2.

<sup>21</sup> On the importance and challenge of intersectional analysis, see Emily Grabham et al, eds, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: Routledge-Cavendish, 2009).

<sup>22</sup> Grabham et al, *ibid* at 1-2.

paper will consider how feminist prison reformers have engaged with the carceral state seeking substantive equality – through the Task Force on Federally Sentenced Women in 1990 and other means – and how the aftermath of those engagements has been problematic for many criminalized women. Their experience cries out for a liberty-based analysis that is critical of the state and its punishment practices while also attending to substantive inequality.

### A. The Punishment Agenda: Chronicling Some of the Changes

From 2006 to 2015, Canada’s Parliament was busy enacting piecemeal, yet very substantial, changes to criminal and penal law.<sup>23</sup> The increased number of mandatory sentences is one of the higher profile aspects of this punishment agenda.<sup>24</sup> For a paper published in 2012, I tallied nearly 100 mandatory sentences, with the vast majority of those being added in the preceding 20 years.<sup>25</sup> A recent study by the British Columbia Civil Liberties Association identified approximately 50 mandatory minimum sentences in the *Criminal Code*, noting that different methods of counting may yield different absolute numbers while concluding that “it is beyond doubt that mandatory minimum sentences of imprisonment are a growing trend in Canada.”<sup>26</sup>

Looking beyond the unprecedented growth of mandatory sentencing, a number of other punitive changes have been made. They include new limits on the availability of conditional sentences of imprisonment (*i.e.*, sentences that would otherwise be terms of imprisonment, served in the community on strict conditions) to the point that they are largely unavailable for most offences for which they would be useful;<sup>27</sup> new limits on credit for pre-sentence custody in sentencing (sharply limiting the availability of enhanced credit - such as “two for one” credit - for time served in

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<sup>23</sup> Since this paper was written, the federal Conservative party that enacted these laws over a decade was defeated in the October 19, 2015 general election. Canada’s new Liberal government has indicated an intention to roll back some of this legislation. See Office of the Prime Minister of Canada, Minister of Justice and Attorney General Mandate Letter (November 2015), online: <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>. Such changes would be welcome, but it is important to note that the growth in women’s imprisonment (as well as the gendered and racialized impact of various reform efforts) predate the Conservatives taking power in 2006.

<sup>24</sup> I use the term punishment agenda to describe not only an increasing prison population but more fundamentally a policy agenda that is based on an ideology – often in the face of contradictory evidence – that more punishment (particularly incarceration) will make Canadians safer. In the US context, see Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

<sup>25</sup> Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 Sup Ct L Rev 149. I counted 84 mandatory minimum sentences in the *Criminal Code*, RSC 1985, c C-46, and 14 in the *Controlled Drugs and Substances Act*, SC 1996, c 19 (counting a hybrid offence as one even where there is a minimum sentence for both indictable and summary options; and counting a first offence minimum as one and a subsequent offence minimum as another).

<sup>26</sup> Raji Mangat, *More than We Can Afford: The Costs of Mandatory Minimum Sentencing* (Vancouver: British Columbia Civil Liberties Association, 2014) at 9.

<sup>27</sup> *Safe Streets and Communities Act*, SC 2012, c 1, amending *Criminal Code*, s 742.1.

custody awaiting trial);<sup>28</sup> and changes to the availability of parole such as the repeal of provisions for accelerated early parole,<sup>29</sup> meaning that prisoners are serving longer before being eligible for release. Additional legislative amendments change the pardon system, abandoning the notion of pardons altogether in favour of “criminal record suspensions” and making them more difficult to obtain.<sup>30</sup>

Added to this disheartening list are changes to key provisions in federal corrections legislation, the *Correctional and Conditional Release Act*,<sup>31</sup> watering down the former guiding principle that correctional authorities must use “the least restrictive measures consistent with the safety of the public, staff and offenders” to now provide simply that measures be “limited to only what is necessary and proportionate to attain the purposes of this Act.”<sup>32</sup> Without attempting to be exhaustive of all changes, I note that other legislative initiatives have:

- introduced mandatory victim fine surcharges, removing judicial discretion to waive the fine for indigent individuals;<sup>33</sup>
- made it easier to have someone declared a dangerous offender (and therefore, imprisoned indefinitely);<sup>34</sup>
- introduced a new regime for the detection and investigation of drug-impaired driving and increase the penalties for impaired driving;<sup>35</sup>
- created new offences with enhanced punishments, for example theft of a motor vehicle, trafficking in the proceeds of crime, identity theft, and recording a movie in a movie theatre;<sup>36</sup>

<sup>28</sup> *Truth in Sentencing Act*, SC 2009, c 29, amending *Criminal Code*, s 719(3)-(3.1). But see *R v Summers*, 2014 SCC 26 (interpreting s 719(3) which provides as follows: “In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.” The Court held that the lost opportunity for early release and parole during pre-sentence detention can be circumstance capable of justifying enhanced credit at rate of 1.5:1). See also *R v Safarzadeh-Markhali*, 2014 ONCA 627, on appeal to the SCC (declaring s 719(3.1), which capped pre-sentence credit at 1:1 in certain circumstances, invalid under the *Charter*).

<sup>29</sup> *Abolition of Early Parole Act*, SC 2011, c 11, s 10(1), repealing s 125(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20. But see *R v Whaling*, [2014] 1 SCR 392 (declaring the retrospective application of this change invalid under the *Charter*).

<sup>30</sup> *Safe Streets and Communities Act*, SC 2012, c 1, amending *Criminal Records Act*, RSC, 1985, c C-47.

<sup>31</sup> *Correctional and Conditional Release Act*, SC 1992, c 20.

<sup>32</sup> *Ibid* at s 4(c).

<sup>33</sup> *Increasing Offenders’ Accountability for Victims Act*, SC 2013, c 11, amending s 737 of the *Criminal Code*. But see *R v Michael*, 2014 ONCJ 360 (declaring the mandatory nature of the victim fine surcharge invalid under the *Charter*).

<sup>34</sup> *Tackling Violent Crime Act*, SC 2008, c 6, amending *Criminal Code*, Part XXIV, s 752 ff. See Jordan Thompson, “Reconsidering the Burden of Proof in Dangerous Offender Law: Canadian Jurisprudence, Risk Assessment and Aboriginal Offenders” (2016) 79:1 Sask L Rev 49, citing an increase in the number of dangerous offender designations following the amendments and noting that various aspects of the new regime “have overwhelmingly contributed to the increase in DOs as a whole and specifically DOs with Aboriginal identity” (at 50).

<sup>35</sup> *Ibid* SC 2008, c 6, amending *Criminal Code*, ss 253-259.

