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Latimer: Something Ominous is Happening in the World of Disabled People

H. Archibald Kaiser

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Abstract
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LATIMER: "SOMETHING OMINOUS IS HAPPENING IN THE WORLD OF DISABLED PEOPLE ..."©

BY H. ARCHIBALD KAISER*

Although the *Latimer* decision breaks no new substantive ground, it has created a furore over the application of the mandatory minimum sentence for murder. This article maintains that, despite the pre-existing need to examine the complex range of issues in mandatory sentences, the *Latimer* case provides a wholly inapposite base for revisiting this sanction. The Supreme Court of Canada properly rejected the accused's attempt to invoke the defence of necessity, as well as some procedural contentions. The Court also determined that the mandatory minimum sentence for murder was not cruel and unusual punishment as applied to the accused. The reaction of the accused, as well as others, is discussed as a setback for people with disabilities, exposing the shallowness of equality protections for this disadvantaged group. The accused has been portrayed as the victim, despite his having intentionally and premeditatedly killed his child. This article argues that the voices of people with disabilities should be heard and responded to in a manner that more accurately reflects the nature of this homicide. Protections for people with disabilities, as well as children, should be expanded by creating offences and sentencing principles, recognizing the trust reposed in care-providers and the dependence that characterizes some presumably supportive relationships. This article suggests that using the criminal law to promote equality may help to reverse the threatening tide created by the *Latimer* case.

Malgre que la décision Latimer n'apporte pas d'elements substantifs nouveaux, cet arrêt a fait fureur quant à l'application de la peine minimale obligatoire pour le meurtre. Cet article soutient que malgré le besoin preexistant d'examiner l'éventail des questions complexes relatives aux peines minimales obligatoires, l'arrêt *Latimer* constitue une base impertinente sur laquelle ce châtiment devrait être remis en question. La Cour suprême du Canada a correctement rejeté la défense de nécessité invoquée par l'inculpé ainsi que des questions procédurales contestées. La Cour a précisé qu'une peine minimale obligatoire imposée suite à un verdict de culpabilité de meurtre n'était pas une peine cruelle et inusitée dans le cas de l'accusé Robert Latimer. La réaction de l'inculpé, ainsi que celle du public, a exposé le caractère superficiel de la protection des droits à l'égalité des groupes désavantagés. Ces réactions sont également considérées comme étant un pas en arrière pour les personnes handicapées. L'inculpé a été représenté comme étant une victime malgré son intention préméditée de tuer son enfant. Cet article soutient que la voix des personnes handicapées devrait être entendue et que l'on devrait y répondre d'une façon qui reflète adéquatement la nature de ce genre d'homicide. La protection des personnes handicapées devrait être élargie par le biais de nouvelles infractions et principes se rapportant aux sentences. Ceci permettrait de reconnaître la dépendance et la confiance spéciale qui caractérise la relation soi-disant de soutient entre une personne handicapée ou un enfant et les personnes qui prennent soin d'eux. Cet article suggère que l'utilisation du droit criminel dans le but de promouvoir l'égalité pourrait peut-être contribuer à renverser le courant menaçant créé par l'arrêt *Latimer*.

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* Professor, Faculty of Law and Assistant Professor, Department of Psychiatry and Faculty of Medicine, Dalhousie University, Halifax, and a practising lawyer specializing in mental disability law. This article is dedicated to Gordon Comeau, who immediately understood the significance of the *Latimer* case for people with disabilities, and has since died of Amyotrophic lateral sclerosis (ALS). The full quotation from which the title was derived is: "Something ominous is happening in the world of disabled people and its [sic] changing the role our movement must play in society. We must now fight to ensure society and the justice system are concerned about the violence which we are experiencing. Regrettably, this mission appears as if it has been placed on our movement's agenda whether we want it or not," D. Martin, "High-Profile Cases Like Latimer Focus Attention: Disabled Vulnerable to Violence," *Winnipeg Free Press* (6 February 1997) A13, online: Council for Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/wfp6297.html> (date accessed: 21 February 2001).

I. FOREWORD

The Supreme Court of Canada decision *R.* v. *Latimer*[1] has created an unprecedented level of interest in mandatory minimum sentences for murder. The accused, Robert Latimer, has generally not been seen as comporting with widely shared, if inaccurate, typologies of killers. Thus, he has come to be portrayed by many as the victim of a harsh and inflexible statute and as an example of the misuse of Crown discretion. Lost in the confusion has been a clear picture of the victim and an understanding of the purposes and methods of the criminal law in protecting vulnerable citizens.

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[1] [2001] 1 S.C.R. 3 [hereinafter *Latimer*].

Latimer has resulted in attention being focused on mandatory penalties, but through a lens that will distort the analysis of the complex moral and legal issues of fixed sentences and that will cause further harm to the interests of people with disabilities.

Following a review of the decision of the Court, this article will examine the broad implications of *Latimer* for people with disabilities. Using sources drawn from both academic journals and other fora such as disability rights advocacy organization publications, this article will, wherever possible, give voice to the concerns of the disabled. It will attempt to explain the multi-faceted injuries, which the legal and media treatment of the case have inflicted on the disabled. This article covers some of the issues directly related to mandatory minimum sentences for murder, although it argues that *Latimer* is an unsuitable basis for addressing the many problems inherent in these sentencing practices. The final portion of the article presents a limited plan for a parliamentary response to the setbacks caused by the *Latimer* case through amending the *Criminal Code*.[2]

II. THE SUPREME COURT: INEVITABLE DECLARATIONS AND SOME BACKPEDALING

The Supreme Court of Canada closed the judicial chapter of the *Latimer* case when it rejected all of the accused's arguments, upholding his conviction for second-degree murder as well as the statutory sentence of life imprisonment with no parole eligibility for ten years.[3] Seven years earlier, Latimer had methodically carried out his plan to kill his daughter, Tracy, by poisoning her with carbon monoxide. From the beginning of his involvement with the criminal justice system, Latimer had *inter alia* claimed that he should be able to use the residual necessity defence. Following his second conviction for murder, he also contended that the mandatory sentence for his crime was cruel and unusual punishment. In refusing to countenance these submissions, the Court drew what were surely inevitable conclusions, in light of the threat that the accused's contentions presented

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[2] R.S.C. 1985, c. C-46.

[3] The author has discussed the Court's decision more extensively in H.A. Kaiser, "Latimer: The End of Judicial Involvement and an Unsatisfactory *De Facto* Beginning of the Clemency Process" (2001) 39 C.R. (5th) 42. In the same edition, three other authors also discuss this controversial case, sometimes taking issue with his contribution: B. Sneiderman, "*R. v. Latimer*: Juries and Mandatory Penalties" (2001) 39 C.R. (5th) 29; D. Stuart, "A Hard Case Makes For Too Harsh Law" (2001) 39 C.R. (5th); 58 and A. Manson, "Motivation, the Supreme Court and Mandatory Sentencing for Murder" (2001) 39 C.R. (5th) 65.

to the section 15 *Canadian Charter of Rights and Freedoms*[4] guarantee of "equal protection and equal benefit of the law."

Despite the generally sound reasoning of the Court's holdings, the decision does not capitalize on the full potential of judicial pronouncements for people with disabilities to articulate forcefully and unequivocally the equal value of their lives. As Melinda Jones and Lee Ann Marks have recognized:

> Judicial decision-making has an importance to the legitimisation of values and principles. Where judges develop their ideas informed by an inclusive view of human rights and entitlements, their words can have impact well beyond the specific case that they are adjudicating.[5]

Although, some passages of the *Latimer* decision do have a strong resonance for disabled people, other parts actually permit an erosion of some of the limited hortatory value of the decision. The closing comments on the suitability of an application for executive clemency are particularly noteworthy for their retreatist tone and effects.

The decision reiterates the *Perka et al.* v. *The Queen*[6] version of necessity: (1) there must be imminent peril, (2) there can be no reasonable legal alternative, and (3) there must be proportionality between the harm caused and the harm avoided. In *Latimer*, the Court decided that the first two criteria should be assessed on a modified objective standard while the third would be measured on a strict objective standard. The Court determined that none of these requirements were met in the *Latimer* case. There was no danger to Latimer, or more importantly to his daughter, given that Tracy could have benefited from a feeding tube and better pain management.[7] Reasonable legal alternatives were available in the situation, but were rejected by the accused.[8] Finally, there could be no basis for the proportionality element, as the harm inflicted by the killing "was immeasurably more serious than the pain resulting from Tracy's operation,

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[4] Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

[5] M. Jones & L.A. Basser Marks, "Valuing People Through Law - Whatever Happened to Marion?" in "Explorations on Law and Disability in Australia," (2000) 17:2 L. in Context 147 at 176.

