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Abstract

This article examines the issue of mandatory minimum sentencing from the unique perspective of women with disabilities. Concerns about the discriminatory application of mandatory minimum sentences are outlined and analyzed from a gendered disability perspective, as are concerns about the devaluation of the lives of persons with disabilities through the support of reduced sentences for those convicted of murdering persons with disabilities. This examination makes it clear that the different concerns of women with disabilities are difficult to reconcile, as they mandate contradictory positions with respect to the possible abolition of the sentencing practice. The challenges inherent in the development of a position that addresses all of the concerns of women with disabilities relating to the practice of mandatory minimum sentencing, and its possible abolition, are analyzed. The author concludes that if the practice of mandatory minimum sentencing is abolished, it must be replaced with a sentencing mechanism designed to ensure that sentencing discretion is exercised in accordance with Charter values, in order to protect the equality rights of all persons, including women with disabilities.

Keywords

Mandatory sentences; Women with disabilities--Legal status, laws, etc.; Canada

MANDATORY MINIMUM SENTENCES AND WOMEN WITH DISABILITIES©

BY FIONA SAMPSON*

This article examines the issue of mandatory minimum sentencing from the unique perspective of women with disabilities. Concerns about the discriminatory application of mandatory minimum sentences are outlined and analyzed from a gendered disability perspective, as are concerns about the devaluation of the lives of persons with disabilities through the support of reduced sentences for those convicted of murdering persons with disabilities. This examination makes it clear that the different concerns of women with disabilities are difficult to reconcile, as they mandate contradictory positions with respect to the possible abolition of the sentencing practice. The challenges inherent in the development of a position that addresses all of the concerns of women with disabilities relating to the practice of mandatory minimum sentencing, and its possible abolition, are analyzed. The author concludes that if the practice of mandatory minimum sentencing is abolished, it must be replaced with a sentencing mechanism designed to ensure that sentencing discretion is exercised in accordance with *Charter* values, in order to protect the equality rights of all persons, including women with disabilities.

Cet article examine la perspective unique que peuvent avoir les femmes handicapées face aux peines minimales obligatoires. D'une perspective attentive à la fois au sexe et à l'handicap, l'auteur donne les grandes lignes et fait une analyse des inquiétudes face à la possibilité que les peines minimales obligatoires seront imposées de façon arbitraire. L'auteur discute également des soucis face à la dévaluation de la vie des personnes handicapées grâce aux sentences réduites imposées à ceux déclarés coupables d'avoir tué une personne handicapée. Lors de l'examination des inquiétudes des femmes handicapées face au peines minimales obligatoires, il devient très clair que ces inquiétudes sont difficilement réconciliables parcqu'il existe plusieurs points de vue contradictoires à savoir si la pratique d'imposer ces peines devrait être abolie. L'auteur analyse le défi inherent qui existe dans le développement d'une position qui représente toutes les inquiétudes des femmes handicapées vis-à-vis les peines minimales obligatoires et son abolition potentielle. L'auteur conclut que si la pratique d'imposer des peines minimales obligatoires est abolie, elle devra être remplacée par un mecanisme d'imposition de peines qui assure qu'elles seront déterminées conformément aux valeurs énoncées dans la *Charte* afin que les droits à l'egalité de toutes personnes, y compris la femmes handicapées, soient protégés

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I. THE CHALLENGE OF MANDATORY MINIMA FOR WOMEN WITH DISABILITIES

The issue of mandatory minimum sentences is important to able-bodied women, persons with disabilities, and women with disabilities; however, their respective interests on this issue are derived from different social, historical, and political perspectives.[1] The main concern for able-bodied feminist advocacy groups relating to the issue of mandatory minimum sentences is its ineffectiveness and discriminatory application.[2] Most recently, non-disabled feminist advocacy groups have advocated for the abolition of mandatory minimum sentences, in conjunction with law reform initiatives calling for the abolition of the defence of provocation.[3] Persons with disabilities approach the issue of mandatory minima primarily from the experience associated with the *Latimer*[4] case, and place a priority on the protection of the social and legal value of the lives of persons with disabilities. Women with disabilities have a unique perspective on the issue

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[1] There are currently twenty-nine offences in the *Criminal Code*, R.S.C. 1985, c. C-46 that carry a mandatory minimum penalty. The discussion in this article is focused primarily on the mandatory minimum penalty relating to convictions for first and second-degree murder.

[2] Canadian Association of Elizabeth Fry Societies, *Response to the Department of Justice re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Ottawa: CAEFS, 1999) [hereinafter *CAEFS Reform Paper*]; National Association of Women and the Law, *Stop Excusing Violence Against Women: NAWL'S Position Paper on the Defence of Provocation* (Ottawa: National Association of Women and the Law, 2000) [hereinafter *NAWL Provocation Paper*]; Women's Legal Education and Action Fund, *A Feminist Perspective on Provocation in Criminal Law: Further Steps Towards the Implementation of Equality Rights in Criminal Law* (Toronto: LEAF, 2000) [hereinafter *LEAF Reform Paper*].