<sup>36</sup> *An Act to amend the Criminal Code (auto theft and trafficking in property obtained by crime)*, SC 2010, c 14, amending *Criminal Code*, s 333, 333.1 (theft of a motor vehicle), s 353.1 (obliterating a vehicle identification number), s 355.1-355.5 (new proceeds of crime offences); *An Act to amend the Criminal*

- abolished the so-called “faint-hope clause” for those serving a life sentence for murder meaning that there is no opportunity to revisit the automatic 25 year parole ineligibility period for first degree murder;<sup>37</sup> and
- introduced the option that judges may order parole ineligibility periods to run consecutive to one another – *i.e.*, to create a 50 year parole ineligibility period where there were two victims.<sup>38</sup> In 2014, Justin Bourque, who pled guilty to the first degree murder of three police officers, was sentenced to life in prison with no possibility of parole for 75 years – described by the sentencing judge as “life-long incarceration.”<sup>39</sup>

Beyond the sheer volume, speed, and scope of the changes, it is worth noting that a number of them originated as Private Member’s Bills<sup>40</sup> with no basis in research and not even a pretense that research and evidence should ground significant amendments to criminal law. Significant errors and omissions have been found in Bills proceeding from the House of Commons to the Senate.<sup>41</sup> Information also emerged about massive cuts to the legal and research budgets in the federal Department of Justice,<sup>42</sup> along with the departure of senior policy and legal advisors, some of whom are speaking out about the state of disarray<sup>43</sup> and at least one who commenced litigation against the Department for failing to vet laws for compliance with the *Canadian Charter of Rights and Freedoms*.<sup>44</sup>

Added to these legislative changes are a host of policy decisions, practices, and cultures within police departments, prosecution offices, and the defence bar that play a role in contributing to a rising prison population, including a rapidly rising

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*Code (identity theft and related misconduct)*, SC 2009, c 28, amending *Criminal Code*, s 56.1, s 402.1-403; *An Act to amend the Criminal Code (unauthorized recording of a movie)*, SC 2007, c 28, amending *Criminal Code*, s 432.2.

<sup>37</sup> *An Act to amend the Criminal Code and another Act*, SC 2011, c 2, amending *Criminal Code*, s 745.6.

<sup>38</sup> *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5, amending s 745.51.

<sup>39</sup> *R v Bourque*, 2014 NBQB 237, 427 NBR (2d) 259 at para 33. For a critique of this decision and the lack of any consideration of the *Charter*, see Isabel Grant and Debra Parkes, “By locking up Bourque and throwing away the key, we lose hope in justice,” *The Globe and Mail* (2 November 2014), online: <http://www.theglobeandmail.com/globe-debate/by-locking-up-bourque-and-throwing-away-the-key-we-lose-hope-in-justice/article21419211/>

<sup>40</sup> Bruce Cheadle, “Vic Toews: Tories Backing Record Number Of Private Members’ Bills,” *Canadian Press* (5 August 2013), online: [http://www.huffingtonpost.ca/2013/05/08/tories-back-private-members-crime-bills\\_n\\_3240603.html](http://www.huffingtonpost.ca/2013/05/08/tories-back-private-members-crime-bills_n_3240603.html)

<sup>41</sup> Michael Spratt, “Firing blind: The Harper government’s bungled crime agenda,” *iPolitics* (5 September 2014), online: <http://ipolitics.ca/2014/09/05/the-harper-governments-crime-agenda-firing-blind/>

<sup>42</sup> Spratt, *ibid.*

<sup>43</sup> For example, Mary Campbell, the Ministry of Public Safety’s former Director-General of the Corrections and Criminal Justice Directorate, is quoted in Sean Fine, “Conservatives’ crime bill endangered by ‘administrative error’,” *The Globe and Mail* (28 August 2014).

<sup>44</sup> Roderick MacDonell, “The Whistleblower,” *CBA National* (November-December 2013) (profile on Edgar Schmidt, former federal Department of Justice lawyer). The claim was dismissed by the Federal Court: *Schmidt v. Canada (Attorney General)*, 2016 FC 269 and Schmidt has filed a notice of appeal: <http://charterdefence.ca/appeal-related.html>.



population of prisoners on remand.<sup>45</sup> Lisa Kerr has identified punitive changes that may take the form of policy rather than legislation, not necessarily resulting from “tough on crime” political promises.<sup>46</sup> For example, she documents the development and implementation of the Management Protocol, a policy regime designed by the Correctional Service of Canada to effectively subject a small group of “difficult to manage,” mostly Indigenous women prisoners, to a prolonged regime of solitary confinement that denied them access to prison programs and some basic legislative protections.

Focusing on legislative changes alone may mean missing significant administrative and policy developments that have gendered impact. We know very little about criminal justice policies and practices because they are rarely the subject of research<sup>47</sup> or media attention in Canada. Deeply troubling, for example, are anecdotal accounts from both Crown and defence counsel in Manitoba about the extent to which lawyers plead clients out in shockingly high volume because of serious access to justice issues in Northern First Nations communities.<sup>48</sup> I hear regularly from former students who are in criminal practice about restrictive Crown policies with respect to bail and sentencing, about Indigenous women not being welcome in their communities when they are released from prison, and about the negative implications of shrinking resources for Legal Aid relative to police and prosecution funding.

There have been a few successful challenges to some of the punitive legislative changes<sup>49</sup> but rates of incarceration remain high. According to 2013/2014 statistics, the rate of imprisonment was down slightly in 5 of the 12 reporting provinces and territories but the federal rate of imprisonment rose. Manitoba has the highest rate of incarceration at 242 per 100,000 adult population.<sup>50</sup> Prisoners are being double-, triple-, and quadruple-bunked, and are being held in make-shift cells or dormitories which are supposed to be gyms, programming areas, and the like.<sup>51</sup> A parallel

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<sup>45</sup> Lindsay Porter & Donna Calverley, “Trends in the use of remand in Canada,” *Juristat* 85-002-X (17 May 2011).

<sup>46</sup> Lisa Kerr, “The Origins of Unlawful Prison Policies,” (2015) 4:1 *Can J Hum Rts* 91.

<sup>47</sup> There are exceptions. See, e.g., the work of criminologist Nicole Myers who has studied the operation of the bail system in Canada. Nicole Myers & Sunny Dhillon, “The Criminal Offence of Entering any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions” (2013) 55 *Can J Crim & Crim J* 187; Nicole Myers, “Shifting Risk: Bail and the Use of Sureties,” (2009) 21 *Current Issues in Criminal Justice* 127.

<sup>48</sup> This practice raises significant ethical issues and the potential for the wrongful convictions, yet it is little studied in the Canadian context. See Debra Parkes & Emma Cunliffe, “Women and wrongful convictions: concepts and challenges,” (2015) 11:3 *Int J L Context* 219.

<sup>49</sup> See Debra Parkes, “The Punishment Agenda in the Courts,” (2014) 67 *Sup Ct L Rev* 589, online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2488758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488758) (discussing some successful *Charter* challenges to mandatory sentences for gun crimes and to inhumane prison conditions).

<sup>50</sup> Correctional Services Program, “Adult Correctional Statistics 2013/2014,” *Juristat* 85-002-X (22 April 2015).

<sup>51</sup> See, e.g., *Report of the Office of the Correctional Investigator (Canada) on the Baffin Correctional Centre and the Legal and Policy Framework of Nunavut Corrections* (23 April 2013) <http://assembly.nu.ca/library/GNedocs/2013/001193-e.pdf> (The report concluded that the Baffin Correction

development is the rapid rise in the remand population. In the last 10 years, the remand population relative to sentenced population has gone from roughly 40-60 to 60-40, meaning that now over 60% of all people detained in provincial jails are awaiting trial. At last count, Manitoba has the dubious distinction of leading the country in this regard, with Ontario close behind.<sup>52</sup> There appears to be some increasing media attention to the breadth and impact of this phenomenon, particularly since the release of the Canadian Civil Liberties Association’s damning report on the subject.<sup>53</sup>

## **B. Gendered Impact of the Punishment Agenda**

### *Disproportionate Impact of Mandatory Sentencing on Women*

Experience with decades of mandatory sentences in the United States has shown that removing discretion from judges in sentencing coincides with a growth in women’s imprisonment. From 1980-2010, the rate of incarceration for American women increased at a rate of 646% (compared to 419% for men during the same period).<sup>54</sup> There are at least three reasons why mandatory sentences may disproportionately increase sentences for women. The first is that judges cannot take family responsibilities and the impact on children into account to mitigate a sentence below the minimum, which has an impact on women who are more likely to be primary caregivers for children. In addition, the inability of judges to take into account lower levels of culpability (such as being a party to a spouse’s offence), may disproportionately affect women.<sup>55</sup> Finally, there is some evidence that women may plead guilty at rates higher than men<sup>56</sup> and that mandatory sentences may disproportionately increase the risk of wrongful convictions for women.<sup>57</sup> Harsh mandatory penalties, and prosecutorial decisions to pursue them, can lead to wrongful convictions when innocent women (and men) plead guilty, and those pressures may be even more pronounced on women who are more likely to be primary caregivers of children.<sup>58</sup>

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Centre “has been grossly overcrowded for many years, and it is now well past its life expectancy. The current state of disrepair and crowding are nothing short of appalling, and negatively impacts on both inmates and staff. Cells are overcrowded beyond acceptable standards of safe and humane custody” at 6-7).

