CHAPTER THIRTEEN

How Sentencing Reform Movements Affect Women

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The distinct pains of punishment for women are well established in studies of the social and material realities of sentence administration. Some of the unequal burdens that women experience in custody flow from how "systems, practices, and policies" are "designed for the majority of the incarcerated population: men."[1] Other disparities derive from inequalities in the broader community. For example, women who appear at sentencing are more likely to be the primary caretakers of children, and for them a custodial sanction will mean family separation. In this chapter, I canvass the capacity of Canadian sentencing law to respond to the distinct impacts and effects of incarceration on women. I argue that the limited impact of sentencing reform movements in contemporary Canada has helped to sustain the judicial discretion and the strong emphasis on individualization that allows judges to craft fit sentences for women.

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1 Elizabeth Swavola, Kristine Riley, & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform* (New York: Vera Institute of Justice, 2016) at 7.

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Scholars have highlighted the ways in which women have been mistreated in Canadian prisons, how incarcerated women are disproportionately Indigenous, and how they have been "disadvantaged, treated unfairly and essentially penalized for their underrepresentation among those convicted of crime."[2] These critical perspectives point to important empirical truths, but it is equally important to emphasize the ways in which the sentencing courts are, in many respects, officially open to considering these realities.

Canadian sentencing courts are well positioned to respond, within the bounds of existing legal rules and principles, to the distinct experiences and effects of women's imprisonment.[3] This is largely because Canadian judges have broad discretion to consider the circumstances of an offender at sentencing, and because the collateral consequences and impacts of imprisonment are broadly relevant. In addition, the circumstances of Indigenous women must be considered at sentencing pursuant to section 718.2(e) of the *Criminal Code*,[4] and *R v Gladue* is broadly instructive on how to consider systemic factors in the context of individual cases and an overarching commitment to proportionality.[5] The *Gladue* framework helps to resolve what scholars have called the "challenge" of sentencing that responds to the distinct impacts of imprisonment on women "without compromising the fundamental sentencing principles of equity and proportionality."[6]

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2 See, for example, Debra Parkes & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 251 at 251–52.

3 Of course, these issues change over time and vary across penal institutions and individual cases. As Judith Resnick put it in a piece about sentencing women in the United States: "Women are not a singular set, but differ on many dimensions, including those of race, class, sexual orientation, age, parental status, occupational position, and the like. Women share the ways in which the social order is organized by gender, but that organization is varied and complex." Judith Resnik, "Sentencing Women" (1995) 8 *Federal Sentencing Reporter* 134 at 135.

4 RSC 1985, c C-46 [*Criminal Code*].

5 *R v Gladue*, [1999] 1 SCR 588; see also *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

6 See Julian Roberts & Gabrielle Watson, "Reducing Female Admissions to Custody: Exploring the Options at Sentencing" (2017) 17 *Criminology & Criminal Justice* 546 at 547.

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To take one example of the upshot of these commitments: If imprisonment means a defendant's child will be placed in foster care — particularly if that outcome will continue a wider pattern of state-imposed separation of Indigenous women from their children — that is the kind of circumstance that Canadian law directs judges to consider. Whether these issues are invariably or adequately argued by defence counsel and considered by judges is another question.[7] The point here is that the law allows it, even calls for it.

The fundamental principle of Canadian sentencing law is proportionality according to the gravity of the offence and the degree of responsibility of the offender.[8] In Chapter 18, Benjamin Berger argues that the Canadian brand of proportionality mandates judges to calibrate a sentence according to the individualized experience and effects of punishment, along with individualized notions of responsibility and desert.[9] Although the *Criminal Code* and many judicial opinions emphasize parity, overall, our courts have rejected a formalist version of parity that requires nothing more than a similar quantum of punishments for similar offences. As Moldaver J recently put it: "Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer 'like' the others, rendering a given sentence unfit."[10] These commitments are enormously important for women, and they may help to explain, in part, Canada's high degree of consistency and moderation in the female rate of incarceration.

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7 A recent study was unable to find reported sentencing decisions that formally analyze the "best interests of the child," though family ties are generally relevant at sentencing and conditional sentences may be imposed in some cases to provide for care of children: Canadian Friends Service Committee, *Considering the Best Interests of the Child When Sentencing Parents in Canada: Sample Case Law Review* (December 2018) at 14–15, online: https://quakerservice.ca/wp-content/uploads/2018/12/Considering-the-Best-Interests-of-the-Child-when-Sentencing-Parents-in-Canada.pdf.

8 *Criminal Code*, above note 4, s 718.1.

9 See also Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 *Supreme Court Law Review* (2d) 337 [Berger, "Salience of Pain and Hope"]; and Dwight Newman & Malcolm Thorburn, eds, *The Dignity of Law: The Legacy of Justice Louis LeBel* (Markham, ON: LexisNexis, 2015).

10 *R v Suter*, 2018 SCC 34 at para 48 [*Suter*].

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Part of this chapter considers these commitments in the Canadian system in comparative perspective. Comparison with the United States underscores the distinct and deliberate character of sentencing law and policy in Canada today, as well as the high stakes of this policy field for women. I show that Canada contemplated — and rejected — the main features of a US sentencing reform movement that took hold mainly from 1985 to 2005. Over this period, the US federal system opted to minimize points of discretion that could respond to individual circumstances at sentencing. The reforms of this period were largely founded on the idea that the only legitimate factors at sentencing are the features of an offence and the defendant's criminal record, rather than the broader circumstances of the offender. As Michael Tonry summarizes the results: judges were precluded from considering "the commonsense bases for distinguishing among offenders."[11] Differences that related to or flowed from sex and family status, along with many other individual factors, were now banished from consideration. The female rate of incarceration saw a sharp increase over this period.