[3] *Ibid.*

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

of mandatory minimum sentencing and there is no easy way for them to reconcile the different concerns over mandatory minimum sentencing that mandate contradictory positions with respect to the possible abolition of the sentencing practice.[5]

Women with disabilities share the different equality-based concerns of both able-bodied feminists and persons with disabilities relating to mandatory minimum sentencing. These different concerns relate to the repercussions of mandatory minimum sentencing for those members of disadvantaged groups who are likely to be charged with murder, and for persons with disabilities who are potential murder victims. Women with disabilities face a difficult challenge as they seek to balance competing concerns in their development of a position on the possible abolition of mandatory minimum sentences. In order to ensure that their rights within this context are protected and respected, the challenges facing women with disabilities need to be made clear. An understanding of the unique perspective of women with disabilities on the issue of mandatory minimum sentencing is necessary in order to appreciate the reticence that they have in supporting the unconditional abolition of mandatory minimum sentencing, and their insistence on the need for protections against the discriminatory exercise of judicial discretion in the sentencing context.

Women with disabilities are concerned with the practice of mandatory minimum sentencing as both potential criminal defendants and potential victims of murder. The imposition of increasingly repressive sanctions, including mandatory minimum sentences, operates to augment the systematic discrimination that is usually associated with the criminal justice system. The fact that the criminal justice system operates primarily to preserve state authority, usually to the disadvantage of vulnerable minority groups, places women with disabilities at risk. Mandatory minimum sentences contribute to the inequality that defines the criminal justice system, and therefore women with disabilities are concerned with the use of this sentencing practice and appreciate the need for its abolition.

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[5] The opinions expressed in this paper relating to women with disabilities are based upon my own experience as a woman with a physical disability, my work as a member of Disabled Women's Network Canada's Equality Rights Committee (DAWN Canada), and my own understanding of the political consensus within the community of women with disabilities in Canada. The opinions expressed do not represent those of DAWN Canada, unless otherwise noted.

However, women with disabilities are also concerned with the devaluation of the lives of persons with disabilities that may occur through the support of reduced sentences for those convicted of murdering persons with disabilities. The discriminatory reasoning employed to justify the murder of persons with disabilities, such as Tracy Latimer, is offensive, and violates the equality rights of persons with disabilities. Justifying the murder of persons with disabilities based upon the rationale that they live lives of diminished value reinforces rationalizations for treating them prejudicially. Women with disabilities are concerned that without the application of mandatory minimum sentences, judicial discretion relating to sentencing decisions would operate to the disadvantage of persons with disabilities as discriminatory reasoning would be used to justify reduced sentences for those convicted of murdering persons with disabilities.

The difficulty in reconciling these competing concerns represents the primary challenge for women with disabilities as they attempt to develop a position on the possible abolition of the practice of mandatory minimum sentencing.

In this article I examine the various concerns of women with disabilities relating to the issue of mandatory minimum sentences. The concerns relating to the possible abolition of mandatory minimum sentences in the context of the defence of provocation will be discussed. The issue of mandatory minimum sentences in the context of the *Latimer* case as it relates to women with disabilities will then be discussed. This discussion will be followed by an examination of the challenges facing women with disabilities in balancing the competing concerns associated with mandatory minimum sentencing.

Through a consideration of the future of mandatory minimum sentencing in the different contexts relevant to women with disabilities, the conflicting options for reform, including the abolition of mandatory minima, the maintenance of the status quo, or a variation of the status quo, become apparent. It is difficult to conceive of a single position on mandatory minimum sentencing that addresses all of the concerns associated with the practice. The goal of this article is to identify the challenges faced by women with disabilities as they attempt to address these concerns, and as they work to ensure that they do not disappear from the debate about mandatory minimum sentences.

II. MANDATORY MINIMUM SENTENCES AND THE DEFENCE OF PROVOCATION

Most recently, able-bodied feminists have considered the issue of mandatory minimum sentencing in the context of deliberations on the defence of provocation. In 1998, the federal government introduced a law reform initiative in consideration of reforming the *Criminal Code* defences of provocation, self-defence, and the defence of property. A wide range of constituents were invited to respond to this initiative. At least three national women's equality rights organizations, the Women's Legal Education and Action Fund (LEAF), the Canadian Association of Elizabeth Fry Societies (CAEFS), and the National Association of Women and the Law (NAWL) developed positions on recommendations for law reform in response to this initiative.[6] Feminists represented by these organizations used this opportunity to develop formal positions on the defence of provocation, currently enshrined in section 232 of the *Criminal Code*, and the related issue of mandatory minimum sentencing.