<sup>52</sup> Porter & Caverley, *supra* note 45.

<sup>53</sup> See, e.g., Patty Winsa, “Canada’s jails teeming with people awaiting bail, or trial,” *The Toronto Star* (23 July 2014); Canadian Civil Liberties Association, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (July 2014), online: [https://ccla.org/dev/v5/doc/CCLA\\_set\\_up\\_to\\_fail.pdf](https://ccla.org/dev/v5/doc/CCLA_set_up_to_fail.pdf)

<sup>54</sup> The Sentencing Project, “Incarcerated Women,” (September 2012) online: [http://www.sentencingproject.org/doc/publications/cc\\_Incarcerated\\_Women\\_Factsheet\\_Sep24sp.pdf](http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf), cited in Lisa Kerr, “Tough Sentencing: Women and Children First,” *In Due Course*, online: <http://induecourse.ca/tough-sentencing-women-and-children-first/>.

<sup>55</sup> Kerr, *ibid*.

<sup>56</sup> Kathleen Daly, *Gender, Crime, and Punishment* (New Haven: Yale University Press, 1994) at 19.

<sup>57</sup> Parkes & Cunliffe, *supra* note 48 at 230-235.

<sup>58</sup> *Ibid* at 230-231, citing, for example, Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) at 127-128.

Our experience in Canada is following the exploding incarceration rate for women south of the border. In the last decade, the rate of women’s incarceration in Canadian federal prison has increased at a much faster rate than it has for men. Between 2003-2013, the number of women prisoners increased by over 60%, while the federal population increased 16.5% overall during the same period. Most troubling is that the federal incarceration rate for Indigenous women increased by 84% during this period.<sup>59</sup> Manitoba is leading this troubling trend, with a provincial rate of incarceration that grew 233% from 2003 (78 women) to 2012 (260 women).<sup>60</sup>

Other research has demonstrated that the incarceration of women, most of whom live in low-income, under-serviced, and otherwise struggling communities has a disproportionately negative impact on those communities.<sup>61</sup> In addition to women bearing more childcare responsibilities than men, women in these communities often serve multiple roles, including with extended family, and are often the “glue” that keeps poor, disadvantaged neighbourhoods together. Their removal affects communities on a scale disproportionate to their relatively low numbers. Most of the attention in the US to the impact of mass incarceration on families and communities has been on the absence of fathers. This attention is important, but longitudinal studies show that parental imprisonment increases negative outcomes for children and, to the extent that it has been studied, there are indications that the outcomes are worse (*i.e.*, the impact is even greater) when the parent is a mother.<sup>62</sup>

It is beyond the scope of this paper to canvass all of the ways that women might be affected differently or disproportionately by various other legislative and policy changes beyond mandatory sentencing. However, the reality of a growing population of incarcerated women cannot be denied. And many of them do particularly hard time.

*Gendering Prison Reform: From “Correctional Afterthoughts” to “Unempowerable Women”*

Despite the recent growth in women’s imprisonment, men still vastly outnumber women in prison. According to the most recent numbers from Statistics Canada, women represent 11% of admissions to provincial and territorial custody and 6% of those in federal custody.<sup>63</sup> As a group, women’s crimes tend to be on the lower end of seriousness; over half are property crimes or administration of justice offences, such as breaches of court orders. Women’s violent offences are more likely to be

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<sup>59</sup> Office of the Correctional Investigator, *Annual Report of the Correctional Investigator 2012-2013* (28 June 2013) at 35, online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20122013-eng.pdf>.

<sup>60</sup> Office of the Auditor General – Manitoba, *Annual Report to the Legislature* (March 2014), Chapter 6: Managing the Province’s Adult Offenders, at 242, online: <http://www.oag.mb.ca/wp-content/uploads/2014/03/Chapter-6-Managing-the-Provinces-Adult-Offenders-Web.pdf>.

<sup>61</sup> Candace Kruttschnitt, “The Paradox of Women’s Imprisonment” (2010) 139(3) *Daedalus* 32.

<sup>62</sup> Kruttschnitt, *ibid.*

<sup>63</sup> Adult Correctional Statistics in Canada, 2013/2014, *supra* note 50.

common assault rather than more serious offences, although, of course, there are cases where women commit serious violent offences.

In Canada, the increased rate of women’s imprisonment has come on the heels of rapid changes in federal imprisonment during the last 15-20 years – the closure of the Prison for Women and subsequent construction of the new regional prisons ostensibly based on the model of empowering women set out in the 1991 Report of the Task Force on Federally Sentenced Women, *Creating Choices*.<sup>64</sup> That Report advocated a new, less punitive, more empowering approach for women. In fact, what we saw was the closure of the Prison for Women in Kingston and the construction of new regional women’s prisons which were soon fortified with increasing levels of static security, maximum security units that amount to virtual segregation, and the closure of the only minimum security prison for women in the country.<sup>65</sup> A centerpiece of the new reforms, the Okimaw Ohci Healing Lodge, located on the Nekaneet First Nation in southwestern Saskatchewan, remains inaccessible to the vast majority of Indigenous women prisoners. Contrary to the recommendations in *Creating Choices*, the Correctional Service of Canada limits admission to the Lodge to women who are minimum security (or in rare cases, “low risk” medium security). Due to the under-representation of Indigenous women in minimum security populations (further discussed below), this restrictive policy ensures that the vast majority of Indigenous women have no hope of serving their time at the Lodge.<sup>66</sup>

As Kelly Hannah-Moffatt has shown in her study of the aftermath of *Creating Choices*, the idea of a women-centred prison, tasked with empowering women and giving them meaningful choices, was a paradox from the start.<sup>67</sup> The malleability of “empowerment” discourse in a prison environment has been demonstrated in the justification for the many security enhancements and the building of maximum security units in the regional prisons. The Correctional Service of Canada now routinely talks about “difficult to manage” or “high-risk, high-need” women prisoners (overwhelmingly Indigenous women and/or women with mental health needs)<sup>68</sup> who are seen as unable or unwilling to take responsibility and, therefore,

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<sup>64</sup> *Creating Choices*, *supra* note 8.

<sup>65</sup> Rob Tripp, “Women’s prison can be closed, court rules,” *Kingston Whig-Standard* (16 October 2008), online: <http://www.thewhig.com/2008/10/16/womens-prison-can-be-closed-court-rules>

<sup>66</sup> Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (22 October 2012), online: <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx>. See also Patricia Monture, “Confronting Power: Aboriginal Women and Justice Reform,” (2006) 25(3) *Can Women Studies* 25.

<sup>67</sup> Kelly Hannah-Moffatt, *Punishment in Disguise: Penal Governance and the Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001) at 189.

