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## Implicating The System: Judicial Discourses in The Sentencing of Indigenous Women by Elspeth Kaiser- Derrick

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Book Review

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## Implicating The System: Judicial Discourses in The Sentencing of Indigenous Women by Elspeth Kaiser- Derrick

### Abstract

In *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women*, Elspeth Kaiser-Derrick critically engages with sentencing decisions involving Indigenous women and the application of Gladue reports during sentencing. With an impressive selection of pre-sentence reports and case law, Kaiser-Derrick examines how the histories of victimization are recorded and filtered through legal narratives.

## Book Review

***Implicating The System: Judicial Discourses in The Sentencing of Indigenous Women* by Elspeth Kaiser-Derrick<sup>1</sup>**ARUNITA DAS<sup>2</sup>

IN *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women*, Elspeth Kaiser-Derrick critically engages with sentencing decisions involving Indigenous women and the application of *Gladue* reports during sentencing. With an impressive selection of pre-sentence reports and case law, Kaiser-Derrick examines how the histories of victimization are recorded and filtered through legal narratives.<sup>3</sup> In what she calls the “victimization overlap,” Kaiser-Derrick writes about how histories of victimization of criminalized Indigenous women generally overlap with factors that comprise the *Gladue* analysis.<sup>4</sup> Since Indigenous women’s experiences with violent victimization are underreported to the police, Kaiser-Derrick’s research finds that often their histories with trauma are first accounted for during *Gladue* reports.<sup>5</sup> Examining what is left out from sentencing decisions with *Gladue* reports reveals the language used to contextualize gender-specific considerations, and how it connects to the effects of colonization and displacement. Her research, grounded in an intersectional-

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1. (University of Manitoba Press, 2019).
  2. PhD Student, Socio-Legal Studies, York University.
  3. See Kaiser-Derrick, *supra* note 1 at 87-88.
  4. *Ibid* at 183-82.
  5. *Ibid* at 57.

feminist analysis, makes a strong case for prison reform and decarceration studies, bridging research and practice to address the over-reliance on incarceration, and the racial disparities within the Canadian justice system.

Kaiser-Derrick's research on over-incarceration centres around section 718.2(e) of Canada's *Criminal Code*, commonly known as "Gladue" or "Gladue principles."<sup>6</sup> *Gladue* principles require that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."<sup>7</sup> This provision in the *Criminal Code* allows for the preparation of *Gladue* reports, which are reports prepared for a bail hearing or a sentencing hearing. Unlike traditional pre-sentence reports, *Gladue* reports provide sentencing judges with more detailed and comprehensive information on the systemic and historical circumstances that propelled the offender into conflict with the law. *Gladue* reports also include recommendations for sentences that meaningfully address the unique factors that have brought the specific individual to court.<sup>8</sup> Though *Gladue* reports are assessed during sentencing, at the end of the criminal justice process, they detail layered experiences of violence and trauma that frequently occur throughout the lives of women in conflict with the law. *Gladue* reports are one of the few places where Indigenous women are "listened to" in the criminal justice process, which impacts how the justice system responds.<sup>9</sup>

Section 718.2(e) was implemented in 1996 as a measure to reduce the disproportionate rate at which Indigenous peoples are incarcerated.<sup>10</sup> *Gladue* reports within sentencing decisions were created to orient judges to the complexities of criminality, and to change the mentality that incarceration is a primary form of punishment and rehabilitation. At the time that the SCC decision for *R. v. Gladue* was released, it was unclear what kind of impact this reform would have on changing the cycle of violence and criminality for Indigenous women. However, more than twenty years after section 718.2(e)'s enactment, carceral admissions for Indigenous women in the prison system continue to rise. In the

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6. RSC 1985, c C-46, s 718.2(e) [*Criminal Code*]. Section 718.2(e) of the *Criminal Code* is referred to as "Gladue" because of the 1999 Supreme Court of Canada case *R v Gladue*, the first to adopt and elaborate upon this *Criminal Code* provision. See *R v Gladue*, [1999] 1 SCR 688 [*R v Gladue* SCC]. For additional reading, see *R v Gladue* (1997), 98 BCAC 120 (CA) [*R v Gladue* BC CA].
  7. *Criminal Code*, *supra* note 6, s 718.2(e).
  8. See Kaiser-Derrick, *supra* note 1 at 129.
  9. *Ibid* at 3.
  10. See *ibid* at 21.