Similar sentencing reform debates circulated in Canada at the same time that the United States redesigned the federal and many state systems. The 1987 report of the Canadian Sentencing Commission[12] proposed to abolish parole and switch to guideline sentencing, but these reforms did not receive political or legislative uptake. As Julian Roberts describes, the sentencing reform experience has been "far more modest and tentative" in Canada than in the United States.[13] The principal difference between the two countries "lies in the degree of constraint imposed on the judiciary."[14] Canadian sentencing might be less predictable and less coherent in certain ways as a result, but it has also been

11 Michael Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996) at 77 [Tonry, *Sentencing Matters*].

12 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987), online: http://johnhoward.ca/wp-content/uploads/2016/12/1987-KE-9355-A73-C33-1987-J.R.-Omer-Archambault.pdf [CSC, *Sentencing Reform*].

13 Julian V Roberts, "Sentencing Reform: The Canadian Approach" (1997) 9 *Federal Sentencing Reporter* 245 at 248.

14 *Ibid.*

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better insulated from politicization and has enjoyed striking stability in rates of incarceration, women included.[15]

In this chapter, I suggest that the capacity of Canadian sentencing judges to bring a gendered analysis to sentencing is one positive consequence of the failure of the late twentieth-century Canadian sentencing reform movement. My aim is to show how Canadian sentencing law remains open to a gendered analysis of the pains and effects of punishment. The comparative material helps us to understand and recognize the significance of the Canadian path not taken, and the implications for the prospect of fair sentencing for women today.

A. THE GENDERED EXPERIENCE AND IMPACTS OF IMPRISONMENT IN CANADA

In 2013, in the face of a robust trial record, a British Columbia court pointed to evidence that far more women than men are primary caretakers of children before being incarcerated and that the consequences of incarceration for a mother and her child(ren) can be substantial and devastating.[16] Incarceration means not only the disruption of caretaking relationships for the period of confinement, but it can also increase the likelihood of state apprehension and a permanent loss of parental rights.[17] In contemplating differences like these, Candace Kruttschnitt

15 See, generally, Anthony Doob & Cheryl Marie Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" (2016) 45 *Crime and Justice* 359 [Doob & Webster, "Weathering the Storm?"].

16 *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras 21, 229, 411, and 485–86. The court also pointed to evidence that children in government care are more likely to be diagnosed with a health condition, more likely to be prescribed mental health–related drugs, more frequently admitted to hospital, four times more likely to be diagnosed with a mental disorder, and more likely to die of both natural causes and external causes than children in the general population.

17 *Ibid* at para 485, citing Jane Morley & Perry Kendall, *Health and Well-Being of Children in Care in British Columbia: Report 1 on Health Services Utilization and Mortality* (September 2006), online: Joint Report of the Child and Youth Officer for British Columbia & the Provincial Health Officer www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/complete_joint_report.pdf.

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calls for women's imprisonment to be understood in light of the "sizable repercussions it has on society" well beyond the sentenced person.[18]

In Canada, geography and economies of scale are additional drivers of inequality in the burdens of imprisonment. In a paper outlining how Canadian women are a "correctional afterthought" and do "particularly hard time" as a result, Debra Parkes summarizes the following systemic differences that women face: programming inequities, fewer community-based alternatives, less community involvement in women's facilities, and confinement in conditions that are more secure than required.[19] One contributor to these inequities is the use of security classification tools developed in relation to a male population: tools that have not been validated for use on women are applied to them in ways that can have an impact on crucial issues such as security level and access to early release.[20]

Another notorious example of male policies being thoughtlessly applied to women occurs in relation to medical care and childbirth. Corrections policy tends to require that male prisoners be shackled while attending medical appointments in the community in order to prevent escape. The application of this policy to women has led to shackling during labour and delivery in both the United States and Canada, despite the obvious barriers to escape during childbirth and the fact that the interests of mother and child should take precedence over that fanciful risk.[21]

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18 Candace Kruttschnitt, "The Paradox of Women's Imprisonment" (2010) 139 *Daedalus* 32 at 39.

19 Debra Parkes, "Women in Prison: Liberty, Equality and Thinking Outside the Bars" (2016) 12 *Journal of Law & Equality* 127 [Parkes, "Women in Prison"].

20 Cheryl Marie Webster & Anthony Doob, "Classification Without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 395. For an update on ongoing assessment problems for women, and particularly Indigenous women given their relatively small numbers and overrepresentation at higher security levels, see Correctional Service Canada, *An Examination of a Reweighted Custody Rating Scale for Women* by Sara Rubenfeld (Research Report R289) (Ottawa: CSC, 2014) at 54–58, online: www.csc-scc.gc.ca/research/005008-0289-eng.shtml.