The defence of provocation is a partial defence to a conviction of murder. If applied successfully, it will reduce a conviction of murder to manslaughter. The relevant sections of the *Criminal Code* read:

> 232.(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions
>
> (a) whether a particular wrongful act or insult amounted to provocation, and
>
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
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> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.[7]

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[6] *Supra* note 2.

[7] *Criminal Code*, *supra* note 1, ss. 232(1)-(3).

With a reduction from murder to manslaughter, the accused avoids the mandatory minimum sentences of life imprisonment with no eligibility of parole for twenty-five years for first-degree murder, and no eligibility for parole for ten years for second-degree murder.[8]

What is particularly offensive about the defence of provocation is the sexist origins of the defence and the discriminatory way in which the defence continues to be applied today. Originally, the defence was introduced to partially excuse so-called crimes of passion wherein men killed their spouses and were able to blame the spouse for having provoked the murder by, for example, having committed adultery, or insulting the accused so that his loss of self-control and anger was excused.[9] The defence of provocation is based upon a model of the criminal law that excuses sexual domination and endorses a husband's proprietary interest in his wife.[10] The effect of the successful application of this defence is to partially condone a crime committed to avenge any violation of these historical male prerogatives.[11] As it represents a legal sanction to the exercise of violence against women, the defence of provocation can be understood to violate the security and equality rights of women. It is thus easy to understand the support of feminists for the abolition of this defence.

In addition to concerns about sex discrimination, the defence of provocation is also problematic from the perspective of an accused with a cognitive or mental impairment. Pursuant to section 232(2) of the *Criminal Code*, in determining whether a specific act or insult was sufficiently provocative to cause the ordinary person to lose self-control, the test applied to the analysis is an objective one. Because the analysis is grounded in the perspective of the ordinary, reasonable person, there is the potential that the defence may be rendered unavailable to a person with a cognitive

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[8] *Ibid.*, ss. 235, 236, 745(a), 745(c).

[9] A. Côté, *The Defence of Provocation and Domestic Femicide* (LL.M. Thesis, University of Montreal 1994) [unpublished] at 38, 41–42, 120.

[10] *Ibid.* at 2, 84, 119.

[11] *Ibid.* at 2.

impairment. According to the Supreme Court of Canada's decision in *R* v. *Hill*[12] the reasonable person in the provocation context has "a normal temperament and level of self-control."[13] In *Hill*, Chief Justice Dickson, as he then was, found that the goal of the objective test in the provocation context was to deny the benefit of the defence to "an ill-tempered or exceptionally excitable person."[14]

Following a review of British jurisprudence dealing with the defence of provocation and the application of the objective standard, Mr. Dickson concluded that the ordinary or reasonable person was one of "normal temperament and average mental capacity."[15] Based upon this understanding of the ordinary person standard, persons with 'abnormal' temperaments, with less than average mental capacities, or those who are exceptionally excitable, such as persons who may have cognitive impairments, may be denied the benefit of the provocation defence because the wrongful act or insult that triggered their loss of self-control may be considered to have been sufficient to deprive an ordinary person of self-control.

The effect of the alleged provocation would be considered unreasonable. At the same time, the accused's cognitive impairment may be such that the accused may be unable to successfully argue that she is not criminally responsible for her actions due to mental disorder under section 16 of the *Criminal Code*. Such an outcome could be understood to constitute a violation of the section 15 *Charter* rights of persons with disabilities, as the accused may be denied the equal benefit and protection of the law because of a mental or cognitive disability. This fundamental flaw with the defence of provocation gives women with disabilities an additional reason to find fault with the defence and to support its abolition.

Because of the discriminatory nature of the defence of provocation, many feminists support its abolition. However with the abolition of the defence of provocation, one means of circumventing a possible mandatory

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[12] [1986] 1 S.C.R. 313 [hereinafter *Hill*].

[13] *Ibid.* at 331.

[14] *Ibid.* at 324.