<sup>68</sup> See, for example, Roger Boe et al., *The Changing Profile of the Federal Inmate Population: 1997 and 2002*, Ottawa: Research Branch, Correctional Service of Canada, 2003. This report warns that not only is the population of women prisoners growing, ‘but the composition has also changed in some ways that portend greater challenges for correctional managers and staff,’ citing increases in maximum security designations, gang affiliation, and prior contact with youth and provincial adult correctional systems. A

as essentially “unempowerable.” The retreat from the goals of *Creating Choices* has been justified at least in part due to this alleged “changing profile” of women prisoners as more dangerous and “risky”.<sup>69</sup> Within this system, there is strong evidence of systemic over-classification of Indigenous women as maximum security.<sup>70</sup> At the same time, Indigenous women are under-represented in the minimum security population.<sup>71</sup>

One basic element of the discrimination experienced by women prisoners in Canada is the reality that they are effectively penalized for their smaller numbers relative to men. At both ends of the security classification spectrum, women are disadvantaged. There is no minimum security prison for women in the entire country. Women’s prisons – at both the federal and provincial/territorial level – are “multi-level” which means that women who are designated minimum security do not have the benefit of meaningful minimum security conditions (which, for men, means a stand-alone minimum security institution with more freedom of movement, vocational opportunities, etc.). At the other end of the classification spectrum, women designated maximum security serve their time in more restrictive environments than maximum security men. Due to economies of scale, there are many large prisons that hold only maximum security men, meaning that those men – while under significant restraints – have access to the whole institution. If they are in the general population they can move throughout the institution at various times during the day. On the other hand, women designated maximum security are incarcerated in “max units” inside multi-level prisons. Those max units are akin to segregation units in many respects and the women rarely leave them.<sup>72</sup>

None of this is meant to suggest that men’s prisons are models worthy of aspiration, or that women and men should be treated exactly the same. The point is simply that the fact of women being charged with, and convicted of, crime at lower rates than men is a source of disadvantage in the current system. Louise Arbour, in her 1996 Report of the Commission of Inquiry into Certain Events at the Prison for Women in

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larger proportion were said to have “considerable need” for improvement in the area of substance abuse and personal/emotional issues.’ Online: [http://www.csc-scc.gc.ca/text/rsrch/reports/r132/r132\\_e.pdf](http://www.csc-scc.gc.ca/text/rsrch/reports/r132/r132_e.pdf)

<sup>69</sup> Boe, *ibid*; Hannah-Moffat, *supra* note 67 at 180-185.

<sup>70</sup> Cheryl Webster & Anthony Doob, “Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada,” (2005) 46 Can J Crim & Crim J 395. See also Kelly Hannah-Moffat, “Gendered Risk at What Cost: Negotiations of Gender and Risk in Canadian Women’s Prisons,” (2014) 14 Fem & Psych 243.

<sup>71</sup> Mandy Wesley, *Marginalized: The Aboriginal Women’s Experience in Federal Corrections* (Ottawa: Public Safety Canada, 2012) at 24, online: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/mrgnlzd-eng.pdf>, citing 2007 statistics that Aboriginal women made up only 18% of those women classified minimum security classification but 45% of those designated maximum security.

<sup>72</sup> All of this also means that the per person cost of women’s imprisonment is astronomical – over \$210,000 – per federally-sentenced woman per year, while the average cost for men is \$117,000 per person. Eric Thibault, “Federal inmate cost soars to \$117Gs each per year,” *Winnipeg Sun* (18 March 2014). Most of that additional spending is focused on excessive security and surveillance of this still small group of people, just over 600 women across the country.

Kingston,<sup>73</sup> saw it another way. She saw the low number of federally sentenced women, relative to men, as an opportunity to pilot new, community-based, decarceration initiatives and independent oversight mechanisms that could address the very troubling reality of illegality and human rights abuses in Canadian prisons.<sup>74</sup> These recommendations were not taken up and instead we have seen the rapid rise in women’s incarceration described earlier.

### *Gendered Pains of Imprisonment*

Additional disadvantage flows from the fact that women are often incarcerated a longer distance from their families,<sup>75</sup> a reality which has a disparate impact on them since many more women than men are primary caregivers for children. This problem is compounded by the fact that women are often less likely than men to have visits with their children because it tends to be women/mothers who are most likely to facilitate visits with an incarcerated parent. Given that more women than men are primary caregivers to children, the incarceration of women has a disproportionately negative impact on children.<sup>76</sup>

Furthermore, a growing body of research also shows that women are disciplined, managed, and penalized in correctional systems in ways different from men. Correctional authorities place a strong focus on “institutional adjustment” which rewards compliance, docility, and the ability to adapt to a prison environment.<sup>77</sup> While there are no Canadian studies on the topic, research from Australia and the US has shown that women are disciplined within the prison environment for less serious infractions than are men, a phenomenon often related to expectations about appropriate behaviour for women. A 2003 review of disciplinary proceedings in Victoria, Australia prisons found that women were more likely than men to be

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<sup>73</sup> The Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996) (“Arbour Report”).

<sup>74</sup> Arbour Report, *ibid.*

<sup>75</sup> For example, federally sentenced women from Manitoba serve their sentences out of province, most in Edmonton Institution but many even further away in BC, Quebec, Ontario, or Nova Scotia. For a few years after it opened in 2012, the new Women’s Correctional Centre (WCC) near Winnipeg had some beds for a few Manitoba federally sentenced women. The women who served their federal sentences at the WCC were there under an exchange-of-services agreement between the federal and provincial correctional authorities. That agreement ended on August 16, 2016 and was not renewed by Manitoba Justice. E-mail communication with Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies (19 July 2016) and letter from Margo Lee, Superintendent, Women’s Correctional Centre, Manitoba Justice, to Sue Delaney, Executive Director, Elizabeth Fry Society of Saskatchewan dated 11 July 2016 (on file with author).

<sup>76</sup> The harms of removing children from incarcerated mothers were recognized in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, [2013] BCJ No 2708 (declaring that the BC prison’s cancellation of a mother-child program unjustifiably infringed *Charter* rights), discussed *infra*.

<sup>77</sup> This approach has particularly negative implications for Indigenous women. See generally, Wesley, *supra* note 71.

<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/index-eng.aspx>

charged with institutional offences related to the “good order” of the institution.<sup>78</sup> An earlier, American study found that women were more likely than men to be disciplined for offences such as failing to obey orders, creating a disturbance, using vulgar language, and being out of place.<sup>79</sup>

At the same time, there has been important research conducted on the extent of trauma experienced by criminalized women throughout their lives – before, during, and after imprisonment. Trauma is a consistent reality, not a discrete event for these women<sup>80</sup> and prison fundamentally does not address trauma in women’s lives. Rather, there is evidence that many women experience prison as a continuation of the trauma.<sup>81</sup> Rates of self-injury are high, and increasing, among imprisoned women, with particularly high rates among Indigenous women. In a recent report, the federal Correctional Investigator (prison ombudsperson) noted with alarm that the frequency of self-injury among women prisoners has doubled in recent years and that fully one-quarter of the 559 incidents of self-harm were met with a use-of-force intervention.<sup>82</sup>

If women, as a group, do harder time in part because of their smaller numbers relative to men, Indigenous women do particularly hard time. The over-classification of Indigenous women as maximum security is even more pronounced than the over-classification of Indigenous men.<sup>83</sup> They are over-represented in segregation and they are more likely than non-Indigenous women to be detained until their statutory release date (2/3 of a federal sentence) or beyond, many to warrant expiry.<sup>84</sup> Risk assessment and security classification tools translate needs (experiences of trauma and abuse, mental health, addictions, perceived deficits in parenting and relationships) into risk factors which have gendered impacts for women generally and, in particular, lead to disproportionately higher security

<sup>78</sup> John (Darcy) Dugan, Vivienne Roche & Ian Tucker, *The Prison Discipline Review Regime*, Report to the Correctional Services Commissioner into prison discipline provisions, sanctions and privileges (June 2003) at 22, online: <https://assets.justice.vic.gov.au/corrections/resources/12ea58ea-5372-46c3-95e8-fb21707baa05/prisondisciplineregimereview.pdf>

<sup>79</sup> See, for example, Chloe Tichler and James Marquart, “Analysis of Disciplinary Infraction Rates among Male and Female Inmates” (1989) 17 J Crim J 507.