[6] [1984] 2 S.C.R. 232.

[7] *Supra* note 1 at 24.

[8] *Ibid.*

which her father sought to avoid."[9] Fortunately, the Court did draw some attention to the equality concerns which were so conspicuously raised by the case:

> ... we must remain aware of the need to respect the life, dignity and equality of all the individuals affected by the act in question. The fact that the victim was disabled rather than able-bodied does not affect our conclusion that the three requirements for the defence of necessity had no air of reality here.[10]

In a civilized society, the combination of necessity and murder must always be a dim theoretical possibility at best. One should have to strain to think of hypothetical situations where there is even a chance of congruence between this defence and the crime. Jonathan Rogers has cited the need to be sure of the moral justifiability of providing such a defence to intentional killing: "If the Court was to authorize, for the first time in legal history, the killing of an innocent human being," he wrote, "then one might expect it to be *confident* that this was the morally right thing to do."[11]

The *Latimer* case could not meet the standard of a confident assertion of a moral entitlement to kill. To have accepted any variation of the necessity argument on these facts would have allowed for an unprecedented erosion of the protective function of the criminal law in Canadian society.

Latimer's other grounds of appeal against conviction were also unacceptable to the Court. The trial judge's delay in determining whether necessity would go to the jury did not affect the fairness of the trial.[12] Latimer's attempt to combine this alleged shortcoming with the trial judge's possible equivocation over the role of the jury in sentencing as a cumulative discouragement of jury nullification was also not given any credence by the Court. The Court held that "the accused is not entitled to a trial that increases the possibility of jury nullification."[13]

Once the grounds of appeal against conviction had been disposed of, the Court had to consider the challenge against the sentence of life imprisonment imposed on the accused through the operation of section 745 of the *Criminal Code*. Latimer did not attack the general constitutionality

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[9] *Ibid.* at 26.

[10] *Ibid.*

[11] J. Rogers, "Necessity, Private Defence and the Killing of Mary" (2001) Crim. L.R. 515 at 521.

[12] *Supra* note 1 at 33.

[13] *Ibid.*

of the mandatory life sentence for murder, nor did he pursue the section 12 tactical option of suggesting that the sentence was grossly disproportionate in reasonable hypothetical circumstances. The Court only had to determine whether or not this was a case of cruel and unusual punishment in the particular circumstances of the accused's crime.

The many aggravating features of Latimer's killing of his daughter ensured that he could not invoke constitutional doctrine to overturn a sentence that Parliament insisted upon. The Court noted the potential deterrent effect of this sentence, but emphasized the vulnerability of the victim in a situation where the accused had used a "high degree of planning and premeditation."[14] The accused's "initial attempts to conceal his actions, his lack of remorse, his position of trust"[15] further influenced the Court's rejection of the disproportionality argument, ensuring its unacceptability on individual and utilitarian levels.

Had the Court been more vigorous in its articulation of equality concerns, while still rejecting the necessity and section 12 arguments on conventional legal and constitutional bases, the decision in *Latimer* might have been laudable from the perspective of people with disabilities. The economy of the pronouncements on section 15 was only exacerbated by the Court's tacit encouragement of an application for the royal prerogative of mercy. Oddly, the Court went so far as to suggest, with certainty, that the government would examine "all of the underlying circumstances surrounding the tragedy of Tracy Latimer,"[16] and that the publicity surrounding the accused's several judicial involvements had brought "consequential agony for him and his family."[17]

I have previously argued that *Latimer* is an implausible case for executive clemency, despite the apparent support for it by the Court. The case seems to be inconsistent with the policies applied by the National Parole Board. Moreover, government policy statements on the need to protect children and people with disabilities appear to directly collide with the facts of *Latimer*.[18]

Popular support (which will be discussed *infra*) aside, this prediction seems to be shared by other academic commentators. Carolyn Strange

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[14] *Ibid.*

[15] *Ibid.* at 40.

[16] *Ibid.*

[17] *Ibid.*

[18] Kaiser, *supra* note 3 at 51 – 56.

concludes that an extension of the royal prerogative would "stir unpalatable charges of politicized justice into the controversy."[19] Kent Roach is more ambivalent: first doubting that Parliament will revisit mandatory penalties for murder, then suggesting that the accused's "sentence will more likely be commuted," although contending that the latter form of relief "may depend on the outcome of a political popularity contest which pits his claim for sympathy against that of Tracy Latimer."[20] The potential for a remedy for the accused in this post-judicial forum, however unlikely, ensures that the case will continue to be the locus of attention for the minimum mandatory sentence for murder. More disturbingly for people with disabilities, the same currents that animated the necessity and disproportionality arguments in the Court and that devalued their humanity there will continue to be at the forefront in the ensuing public and Cabinet debate. The stakes for people with disabilities will continue to be high and an awareness of all the dimensions of this struggle should be developed now.

III. FRAGILE ADVANCES AND THE POTENTIAL FOR PROGRESS

For people with disabilities, considering the implications of the *Latimer* case is an exercise fraught with sadness. Nonetheless, this atmosphere of desperation must be transcended or the disabled community will suffer even greater losses.

As with other groups living in conditions of inequality, *Latimer* reminds one that any gain can be illusory and that vigilance, rather than complacency, must characterize the stance of equality promoters. The editorial of a recent edition of Canadian Journal of Women and the Law speaks of the fragility of any apparent alteration of the status quo. It can be read *mutatis mutandis* for people with disabilities after *Latimer*, although it should be remembered that the influence of gender is clearly present at one level or another in the accused's murder of his daughter. The editorial notes that "even when the legal system delivers some good news for women, it is rarely unequivocal or secure against backlash, misunderstanding, or whittling down."[21]

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[19] C. Strange, "Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy" (2001) 64 Sask L. Rev. 559 at 570.

[20] K. Roach, "Crime and Punishment in the *Latimer* Case" (2001) 64 Sask L. Rev. 469 at 485–86.

[21] "Editorial," (2000) 12:2 C.J.W.L. at v.

Occasionally, there have been glimpses of appropriate attitudes in the response of the legal system to Tracy's murder, but even during these moments of lucidity and hope, threatening forces have emerged to set back the cause of equality. Yvonne Peters has summarized the extent of the assault on equality gains represented by the *Latimer* case:

> After years of fighting for social issues such as the right to live, work, and participate in the community as equal citizens, disability rights activists were taken aback by the relentless, passionate, public-wide debate on the fundamental issue of whether it is legally and morally acceptable for a father to take the life of his severely disabled daughter. Even more disturbing is the belief by much of the public that Latimer performed a humane and noble act in killing his daughter, Tracy.[22]

This article next considers the comprehensive damage inflicted by *Latimer,* before returning to coping and resistance strategies that should be advocated before Parliament.

IV. THE SHALLOWNESS OF DEMOCRATIC PROMISES

> Democracy announces its presence by a few fundamental traits of character, among them a reasonably honest discussion of public issues, the accountability of the governors to the governed, and *equal protection under the law.*[23]

Lewis Lapham's emphasis on equal protection under the law as a central feature of democracy seems virtually unarguable. The *Latimer* case demonstrates how easily Canada will abandon such societal underpinnings in favour of distorted images of disability, confusion over fundamental legal concepts, and saccharine, yet dangerous, sentimentality. One should not sound the alarm bells prematurely, but there are portends of faltering, if not doom, for our democracy in *Latimer.*

As the Court has said in *R.* v. *Oakes,*[24] "the values and principles essential to a free and democratic society" include "respect for the inherent dignity of the human person, commitment to social justice and equality...."[25] In *R.* v. *Zundel,*[26] the Court noted that the *Charter:*

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[22] Y. Peters, "Reflections on the *Latimer* Case: The Rationale for a Disability Rights Lens" (2001) 64 Sask. L. Rev. 631 at 632.

[23] L.H. Lapham, *The Wish for Kings: Democracy at Bay* (New York: Grove, 1993) at 12 [emphasis added]

[24] [1986] 1 S.C.R. 103.

[25] *Ibid.* at 136.

[26] [1992] 2 S.C.R. 731.

> ... provides us with indications as to which values go to the very core of our political structure. A democratic society capable of giving effect to the *Charter's* guarantees is one which strives toward creating a community committed to equality, liberty and human dignity.[27]

Subsequent to the *Latimer* decision, the Court has recognized the role of the courts in protecting vulnerable communities through "anti-majoritarian judicial review."[28] The Court's decision in *United States* v. *Burns*[29] declares that it is the duty of the courts to bolster democratic values that are under attack. The Court approved statements by Arthur Chaskalson, President of the Constitutional Court of South Africa:

> The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.[30]

Whether the courts have adequately safeguarded the citizenry, including people with disabilities through their various decisions in the *Latimer* saga is somewhat doubtful. As noted previously, even the otherwise sound judgment of the Court contains passages that tend to dilute this protective function. However, the point remains that the many direct and more subtle slights on people with disabilities that have characterized the *Latimer* case should activate warning signals for democracy.