current federal prison population, Indigenous women account for 41 per cent of female admissions, while comprising only about 4.5 per cent of the country's female population.<sup>11</sup> The continuing high rates of incarceration of Indigenous women suggest that they are not benefitting from *Gladue* reports, which aim to direct sentencing judges to consider imprisonment a “last resort” after all other sentencing options have been considered.<sup>12</sup>

A significant contribution of *Implicating the System* is the application of the “victimization-criminalization continuum” that overlaps with *Gladue* factors. Forming the basis of Kaiser-Derrick’s analysis of *Gladue* reports, the “victimization-criminalization continuum” theory suggests that Indigenous women’s criminality should be “understood as connected to their experiences of victimization, and that women’s responses to victimization can lead to criminalization.”<sup>13</sup> Victimization in this sense foregrounds Indigenous women’s unique lived experiences, including intimate partner violence, abuse, single parenthood, intergenerational trauma, and other forms of victimization. These social conditions should not be considered the reason for the crime. Rather, for many Indigenous women with criminal offences, these factors<sup>14</sup> provide insight into the ways that experiences of racial and gender discrimination constrain available options and financial support. For many Indigenous women with criminal offences, experiences of victimization create conditions for criminality.<sup>15</sup> Kaiser-Derrick emphasizes that the way judges consider (or fail to consider) *Gladue* factors and their overlap with the victimization–criminalization continuum reveals systemic barriers within the criminal justice system that disproportionately impact Indigenous women.<sup>16</sup> Thus, Kaiser-Derrick sheds light on the racial and gender-specific ways that sentencing judges continue to interpret incarceration as a culturally appropriate sanction, even though there are viable alternatives.

Kaiser-Derrick examines an impressively vast selection of Canadian data, reviewing 175 pre-sentence reports, decisions, and judgments from 1999–2015. Her careful analysis of judicial discourse explores an important question: Is imprisonment a sentence that appropriately addresses the rehabilitative needs

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11. See Statistics Canada, *Adult and Youth correctional statistics in Canada, 2018/2019*, by Jamil Malakieh, Catalogue No 85-002-X (Statistics Canada, 21 December 2020) at 5.

12. *R v Gladue* SCC, *supra* note 6 at para 35.

13. See generally *supra* note 1 at 249.

14. *Ibid* at 12.

15. See *ibid* at 89.

16. See *ibid* at 38-39.

of criminalized Indigenous women?<sup>17</sup> In asking this question, she also examines the language that sentencing judges use when interpreting and assessing *Gladue* reports presented to them. She finds that judges often employ language that suggests “predictability or inevitability,” signifying a causal link, in the judge’s mind, between Gladue factors and the offence.<sup>18</sup> In her view, systemic legacies of colonization and victimization should not be considered the very cause of the offence, but should rather serve as contextual information that explains why some Indigenous women have limited options.<sup>19</sup> Kaiser-Derrick draws on decisions where the victimization–criminalization continuum is engaged, locating violence and victimization as significant in a woman’s decision to commit a criminal offence. By focusing on Indigenous women, this book recognizes that systemic experiences of colonialism are inseparable from gender inequality, which is critical to understanding why *Gladue* reports do not yield consistent outcomes for Indigenous and non-Indigenous offenders.

The book is organized into three chapters. In chapter one, Kaiser-Derrick first provides an overview of relevant feminist theories and scholarship on the victimization–criminalization continuum and colonization in order to situate her current study within the larger research context of the criminalization of Indigenous women in Canada. Using selected works in feminist criminology, Kaiser-Derrick examines the role of abuse in the lives of criminalized Indigenous women, and how it is widely constructed in the courtroom.<sup>20</sup> Using the victimization–criminalization continuum as a foundation, Kaiser-Derrick identifies how judges consider the ways in which victimization—on the basis of factors such as low-income, escaping violent and abusive households, and minimal supports—creates limited options and propels Indigenous women into conflict with the law.<sup>21</sup> With the groundwork on feminist theories and the overlap

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17. See *ibid* at 234.

18. *Ibid* at 112.

19. See *ibid* at 112.

20. For additional reading, see Gillian Balfour, “Do law reforms matter? Exploring the victimization—criminalization continuum in the sentencing of Aboriginal women in Canada” (2012) 19 *Intl Rev Victimology* 85; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (UBC Press, 2013); Sherene Razack, *Looking White People In the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998); Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, 2014), ch 5 at 161; Toni Williams, “Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?” in Emily Grabham et al, eds, *In Intersectionality and Beyond: Law, Power, and the Politics of Location* (Routledge, 2008).