<sup>80</sup> Bree Carlton & Marie Segrave, “Women, Trauma, Criminalisation and Imprisonment” (2010) 22 Current Issues in Crim J 287, online: <http://www.austlii.edu.au/au/journals/CICrimJust/2010/33.html>

<sup>81</sup> Shoshana Pollack, *Locked In, Locked Out: Imprisoning Women in the Shrinking and Punitive Welfare State* (2008), online: <http://www.efryottawa.com/documents/LockedInLockedOut-SPollockresearchreport.pdfm>, at 20: “Being imprisoned often activates flashbacks and other effects of abuse since the carceral environment is reminiscent of abuse dynamics, such as powerlessness, extreme power imbalances and unpredictability. Sometimes women use familiar coping strategies such as dissociation, anger, and self-harm while imprisoned in order to deal with feelings and memories associated with abuse.”

<sup>82</sup> Office of the Correctional Investigator, Annual Report 2010-2014 (27 July 2014) at 46, online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf>. See also Office of the Correctional Investigator, *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women* (30 September 2013), online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20130930-eng.pdf>

<sup>83</sup> Wesley, *supra* note 77 at 23.

<sup>84</sup> Wesley, *ibid* at 41.

classification for Indigenous women.<sup>85</sup> In addition, there is a lack of gender- and culturally-appropriate programming available to Indigenous women in prison. Even where some programs have shown success, limited resources, overcrowding, and transferring women between institutions for “population management” means that many women simply do not have access to the programs they need to complete their “correctional plan” and seek parole.

The widespread and prolonged use of solitary confinement, or segregation as it is called in Canadian prisons, is a pressing human rights issue with gendered dimensions. A recent report by the American Civil Liberties Union discusses a number of ways in which solitary confinement involves particular harms for women.<sup>86</sup> Women may be disproportionately put in “the hole” for relatively minor infractions and for mental health reasons (*i.e.*, ostensibly for their own safety). Since women prisoners are survivors of trauma in huge numbers, they tend to turn that trauma onto themselves through self-injury (while, in some cases, also lashing out at correctional staff).

Much is now known about the harms and lasting psychiatric impact of solitary confinement.<sup>87</sup> It has been shown to contribute to the development of clinical depression, anxiety, perceptual distortions, paranoia and psychosis, as well as insomnia, anorexia and palpitations.<sup>88</sup> Nevertheless, it is still regularly used as a management tool in Canadian prisons and jails in a largely unregulated – even lawless – way. My study of segregation records in Manitoba’s provincial jail for women, obtained through access to information requests in 2010, revealed that administrative (non-disciplinary) segregation was used for reasons not grounded in law (*i.e.*, for “overflow” in 29% of cases) and for no documented reason at all (in 20% of those administrative segregation cases).<sup>89</sup> Record-keeping is shoddy and there appears to be no expectation of accountability on the part of provincial and territorial correctional authorities for their use of segregation.<sup>90</sup>

### C. Thinking Outside the Bars

In the face of this punitive system, what is a feminist advocate to do? I suggest that, to seek liberty and substantive equality for women in this context we need to “think outside the bars”, which involves at least three elements: bearing witness to the

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<sup>85</sup> Webster & Doob, *supra* note 70; Kelly Hannah-Moffat, *supra* note 70.

<sup>86</sup> American Civil Liberties Union, *Worse than Second Class: Women in Solitary Confinement in the United States* (12 February 2012), online: <https://www.aclu.org/report/worse-second-class-solitary-confinement-women-united-states>.

<sup>87</sup> Debra Parkes, “Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement” (2015) 4:1 *Can J Hum Rts* vii.

<sup>88</sup> See, *e.g.*, Diane Kelsall, “Cruel and unusual punishment: solitary confinement in Canadian prisons” (2014) 186:18 *CMAJ* 1345; Stuart Grassian, “Psychiatric Effects of Solitary Confinement” (2006) 22 *Wash UJL & Pol’y* 325.

<sup>89</sup> Documents on file with author.

<sup>90</sup> See, *e.g.*, “Yukon should track, publish segregation records: professor,” *CBC My Region* (11 September 2014), online: <http://www.cbc.ca/m/touch/canada/north/story/1.2763076>



violence of incarceration; seeking external oversight of corrections; and assessing our strategies for their potential to either disrupt or normalize punishment and imprisonment as policy.

### *Bear Witness*

A key element of thinking outside the bars is bearing witness to the harsh realities of imprisonment, the experiences of imprisoned people, and what Phil Scraton and Jude McCulloch have called the violence of incarceration.<sup>91</sup> Angela Y. Davis speaks to the way that imprisonment is both present and absent in US society and in the lives of Americans. Her words are apt in the Canadian context:

... the prison is present in our lives and, at the same time, it is absent from our lives. To think about this simultaneous presence and absence is to begin to acknowledge the part played by ideology in shaping the way we interact with our social surroundings. We take prisons for granted but are often afraid to face the realities they produce.”<sup>92</sup>

Scraton and McCulloch argue that “academic research has a fundamental responsibility to inquire, investigate, and bear witness to what happens behind the doors of closed institutions.”<sup>93</sup> Academic freedom is an important tool that can be wielded strategically as one means to crack open the intensely closed nature of penal institutions, through both our teaching and research. As a legal academic I am particularly mindful of the extent to which most legal education in Canada effectively ignores that reality of imprisonment as the sanction so central to criminal law - both in terms of its ubiquity as a sentence, recognizing that the vast majority of charges are resolved by guilty plea, and in the way substantive and procedural criminal law is shaped by the spectre of imprisonment. We talk in the abstract about deprivations of liberty but we rarely engage with the actual practices and conditions of incarceration in teaching the next generation of lawyers who will set policy and play central, if unwitting, roles in perpetuating carceral systems in Canada. On the research side, we have (admittedly shrinking) access to research monies to conduct research into imprisonment in Canada. I have found access to information processes (some of which entail substantial fees to produce basic information about correctional practices such as segregation or uses of force), as well as collaborations with prisoner advocacy groups such as the Elizabeth Fry Societies, to be key components of a research agenda grounded in bearing witness to the realities of incarceration.

Lawyers also play a role in bearing witness, as does civil society. Lawyers have

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<sup>91</sup> Phil Scraton & Jude McCulloch, *The Violence of Incarceration* (New York: Routledge, 2009).

<sup>92</sup> Angela Y. Davis, 2003 at 15.