The *Latimer* case strikes at the heart of the guarantee of equality for people with disabilities, and hence at the "very core of our political structure." As Catherine Frazee urged in 1995:

> Whether or not we have disabilities, whether or not we have "severe" disabilities, whether or not our circumstances are similar to those of Tracy Latimer, we consider Tracy Latimer to be our equal. Because she was. In her humanity, in her entitlements, in her citizenship, she was anyone's equal.[31]

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[27] *Ibid.* at 806.

[28] K. Roach, "Editorial: *Burns and Rafay*" (2001) 44 Crim. L.Q. 437 at 438.

[29] [2001] 1 S.C.R. 283.

[30] *Ibid.* at 324.

[31] C. Frazee, "Our Lives Are Worth Living, Comments from a Vigil for Tracy Latimer" *Archipe* 13:3 (1995) 1, online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd.ch9 html> (date accessed: 21 February 2001).

This fundamental acknowledgment of the equality rights of the victim has appeared in some of the judicial pronouncements on the case, although it cannot be seen as the dominant theme in the jurisprudence, let alone in the media reports. For example, at the Saskatchewan Court of Appeal, Mr. Justice Tallis contrasted the handling of *Latimer* with what would happen were the victim not disabled:

> In this situation it is a fair inference that such a decision [Tracy Latimer's murder] would never have been suggested or considered if Tracy were not handicapped and in extreme pain. This difference in approach between handicapped and non-handicapped children directly reflects a sense that the life of a handicapped child is of significantly less value than the life of a non-handicapped child in extreme pain.[32]

At the Court, there were only brief notations of the section 15(1) equality rights of the disabled as informing the constitutional considerations relevant to community standards in "evaluating the gravity of the act."[33] One recalls the distancing of the Court from even these statements in the later supportive *obiter* pronouncements on the availability of an application for executive clemency.

The Council of Canadians with Disabilities (CCD) had emphasized the threats to equality in their factum to the Court:

> The equality guarantees in the Charter of Rights and Freedoms and human rights statutes in all Canadian jurisdictions have been introduced for the precise purpose of responding to the stereotypes and stigmatization which are involved in the arguments advanced in this case and which are reflected in some of the public reaction which the Appellant's conviction has engendered.[34]

Latimer is a case about equality and the willingness to infringe upon the entitlements of people with disabilities, despite the declared importance of equality in Canadian democracy. Its message is that there is a propensity to engage in rhetoric about this fundamental feature of democracy, rather than a deep reverence for the principle of equality. How this diminution of such fundamental rights occurred so readily must be considered.

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[32] *R.* v. *Latimer* (1995), 99 C.C.C. (3d) 481 at 519 (Sask. C.A.).

[33] *Supra* note 1 at 22.

[34] *Latimer, ibid.* (Council of Canadians with Disabilities' factum) [hereinafter *Factum*].

V. IMAGES OF DISABILITY: AN UNFAVOURABLE CONTRAST WITH THE ACCUSED

It was easy to kill Tracy because of her disability, but her physical defenselessness is only part of the explanation. Tracy's disability allowed her to be devalued, which made her especially vulnerable. The rationalization of her death has been facilitated by the variegated images of disability which have been fostered by the accused and repeated enthusiastically in the news media, subtly penetrating the psyche of many otherwise logical and caring Canadians. Frazee called these forces "a Trojan horse within our popular culture ... forces that operate not at the level of reason but instead 'more like a computer virus ... [altering] our programming without our knowledge.'"[35] Other writers have eloquently explained how these influences actually function to debase people with disabilities once they are implanted.

Many erroneous assumptions have clouded public perceptions and facilitated a "pernicious example of disability-based discrimination"[36] represented by the accused's defence that he killed his daughter out of necessity. As Heather Heavin has argued, the complex devaluation processes displayed in this case involve the creation and assertion of a supposedly objective measurement scale involving quality of life assessment norms.[37] As a result, it became possible for the victim to be placed at the low end of the hierarchy, as if one were dealing with a simple question of fact. Consequently, there was an "erosion of the principle that all life is of equal value"[38] and the removal of Tracy's entitlement to the protection of the law. The case for the accused was, in addition, based upon the legitimacy of Latimer's perception of his daughter's pain and her ability to tolerate this aspect of her disability.[39] This assumption that surrogate decision makers should be allowed to make all decisions for persons with disabilities, including whether they should live or die, has structured the

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[35] C. Frazee, "Under the Microscope: Dissecting Law and Medicine in the Disability Rights Laboratory" (Public Lecture, Dalhousie University Health Law Institute, Halifax, Nova Scotia 9 February 2001) [unpublished].

[36] Peters, *supra* note 22 at 641.

[37] H. Heavin, "Human Rights Issues in *R. v. Latimer* and Their Significance for Disabled Canadians" (2001) 64 Sask. L. Rev. 613.

[38] *Ibid.* at 618.

[39] *Ibid.* at 618-19.

defence of this crime as well as the public response.[40] Through these mechanisms, as Peters has discussed, the victim eventually becomes defined as the problem, whose less valuable, even "sub-human or alien,"[41] life is subject to end when an able-bodied parent determines that it is appropriate.

The insidious images of disability, which are so "highly prejudicial to the personal and collective claims to equality, health and justice for people with disabilities"[42] are that "Tracy is consistently depicted as hopelessly flawed, and hopelessly ill."[43] As well:

> ... when Tracy Latimer was described, it was almost exclusively in terms of her disability. Little is mentioned of what she enjoyed, of how she interacted with other children, of what she did in her school program. ... By describing her only in terms of her surgeries, her pain, her disabilities, Tracy Latimer was dehumanized in the media.[44]

How and why were these negative and limited portrayals of Tracy circulated so successfully? It may well be that widespread and deep-seated prejudices against people with disabilities in Canada have given such reportage currency. Heidi Lanz has argued this point:

> When this portrayal of Tracy is contrasted with the typical depiction of Robert Latimer as a devoted parent and a well-liked, well-respected member of the community, it becomes painfully evident that the mass media is at once mirroring and perpetuating the common public perception of people with severe disabilities as somehow less-than-human beings condemned to a burdensome, pain-filled existence.[45]

Indeed, Ruth Klinkhammer and David Taras have concluded that, despite some coverage to the contrary, the accused had enjoyed a media victory, even to the point of undoing the decision of the Court. "[Klinkhammer and Taras] contend that the sympathetic media coverage

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[40] *Ibid.* at 620-21.

[41] *Supra* note 22 at 642.

[42] Frazee, *supra* note 35.

[43] C. M. Eckstein, "One of Our Children is Dead" *Ability Network Magazine* (Winter 1996- 97) 5, online: Compassionate Healthcare Network <http://www.chninternational.com/v5n2p37.html> (date accessed: 21 February 2001).

[44] D. Sobsey, "The Media and Robert Latimer" *Archtype* 13:3 (August 1995) 8, online: Council for Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/ch7.html> (date accessed: 21 February 2001).

[45] H.L. Lanz, "Disabling Images and the Dangers of Public Perception: A Commentary on the Media's 'Coverage' of the *Latimer* Case" (1998) 9:3 *Constitutional Forum* 66 at 70.

awarded to Robert Latimer, to some degree, 'overturned' the Supreme Court's ruling in *Latimer* and the message that the Court wanted to send."[46]

The accused, in contrast to his victim, "is positioned well within—perhaps right on—the normative bull's-eye,"[47] to the point where, despite being an admitted, unrepentant child killer, his acts are portrayed as merciful[48] and compassionate. Klinkhammer and Taras elaborate on the mysterious attractiveness of the accused, pointing to the media celebration of his "ordinariness" and the depictions of "Latimer on his farm in the cold Saskatchewan winter."[49] The simple pictures of the "stolid Canadian farmer" on his land are said to symbolize "the Canadian preoccupation with surviving in a harsh land [where] Latimer perfectly fits the survivor role."[50]

As Dick Sobsey has pointed out, the skewing of news coverage has permitted many distortions that are highly favourable to the accused: misuse of language, disputed facts being presented as truth, inconsistencies in the accused's story being accepted solely from his perspective, the omission of relevant information and the blurring of issues, as well as the erasure of the victim's humanity.[51] The victim's experience, conversely, has largely been ignored. The media have seldom engaged in a deconstruction of a supposed love that kills its object. There is no mention of the trust that was so egregiously betrayed.