21 While shackling affects female prisoners of all races today, Priscilla Ocen argues that the persistence of the US practice is connected to the historical devaluation, regulation, and punishment of the reproductive rights of black women. Priscilla A Ocen, "Punishing

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Parkes also unpacks the multiple ways that women in Canada are "penalized for their smaller numbers relative to men."[22] To take one example, while most men are confined in an institution that accords with their security rating, for several years women were all incarcerated in multi-level institutions, meaning that there were no "true" minimum security facilities. A 2008 decision of the Federal Court on that issue accepted that there were "significant and important differences" between minimum security facilities for men and women, including in the provision of housing, meals, and programs.[23]

The Office of the Correctional Investigator (OCI) confirms that Canadian women are less often incarcerated in their home province, thereby making family ties and relationships difficult to maintain and reintegration more fraught. The OCI commentary on this point makes clear women's complex position. Even successful reforms, such as the 2000 closure of the troubled Kingston Prison for Women (P4W), can transform but not eliminate the burdens faced by incarcerated women.[24] As the OCI describes this example:

> The relatively small number of women offenders in a very large country creates unique economy of scale challenges in women's corrections. The situation today is, of course, considerably better than when there was only a single penitentiary (P4W in Kingston) … This is a particular problem for women convicted or sentenced in the Prairie and Atlantic provinces, although even the vast distances in Ontario and Quebec create challenges.[25]

Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners" (2012) 100 *California Law Review* 1239.

22 Parkes, "Women in Prison," above note 19 at 12.

23 *Dodd v Warden of Isabel Mcneill House*, 2008 CanLII 17569 (ON SC) at para 72.

24 For an examination of how the meaning and content of women's penal governance changes over time, but invariably frustrates progressive reform, see Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001).

25 Ivan Zinger, *Annual Report, Office of the Correctional Investigator, 2017–2018* (29 June 2018) at 83, online: https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx. At Nova Institution for Women, only 28 percent of inmates were sentenced in Nova Scotia. At Fraser Valley Institution in Abbotsford, only 48 percent of inmates were sentenced in British Columbia. Compare Grand Valley Institution in which 94

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The impacts and effects of imprisonment on women in Canada will, of course, vary across individual cases and will be marked by significant geographic and jurisdictional variation.[26] But the question of whether this kind of material can or should bear upon sentencing where relevant in individual cases is clear. This material is relevant to sentencing. It is part of the circumstances of the offender, it bears on the *Criminal Code* principles of proportionality and rehabilitation, and it may be part of what judges have a duty to consider as part of the circumstances of Indigenous offenders.

Comparison helps to remind us that things could be otherwise. The US federal system in recent decades has treated this topic very differently, opting for offence-based formalism as a way to rein in judicial discretion. Reviewing the US and Canadian history of this period helps to underscore the distinctive and deliberate features of the sentencing system that Canada continues to have today.

B. COMPARING SENTENCING REFORM MOVEMENTS

1) Disparity Battles: The United States Sentencing Guidelines Project, 1985-2005

A sentencing reform movement captured significant public and political attention in the United States, beginning in the 1970s. The central target for reform was the indeterminate sentence and its rehabilitative underpinnings. The widespread practice at this time was that a sentencing judge would impose a sentence that specified only a maximum of custodial time to be served. Prison managers could reduce the maximum by a

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percent were sentenced in Ontario—the problem is clearly lessened in a more populous province.

26 Many of these same issues regarding the "disproportionate and unintended penal impact that imprisonment imposes on women" were noted in a report by UK Sentencing Advisory Panel head Andrew Ashworth:: Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing* (London: Sentencing Advisory Panel, 2010). The "collective vulnerability" of female offenders is not unique to Canada. For discussion, see Elaine Player, "Sentencing Women: Towards Gender Equality" in Lucia Zedner & Julian Roberts, eds, *Principles and Values in Criminal Law and Criminal Justice* (Oxford: Oxford University Press, 2012) at 254–55.

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third based on good behaviour, and the parole board could decide when prisoners were released.[27] The idea was that inmates should be released when they were rehabilitated, rather than when the sanction demanded by their crime was complete. Every state and the federal system sentenced in this way, with no real role for appellate review.[28]

Fast forward just a few years, and the federal system looked very different: parole was abolished, guidelines were enacted to constrain judicial discretion and assign a fixed punishment for specific offences, and credit for good behaviour was either abolished or narrowed. These significant transformations in sentencing and penal policy received support from across the political spectrum, for varying reasons. Progressive criminologists and sociologists saw discretion as the main problem of criminal justice and argued that it tolerates discrimination and promotes a sense of injustice.[29] They pressed for the abolition of the indeterminate sentence and counselled a shift to legislatively fixed sentences that would be immune from judicial or parole board discretion. A federal judge wrote an influential book that called indeterminate sentencing a bizarre "non-system" of extravagant powers consigned to "variable and essentially unregulated judges, keepers, and parole officials."[30]

Conservative camps agreed on the need, if not the rationale, for reform. Worried about excessive leniency and a lack of transparency in sentencing, they called for "truth in sentencing" and retributive notions of "just deserts" over rehabilitative promises.[31] Michael Tonry

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27 Tonry, *Sentencing Matters*, above note 11 at 6.

28 The law was clear that the "appellate court has no control over a sentence which is within the limits allowed by a statute." See *Dorszynski v United States*, 418 US 424, 431 (1974). Once a sentence is within statutory limitations, "appellate review is at an end." See *ibid*. See also *Gore v United States*, 357 US 386, 393 (1958). Kate Stith and José Cabranes have observed that, had the United States implemented more robust appellate review of sentencing, as countries such as the United Kingdom and Canada do, then it might never have seen the federal Sentencing Guidelines. See Kate Stith & José Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998) at 9.