[15] *Ibid.* at 325.

minimum sentence for murder would be lost. This possibility concerns feminists because of the potential for mandatory minimum sentences to be applied to the systemic disadvantage of women, members of racialized communities, persons with disabilities, the poor, and lesbians and gays.[16] There is evidence supporting the proposition that prosecutors' exercise of discretion with respect to level of charges, choices of summary or indictable process, position on bail, and sentencing, evince patterns of systemic racism against African-Canadian and Aboriginal accused and in favour of accused persons of Caucasian descent.[17]

Research conducted by both CAEFS and Judge Ratushny in her 1997 Self-Defence Review[18] demonstrates that most women charged with homicide of allegedly violent mates forego the use of possible defences available to them, such as self-defence and/or provocation, and simply plead guilty to manslaughter. These women do this because of their concern that their defence might fail, and that they would consequently be convicted of murder and receive a mandatory sentence.[19] Offenders with mental disabilities are disadvantaged by mandatory minimum sentences because unless their condition amounts to a mental disorder that deprived them entirely of their ability to distinguish right from wrong, pursuant to section 16 of the *Criminal Code*, judges are required to ignore their reduced capacities.[20]

Because of these concerns about the discriminatory application of mandatory minimum sentencing, and related concerns about the ineffectiveness of mandatory minimum sentences, many feminists support the abolition of the defence of provocation only in conjunction with the abolition of mandatory minimum sentencing.[21]

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[16] *CAEFS Reform Paper, supra* note 2 at 9-14.

[17] See *NAWL Provocation Paper, supra* note 2 at 39; *CAEFS Reform Paper, ibid.*

[18] L. Ratushny, *Self-Defence Review* (Final Report) (Ottawa: Minister of Justice, 1997).

[19] *CAEFS Reform Paper, ibid.* at 12.

[20] *Ibid.* at 13.

[21] See *supra* note 2.

Women with disabilities understand and are critical of the discriminatory nature of the defence of provocation, and appreciate the arguments in support of its abolition. The defence of provocation contributes to society's endorsement of violence against women.[22] Women with disabilities experience gender violence at a rate disproportionate to that of any other group of women,[23] and therefore women with disabilities generally support legal initiatives designed to eliminate violence against women and advance their equality rights. Women with disabilities appreciate the unacceptable consequences of the discriminatory application of mandatory minimum sentences, particularly as they may find themselves especially vulnerable. However, it is difficult for women with disabilities to agree that the defence of provocation should be abolished only in conjunction with the abolition of mandatory minimum sentences. Their concern about mandatory minimum sentences is grounded in their experience of the *Latimer* case and the discriminatory effect of the dehumanization of disabled murder victims in the sentencing process.

III. MANDATORY MINIMUM SENTENCES IN THE *LATIMER* CONTEXT

While able-bodied feminists were developing positions on the possible reform of the defence of provocation and the abolition of mandatory minimum sentences, women with disabilities were dealing with the issue of mandatory minimum sentences in the context of persons with disabilities as potential victims of murder. Since the murder of Tracy Latimer, a twelve-year old girl who lived with cerebral palsy, by her father Robert Latimer in 1993, the security and equal treatment of persons with disabilities as potential murder victims at the hands of frustrated caretakers has been a prime concern for persons with disabilities. Robert Latimer attempted to characterize the murder of his daughter as a "mercy killing" that was committed out of love in order to end Tracy's pain.

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[22] Côté, *supra* note 9 at 119.

[23] See D. Sobsey, "Patterns of Sexual Abuse and Assault" (1991) 9 Sexuality and Disability 243 at 248-49.

Latimer's defence focused only on what Tracy could not do: she was spoon fed, incontinent, unable to talk, cognitively impaired, and dependant upon others to provide her care—all of which had nothing to do with Tracy's alleged pain, and the avowed theory of Latimer's defence.[24] Latimer attempted to dehumanize Tracy in order to justify his request for a constitutional exemption to the application of the mandatory minimum sentencing provisions of the *Criminal Code*. Latimer thereby attempted to deny Tracy, as the victim of his crime, and other persons with disabilities as potential victims of what Latimer portrayed as a 'mercy killing,' the equal application and potential benefit of these sentencing provisions.

In November 1997 Latimer was convicted of second-degree murder for a second time.[25] Because the first jury that tried Latimer had convicted him of second-degree murder rather than first-degree murder, he was charged with second-degree murder for the purposes of his second trial. Following the recommendation advanced by the jury in the second *Latimer* trial, the judge granted Latimer a constitutional exemption from the application of the mandatory minimum sentence provisions. The second trial judge sentenced Latimer to one year of imprisonment and one year on probation, rather than the mandatory minimum sentence for second-degree murder of life imprisonment with no eligibility for parole for ten years.[26]

The Court of Appeal affirmed Latimer's conviction, but varied the sentence, imposing the mandatory minimum sentence of life imprisonment without parole eligibility for ten years.[27] Latimer appealed the Court of Appeal's decision to the Supreme Court of Canada. DAWN Canada intervened before the Supreme Court of Canada to argue that the imposition of a mandatory minimum sentence in Latimer's case did not constitute cruel and unusual punishment in violation of section 12 of the

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[24] *R.* v. *Latimer*, [2001] 1 S.C.R. 3 (DAWN Canada Coalition Factum at 5) [hereinafter *Dawn Canada Factum*].