Public attitudes towards people with disabilities and the ready exploitation of such prejudices have ensured that Robert Latimer is consistently viewed as the victim, despite his flagrant criminality. His

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[46] R. Klinkhammer & D. Taras, "Mercy or Murder? Media Coverage of the Robert Latimer Supreme Court Decision" (2001) 64 Sask. L. Rev. 573 at 574.

[47] Frazee, *supra* note 35.

[48] Perhaps the apotheosis of this depiction was reached in Alberta, where the Provincial Museum sponsored an exhibit "Anno Domini: Jesus Through the Centuries," showing Robert Latimer as a modern example of the beatitudes. See, letter from Zuhy Sayeed, Past President, Alberta Association for Community Living, online: Canadian Association for Community Living <http://www.cacl.ca/english/altamuseum.html> (date accessed: 21 February 2001). In the same vein, but beyond the pale even of this exhibit, or the flurry of supportive petitions, is the growing list of people who have volunteered to serve part of the accused's sentence. See *Volunteers to serve time for Robert Latimer*, online: Robert Latimer <http://www.robertlatimer.com/jailtime.htm> (date accessed: 9 September 2001). As of the time of writing, the website RobertLatimer.com listed over 170 potential surrogate prisoners.

[49] *Supra* note 46 at 585.

[50] *Ibid.* at 586.

[51] *Supra* note 44.

murder of his daughter is thereby excused or justified in the eyes of many, and he is depicted as being inappropriately and unjustly punished. The victory of the anti-equality argument, at least in terms of public perception, has been virtually complete.

VI. IMPLICATIONS FOR PEOPLE WITH DISABILITIES

> Tracy's tragic death has been a watershed event in the history of Canadians with disabilities. Her murder has awakened most people with disabilities from an apathy that had been caused by a decade of improvements in our quality of life.[52]

> [*Latimer*] is tragic for persons with disabilities because they have endured the blunt truth that prejudice and discrimination still figure prominently in today's society.[53]

The above passages illustrate the perspective of most people with disabilities and their allies regarding the *Latimer* case. The direct implications were perhaps most acutely felt by Canadians with cerebral palsy, especially those with conditions similar to Tracy's. It is estimated that there are approximately five thousand Canadian children who are disabled in the same way and to the same degree as Tracy.[54]

For some observers, there are parallels between the Nazi death camps and the manner of and rationale for killing Tracy:

> People with disabilities are murdered in the name of kindness more often than in hatred. Several hundred thousand Europeans with disabilities were gassed in Hitler's euthanasia program. In the first stage of the policy, somewhere around 8,000 children were "humanely" put to death at the behest of their families—only Aryans need apply.[55]

Sobsey has described the comparisons more extensively, noting that the inception of the Nazi genocide was marked by the special interest taken by Hitler in the "severely handicapped son" of a Leipzig family, who was killed by Hitler's personal physician, Karl Brandt.

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[52] D. Martin, "High-Profile Cases Like *Latimer* Focus Attention: Disabled Vulnerable to Violence" *Winnipeg Free Press* (6 February 1997) A13, online: Council for Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/wfp6297.html> (date accessed: 21 February 2001).

[53] Peters, *supra* note 22 at 643.

[54] C. Cooper, *A Mother Speaks For Those Who Cannot Speak For Themselves,* online: Compassionate Healthcare Network <http://www.chninternational.com/tracy.htm> (date accessed: 21 February 2001).

[55] J. Derksen, *Deadly Compassion, Fearsome Kindness: Murdered in the Name of Kindness,* online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/ch8.html> (date accessed: 21 February 2001).

> No one knows the number of people who were killed in this program. Most suggest that the number was about 275,000. ... Before mass extermination made carbon monoxide canisters practical, gassings were commonly conducted using the exhaust from trucks.[56]

The links to Nazi inhumanity that have been drawn by many people in the disability movement are neither surprising nor inapposite. Some observers who are more sympathetic to the accused accept the inexorability of such comparisons. For example, Barney Sneiderman, who concedes the accused's crime but deplores the sentence he received,[57] anticipates the reaction to any proposal for the adoption of a mercy-killing defence inspired by *Latimer*:

> ... any proposal for a mercy-killing defence would be met with an impassioned stream of protest from disabled circles, invoking Hitler's so-called euthanasia programme as its historical precedent. As it was, voices from the disabled community quickly branded the [Special Senate] Committee's proposed amendment as a licence for the mass killing of the disabled by their care-givers.[58]

What has been particularly striking after *Latimer* is the tenor of the reaction from people with disabilities. The response is not abstract or distanced from the killing of Tracy. The literature is permeated with a palpable fear and an accompanying resolve to continue the struggle, not merely for the conventional ideals of legal equality, but also for simple safety. When the level of concern about a crime and its prosecution reaches this stage, one begins to recognize the enormous destructive potential of *Latimer* and the need for a respectful and reassuring remedy. As demonstrated by the following samples of commentary, the reactions of many advocates for people with disabilities are virtually unprecedented in Canadian history:

> Council of Canadians with Disabilities strongly believes that arguments advanced on behalf of Mr. Latimer in this case involve a threat to the lives and security of people with disabilities.[59]

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[56] *Supra* note 44.

[57] B. Sneiderman, "Latimer in the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing" (2001) 64 Sask. L. Rev. 511 at 534.

[58] *Ibid.* at 539.

[59] Council of Canadians with Disabilities Press Release, "Latimer Appeal to Supreme Court Watched by Disabled Canadians" (12 June 2000), online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/pr12600.html> (date accessed: 21 February 2001).

> Cases like the *Latimer* case show us that the very lives of people with disabilities, particularly people with very severe disabilities, are in jeopardy.[60]
>
> ... [P]eople with disabilities, particularly those who cannot articulate their own needs, are currently in great jeopardy. The attitudes expressed in the press about these people can only increase their risk for violence and death.[61]
>
> [The *Latimer* case] conveyed to us how very precarious our status in society is, if a life can be taken and there is a kind of public endorsement of that act. It forced us to realize we all have to be involved in fighting this dangerous threat to our very lives.[62]
>
> This view [that a parent has a right to kill his disabled child], and the arguments advanced by Mr. Latimer in his defence were seen as a direct threat to persons with disabilities who rely on relatives or professional caregivers for their continued care.[63]

The foregoing quotations evince a rational and proportionate reaction to a case in which there had been arguments for the necessity for homicide and the appropriateness of providing a special lenient penalty for killing a child with a disability. [64]

As will be seen *infra*, one can envisage changes to the criminal law that will, in part, allay such fears. However, the erosion of confidence in Canadian society generated by *Latimer* will not recede for a considerable period, if it ever does.

VII. MANDATORY SENTENCING: THE PROBLEMS OUTSIDE THE PARAMETERS OF *LATIMER*

The issues raised by the policy of imposing mandatory minimum sentencing, the sentencing issues argued by Latimer and the judicial

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[60] H.R. Scher, *The Latimer Case: The Reflections of People with Disabilties Introduction*, online: Council of Canadians with Disabilities: <http://www.pcs.mb.ca/~ccd/ch1.html>(date accessed: 21 February 2001).

[61] Lanz, *supra* note 45 at 70.

[62] C. Frazee, *A Wake Up Call: an Interview with Catherine Frazee*, online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/ch4.html>.

[63] Heavin, *supra* note 37 at 615.

[64] As further evidence of the reality of these fears, in March 2001, a Montreal parent was accused of killing a child with a disability. Although the facts seem to diverge from *Latimer*, the vulnerability of the victim amplified the alarm initiated by that case. "A woman [Rachel Capra Craig] was charged with first-degree murder yesterday after her severely disabled fourteen year-old daughter was found dead in her home from what police called a deadly cocktail of medications," G. Hamilton, "Disabled Teen Dies, Mother is Charged; Suffered Rett Syndrome" *National Post* (21 March 2001) A1; "[The accused] appeared briefly in the prisoner's box as debate swirled outside over whether she deserves compassion or condemnation for allegedly taking her daughter's life." I. Peretz, "Psychiatric Tests Ordered for Mother" *The Globe and Mail* (22 March 2001) A8.

response have several meeting points, at least in the eyes of the media and the public. It is sad and shameful that the murder of a child with disabilities should be the crucible for the impetus to scrutinize the complex moral, penological, and constitutional issues surrounding mandatory sentencing. In many ways, it would be better if these connections had never been made and if one did not have to consider the *Latimer* case. It is undesirable that *Latimer* has spawned an interest in mandatory sentencing, because that case is a wholly inappropriate vehicle for arguing against minimum sentences.