29 American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (New York: Hill & Wang, 1971) at 124.

30 Marvin Frankel, *Criminal Sentences: Law Without Order* (New York: Farrar, Straus and Giroux, 1973) at 1.

31 See, for example, James Q Wilson, *Thinking About Crime* (New York: Basic Books, 1975).

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summarizes the various critiques that emerged about the long-standing rehabilitative paradigm from across the political spectrum:

> Liberals charged that it gave too much discretion to judges and parole boards and produced results that were inconsistent, unpredictable, often unjust, and sometimes racist. Conservatives complained that the system was too lenient and insufficiently oriented toward retribution, deterrence, and incapacitation. Both groups believed that rehabilitative programs were seldom effective.[32]

James Whitman characterizes this period as the widespread loss of faith in "penal modernism," defined as a purpose-driven, consequentialist program of state punishment.[33] The collapse of a rehabilitative ethos in punishment was part of a larger discrediting of the welfare state that occurred over the same period.[34] In a 1981 book, Francis Allen pointed out the propositions on which a new critique of the "rehabilitative ideal" rested: doubt that it worked, doubt that it was consistent with the political values of free societies, and a sense that it was mere camouflage for unacceptable forms of social control.[35]

The bipartisan rejection of the existing system created the conditions for rapid and comprehensive change. In 1977, Congress established a United States Commission on Sentencing, which would be tasked with the development of sentencing guidelines that would govern district court judges and deliver "honesty," "uniformity," and "proportionality" in sentencing.[36] Under the *Sentencing Reform Act of 1984*,[37] sentence lengths were based almost entirely on the offence and the criminal history of the offender. Departures from narrow ranges were

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32 See, for example, Michael Tonry, *Sentencing Fragments: Penal Reform in America, 1975–2025* (New York: Oxford University Press, 2016) at 3.

33 James Q Whitman, "The Case for Penal Modernism: Beyond Utility and Desert" (2014) 1 *Critical Analysis of Law* 143.

34 *Ibid* at 145. See also David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: Chicago University Press, 2001) at 53–77.

35 Frances Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981) at 34, 53–54, and 57.

36 United States Sentencing Commission, *1993 Federal Sentencing Guidelines Manual*, (Washington, DC: US Sentencing Commission, 1993) ch 1, pt A at 2.

37 Pub L No 98-473, 98 Stat 1987 (1984) [*SRA*].

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possible in limited cases, such as where defendants pleaded guilty and thus qualified for "acceptance of responsibility" or where defendants offered "substantial assistance" to prosecutors. Federal sentencing was transformed from discretionary and indeterminate to tightly regulated and fixed. The power of the individual judge and parole board was replaced by a structured grid and expanded prosecutorial influence.

Under the guidelines, offence conduct triggered either the application of a mandatory minimum sentence or a guideline sentence. The only important fact about an offender, for purposes of sentence calculation, was the individual's criminal record.[38] Over time, the commission declared through a series of policy statements that many potentially mitigating offender characteristics were either "not ordinarily relevant" or entirely irrelevant in determining whether a sentence should be outside the guideline range.[39] A defendant's education and vocational skills, mental and emotional conditions, previous employment record, and family and community ties were "not ordinarily relevant."[40] Drug dependence or alcohol abuse was "not a reason for a downward departure."[41]

Formalism triumphed as the guidelines project unfolded and individualization receded. Joachim Savelsberg describes the guidelines as an effort to redraw formal boundaries of criminal responsibility: to equalize sentencing practice and restore due process after decades of indeterminate sentencing and discretionary parole as the unquestioned correctional paradigm.[42] But Savelsberg and other scholars also track how discretion, individualization, and rehabilitative approaches managed to survive the rigid, discretion-denying guidelines. This makes sense, argues Savelsberg, since the ethos of substantive justice is connected to the structures of the modern, interventionist state. These

38 For discussion, see Carissa Hessick, "Why Are Only Bad Acts Good Sentencing Factors?" (2008) 88 *Boston University Law Review* 1109.

39 Douglas A Berman, "Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms" (2005) 58 *Stanford Law Review* 277 at 284.

40 *Ibid*.

41 *Ibid*.

42 Joachim Savelsberg, "Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law" (1992) 97 *American Journal of Sociology* 1346 at 1346–47 and 1349.

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structures do not disappear overnight. Various forms of "guidelines circumvention" happened in collusion with judges, including by dismissing selected charges or stipulating limited facts for the purposes of sentencing.[43] Prosecutors continued to pursue individualized justice in the background.

These tensions culminated in the 2005 watershed decision of the US Supreme Court in *United States v Booker*.[44] After two decades in operation — and multiple Supreme Court endorsements — a majority opinion in *Booker* announced that the guidelines were unconstitutional, in violation of the Sixth Amendment right to a jury trial, because they allowed judges rather than juries to determine facts that increase punishment. The majority's remedy was to render the guidelines advisory rather than mandatory.

Today, a decade after *Booker*, federal sentencing has largely returned its gaze to the individual. The guidelines are still considered at sentencing — and likely have an anchoring effect on length — but sentencing hearings once again permit a deep dive into the particular circumstances of the defendant. Factors such as family and community ties — so important to many women at sentencing — can once again be put before the court with the hope of a responsive sentence.