[25] *R.* v. *Latimer*, [1997] 1 S.C.R. 217. A second trial was necessary because of prosecutorial interference with the jury selection process at the first trial.

[26] *R.* v. *Latimer* (1997), 121 C.C.C. (3d) 326 [hereinafter *Latimer 1997 T.D.*].

[27] *R.* v. *Latimer* (1998), 172 Sask. R. 161.

Charter. DAWN Canada argued in support of the protection of the equality and security rights of persons with disabilities in the context of sentencing considerations in which the victim is a person with a disability.

DAWN's intervention in the *Latimer* appeal was not an intervention in support of mandatory minimum sentences *per se*, but an intervention in support of the equal application of the mandatory minimum sentencing provisions of the *Criminal Code*. What was particularly offensive about Latimer's defence from a disability equality rights perspective was the use, or abuse, of the murder victim's disability to justify an exemption from the regulated sentencing practice. When an accused attempts to justify a diminished sentence by dehumanizing and devaluing the life of a disabled victim, the victim unwillingly assumes a central role in the sentencing process. To support such arguments used to justify the murder of disabled persons constitutes discrimination. Persons with disabilities are vilified as a result of the accused's prejudicial treatment of the disabled victim in the sentencing context, and if the accused is successful, murder victims with disabilities are clearly treated differently than non-disabled murder victims.

DAWN did not intervene in *Latimer* to advocate in support of an increased role for the victim within the sentencing process. Traditionally, criminal justice in Canada has been understood to involve a dispute between only the state and the accused, with no direct involvement of the victim. The role of the victim in the criminal sentencing process is an issue that has generated some controversy and debate.[23] However, women with disabilities are concerned not with the role of the victim in the sentencing process *per se*, but with the treatment of the victim in the sentencing context. The primary concern relates to the violation of the equality rights of victims with disabilities through the discriminatory exercise of the sentencing process as it currently exists. There is also concern about the possibility of future equality rights violations resulting from sentencing reform that may not provide for recognition of the vulnerability of disadvantaged persons.

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[23] See D.R. Lanctot, "The Role of the Victim in Sentencing" in National Seminar on Sentencing (Edmonton: Canadian Institute for the Administration of Justice, 1985); W. N. Renke, "Flappers to Rappers: Criminal Law in 1921 and 1996" (1996) 35 Alta. L. Rev. 89; I. Waller, "The Role of the Victim in Sentencing and Related Processes" (Ottawa: Department of Justice Canada, 1988).

The discrimination inherent in sentencing arguments that dehumanize a disabled victim are offensive because such arguments lead to the denial of equal treatment under the law for the victim if they are successful. However such arguments are also problematic because they reinforce circular reasoning. Persons with disabilities are devalued by society because of the differences associated with their physical and/or mental impairment, subjected to discrimination and oppression, and then, based upon their defining differences, the discrimination that they experience is considered justified. The perception that disabled persons lead lives of diminished value reinforces rationalizations for treating them prejudicially.[29] The effectiveness of the accused's dehumanization of persons with disabilities is demonstrated by the trial judge's finding in *Latimer* that Tracy had been "put to sleep"[30] by her father—a euphemism usually reserved for animals. The perpetuation of this kind of discriminatory opinion about persons with disabilities is a result of the primacy placed on "normalcy" by society[31]—a primacy that Latimer assumed and the trial judge endorsed through the devaluation of Tracy as a person outside of the norm.

Another dimension of the disability equality rights argument in *Latimer* relates to the legislated purpose of sentencing provisions as found in section 718 of the *Criminal Code*. According to the *Criminal Code*, one objective of sentencing is, under section 718(e), "to provide reparations for harm done to the victims or to the community," and, under section 718(f), "to promote ... acknowledgement of the harm done to victims and to the community." There is some debate about the utility of section 718 of the *Criminal Code* as it incorporates elements of both utilitarian and retributivist sentencing traditions.[32] The legislation mandates judges to

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[29] M. Oliver, "Theories of Disability in Health Practice and Research" (1998) 317 British Medical Journal 1446.

[30] *Latimer 1997 T.D.*, *supra* note 26 at 342.

[31] L.J. Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century" in L.J. Davis, ed., *The Disability Studies Reader* (New York: Routledge, 1997) 9.

[32] J.V. Roberts & A. Von Hirsh, "Legislating the Purpose and Principles of Sentencing" in J.V. Roberts & D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 48 at 53.

impose a sanction that includes at least one of the potentially conflicting objectives identified in the legislated list of purposes. Taking into consideration the objectives of sentencing practices as currently identified in section 718, the sentencing objectives of victim and community reparations and recognition of harm should not be ignored by judges because the victim of a crime was a person with a disability. So long as victim reparation and recognition of harm are recognized within the *Criminal Code* as legitimate sentencing objectives, persons with disabilities should be entitled to the equal application of these objectives, as would any non-disabled victim or community. Persons with disabilities should not have their difference used to justify the commission of an offence, and then have the resulting harm experienced by the victim and the victim's community go unrecognized.