The singular attack on the equality of people with disabilities which *Latimer* represents has been canvassed at a general level. However, the objections to the case and its penumbra must be restated here to show the invalidity of a *Latimer*-based attack on mandatory sentences. As a 1998 press release from the CCD urged, people with disabilities must continue to insist on equality in this context as well:

> The central issue is the rights of persons with disabilities to equal protection of the law. The decision of the trial judge put disabled persons at risk by not imposing the mandatory sentence for second degree murder," said [Hugh] Scher, a Toronto lawyer with a disability.
>
> Theresa Ducharme Chairperson of PEP [People for Equal Participation] asks, 'Is my life worth less simply because I have a disability? Is my disability a reason for diminishing the protection I'm given by the law?'"[65]

This is not to say that the current mandatory sentencing regime for murder (and other crimes) should not be reassessed outside the context of *Latimer*. There are many who will argue that there are criminological weaknesses as well as a harshness and pointlessness to some mandatory minimum sentences. Unfortunately, the *Latimer* case distorts this necessary debate. Until a broader and more principled discussion ensues, beyond the obfuscating conceptual dust-storm of *Latimer*, the existing penalty structure should be maintained.

Based upon the present legislative and judicial temperament, the mandatory sentence of life imprisonment with minimum periods of parole ineligibility for murder is unlikely to be interfered with by Parliament or the judiciary in the near future, unless the disquiet over the *Latimer* sentence continues to reverberate. At most, there may be some suggestion to change the *Criminal Code* with regard to parole ineligibility, but one need only recall the furore over the recent modest revisions to the "faint-hope" clause

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[65] Council of Canadians with Disabilities Press Release, "Coalition of Disabled Canadians Seek Intervener Status in Latimer Appeal" (19 May 1998), online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/prescoal.html> (date accessed: 21 February 2001)

to see how improbable it is that this harsh feature of our sentencing law will be liberalized, even for first-degree murder.

The introduction of another type of homicide, with lesser penalties when the victim is a person with a disability, would conspicuously offend section 15 of the *Charter* and would be anathema to people with disabilities. As the CCD maintained in their factum to the Court, in responding to the accused's plea for a constitutional exemption, this sentence would be horrific for "individuals with disabilities and/or those who are perceived to be experiencing unacceptable levels of pain."[66]

In fact, at least insofar as those who are unable to formulate or express views on the matter are concerned, their lives would rest entirely in the hands of their parents or caregivers. If their situation became such that (in the eyes of the caregiver) death was preferable to life, they could be killed and the caregivers would not suffer the full sanction of the criminal law.[67]

There is, in the final analysis, no basis on the facts of the *Latimer* case for the advancement of the cause of reducing the range and extent of minimum penalties for homicide, regardless of the importance of the debate in other contexts. Canada cannot use the killing of a child with disabilities as the foundation for a new sentencing regime. The inherent violation of the equality obligation under the *Charter* and the diminution of human value and dignity for people with disabilities is plainly unacceptable. Cal Lambeth wrote:

> Whatever ones own feelings about mandatory sentencing, it must be made clear to our legislators that in determining [a] sentence for the perpetrator of a crime, that the nature of the victim must not be allowed to be taken into account. That is to say, the court or jury shall not be entitled to pass judgment on the quality of the life of the victim. To allow this to occur would be to establish a hierarchy of rights and penalties for victims and perpetrators.[68]

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[66] *Factum*, *supra* note 34.

[67] *Ibid.* See also Heathen Heavin, who wrote "the necessary effect of creating this mercy killing exemption is that it would deprive Tracy Latimer of her right to life without any concern for the principles of fundamental justice, and it would also deprive her of the full protection of the criminal law as provided for in s. 15 of the *Charter*." *Supra* note 37 at 628.

[68] C. Lambeth, *Issues Raised by the Latimer Case: Equality Rights Issues*, online: Council of Canadians with Disabilities <http://www.pcs.mb.ca/~ccd/ch5.html> (date accessed: 21 February 2001). Many commentators have unabashedly drawn a link between the *Latimer* case and the unrelated problems of minimum sentencing. An example of this are the comments of A. A. Borovoy: "Incredibly, this proposal [the four-year minimum for firearms related offences] was introduced within a month after a life sentence—no chance of parole for 10 years—was imposed upon Saskatchewan farmer Robert Latimer for the mercy killing of his severely disabled 12-year-old daughter." A.A. Borovoy, "The Perversity of Ottawa's Minimum-Sentence Move" *The Toronto Star* (28 December 1994) A23.

Indeed, this article will argue that the circumstances of the *Latimer* case provide a strong basis for proposing that the *Criminal Code* should be amended. Before looking at those recommendations, it is worthwhile to pause and reflect on the genre of homicide represented in the *Latimer* case. When one thinks of the nature of this killing, one should be reminded of some basic doctrines. It will be argued that the killing of a child or person with a disability should be considered an aggravating circumstance, from the point of view of the charge laid or the penalty or both. Consequently, there should be an increase in the general level of protection provided by the criminal law through the creation of new offences against children and people with disabilities.

VIII. CONTRASTING RESPONSES TO CHILD HOMICIDE

Frequently, responses to the *Latimer* case have shown contempt for what one would have thought were basic values and legal doctrines. The conventional abhorrence of child killing is virtually forgotten. The betrayal of trust by a parent in inflicting violence on a child is excised. Peters stated, "the murder of a disabled child should have invoked swift justice and strong public condemnation."[69]

The conspicuous failures to discharge the legal duties to provide the necessaries of life as required by the *Criminal Code* (section 215), and to ensure that medical treatment is provided and that the child is not harmed, as guaranteed by child protection legislation, seem to go unrecognized. The repackaging of the brutishness of an attack upon a person with a disability who has communication problems and who is wholly dependant on her care providers as compassion, love, or mercy is arguably the cruelest and most insidious aspect of the case. Mariette Ulrich has captured the unsuitability of such concepts for the context of murder, writing that:

> "Compassionate Murder" is an oxymoron The word compassion means "to suffer with," and you can't suffer with someone you're killing. After all, homosexuals, women and ethnic/racial minorities also suffer, don't they? Would anyone suggest as a remedy they be murdered?[70]

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[69] *Supra* note 22 at 639.

[70] M. Ulrich, *Latimer may not like it, but the old, simple law against murder fits him just fine* (March 2001), online: Compassionate Healthcare Network <www.chninternational.com/m_ulrich_the_report.htm>.

Normally, society would find such actions so utterly reprehensible and incomprehensible that the perpetrator would be denounced as a monster or society would compartmentalize the killing as the action of a person who must have been psychotic at the time of the offence. The typical readiness to see the child killer as a moral pariah or as a person who has an internal disorder indicates society's unwillingness to examine motive to mitigate the condemnation attaching to child homicide.

The illogicality of a necessity defence, a constitutional exemption, or a novel kind of less heinous homicide should be particularly plain when one remembers other murders of children. For example, in 1995, Susan Smith narrowly escaped the death penalty for killing her two healthy children in South Carolina. Their 1994 drowning deaths were portrayed as unthinkable crimes. "When Susan was arrested, angry and tearful mobs gathered outside the courtroom."[71] In Smith's case, the outrage was "because those were 'valuable lives' snuffed out."[72] "It is obviously the disability of Tracy that most accounts for the difference in public opinion."[73] Advocates for the accused in *Latimer* would no doubt try to differentiate and ennoble his killing as being motivated by his inability to tolerate his daughter's suffering, as opposed to the ostensibly more selfish motive of the Smith case. Such distinctions seem insubstantial when one sees the crime from the victim's perspective. None of these children wanted to be killed. Their lives were terminated because of someone else's problems with their existence.

Adam Hildebrand has consolidated and advanced our understanding of why the killing of vulnerable people like Tracy seems to take on such inverted dimensions.[74] He explains how language is used to dehumanize people and how:

> Unpleasant realities, such as killing thoughts and wanting someone dead, can be "prettified" through what Wolfensberger has described as detoxification. Detoxification is the manipulation of language which removes the poison from unpleasant realities by using words that sound more palatable.[75]

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[71] Frazee, *supra* note 35.

[72] Lambeth, *supra* note 68.

[73] Derksen, *supra* note 55.

[74] A. J. Hildebrand, "Masked Intentions: The Masquerade of Killing Thoughts Used to Justify Dehydrating and Starving People in a 'Persistent Vegetative State' and People with Other Profound Neurological Impairments" (2000) 16 Issues L. & Med. 143.

[75] *Ibid.* at 148.

Through detoxification, differences between child homicides can be created through not only the devaluation of the victim but also through the benign colouration of motive, which is what occurred in *Latimer*. Such discussions of diversions should not obscure the need for a direct confrontation with the real problems raised by the killing of Tracy.