The effect of this period of sentencing reform on the US rate of female incarceration was profound. Under the structured and mandatory sentencing regimes that arrived to the federal and many state systems in the 1980s, women have been the fastest growing inmate population. Between 1980 and 2016, the number of incarcerated women grew by more than 700 percent, from 26,378 women in 1980 to 213,722 women in 2016.[45] Since 1980, the rate of growth for female

43 Stephen J Schulhofer & Ilene H Nagel, "Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta* Period" (1997) 91 *North Western University Law Review* 1284 at 1289, indicating that circumvention occurred in a third or more of cases resolved through a guilty plea.

44 543 US 220 (2005).

45 The Sentencing Project, "Fact Sheet: Incarcerated Women and Girls" (1980–2016, updated June 2019), online: www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls-1980-2016.pdf. Data drawn from E Ann Carson, *Prisoners in 2016* (January 2018), online: Bureau of Justice Statistics www.bjs.gov/content/pub/pdf/p16.pdf.

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imprisonment has been more than double that of men (though many more men are in prison than women). There is no single explanation for these changes, and there is variation across states and in the federal system, but there is little doubt about the significant role played by new limits on discretion in sentencing.

As I note below, some states such as Minnesota opted for sentencing guidelines that did not have the rigid, politicized features and effects of the federal system. The Minnesota example underscores the main point: when systems of mandatory or guideline sentencing are excessively focused on minimizing disparity according to offence alone, judges cannot grapple with the unique circumstances and distinct consequences of incarceration for women.

2) Resisting Radical Change: The Canadian Path Not Taken

The Canadian Sentencing Commission was established in 1984 with a mandate to conduct a systematic examination of sentencing policy. Right in sync with United States developments, the commission was asked to analyze and design a system of sentence guidelines and to make recommendations on issues such as mandatory sentences and early release. In 1987, the commission recommended abolishing parole. It designed presumptive guidelines and asked that judges be required to give reasons to depart from them. The commission's recommendations called for a retributive principle of "just sanctions" to be newly predominant.

The commission echoed the concerns with sentencing disparities that had taken hold in the United States, with the final report pointing to evidence of "unwarranted variation" in sentencing.[46] But Canada did not have the same degree of indeterminacy and discretion that motivated the politically diverse group of US reformers over this same period. In Canada, provincial appellate courts periodically review the decisions of sentencing judges, setting ranges for specific offences and intervening to correct errors of law and unwarranted disparities. There are, of course, occasional debates about the standard of review and the

46 CSC, *Sentencing Reform*, above note 12 at 77.

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question of how binding the appellate "starting points" are on trial judges. But as Allan Manson explains, clear guidelines from appellate courts — whether cast in terms of ranges or starting points — are a central part of the Canadian sentencing system. They are "tools to avoid disparity" though the law is also clear that they "cannot usurp the role of individualization."[47]

The Sentencing Commission advanced proposals that could have dramatically altered the Canadian system, but most were not adopted. Note that the commission was not proposing a grid-based system akin to the US Sentencing Guidelines. Rather, it recommended a more nuanced hybrid system, following Minnesota. The ranges were to be more flexible and criminal record effects, not as mechanical; judges were to be furnished with much information regarding mitigating and aggravating factors. Judges would be allowed to depart from the presumptive disposition, so long as departures were accompanied by written reasons. Although the Canadian proposals were more balanced than the US federal reforms, the government declined to move towards presumptive or even advisory guidelines.

Only in 1995 did the government respond by revising part XXIII of the *Criminal Code*. The new provisions were largely aimed at rationalizing and formalizing sentencing: adding procedural and evidentiary rules for sentencing hearings while preserving significant judicial discretion.[48] With a goal of reducing rates of incarceration, the reforms also introduced the conditional sentence, and section 718.2(e) directed judges to exercise restraint in the use of imprisonment with special attention to the "circumstances of Aboriginal offenders." While the actual progressive effects of these provisions can be debated, they represent the codification of a view that imprisonment should be a measure of last resort. The newly legislated aims of sentencing included the traditional mix of rehabilitation, deterrence, and incapacitation, with an overarching limit of proportionality based on the gravity of the

47 Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 73–75 [Manson, *The Law of Sentencing*].

48 For discussion, see, for example, David Daubney & Gordon Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)" in Julian Roberts & David Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) ch 2 at 33.

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offence and the degree of responsibility of the offender. The results of Canada's sentencing reform movement neither marked the collapse of what Whitman calls "penal modernism" nor expressed a lack of trust in judges and parole boards.

Anthony Doob has offered important criticisms of the unfinished work of the Sentencing Commission, pointing to key debates that were never resolved and an ongoing lack of coherent structure in our system.[49] But comparison with the US federal experiment reminds us of the risks of a sentencing reform project aimed at constraining the discretion of experts handling individual cases on the ground. The liberal and progressive critics of the 1970s had no aim to achieve explosive growth in the US prison population, with effects concentrated on women. Some state systems, like Minnesota, had better success at insulating sentencing policy from political pressure. But the risks of political influence on any project of sentencing reform are serious. States such as California saw greater levels of legislative input and a 400 percent growth in the prison population between 1980 and 1995.[50]

The implications of sentencing reform movements for women are rarely discussed, but they are significant. At a time when much of US sentencing policy was dismantled and radically reformed, Canada emerged from a wholesale review of our sentencing regime with robust judicial discretion and a commitment to individualization and rehabilitation intact.[51] Comparative and historical perspective underscores that the survival of these commitments today is not accidental. This is a story of a path consciously not taken. The ability of Canadian sentencing judges to bring a gendered analysis to sentencing may be one underappreciated outcome of the unfinished work of Canadian sentencing reform.