<sup>93</sup> Scraton & McCulloch, *supra* note 91 at viii.

unique access to carceral sites<sup>94</sup> and important relationships with prisoners that provide them with information about conditions of confinement that may involve serious violations of statutory and constitutional rights. Of course, the economics of criminal defence practice and the very limited legal aid funding for prisoner cases pose challenges for lawyers who seek to do this work. However, lawyers who are aware of the relevant law (including viable *Charter* arguments and precedents), and conditions in local jails and remand centres, can make a difference, particularly in sentencing and bail matters. Lawyers regularly putting the conditions of confinement on the record can have at least two consequences: those conditions can provide a basis for a mitigated sentence,<sup>95</sup> where possible (*i.e.*, where there is no mandatory minimum) while also providing important context to the sentencing principles themselves (rehabilitation, deterrence and the like) which otherwise tend to be considered in the abstract.<sup>96</sup>

Knowledge of the conditions of confinement, and systemic discrimination experienced by Indigenous prisoners, should also inform lawyers' sentencing submissions for all Indigenous clients facing jail time. The reality that Indigenous women do particularly hard time (they are disproportionately in segregation and in near-segregation maximum security units, while also regularly delayed in accessing parole) is relevant to a sentencing court's consideration of "all available sanctions other than imprisonment, with particular attention to the circumstances of aboriginal offenders," as interpreted in *R v Gladue*.<sup>97</sup> Part of the rationale for *Gladue* consideration in sentencing is to avoid or limit the particularly negative impact that incarceration has on Indigenous people. However, without knowledge of the lived experience of incarceration for Indigenous women, and in the context of a punishment-focused sentencing system where "*Gladue* factors" such as experiences of abuse, poverty, and addiction can be converted into risk factors<sup>98</sup> favouring a more stringent sentence, Indigenous women often do not receive any meaningful benefit from the promise of *Gladue*.<sup>99</sup>

Civil society, through advocacy groups, social media, conventional media campaigns or investigative journalism, can also play a crucial role in bearing witness. Prisoners

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<sup>94</sup> However, even basic rights to counsel can be thwarted by correctional officials. But when this happens, lawyers can and should speak out. See, *e.g.*, "Defence lawyer forced to meet with client through meal slot," CBC News North (9 September 2014), online: <http://www.cbc.ca/news/canada/north/defence-lawyer-forced-to-meet-with-client-through-meal-slot-1.2760790>. The lawyer quoted in this new story is one of a small handful who practices prison law and take prisoners' rights cases as part of his criminal defence practice

<sup>95</sup> See, *e.g.*, *R v Palmantier*, 2014 NWTTC 10.

<sup>96</sup> Debra Parkes, "The Punishment Agenda in the Courts," *supra* note 49 at 614-615.

<sup>97</sup> [1999] 1 SCR 688, 171 DLR (4<sup>th</sup>) 385. See David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Toward Implementation in Manitoba," (2011) 35 Man LJ 84 for a discussion of the limited effect that *Gladue* has had in addressing the crisis of Indigenous over-representation in prisons and jails.

<sup>98</sup> Kelly Hannah-Moffat, "Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 Punishment & Society 262.

<sup>99</sup> Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 Fem Crim 101.

and former prisoners themselves should also be part of advocacy and education efforts as they are the true experts on the experience of prison.<sup>100</sup> Community and media strategies can be effectively combined with litigation or other legal strategies. For example, the media attention surrounding the events and aftermath of Ashley Smith’s death in custody – including in-depth, investigative reporting by the Fifth Estate,<sup>101</sup> combined with dogged advocacy by the Canadian Association of Elizabeth Fry Societies and other groups – augmented the formal legal processes (coroner’s inquest, judicial review applications, civil action). Together, these efforts opened a rare window on disturbing realities of women’s imprisonment that Canadians do not otherwise see.

### *Seek oversight*

Seeking oversight and accountability of prisons, jails, and lock-ups in Canada can be part of an agenda to think outside the bars, not as a tool of prison reform but as a means to shed light on the realities of incarceration and to redress some of the very real harms of imprisonment. In her *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, then Justice Louise Arbour concluded that judicial oversight of imprisonment was necessary to effectively sanction widespread illegality and violations of rights. She recommended that judges should supervise the integrity of the sentence handed down by ordering a reduction in the term of imprisonment where it has been proven that there were “illegalities, gross mismanagement or unfairness in the administration of the sentence.”<sup>102</sup> The recommendation to legislate the so-called Arbour Remedy has, not surprisingly, not been taken up. However, it was successfully argued by a prisoner in one case decided very soon after the Report was released<sup>103</sup> and could potentially be available as a remedy under section 24(1) of the *Charter*, even without legislation providing for such applications. *Habeas corpus* is a sufficiently flexible remedy<sup>104</sup> that could enable a court to consider such an application post-sentencing.

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<sup>100</sup> Gayle Horii, Debra Parkes, & Kim Pate, “Are Women’s Rights Worth the Paper They’re Written On? Collaborating to Enforce the Human Rights of Criminalized Women,” in Gillian Balfour and Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)Justice in Neo-Liberal Times* (Halifax: Fernwood, 2006) at 302 (discussing the broad-based coalition of women’s organizations, former prisoners, and other social justice groups, led by the Canadian Association of Elizabeth Fry Societies, that urged the Canadian Human Rights Commission to issue a special report into systemic discrimination experienced by federally sentenced women in 2003).

<sup>101</sup> The Fifth Estate produced two different documentaries on the Ashley Smith case – “Out of Control” (2009) and “Behind the Wall” (2010). I regularly show part or all of these documentaries in my law school classes. They provide the opportunity for rare glimpses into Canadian prisons, including raw, disturbing footage that correctional authorities did not want Canadians to see and which was only made available through a court application: *Canadian Broadcasting Corporation v R*, 2010 ONSC 86.

<sup>102</sup> Arbour, *supra* note 73 at 183.

<sup>103</sup> *MacPherson* (1996), 48 CR (4th) 122 (NBSC).

<sup>104</sup> See, e.g., *Khadr v Bowden Institution*, 2015 ABQB 261, 18 Alta LR (6th) 329, *aff’d* 2015 ABCA 159, 2015 AJ No 508 in which Ross J granted bail pending appeal to Omar Khadr in relation to a US Military Tribunal matter, on the basis of *habeas corpus*’ common law gap-filling function for assessing the legality of any deprivation of liberty.

In addition to being an important avenue to bear witness to the realities of women’s imprisonment, rights litigation is the strongest of the existing (limited) avenues of prison oversight in Canada. Through strategic litigation, human rights complaints, *habeas corpus* applications, challenges based on the *Charter* or other laws, coroners’ inquests, and other judicial or quasi-judicial processes, there can be some measure of accountability brought to correctional systems.<sup>105</sup> Other avenues of oversight include complaints to provincial Ombuds offices or, in the case of federal corrections, to the Office of the Correctional Investigator (OCI). Unlike the OCI, provincial Ombuds officials do not have a specialized mandate to address prisoner complaints, nor do they have an explicit human rights mandate.<sup>106</sup> However, like the OCI, provincial Ombuds officials are empowered in many jurisdictions to bring complaints of their own initiative<sup>107</sup> and can, for example, conduct significant investigations into conditions and abuses in correctional centres.<sup>108</sup>

It is possible for lawyers to make greater use of *habeas corpus* as a remedy to bring illegal conditions and treatment before the courts. The Supreme Court of Canada has recently reaffirmed that right of prisoners to seek timely *habeas corpus* review in provincial superior courts.<sup>109</sup> Those courts can assess both the procedural fairness and the substantive reasonableness of a correctional decision in deciding whether detention is lawful. One example of *habeas corpus* being used successfully for women prisoners on a systemic issue can be found in the 1997 *Beaudry* case<sup>110</sup> which involved a group of women prisoners challenging a proposed transfer from the then Prison for Women to the Regional Treatment Centre in Kinston Penitentiary (a men’s prison). The right of the prisoners to seek *habeas corpus* in the superior court was challenged by the correctional authorities but the prisoners won at both the Superior Court and the Court of Appeal. At that point, the action was settled and the transfer was cancelled.

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<sup>105</sup> See generally, Debra Parkes & Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48 Can J Crim J 251.