IX. ENVISAGING A DIRECT RESPONSE TO *LATIMER*

What is the proper societal response to the conflict in the popular presentation of these two instances of child homicide? Retreat and pessimism would be counter-productive. Instead, this article favours a positive approach, which is truly responsive to the challenges presented by the *Latimer* case. Deborah Kaplan has advocated direct strategies, the goal of which is to eradicate stigma, destroy stereotypes, and reduce discrimination. "Social and legal activism that challenge the assumptions behind disability discrimination," she wrote, "address the issues head on."[76]

Margaret Thornton evokes Nietzsche's concept of *ressentiment*, suggesting that "enduring a harm caused by the act of another triggers a desire to retaliate by inflicting harm on the perpetrator in order that the victim might lessen his or her own pain."[77]

When used in the context of discrimination, Thornton deploys this spirit "as a positive force in reshaping the concept of citizenship,"[78] promoting, as has Holloway Sparks, an ethic of "dissident citizenship" in which the courage to stand up, speak out, and take an unpopular position is shown to be productive and energizing.[79]

In this spirit of confronting the disability discrimination demonstrated by *Latimer* and its public sequelae head on, Thornton's evocation of *ressentiment* has inspired the presentation of the following proposals. Of necessity, they will be succinct, and intentionally provocative.

The appropriate answer to the dangers exemplified in the *Latimer* case is to amend the criminal law. The dignity and equality of people with disabilities may thereby be reasserted. Society should be reminded of the need to ensure that the most vulnerable people in our society (children and

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[76] D. Kaplan, "The Definition of Disability: Perspective of the Disability Community", (2000) 3 J. of Health Care L. and Pol. 352 at 364.

[77] M. Thornton, "Neo-Liberalism, Discrimination and the Politics of *Ressentiment*" in *Explorations on Law and Disability in Australia* (2000) 17 L. in Context 8 at 19.

[78] *Ibid.* at 22.

[79] *Ibid.*

people with disabilities who have communication barriers and who are dependant) require extra protection. Further, the basic principle that the violation of a parental trust constitutes an especially heinous offence must be reiterated.

In order to advance this discussion, this article will look at a series of proposals to amend the *Criminal Code* and respond to some objections to these recommendations.

X. EXPANDING THE RANGE OF DISABILITY-SPECIFIC OFFENCES

The Federal Department of Justice, albeit inadvertently, provided a response to many of the issues arising out of *Latimer* through the federal Justice Department's 1999 Consultation Paper on child victimization, "Child Victims and the Criminal Justice System."[80] A number of the areas for consultation concerned the possibility of creating new child-specific criminal offences. It seems equally appropriate to consider the criminalization of similar behaviours with respect to persons with a mental or physical disability, with an insistence upon a trust or dependency relationship as explained *infra*. Both types of offences should be discussed, based upon the facts of *Latimer*.

Parliament has already seen the need to provide special protection for people with disabilities in a series of 1998 amendments to the *Criminal Code* and other federal legislation.[81] Section 153.1 of the *Criminal Code*, "Sexual Exploitation of Person With Disability," was created to prohibit sexual touching of a person with a mental or physical disability by persons in positions of trust or authority or with whom the person with a disability is in a relationship of dependency. The provision was said to "ensure comprehensive protection for the disability community against physical and sexual violence," given that "the reality is, however, that the law has not always recognized the special needs or circumstances of people with disabilities."[82] The motivation which gave rise to this new offence should

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[80] Department of Justice Canada, *Child Victims and the Criminal Justice System: A Consultation Paper* (November 1999), online: Department of Justice Canada <http://canada.justice.gc.ca/en/cons/child/toc.html> (date accessed: 19 January 2001) [hereinafter *Consultation Paper*].

[81] Department of Justice Canada, *Backgrounder: Canada Evidence Act and Criminal Code Amendments to Accommodate Persons with Disabilities* (June, 1998), online: Department of Justice Canada <http://canada.justice.gc.ca/en/news/nr/1998/disabk2.html> (date accessed: 18 January 2001).

[82] *Ibid.*

ensure that Parliament is able to consider widening the range of offences intended to protect people with disabilities in the same manner proposed in the *Consultation Paper* on child victims.

It is beyond the scope of this article to explore in detail the full range of offences discussed in the *Consultation Paper* or its counterparts in the disability context. It does seem, however, that every potential expansion of the range of *Criminal Code* prohibitions vis-à-vis children deserves parallel consideration for legislative activity vis-à-vis persons with disabilities. For present purposes, offences are merely listed with appropriate alterations to adapt their elements to the context of people with disabilities.

In each case, in order to avoid both overbreadth and inaccurate and paternalistic assumptions about the nature of disability, it would likely be appropriate to incorporate the definitional structure of the current section 153.1 of the *Criminal Code*, which demands that the perpetrator be in a position of trust or authority or be a person with whom the person with a disability is in a relationship of dependency.

i) *Criminal physical abuse of a person with a disability*: this offence would address the harms which can be inflicted upon vulnerable people by care providers.

ii) *Criminal neglect of a person with a disability*: this offence would be directed to forms of neglect which might not be covered by other current offences against the person, with an emphasis on violence.

iii) *Criminal emotional abuse of a person with a disability*: injuries suffered by people with disabilities inflicted by persons in positions of trust may not stop at physical harm. Severe psychological and emotional damage may well deserve separate coverage.

iv) *Failing to report suspected crimes against persons with a disability*: there is, in general, no criminal law reporting requirement in Canada, despite the various provincial offences penalizing the failure to report children or adults in need of protection. Escalating the severity of failures to report by including them in the *Criminal Code* would enhance the protection offered by the law for persons with disabilities.

v) *Manslaughter—causing the death of a person with a disability arising out of abuse or neglect*: this offence would not be intended to oust the offence of murder where it can be proved. Instead, it would be designed to deal with the causation of death through the above physical abuse or neglect offences, which might draw the public's attention to conduct that results in the death of a person with a disability.

XI. SENTENCING ISSUES

Outside the creation of these new offences, several major sentencing issues should be addressed. There are areas involving basic principles of sentencing, factors in sentencing, procedure in sentencing, and

the actual punishment provisions of certain crimes which merit study by Parliament, in order to properly respond to *Latimer*. For convenience, existing legislation is reproduced, where applicable, with an asterisk accompanying the recommended reforms, unless otherwise noted.

Judges have probably benefited from the recent guidance of Parliament on the very basic issue of the purpose of sentencing. Inserting an equality dimension seems consistent with this form of direction for the judiciary.

A. *Purpose and Principles of Sentencing*

Section 718, a provision setting out the purposes of sentencing, was included as part of amendments to the *Criminal Code* passed in 1995. That section should be amended to underscore the importance of equality rights of all citizens. The language I have proposed is italicized.

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society, *where every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination*, by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims and to the community;
>
> (f) to promote a sense of responsibility in offenders, an acknowledgment of the harm done to victims and to the community.[83]

This amendment would provide an additional description of Canadian society and its aspirations. It presumes that Canadians believe that equal protection and benefit of the law is as much a defining feature of the country as being "just, peaceful and safe." It would require the judge, when imposing sanctions, to take equality considerations into account. This proposal might diminish the likelihood of a sentence such as the constitutional exemption given for Latimer's second murder conviction, which was either unmindful or reckless with respect to equality principles.

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[83] *Supra* note 2, s. 718.

B. *Other Sentencing Principles: Section 718.2 et seq.*

Other sentencing provisions should be considered in order to provide explicit Parliamentary recognition of the special needs of persons with disabilities and to provide a clearer demonstration of this responsibility to the judiciary. Once again, the *Consultation Paper* provides some inspiration for legislative action on the twin fields of children and persons with disabilities raised in the *Latimer* case. Given the attention in the *Consultation Paper* paid to "Sentencing to Protect Children"[84] this part will concentrate on the utility of adopting similar initiatives for persons with a disability in Canadian sentencing policy.

Section 718.2 already recognizes the aggravating effect of "evidence that the offender, in committing the offence, abused the offender's spouse or child"[85] or of "evidence that the offender, in committing the offence, abused a portion of trust or authority in relation to the victim."[86] Both of these stipulations are directly engaged in the *Latimer* case, although, in most discussions of the case, there have been few references to these provisions, and some tendency to deemphasize their salience.

Although it is conceivable that these sections will be adequate to deal with many scenarios, it would be more suitable to create separate provisions which explicitly require that certain kinds of harms against children and people with disabilities be considered in sentencing. *Latimer* was a case where both interests were involved, as the victim was a child and a person with a disability. In order to avoid the paternalistic conflation of childhood and disability, distinct provisions should be created for each segment of the population. In order to avoid duplication of the coverage of child-related protections in the *Consultation Paper*, the following proposals will be phrased with exclusive reference to people with disabilities.