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49 Anthony N Doob, "The Unfinished Work of the Canadian Sentencing Commission" (2011) 53 *Canadian Journal of Criminology and Criminal Justice* 279.

50 Frank Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (New York: Oxford University Press, 1995).

51 For a positive appraisal of Canadian versus US outcomes after forty years of sentencing reform movements, see Michael Tonry, "'Nothing' Works: Sentencing 'Reform' in Canada and the United States" (2013) 55 *Canadian Journal of Criminology and Criminal Justice* 465 at 473.

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As in the United States, the rate of imprisonment has also been growing faster for Canadian women than men, but the overall numbers remain small. Over the past ten years, the number of federally sentenced women has increased by nearly 30 percent, growing from 534 women in 2008 to 684 women in 2018.[52] While the percentage increases are both noteworthy and concerning — as is the alarming concentration of growth for Indigenous women — these increases must be considered together with the increase in absolute numbers (an increase of 150 women). Women's growth rates stand in contrast to the decrease in the male in-custody population over the same period (a decline of 4.67%),[53] but men still make up the bulk of both admissions and the 14,000 plus people in federal custody. Rates of female incarceration are often higher in provincial settings, with some provinces seeing sharp rates of growth for women in recent years.[54] The federal numbers indicate stability and moderation at the most serious end of the punishment spectrum.

C. CANADIAN SENTENCING JURISPRUDENCE TODAY

Let me turn to three aspects of Canadian sentencing law today that help to underscore the continued vitality of individualized justice in our system and its relevance to female defendants. First is the story of mandatory minimum sentences, and the judicial reaction to the

52 Zinger, above note 25 at 82. Also concerning is the concentration of growth for Indigenous women: a 53 percent increase since 2008 (an increase of ninety-four women, from 177 to 271).

53 Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview, 2017* (July 2018) at 39, online: www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2017/ccrso-2017-en.pdf. Along with moderate growth in the number of women in federal custody, there are also markers of stability. Consider that, in 2007–08, 304 women were committed from the courts to federal custody, but that number was 266 in 2012–13 (*ibid* at 40). The number of women who received their first federal sentence was 220 in 2012–13, 348 in 2015–16, and 366 in 2016–17 (*ibid* at 38).

54 For example, Debra Parkes points to a 233 percent increase in Manitoba, from 2003 (seventy-eight women) to 2012 (260 women). See Parkes, "Women in Prison," above note 19 at 10.

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proliferation of minimum sentences in the Harper era: 2005–2015.[55] Leading scholars have lamented these policies and have been critical of a long period of what seemed like judicial acquiescence.[56] But mandatory minimum sentences are faring poorly in the courts today. The story of mandatory minimums is turning out to be one of steady legal contestation and judicial invalidation.

In 2015, in *R v Nur*, a majority of the Supreme Court of Canada upheld a decision striking a three-year penalty for possessing loaded prohibited firearms.[57] Rosemary Cairns-Way lamented that *Nur* deployed a "classic fault" rather than an equality analysis,[58] but more recent cases have focused on how mandatory minimum sentences interact with the structural vulnerabilities of many defendants. In 2016, the Court, in *R v Lloyd*, upheld a decision striking a one-year drug trafficking penalty, pointing to how the offence could be committed by a person with dependency problems who shares drugs with friends.[59] Recent lower court decisions have struck dozens of mandatory sentences, including for gun crime,[60] child pornography,[61] and sexual offending against young people.[62] In these decisions, mandatory sentences are typically struck not because of the "reasonable hypothetical" as in *Nur* and *Lloyd*, but because of the extreme difficulties and personal limitations faced by the individual defendant before the court.

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55 In 1982, the *Criminal Code*, above note 4, had six mandatory minimums. By 2006, there were forty. As of 2016, there were eighty, plus twenty-six in the *Controlled Drugs and Substances Act*, SC 1996, c 19: see *R v Deyoung*, 2016 NSPC 67 at para 24.

56 See, for example, Debra Parkes, "From Smith to Smickle: The *Charter*'s Minimal Impact on Mandatory Minimum Sentences" (2012) 57 *Supreme Court Law Review* 149; Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences" (2001) 39 *Osgoode Hall Law Journal* 367; Benjamin L Berger, "A More Lasting Comfort: The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009) 47 *Supreme Court Law Review* 101.

57 [2015] 1 SCR 773 [*Nur*].

58 Rosemary Cairns Way, "A Disappointing Silence: Mandatory Minimums and Substantive Equality" (2015) 18 *Criminal Reports* 297 at 303.

59 2016 SCC 13 [*Lloyd*].

60 *R v Harriott*, 2017 ONSC 3393; *R v Friesen*, 2015 ABQB 717. Firearms minimums were upheld in *R v Robertson*, 2018 BCSC 521; and *R v McIvor*, 2018 MBCA 29.