<sup>106</sup> Interviews with Ombudsman staff in Manitoba reveal that they feel limited by their statutory mandate to promote institutional *fairness*, not human rights. Documents on file with author.

<sup>107</sup> See, e.g., s. 15(a) of *The Ombudsman Act*, CCSM c O45, provides that “The Ombudsman may, on a written complaint or on his own initiative, investigate (a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved...” (emphasis added).

<sup>108</sup> See, e.g., Ontario Ombudsman, *The Code: An investigation into the Ministry of Community Safety and Correctional Service’s response to allegations of excessive use of force against inmates* (June 2013), online:

<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Investigations/SORT%20Investigations/The-Code-EN.pdf> (finding a culture of cover-up, silence, and illegality among correctional officers in the face of known instances of prisoner abuse, and making significant recommendations for culture change and accountability).

<sup>109</sup> *Mission Institution v Khela*, [2014] 1 SCR 502.

<sup>110</sup> *Beaudry et al v Canadian Association of Elizabeth Fry Societies et al*, 1997 CanLII 514 (ONCA). The case should be styled *Beaudry et al v The Commissioner of Corrections et al* since CAEFS was an intervenor, not a respondent to the action.

There have been some unsuccessful cases. For example, an application for *habeas corpus* and *certiorari* to challenge the closure of the only stand-alone minimum security prison for women in Canada as a violation of the women’s *Charter* rights was dismissed.<sup>111</sup> The reasoning in that case is deeply problematic. The court concluded that “even though there existed historical disadvantages between men and women confined to Federal institutions, such conditions have been addressed through *Creating Choices* and do not exist in the present model to a degree that would warrant this *Charter* remedy.”<sup>112</sup> Without ever seeing the respective institutions, the court was persuaded by the government’s submissions that the conditions at the minimum security house were not substantially different from the conditions at the multi-level Grand Valley Institution. This case and others point to the legacy of courts taking a “hands off” approach to a prison cases,<sup>113</sup> as well as the challenges of rights litigation for women prisoners.

There is a great need for lawyers to be equipped and willing to take on test case litigation to challenge systemic issues and rights violations. There have been some important, complex cases involving women prisoners litigated in recent years.<sup>114</sup> However, even when lawyers work pro bono or as staff lawyers in advocacy organizations, the cost of such litigation (which requires expert witnesses and costly case development) is a significant barrier. Legal aid funding for prisoner cases is non-existent in some provinces and territories and very limited in others.

In addition, legal victories can be limited in terms of effecting systemic change. For example, in 2011 the British Columbia Civil Liberties Association (BCCLA) filed a suit in British Columbia Supreme Court on behalf of BobbyLee Worm challenging the constitutionality of the Management Protocol, a regime of prolonged regime of solitary confinement applied overwhelmingly to Indigenous women, denying them access to prison programs and some basic legislative protections.<sup>115</sup> The case settled in 2013 before going to trial and the CSC announced that it had cancelled the program.<sup>116</sup> However, Indigenous women continue to be disproportionately held in solitary confinement for prolonged periods. The Management Protocol is no longer CSC policy, but the legislation that authorizes prolonged segregation remains in effect and is the subject of a new *Charter* challenge brought by the BCCLA and the John Howard Society of Canada.<sup>117</sup>

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<sup>111</sup> *Dodd v Warden of Isabel Mcneill House*, 2008 CanLII 17569 (ON SC)

<sup>112</sup> *Dodd*, *ibid* at para 75.

<sup>113</sup> See generally, Lisa Kerr, “Contesting Expertise in Prison Law” (2014) 60:1 McGill LJ 43.

<sup>114</sup> See, e.g., *Inglis*, *supra* note 76.

<sup>115</sup> Kerr, *supra* note 46.

<sup>116</sup> See British Columbia Civil Liberties Association, *Worm v. Canada: Working to End Solitary Confinement* (2013), online: [http://bccla.org/our\\_work/worm-v-canada/](http://bccla.org/our_work/worm-v-canada/).

<sup>117</sup> British Columbia Civil Liberties Association, BCCLA and JHSC v. AG of Canada: challenging solitary confinement in Canadian prisons (2015), online: [https://bccla.org/our\\_work/bccla-and-jhsc-v-ag-of-canada-challenging-solitary-confinement/](https://bccla.org/our_work/bccla-and-jhsc-v-ag-of-canada-challenging-solitary-confinement/)

*Assess Every Intervention or Strategy*

A final aspect of thinking outside the bars is an attitude of critical reflection that entails assessing every intervention or strategy to determine whether it resists/critiques the use of imprisonment or normalizes it, seeking reform rather than liberty. The recent *Inglis* case is a challenging example. There, the cancellation of a mother-baby program in British Columbia jails was found to violate the equality and personal security rights of incarcerated women and their children. The court's analysis of the historic and ongoing systemic discrimination experienced by these women and their children is a positive development. The court stated, for example:

Provincially sentenced mothers and their babies are members of a vulnerable and disadvantaged group. In that regard the circumstances of Aboriginal mothers and their infants are of particular concern given the history of overrepresentation of Aboriginal women in the incarcerated population and the history of dislocation of Aboriginal families caused by state action. The Mother Baby Program represented a significant step forward in the amelioration of the circumstances of the mothers and their babies who qualified. .... The cancellation increased the disadvantage experienced by this vulnerable population. I find that it constituted discrimination.<sup>118</sup>

However, the strategy and analysis in the case are focused on bringing back the mother-baby program in the prison. This remedy leaves little room for liberty, a critique of imprisonment itself, and a potential remedy that would require mothers to be released into the community to be with their children, rather than bringing the children into prison.

To take another example, in drawing attention to the systemic inequality that means women do not have access to true minimum security conditions in Canada, do we end up advocating for new prisons to be built? Can we instead advocate for community-based options, including, for example, the utilization of sections 81 and 84 of the *Corrections and Conditional Release Act*? These provisions are meant to provide Indigenous communities with opportunities and resources to support community-based correctional services and to determine conditions of release into their communities. These provisions have been vastly under-utilized, particularly for Indigenous women.<sup>119</sup>

While the kind of reflection I am urging here is challenging and the options may seem quite limited, the history of prison reform efforts, including prisoner litigation, points to the ever-present potential of well-meaning advocacy efforts resulting in partial victories or an expansion of the penal state. Criminalized women cannot

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<sup>118</sup> *Inglis*, *supra* note 76 at paras. 612-613.

<sup>119</sup> Wesley, *supra* note 71 at 43-44.

avoid engagement with the law. Those of us who seek their liberation do well to remember the Hippocratic Oath: “first, do no harm.” While the Oath applies to those in the medical profession, it is an important guideline for both research and advocacy. With respect to prison research, Phil Scraton and Linda Moore argue that a commitment to doing no harm is an ethical imperative in the light of the power dynamics between prisoners and researchers, the particular vulnerabilities and traumas experienced by prisoners, and the inevitable (sometimes subtle) pressures on researchers to identify with correctional authorities who are giving them access.<sup>120</sup> On the advocacy side, making arguments that assume prisons are inevitable and simply seek to “reform” them can do harm. They can unintentionally lend legitimacy to prison expansion projects and new forms of inequality.<sup>121</sup> That is why thinking outside the bars is so vital, and so potentially powerful.

#### **D. Liberty, Equality and Marlene Carter**

Returning to the place this paper began, what do liberty and substantive equality mean for Marlene Carter? What does thinking outside the bars entail in this context?

While there have been only a handful of women declared dangerous offenders in Canada,<sup>122</sup> substantive equality would have us look beyond those numbers. All of these cases involve Indigenous women and they generally are based on violent offences that have accumulated while the woman was in prison, not in the community. For these women, prison – and their resistance to it – creates the very dangerousness which is then used as a justification to keep them in prison indefinitely.