Arising out of *Latimer*, the sections would focus on: the relationship between victim and offender; consideration of whether the dominant sentencing principles should be denunciation, deterrence, and separation; acknowledgment that care providers will often have no prior record and a good reputation; and the true harms experienced by a victim with a disability. Although there are several parallel directive examples suggested

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[84] Department of Justice Canada, "Sentencing to Protect Children" in *Child Victims and the Criminal Justice System: A Consultation Paper*(November 1999), online: Department of Justice Canada <http://canada.justice.gc.ca/en/cons/child/consul2.html> (date accessed: 19 January 2001).

[85] *Supra* note 2, s. 718.2(a)(ii).

[86] *Ibid.* at, 718.2(a)(iii).

in the *Consultation Paper* for adoption in relation to children, it should be noted that the *Criminal Code* already has some comparable provisions. For instance, section 743.6(2), which concerns delayed eligibility for parole, establishes a hierarchy of principles in some situations:

> ... the paramount principles that are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles.[87]

The following sections would provide Parliamentary leadership in the protection of people with disabilities, while still preserving a large component of judicial discretion, in the post-sentencing amendments tradition:

Section 718.3 Provisions Relating to the Sentencing of Offenders Against Persons with a Disability

(1) In sentencing offenders against persons with a disability, the court shall take into account the nature of the relationship between the offender and the victim, including:

- (a) the nature of the trust reposed in the offender;
- (b) the extent of the dependence of the victim on the perpetrator;
- (c) the types of vulnerability of the victim within the relationship; and
- (d) any difficulties in communication which the victim experienced as a result of his or her disability.

(2) In sentencing offenders against persons with a disability, the court shall recognize the seriousness of such offences for victims and society and shall consider whether the principles of denunciation (s.718(a)), deterrence (s.718(b)) and separation (s.718.(c)) ought to be the predominant objectives in all such circumstances.

(3) In determining the applicable principles and objectives of sentencing, the court shall determine whether the offender's community history, which may otherwise be favourable, ought to be deemphasized, given the context of the offence against the person with a disability.

(4) In assessing the factors involved in the crime against the person with a disability, the court shall examine the full range of harms inflicted on him or her and, in particular, shall consider the physical, emotional, psychological, cognitive and developmental injuries which may have been experienced by the victim.

The foregoing provisions would provide a clear statement of Parliament's intentions with respect to the matter of sentencing offenders

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[87] *Ibid.* at s. 743.6(2).

who have committed crimes against persons with disabilities. The mixture of general principles and specific factors to be considered by the judiciary would have the same salutary educative and procedural effects as other explicit Parliamentary declarations, such as the existing sentencing principles in the *Criminal Code* or the preambles accompanying several recent amendments.

C. *Victim Impact Statement*

In the *Latimer* case, the father of the victim was the killer, while the mother of the deceased has been entirely supportive of her spouse's criminality. There was no victim impact statement, as those who would have been defined as "victims" under the extended concept of section 722(4)(b) of the *Criminal Code,* where the victim is dead, were not likely to comment on the "harm done" or "loss suffered," pursuant to section 722(1). Therefore, there was no one who would be able to bring the kind of information normally contributed by a victim, or his or her survivors, to the sentencing hearing. The Crown Attorney might address these issues in part, but in most cases, would lack a prior involvement in the victim's life or a close familiarity with the victim's disability and his or her needs and characteristics.

The *Criminal Code* could be amended to address this lacuna, although it should be noted that section 722(3) is already very expansive in permitting "any other evidence concerning any victim." Statutory accommodations could be provided to allow a victim's advocacy group to accumulate and present a dossier on the actual victim of the crime where there would otherwise be no voice for the deceased.

The accused's constitutional exemption at trial, as well as the general judicial and public response to the killing, illustrated another weakness in present sentencing policy and practices. An extreme level of anxiety and fear among people with disabilities has been encouraged by these events. The equality dimension of criminal law policy in the sentencing process would be heightened were the above amendments to section 718 to be accepted. In addition, it is worthwhile to consider permitting evidence about the effects of a homicide on other citizens with similar backgrounds or features. In the case of a murder where the reason for the crime overlaps with the victim's disability, one might expect some role to be played by, for example, the Canadian Association for Community Living, the Cerebral Palsy Association or the CCD.

The necessary amendments to accomplish both types of changes in the *Criminal Code* would be chiefly in respect of the definition of "victim" under section 722(4). Subsection (c) *infra* would respond to the situation of

the normal spokespersons being unsuitable by reason of their (or an associate's) criminality. Subsection (d) would address the need to provide a role for representatives of other citizens who also may have been harmed by the violence inflicted on the particular victim.

> For the purposes of this section and section 722.2, "victim," in relation to an offence, means
>
> (a) a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
>
> (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who is in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.[88]
>
> *(c) where the person described in paragraph (a) is dead as a result of a culpable homicide committed by a person or persons who would otherwise be entitled to prepare a victim impact statement pursuant to paragraph (b) and the Court has determined that no other person listed in the subsection is able or suitable to prepare a victim impact statement, means an association or representative so designated for that purpose by the Lieutenant Governor in Council of the province, on the recommendation of the Attorney General; and
>
> *(d) where the person described in paragraph (a) is dead as a result of a culpable homicide committed in whole or in part due to an immutable characteristic of the deceased, including but not so as to restrict the generality of the foregoing, a mental or physical disability, means a representative association, so designated for that purpose by the Lieutenant Governor in Council on the recommendation of the Attorney General, whose objects of association shall include advocacy on behalf of the designated group.

D. *First-Degree Murder*

Until the mandatory minimum penalty provisions are addressed for *all* first-degree murder convictions, the *Latimer* case demonstrates that there is a responsibility to expand the range of the existing provisions. In terms of the conditions of eligibility for a first-degree murder conviction, *Latimer* suggests that it is opportune to revisit the classification system.

Clearly, there were elements of planning and deliberation in the accused's crime which could have amply sustained a conviction for the first-degree murder offence with which the accused was first charged, so *Latimer*

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[88] *Ibid.*, s. 722(4).

does not oblige an alteration of this portion of the legislation.[89] Until the general law of first-degree murder is liberalized, *Latimer* compels reconsideration in respect of some of the other provisions of section 231.

Section 231(4) requires a first-degree murder designation where the victim has a certain status within the criminal justice system, such as peace officers, and was acting in the course of his or her duties when killed. The section could be amended to expand the range of victims whose killing would attract this additional penalty and which should comprise children and people who are vulnerable and dependent as a result of a physical or mental disability. The amendment would recognize the need to provide additional protection for these victims and would highlight the increased culpability that flows from a homicide involving these designated groups.

Similarly, section 231(5) refers to murder committed during the commission of certain crimes as being first-degree. The list should be expanded to include other crimes of domination, specifically those involving children and people with disabilities. Each of the existing offences involves extraordinary danger to a group of people who cannot escape from a risk (section 231(5)(a), hijacking an aircraft); an overcoming and usurpation of a citizen's normal autonomy (section 231(5), subsections (e) and (f), kidnapping and forcible confinement, and hostage taking, respectively) or extremely intrusive and damaging forms of interpersonal violence (the three sexual assaults noted in the section). Killing a child or a vulnerable and dependent person with a disability seems to belong in the same strata of heinousness which the criminal law punishes harshly. Moreover, such homicides can readily be seen as at least as damaging to the social fabric as the present range of offences under section 231(5). The consequent amendments would be:

> (4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first-degree when the victim is
>
> (a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

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[89] The facts of *Latimer*, as discussed in the Supreme Court decision, emphatically demonstrate the justifiability of a first-degree murder conviction in this case. For example, Roach has observed that the accused's planning and deliberation in the case could have resulted in a conviction for first-degree murder. His explanation of the conviction for second-degree murder seems sound. "The first jury's acquittal of first degree murder may have been the result of jury nullification of a law that they believed was too harsh." *Supra* note 20 at 471.

(b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or

(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein;[90]

(d) a child under the age of fourteen years; or

*(e) a person, whether a child or adult, who is vulnerable and dependent owing to a mental or physical disability.

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first-degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f) section 279.1 (hostage taking)[91]

*(g) section 215 (duty of persons to provide necessaries); or

*(h) section 153.1 (sexual exploitation of person with disability);

*(i) a section that would include some of the new offences proposed herein, involving children and people with disabilities: criminal physical abuse, criminal neglect, criminal emotional abuse).