An additional element of the disability equality rights argument in the *Latimer* context relates to section 718(2) of the *Criminal Code*. One of the principles of sentencing according to section 718(2) is that:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence of the offender; and without limiting the foregoing,
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> i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability or sexual orientation or any other similar factor, or
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> ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
>
> iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim ... shall be deemed to be aggravating circumstances.

Persons with disabilities have not argued in support of an increased sentence for Robert Latimer in consideration of the aggravating circumstances relating to his offence—the fact that he killed his daughter because of her disability and abused his position of trust and authority as her father and caregiver. However, the idea that the circumstances associated with Tracy Latimer's murder could be designated as mitigating circumstances by the endorsement of a constitutional exemption to existing

mandatory sentencing provisions, or by the sanctioning of a relatively minimal and disproportionate sentence in the absence of mandatory sentencing provisions, represents a serious equality rights concern. Justifying the imposition of a reduced sentence based upon a discriminatory understanding of the worth and value of the disabled victim's life constitutes a violation of the well-established rule that the law should be applied in accordance with *Charter* principles.[33] Unfortunately, in its decision in *Latimer*, the Supreme Court of Canada did not recognize the significance of these arguments in the development of its reasoning, leaving persons with disabilities wary about the future.

On 18 January 2001, the Supreme Court of Canada released its decision in which it dismissed Latimer's appeal against both conviction and sentence.[34] The decision in *Latimer* may be considered a qualified success from a disability rights perspective. The Court did reject Latimer's arguments that the defence of necessity should have been put to the jury. It found that there was no air of reality to the three requirements of necessity, and that therefore the trial judge was correct to remove the defence from the jury. The Court found that all of the necessary requirements of the defence—peril or danger, the lack of a reasonable legal alternative course of action, and proportionality between the harm inflicted and the harm avoided— were missing in Latimer's case. It assessed Tracy's circumstances and correctly concluded that she was not in peril, that it was unreasonable for her father to end Tracy's life rather than minimizing her pain and helping her to live, and that the harm inflicted in this case was immeasurably more serious than Tracy's pain.[35] The Court's rejection of Latimer's arguments relating to the defence of necessity does represent a success for persons with disabilities.

The Supreme Court's rejection of arguments in support of a constitutional exemption to the mandatory minimum sentencing provisions based upon the specific circumstances of the offender and the offence may

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[33] *R.* v. *Salituro*, [1991] 3 S.C.R. 654; *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Snyder* v. *Montreal Gazette Ltd.*, [1988] 1 S.C.R. 494; *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577; *R.* v. *Gruenke*, [1991] 3 S.C.R. 263; *Blencoe* v. *British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

[34] *Latimer*, *supra* note 4.

[35] *Ibid.* at 23-27.

also be understood to represent a success. The Court did find that the application of the mandatory minimum sentence in Latimer's case was not grossly disproportionate given the circumstances of the case and the gravity of the offence. It concluded that the application of the minimum sentence in Latimer's case did not constitute cruel and unusual punishment and did not violate his rights under section 12 of the *Charter*.[36] The Court also found that the sentence was consistent with valid penological goals and sentencing principles.[37]

However, the Supreme Court made no reference to any consideration of the equality rights of persons with disabilities in its consideration of Latimer's application for a constitutional exemption. The Supreme Court's apparent failure to appreciate the significance of the equality rights concerns for persons with disabilities is problematic, as persons with disabilities are a distinct group with guaranteed rights to equality under section 15 of the *Charter*. The Court made no attempt in *Latimer* to question its own assumptions about the experience of disability, nor to analyze the role that disability plays in the reasoning advanced by Latimer to justify an exemption from the mandated sentencing provisions. The Court's disregard of the disability equality rights perspective means that persons with disabilities virtually disappear from the analysis.[38] The Supreme Court has failed repeatedly to recognize the distinct needs and rights of persons with disabilities in the equality context,[39] and its decision in *Latimer* represents the most recent example of this failure.

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[36] *Ibid.* at 42.

[37] *Ibid.* at 41-42.

[38] The Supreme Court of Canada did consider the issue of disability as it related to Latimer's decision to murder his daughter. The Court implied that Tracy's disability did not justify Latimer's decision to murder her. The Court implied that Tracy's murder was not justified by its conclusion that "Tracy had a serious disability, but she was not terminally ill." (*Ibid.* at 12; *Ibid.* at 26.) However the Court also characterized Latimer's decision to murder his disabled daughter as constituting only "an error in judgment." (*Ibid.* at 11.)