This is one way that a substantive equality analysis can inform a pursuit of liberty for criminalized women (and men). The deep inequality experienced by Indigenous people “before the bars” in the form of pervasive poverty and violence, as well as inadequate housing, water, education, and health care, all contribute to their criminalization in disproportionately high numbers, often with little recognition offered by legal mechanisms including *Gladue* sentencing.<sup>123</sup> Indigenous people – both inside and outside of prison – have experienced the state through harmful, often violent, colonial encounters – such as through residential schools, discriminatory laws, and forced dispossession of land, language, and community.

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<sup>120</sup> Linda Moore & Phil Scraton, *The Incarceration of Women: Punishing Bodies, Breaking Spirits* (London: Palgrave, 2014) at 66-67.

<sup>121</sup> In writing about the “paradoxes and challenges presented to the [penal] abolitionist vision by the project of penal reform,” Eileen Baldry, Bree Carlton, and Chris Cunneen cite examples from Canada and Australia of prisoner rights and critical penal reform campaigns being co-opted, neutralized, or absorbed by penal logics and prison expansion initiatives. They argue that “[t]he challenge faced by abolitionists is to build frames of analysis and strategies that facilitate genuine long-term system change.” Eileen Baldry, Bree Carlton, and Chris Cunneen, “Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-option” (2014) 41:3 *Social Justice* 167 at 167, 183.

<sup>122</sup> As of 2011, three women had been declared dangerous offenders in Canada: “Dangerous offender: what the label means: Number of convicts labelled 'dangerous offender' increasing,” CBC News (15 August 2011), online: <http://www.cbc.ca/news/canada/dangerous-offender-what-the-label-means-1.927620>

<sup>123</sup> Milward & Parkes, *supra* note 97.

Through this lens, state violence is seen, not in an abstract form that a classic civil libertarian analysis assumes is meted out arbitrarily to individuals; but rather, as systemically and substantively unequal and unjust in its relations. The assertion of state power through policing, surveillance, pre-trial detention, imprisonment, segregation, and parole is systemically unequal.<sup>124</sup> Indigenous people are over-represented in all of these areas and experience the criminal justice system as violence. State power is not monolithic and therefore, resistance to it is not just about asserting liberty.

The truly alarming rates of Indigenous women’s criminalization and imprisonment – the degree to which they are deprived of their liberty at much higher rates than non-Indigenous women – are manifestations of structural and systemic inequality which are ongoing effects of colonial patriarchy.<sup>125</sup> In Canada, colonial projects took different forms than they did in Australia, but in both countries we see racialized and gendered categorizations of difference and inferiority that justified state interventions and punishment practices. In contemporary times, the dysfunction and family violence that are legacies of colonialism and discriminatory state policies, such as residential schools and gendered “marrying out” laws that denied Indigenous women their status and community connections, are often equated with Indigenous “culture” as though Indigenous communities are inherently more violent and unequal than non-Indigenous Canadian society. An understanding of Indigenous women as tragic victims is prevalent in Canadian popular discourse but little is done to implement policy change that would equip Indigenous women with the basic resources they need to be safe and secure from violence. For example, at a recent national roundtable on missing and murdered Indigenous women, two key federal cabinet ministers delivered the message that changing the attitudes of Indigenous men – presumably attitudes that see violence against women as acceptable – will address the crisis of missing and murdered Indigenous women.<sup>126</sup>

This account is strikingly similar to the racialized and gendered understandings of Indigenous Australian male violence against Indigenous women and children as “cultural” that has acted as government justification for such draconian and discriminatory policies as the 2007 Northern Territory Intervention.<sup>127</sup> Baldry and Cunneen point out that this government policy, framed as protecting or rescuing vulnerable Indigenous women and children from an assumed violent Indigenous male culture, coincided with a rapid increase in women’s incarceration in the

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<sup>124</sup> See, e.g., Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (2013), online: <http://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20121022-eng.aspx> (highlighting over-representation in federal imprisonment, segregation, maximum security, and denial of parole).

<sup>125</sup> See, in the Australian context, Eileen Baldry & Chris Cunneen, “Imprisoned Indigenous women and the shadow of colonial patriarchy” (2014) 47(2) *Aus & NZ J Crim* 276.

<sup>126</sup> Gloria Galloway & Kathryn Blaze Carlson, “Round table on missing indigenous women results in few concrete steps,” *The Globe and Mail* (27 February 2015), online: <http://www.theglobeandmail.com/news/politics/aboriginal-women-express-frustration-with-ottawa-for-focus-on-domestic-violence/article23225615/>

<sup>127</sup> Baldry & Cunneen, *supra* note 125 at 15 (online version).



Northern Territory that was proportionately more pronounced for Indigenous women than Indigenous men. Their analysis of the Australian situation has resonance for Canada: “The use of imprisonment in the NT remains a normalised response to Indigenous people, constantly re-invented as appropriate on the basis of cultural difference, and one that impacts differently depending on gender.”<sup>128</sup> The extent to which incarceration is normalized and accepted as inevitable for Indigenous people in Canada may go some distance to explaining why *Gladue* has had relatively little impact in limiting the hyper-incarceration of Indigenous women.

Indigenous women are pathologized as victims but also increasingly criminalized as violent perpetrators. Their experiences of marginalization, discrimination and, in some cases, resistance become “criminogenic factors” that justify increasingly punitive state responses. This is a manifestation of substantive inequality.<sup>129</sup> Applying a presumptively neutral risk classification tool or dangerous offender regime to an Indigenous women like Marlene Carter whose life experience has been shaped by profound inequality flowing from state policies and practices,<sup>130</sup> and whose strategies of resistance and survival butt up against the violence of incarceration itself, cannot produce a just result.

A substantive equality lens brings some of the injustice experienced by women like Marlene Carter into focus. However, the exercise of state power to criminalize and imprison is not benign and this, too, needs to figure in our analysis. We should be wary of an anti-discrimination analysis that tends to push us into comparisons with imprisoned men or to conceive of imprisonment as a “government service” that must be applied equally to men and women. As Angela Y. Davis warns, “[t]o assume that men’s institutions constitute the norm and women’s institutions are marginal is, in a sense, to participate in the very normalization of prisons that an abolitionist approach seeks to contest.”<sup>131</sup> The analysis I suggest is one that keeps the violence of incarceration<sup>132</sup> and the role of the state in criminalizing women<sup>133</sup> in view, understanding contemporary Canadian practices of imprisonment as multi-faceted deprivations of liberty within a context of systemic inequality. Through that lens, women’s incarceration is a site of resistance rather than reform. Marlene Carter bears the scars of that resistance on her body. Scholars and advocates who seek liberty and equality can bring it to our work.

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<sup>128</sup> Baldry & Cuneen, *supra* note 125 at 15 (online version).

<sup>129</sup> In a similar vein, Toni Williams and Sonia Lawrence have highlighted the extent to which an uncritical use of “social context” evidence in a sentencing case involving black women convicted of being drug couriers entirely misses the extent to which these women are disproportionately surveilled, policed, and criminalized in the first place. See Sonia N. Lawrence & Toni Williams, “Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing,” (2006) 56 UTLJ 285.

<sup>130</sup> Doob & Webster, *supra* note 70.

<sup>131</sup> Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003) at 61.

<sup>132</sup> Chartrand, *supra* note 7.

<sup>133</sup> See generally the collection of essays on this topic: Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)justice in Neo-Liberal Times*, 2<sup>nd</sup> ed (Halifax: Fernwood, 2014).