XII. CONCLUSION: THINKING ABOUT INCREASED CRIMINALIZATION OF VIOLENCE AGAINST CHILDREN AND PEOPLE WITH DISABILITIES

The approach taken to the implications of the *Latimer* case in this article will be troubling in an environment where there is justifiable skepticism about conventional criminological perspectives on punishment and especially on the morality and efficacy of minimum mandatory sentences. While there are probably areas of intersection between my general perspectives on these issues and those of others, especially contributors to this special issue critical of mandatory minimum sentences,

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[90] *Supra* note 2, s. 231(4).

[91] *Ibid.*, s. 231(5).

the *Latimer* case presents a point of departure which is very serious indeed. This frequent commonality of aims between the author and contributors is raised in order to engage the concept of restorative justice and critical legal perspectives on crime, which would often pull the author's opinions in a direction opposite to the ones expressed herein.

As Anthony Doob has observed in his discussion of public views on sentencing policy, "people reject non-prison sanctions for certain types of offences (e.g., serious violent or sexual offences) because these sanctions are seen as not accomplishing denunciation."[92]

For the offence committed by Latimer, the premeditated killing of a child with a disability who was dependent upon the perpetrator, there is no place for discussion of restorative justice approaches to sentencing. In the face of such brutality and continued self-justification by the offender, extended imprisonment seems to be the only viable sanction. However, it must be acknowledged that, despite the patent difficulties presented by a restorative justice option in *Latimer*, some observers would still attempt to argue for its viability. For example, Tania Sarkar has suggested that "justice would likely have been better served in *Latimer* had such an approach been employed."[93]

Even Roach's careful portrayal of the "multiple faces of restorative justice" in a recent article seems inadequate to refute the incongruity of this approach in a scenario similar to *Latimer*. None of the rationales he submits—restorative justice as "retributive accountability," "rehabilitative healing," or "deterrent crime prevention"[94]—speak to the nature and extent of the violence in the *Latimer* case. Indeed, Roach's analysis of the suspicions and hostility of feminists towards restorative justice could be read, with appropriate revisions, to represent the views of people with disabilities and their advocates after *Latimer*. Roach writes that "feminist opposition to restorative justice could discredit it as a meaningful and non-discriminatory response to serious crime."[95]

The challenging perspectives usually supplied by restorative justice frameworks have no relevance in assessing the implications of *Latimer*.

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[92] A.N. Doob, "Transforming the Punishment Environment: Understanding Public Views of What Should be Accomplished at Sentencing" (2000) 42 Can. J. Crim. 323 at 335.

[93] T. Sarkar, "Do Parents Matter? A Commentary on *R.* v. *Latimer*" (2001) 64 Sask. L. Rev. 691 at 612.

[94] K. Roach, "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise" (July 2000) 42 Can. J. Crim. 249 at 262-267.

[95] *Ibid.* at 273.

People with disabilities will condemn any discriminatory reconsideration of the penological status quo for the murder of a person with a disability. Roach recognizes that "equality-seeking groups often line up on the side of the criminal sanction" in their pursuit of "the equal protection of the criminal law," although he argues that these same groups often "make unrealistic assumptions about how much protection the criminal law actually provides."[96] This skepticism is not misplaced at a general level. When it comes to analyzing the efficacy of deterrence, it is clear that the doctrine sometimes rests more on assumption than on evidence. Nonetheless, it would be illegitimate to suggest that a *realpolitik* perspective should be brought to bear concerning offences relating to people with disabilities, while this influence is not seen elsewhere in drafting legislation.

In addition, *Latimer* may well be an instance where, had a sentence intended to accomplish general deterrence been handed down in a previous parallel case, the accused's crime may have been discouraged. Had Robert Latimer known that a similar homicide had resulted in detection, vigorous prosecution and the most serious of penalties, he might have been deterred from killing his daughter. Given his attempts to avoid detection, his frequent assertions that he has not committed a crime and his unwillingness to accept the justice or inevitability of his life sentence, this hindsight seems well founded.

Looked at another way, perhaps more paradoxically, the outlook on the implications of *Latimer* espoused in this article still has progressive potential, despite being rooted in traditional doctrine. As David Nelken has said:

> It remains to be seen, however, whether critical writers will agree that the main task of criminal law is to serve as a restraint on power or whether they will also assign it a more positive role in prefiguring and building a society based on less exploitative forms of social relations.[97]

A criminal law that is more respectful of the equality interests of children and people with disabilities in dependent relationships will serve as a more effective restraint on abuse of the power that adults and care providers wield. Simultaneously, an acknowledgment of the duty to use criminal law to protect vulnerable citizens in a manner which specifically

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[96] *Supra* note 20 at 487.

[97] D. Nelken, "Critical Criminal Law" in P. Fitzpatrick & A. Hunt, eds., *Critical Legal Studies* (Oxford: Blackwell, 1987) 105 at 115.

contemplates their needs and aspirations presages a society which will be less hierarchical, exploitative, and violent.

One need not become mired in what Klaus Lüderssen calls "false dichotomies"[98] when considering the recommendations of this article. Lüderssen points to the debate over whether the criminal law has social steering functions. However, as he discusses them, both sides of this debate seem consistent with new law-making activity on behalf of people with disabilities. Criminal law may be restricted to exceptional cases, as one hopes *Latimer* will remain, thereby minimizing its social steering role, but requiring action nonetheless. Alternatively, the criminal law can be argued to assist in a "positively formative"[99] manner, again justifying many of the proposals herein. Lüderssen's outlook on the other false dichotomy, whether the law is oriented towards the victim or offender, would also seem to permit, if not encourage, new criminal law in this area. As he explains it, "the offender orientation was never an end in itself," as the concern has always been to protect potential victims through the re-socialization of offenders.[100]

The foregoing recommendations provide some promise of additional protection. On the other hand, the victim orientation, in Lüderssen's conception, does not necessarily demand immediate severe punishment. It does require the rule of law, which these proposals arguably heighten rather than diminish, in the enhanced legal guarantees offered to people with disabilities. Law reform on behalf of this stigmatized group of Canadians should withstand the critics' gaze. Once again, Jones and Marks seem to have captured the spirit which should animate new legal activity on behalf of people with disabilities and should obliterate any timorousness, writing that:

> ... law cannot dispel the pain that is often involved with experience of disability. Law cannot, on its own, transform a society into one which fully values all its members. However, in many ways law is as natural a site for the encounter with disability as is medicine.[101]

The assumption that has been made throughout this article is that anyone would be "hard-pressed to argue" that this "standard index crime"

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[98] K. Lüderssen, "Enlightened Criminal Policy or the Struggle Against Evil"(2000) 3 Buff. Crim. L.R. 687 at 695-96.

[99] *Ibid.*

[100] *Ibid.*

[101] M. Jones and L.A. Basser Marks, "Approaching Law and Disability" (2000) 17 L. in Context 1 at 3.

of murder (*a fortiori* of a child with a disability) is "in a practical or political sense, problematically categorized as unacceptable," as Mark Kelman has put it.[102] One cannot easily explain the conduct of Latimer, who may be seen as part of a group of "relatively unremorseful violent criminals."[103] Hildebrand's analysis may come as close as one is likely to get to comprehending this offender, based upon existing data. He emphasizes "the fear of human impairment—and the dread of profound neurological impairment" as creating obstacles to recognizing true intentions.[104] He also cites the "desire to see oneself as a good person" as "fertile ground for repression, denial, revisionism, reinterpretation, confusion and self-deception,"[105] obscuring "the reality that good people are capable of great evil."[106] All of these mechanisms may be at play, both for the accused and his supporters.

Alternatively, Kelman's use of the concept of marginalization assists in comprehending the sources of this accused's criminal violence. The startling and chilling truth about the *Latimer* case is that it is by no means clear that this accused's perspective is marginal. In fact, given much of the public and judicial response to the case, it appears that this accused may be all too well integrated into a culture which is deeply suspicious of and hostile towards the differences of people with disabilities. This article has endeavored to confront these discriminatory attitudes directly by trying to use the criminal law as an equality-promoting device.

Latimer has been ominous for people with disabilities both in Canadian law and in society. Some of the positions and amendments to the *Criminal Code* advocated in this article may help to dispel the threatening cloud that has formed as a result of this case. The legal and social equilibrium created in the wake of *Latimer* should be unacceptable for all Canadians. The criminal law should be used to try to counteract the obvious dangers that the *Latimer* case and its aftermath have visited upon people with disabilities. At the very least, *Latimer* should not be used to intrude upon sentencing policies which seem to have been aptly invoked against this accused.

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[102] M. Kelman, "Criminal Law; The Origins of Crime and Criminal Violence" in D. Kairys, ed., *The Politics of Law; A Progressive Critique* (New York: Pantheon, 1982) 214 at 221.

[103] *Ibid.* at 224.

[104] *Supra* note 74 at 158.

[105] *Ibid.* at 147.

[106] *Ibid.*