[39] See especially *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241; *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703; *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

From a disability rights perspective, the Supreme Court's findings in *Latimer* relating to the royal prerogative of mercy are also disturbing and lead one to question the relative value placed on the lives of persons with disabilities by the Supreme Court. In the context of the executive clemency issue, the Supreme Court cited its own decision in *R.* v. *Sarson*[40] as follows: "Where the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense 'mercy,' and order the release of the offender."[41] The Supreme Court seems to be implying that *Latimer* may be a case in which the courts are unable legally to provide an appropriate remedy. The Court in *Latimer* went on to state:

> The executive will undoubtedly, if it chooses to consider the matter [of an executive prerogative in Rober Latimer's case], examine all of the underlying circumstances surrounding the tragedy of Tracy Latimer that took place on October 24, 1993, some seven years ago. Since that time Mr. Latimer has undergone two trials and two appeals to the Court of Appeal of Saskatchewan and this Court, with attendant publicity and consequential agony for him and his family.[42]

The Supreme Court appears to be pleading Robert Latimer's application for prerogative mercy. The Court does not specifically refer to the tragedy of Tracy's death or her murder, suggesting that from the perspective of the Supreme Court the tragedy of Tracy Latimer is not limited to her death, but encompasses her entire life. This kind of reductionist thinking contributes to the discrimination experienced daily by persons with disabilities. As was argued by DAWN Canada in its factum:

> [T]his Court should not see Tracy Latimer only in terms of her disabilities. Her status as a human being must be paramount. Her disability cannot be used as a justification for departing from fundamental constitutional values. She was a person first and that fact must not be obscured by the detail of her medical circumstance.[43]

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[40] [1996] 2 S.C.R. 223.

[41] *Latimer, supra* note 4 at 42.

[42] *Ibid.* at 43.

[43] *DAWN Canada Factum, supra* note 24 at 6.

The Supreme Court's comments on the potential use of an executive prerogative are gratuitous; there was no need for it to comment on this issue whatsoever. By raising the issue of executive clemency as "worth(y)" of reference[44] and framing its comments in a supportive fashion, the Court essentially endorsed Robert Latimer's application for prerogative mercy.

The Supreme Court's comments relating to the significance of the publicity associated with the *Latimer* case are also of concern. The Court seems to be implying that the publicity of the defendant's murder of his disabled child created such agony for Latimer and his family that it justifies an executive order of prerogative mercy—a justification that is difficult to appreciate from a disability perspective. Why should publicity concerning a father's irrefutable murder of his disabled daughter justify an order of prerogative mercy? If the defendant were innocent, the negative effect of such publicity would be obvious. However, Latimer is clearly guilty of the offence with which he was charged and convicted. From a disability perspective, the Supreme Court's findings about the publicity associated with Latimer's prosecution and the consequential agony experienced by him and his family represent an expression of sympathy similar to that expressed by the media in support of Robert Latimer—a sympathy that is grounded in discriminatory thinking about persons with disabilities.

The Supreme Court's comments relating to publicity as a justification for an order of prerogative mercy are also perplexing given that so much of the publicity in Latimer's case was actually supportive of his decision to murder Tracy and the imposition of a reduced sentence. In fact, Latimer himself relied upon the publicity associated with his case as evidence of the public support for a reduced sentence.[45] The Supreme Court's suggestion that Latimer's prosecution and the publicity associated with it somehow justify an order for prerogative mercy sounds like the public refrain "he doesn't deserve the mandatory sentence"—the only reason being, because his victim was disabled. It is difficult to understand why the Court felt it necessary to comment on the option of an executive prerogative, and it represents a serious flaw with the decision as it appears to cast doubt on the appropriateness of the Court's own remedy.

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[44] *Latimer*, *supra* note 4 at 42–43.

[45] *DAWN Canada Factum*, *supra* note 24 at para. 75

The nature of the trial judge and jury's findings in Latimer's trial, the Supreme Court's failure to recognize the significance of the disability equality arguments in its decision-making and its comments relating to an executive order of prerogative of mercy, as well as the enormous amount of public support expressed in support of Robert Latimer's defence,[46] justify the concerns of persons with disabilities about the societal value placed on their lives. Persons with disabilities fear that without the safeguard of mandatory minimum sentences, their lives would be significantly devalued through the use of disability as a justification to reduce a sentence following a conviction in the murder of a disabled victim. If judges and juries are inclined to support reduced sentences for those convicted of murdering persons with disabilities, even in the face of mandatory sentencing provisions, people with disabilities are concerned that without mandatory sentencing provisions, they will be at even greater risk of the unequal application of sentencing principles and practices. They are also concerned that the successful use of discriminatory justifications to reduce sentences for those found guilty of murdering persons with disabilities will create the perception that persons with disabilities have lives of diminished value, which will in turn reinforce the rationalization for treating them prejudicially.