61 *R v Swaby*, 2018 BCCA 416; *R v John*, 2018 ONCA 702.

62 *R v BS*, 2018 BCSC 2044; *R v Hood*, 2018 NSCA 18.

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The recent decision in *R v Sharma* is a powerful illustration of how the imprisonment of an Indigenous woman can affect the analysis of a mandatory sentence in Canadian law.[63] Justice Hill strikes down the mandatory minimum penalty of two years for importing cocaine under section 6(3)(a.1) of the *Controlled Drugs and Substances Act*[64] on the basis of gross disproportionality. In the course of his analysis, he points to several concerns about the impact of penitentiary confinement on some offenders, including those with pre-existing health problems,[65] those who will be incarcerated far from home,[66] and Indigenous people who experience disproportionate burdens of incarceration.[67] Justice Hill is clear that the lens of "gross disproportionality" under section 12 of the *Charter of Rights and Freedoms*[68] requires judges to consider more than the length of sentence alone: "the s. 12 *Charter* protection is not confined to one-dimensional focus upon sentence duration but rather the quality and effect of the punishment on the offender including the nature and conditions under which it is applied."[69] At various places in the judgment, Hill J emphasizes the desperate economic conditions under which the offence was committed, when Sharma was a single mother facing homelessness. These factors weigh heavily in the decision to strike down the mandatory sentence.

The judicial treatment of mandatory minimums is connected to a robust notion of sentencing judges as the "front-line workers in the criminal justice system."[70] Rather than the proliferation of mandatory minimums being a story of Canada giving in to the penal populism of late modernity, a longer-range perspective seems to confirm the "protective factors" that Cheryl Marie Webster and Anthony Doob pointed

63 2018 ONSC 1141 [*Sharma*].

64 SC 1996, c 19.

65 *Sharma*, above note 63 at paras 216–20.

66 *Ibid* at para 121.

67 *Ibid* at paras 121–23.

68 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

69 *Sharma*, above note 63 at para 146.

70 *Ipeelee*, above note 5 at para 67.

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to in 2006[71] and 2016.[72] Sentencing women in ways that respond to their actual circumstances, and in light of the effects of imprisonment, can build on and flow from these judicial commitments.

Second is the strikingly capacious approach in Canadian law to what may be considered as part of the "circumstances of the offender." The *Criminal Code* specifies several factors that must be aggravating, but it is silent on the scope of mitigation. The common law menu is vast and includes first offence, guilty plea and remorse, prior good character (where it shows the offence is out of character and the offender is redeemable), impairment (emotional, physical, and psychological), addiction, employment record, post-offence rehabilitative efforts, unrelated meritorious conduct, acts of reparation or compensation, provocation, and duress (even that which falls short of a substantive defence).[73] Most of what the first US Sentencing Guidelines identified as "not ordinarily relevant" is the daily bread and butter of Canadian sentencing submissions.

Drawing again from Hill J's decision in *Sharma*, consider how he points to Sharma's Ojibwa ancestry; to her youth; to the impact of residential school on her relatives; to being sexually assaulted at age sixteen; to her two teenage pregnancies; to the incarceration of her father; to the lack of child support she has received; to her efforts and success at sobriety; to her work caring for her sick mother; and to efforts to improve her education that were thwarted by poverty.[74] In addition, Hill J relies on expert evidence that helps to situate Sharma's biography in a wider social context.[75] Granular attention to the circumstances of female offenders — from both an individual and a systemic perspective — fuels the analysis of constitutional limits in Canadian sentencing.

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71 Anthony Doob & Cheryl Marie Webster, "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate" (2006) 40 *Law & Society Review* 325.

72 Doob & Webster, "Weathering the Storm?", above note 15.

73 Manson et al, *Sentencing and Penal Policy in Canada*, 3d ed (Toronto: Emond, 2016) at 101–6.

74 *Sharma*, above note 63 at paras 10–15.

75 *Ibid* at paras 18–26, describing "the linkage of colonialism and racism to criminalization in particular of indigenous women."

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Finally, Canadian sentencing judges have broad authority to consider collateral consequences. In 2013, in *R v Pham*, the Supreme Court made clear that a sentencing judge must consider the immigration consequences that can follow from imposing sentences of particular lengths.[76] *Pham* involved consequences that flow *by law* following conviction. In 2018, the *Suter* decision extended the point.[77] After a driving offence that caused the death of a toddler, the defendant was brutally attacked in an instance of vigilante violence. The violence did not flow directly from the commission of the offence, nor did it flow from the length of the sentence or the conviction itself. Justice Moldaver quoted Allan Manson for the point that an offender may suffer "physical, emotional, social or financial consequences" that are not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt.[78] Although these facts are not strictly mitigating, they are part of determining a fit sentence in light of the offender's personal circumstances.

This is an important jurisprudential branch for women. In *R v Collins*, Rosenberg J made clear that both the impact on a child and the experience of imprisonment for a mother are relevant factors at sentencing.[79] *Collins* was focused largely on the errors committed by a trial judge in applying *Gladue* and section 718.2(e) of the *Criminal Code*. Justice Rosenberg clarified that *Gladue* does not place a burden on offenders to establish a causal link between systemic discrimination and the commission of an offence; he also found that the material in this case did show strong links.[80] He paused to emphasize the need for sentencing courts to give weight to "the impact on the appellant of being separated from her disabled daughter."[81] He noted that it is "not just the impact on the child" but also the "wrenching experience imprisonment would represent for a mother who has devoted the past eighteen years of her own life caring for her disabled child." Rather

76 2013 SCC 15 at para 11 [*Pham*]. See also *R v Bunn* (1997), 118 Man R (2d) 300 (CA) at para 23; and *R v Bunn*, 2000 SCC 9 at para 23.