Women with disabilities bring an additional, alternative, gender-based perspective to the *Latimer* case and the issue of mandatory minimum sentences—the perspective of women as caregivers. Women are the primary caregivers of children in Canada, and the pressures of providing care to children with disabilities fall predominantly on them. All of the children with disabilities murdered by their caregivers since the death of Tracy Latimer, have been killed by their mothers.[47]

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[46] Online: The Home Page in Support of Robert Latimer <www.RobertLatimer.com> (date accessed: 19 January 2001); J. Mahoney, "Most Support Cut in Latimer's Term for Mercy Killing" *The Globe and Mail* (18 April 2001) A3.

[47] Council of Canadians with Disabilities presentation to the Senate Subcommittee of the Standing Committee on Social Affairs, Science and Technology updating "Of Life and Death," March 27, 2000; See also I. Peritz, "Shy Girl's Death Called Mercy Killing" *The Globe and Mail* (21 March 2001) A3.

This fact does not persuade women with disabilities to support the abolition of mandatory minimum sentences so that mothers may murder their children with disabilities with impunity, or to support sentencing leniency in situations in which women murder their disabled children. Instead, recognizing that women assume a disproportionate share of the caregiver responsibilities for children with disabilities, and that they often receive insufficient assistance to cope with these responsibilities, women with disabilities support increased state assistance for the care of children with disabilities. A gendered perspective on the care-giving issue provides women with disabilities an increased appreciation of the complexities associated with mandatory minimum sentences and of the need to proceed cautiously with respect to the development of recommendations for sentencing reform.

IV. WOMEN WITH DISABILITIES AND THE FUTURE OF MANDATORY MINIMUM SENTENCING

In her article, Nitya Iyer Duclos wrote about racial minority women falling between the cracks of discrimination analyses, and their disappearance as a distinct group as a result of this experience.[48] Women with disabilities are also at risk of falling between the cracks of equality rights analyses. The needs and rights of women with disabilities are often very different from those of able-bodied women, and litigation and law reform analyses developed by able-bodied feminists may not reflect the concerns of women with disabilities. Similarly, the needs and rights of women with disabilities often differ from those of the mainstream, male-dominated disabled community. The issue of mandatory minimum sentences provides a classic example of the unique perspective that women with disabilities bring to an analysis of the law. Because of their unique perspective on an issue such as mandatory minimum sentencing, women with disabilities cannot be assumed to be represented by positions developed by able-bodied feminists or by the disabled male community.

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[48] N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25.

The unique concerns and priorities of women with disabilities must be addressed and recognized in order to ensure that their equality rights are protected.

There is no easy way to reconcile the many different concerns of women with disabilities about the issue of mandatory minimum sentences. It is now well known that the experience of multiple grounds of discrimination is not an additive experience[49]—women with disabilities are not women and disabled, or persons with disabilities and women. As the issue of mandatory minimum sentences demonstrates, women with disabilities are unique in their experience. Therefore they cannot just accept the position on mandatory minimum sentences as adopted by many able-bodied feminist organizations in Canada, such as the abolition of mandatory minimum sentences, even on the condition of the introduction of sentencing "guidelines" designed to protect the interests of disadvantaged groups. The experience of women with disabilities is that when discretion is left in the hands of the judiciary, they are vulnerable to the discriminatory exercise of that discretion. Nor can women with disabilities accept that mandatory minimum sentences should be maintained in light of their unequal application and the systemically discriminatory effect of mandatory minimum sentences on women, persons with disabilities, members of racialized communities, the poor, and other disadvantaged groups.

The introduction of some kind of sentencing mechanism designed to ensure that sentencing discretion is exercised in accordance with *Charter* values so as to protect the equality rights of all persons, including persons with disabilities, represents a possible answer to the dilemma faced by women with disabilities in the mandatory minimum context. The legislative introduction of such a mechanism would alleviate the primary concern with the abolition of mandatory minimum sentences, and would likely facilitate a movement in support of its abolition. As part of a general commitment towards developing a more equitable justice system, women with disabilities are committed to the development and introduction of a sentencing mechanism that will ensure the protection of their equality and security

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[49] See A. Lorde, "Age, Race, Class, and Sex: Women Redefining Difference" in *Sister Outsider* (Freedom: The Crossing Press Feminist Series, 1984) 114 at 120; A.P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 at 588–89; C. Weedon, *Feminism, Theory and the Politics of Difference* (Malden: Blackwell, 1999).

rights so that they can then endorse the abolition of mandatory minimum sentencing without reservation. This goal is critical to women with disabilities as they seek to ensure that the creation of a more equitable justice system is a process from which they do not disappear and to which they contribute.