77 *Suter*, above note 10.

78 *Ibid* at para 47, citing Manson, *The Law of Sentencing*, above note 47 at 136.

79 2011 ONCA 182 [*Collins*].

80 *Ibid* at paras 33–34.

81 *Ibid* at para 41.

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than banishing these facts from the sentencing analysis, Rosenberg J says they "must be considered."[82]

In *Suter*, Moldaver J plainly rejects a formal commitment to parity that would simply look for similar punishments to follow from similar offences. He writes: "Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer 'like' the others, rendering a given sentence unfit."[83] The point is not that collateral consequences diminish the offender's moral blameworthiness or render the offence less serious, but that a sentence will have a more significant impact given their distinct circumstances. In other words, "if the personal circumstances of the offender are different, different sentences will be justified."[84] Under this heading, courts can also consider physical disability and health conditions that stand to make imprisonment more severe.[85] For women who will do what Parkes calls "particularly hard time,"[86] counsel should press judges to factor those issues into the analysis of a fit sentence.

Drawing from *Pham* and other leading cases, Berger has powerfully argued that a "marriage of proportionality and individualization" has emerged in Canadian sentencing jurisprudence: the severity or fitness of punishment must be analyzed in light of individual circumstances, and these circumstances include the lived experience of imprisonment.[87] As LeBel J rhetorically asks in *Ipeelee*: "Who are the courts sentencing if not the offender standing in front of them?"[88] Notably, he poses this

82 *Ibid*. See also *R v Batisse*, 2009 ONCA 114, granting an appeal of a sentence of five years of imprisonment and substituting two-and-a-half-years of imprisonment, in a tragic case concerning the abduction of a newborn following the stillbirth of the defendant's own child. The majority held that, in a case where an Indigenous woman's mental health problems played a central role in the commission of the offence, deterrence and punishment assume less importance, and the primary concern in sentencing shifts to treatment.

83 *Suter*, above note 10 at para 48.

84 *Pham*, above note 76 at para 9, citing Clayton Ruby, Gerald Chan, & Nader Hasan, *Sentencing*, 8th ed (Markham, ON: LexisNexis Canada, 2012) at s 2.41.

85 See, for example, *R v Allen*, 2017 ONCA 170 at para 16; *R v Shahnawaz* (2000), 51 OR (32) 29 at 34 (CA).

86 Parkes, "Women in Prison," above note 19 at 127.

87 Berger, "Salience of Pain and Hope," above note 9 at 19.

88 *Ipeelee*, above note 5 at para 86.

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question in the context of the leading contemporary case on sentencing Indigenous defendants. It is within those cases that our courts have developed a sophisticated and subtle approach to sentencing in a way that respects collective experiences while preserving notions of individual responsibility. During the US sentencing guidelines experiment, the judge had no ability to even pursue that difficult task. And no US sentencing system has attempted to remedy systemic discrimination against racialized minorities at sentencing. In Canada today, sentencing judges — thanks, in part, to a stalled project of sentencing reform — are largely free to sentence the women in front of them and in doing so to respond to the personal and collective experiences and realities of their lives.

D. CONCLUSION

At precisely the same time the United States underwent its radical shift in sentencing policy, a parallel sentencing reform movement emerged in Canada. The debates in Canada were strikingly similar, with emphasis on the excesses and arbitrariness of individualized and rehabilitative approaches that depend on extensive judicial and penal discretion. But several key proposals contained in the 1987 Sentencing Commission report, such as the abolition of parole and a turn to guidelines, did not receive political uptake. Canada has not been immune to what Savelsberg would call a "neoclassical" demand for a higher degree of offence-based uniformity,[89] or, as Webster and Doob remind us, to "tough on crime" politics.[90] Mandatory minimums, for example, have seen moments of legislative success. But they are floundering in the courts.

This chapter points to comparative history to remind lawyers and judges that Canadian sentencing law remains at least formally committed to what Whitman calls "penal modernism" — individualized, forward-looking treatment. These commitments seem to be important for stability in the rate of female imprisonment, and they invite decision makers to consider the social and material realities of particular cases

89 Savelsberg, above note 42.

90 Webster & Doob, "Weathering the Storm?", above note 15.

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when sentencing. These are important traditions when it comes to the fair sentencing of women, and they have only been enriched by the call to consider the circumstances of Indigenous defendants pursuant to section 718.2(e) of the *Criminal Code*. Although the prison system and the broader society produce many inequities for the women ensnared in criminal law, it is crucial to remember that Canadian law is, at least officially, interested in those facts.

Further Readings

DOOB, ANTHONY, & CHERYL MARIE WEBSTER. "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" (2016) 45 *Crime and Justice* 359.

HANEY, LYNNE. *Offending Women: Power, Punishment, and the Regulation of Desire* (Berkeley: University of California Press, 2010).

KRUTTSCHNITT, CANDACE. "The Paradox of Women's Imprisonment" (2010) 139 *Daedalus* 32.