21. See *supra* note 1 at 112-13.

between colonization, the victimization–criminalization continuum, and *Gladue* in place, each chapter subsequently examines cases involving Indigenous women and how they were ultimately viewed as defendants before the law.

In chapter two, Kaiser-Derrick delves deeply into several cases, examining how judges in each case recognize *Gladue* factors and the victimization–criminalization continuum during sentencing. This chapter also *fleshes* out the details of *R. v. Gladue*: a foundational Supreme Court case involving Jamie Gladue, an Indigenous woman who murdered her abusive partner.<sup>22</sup> This case opened discussion on the somewhat vague directive set out under section 718.2(e) of the *Criminal Code* which asks judges to give “particular attention” to Indigenous offenders during sentencing.<sup>23</sup>

Kaiser-Derrick then discusses cases after *R. v. Gladue* to see what judges learn from pre-sentence reports and *Gladue* reports involving Indigenous women, and how judicial understanding informs sentencing. She finds that sentencing judges apply *Gladue* and the victimization–criminalization continuum inconsistently.<sup>24</sup> In her detailed discussion of *R. v. Tippeneskum*, for example, Kaiser-Derrick focuses on how Justice Digiuseppe contextualizes June Tippeneskum’s aggravated assault (for failure to disclose her HIV status to her partner) using the victimization–criminalization continuum and *Gladue* analysis.<sup>25</sup> Justice Digiuseppe details Tippeneskum’s long-term experiences with substance abuse, neglect, domestic violence, and poverty which dramatically narrowed her choices.<sup>26</sup> In the end, however, Tippeneskum was sentenced to three and a half years imprisonment—a sentence that did not place value on rehabilitation.<sup>27</sup> On the contrary, in *R. v. Gregoire*, Justice Goodridge explicitly recognized the relationship between colonization and the intergenerational effects of substance abuse.<sup>28</sup> In this case, Angela Gregoire was sentenced to a conditional two-year less a day sentence, followed by two years probation for impaired driving causing death and bodily harm.<sup>29</sup> Justice Goodridge detailed the ways in which Gregoire’s offence was connected to her “dysfunctional family upbringing;...physical and sexual abuse as a child; multi-generational alcoholism

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22. See *ibid*, ch 2 at 87. For additional reading, see *R v Gladue BC CA*, *supra* note 6. See also *R v Gladue SCC*, *supra* note 6.

23. *Supra* note 6, s 718.2(e).

24. See Kaiser-Derrick, *supra* note 1 at 89-90.

25. See *ibid* at 117-18. See also *R v Tippeneskum*, 2011 ONCJ 219 at para 19.

26. See Kaiser-Derrick, *supra* note 1 at 118-19.

27. *Ibid* at 189.

28. *Ibid* at 118. See also *R v Gregoire*, 2009 NLTD 21 at para 35 [*Gregoire*].

29. Kaiser-Derrick, *supra* note 1 at 119.

in the family; low education; unemployment; lack of opportunities, depression; low income.”<sup>30</sup> An assessment of how these systemic and background factors led to constrained options for Gregoire allowed Justice Goodridge to sentence with sensitivity. However, while engaging with issues of healing, rehabilitation, and treatment, judges often impose sentences in ways that suggest that imprisonment is an ideal place for healing these traumas.<sup>31</sup> Hence, traditional considerations of deterrence and denunciation continue to be valued more than alternatives to imprisonment.

One of the strongest elements in Kaiser-Derrick’s analysis is within chapter three, which maps out the complexities of judicial discourse while sentencing Indigenous women. In this chapter, Kaiser-Derrick uses several cases that consider *Gladue* factors and the victimization–criminalization continuum to demonstrate how some judges fail to acknowledge criminalized Indigenous women’s experiences of victimization by promoting prison as a place for healing and rehabilitation. Often, Indigenous women are decontextualized from the victimization–criminalization continuum and judicial discourse misses the complex historic and systemic contexts of victimization.<sup>32</sup> Kaiser-Derrick explains that, although *Gladue* factors are referenced in sentencing decisions, their relevance to the case is often dismissed.<sup>33</sup> In the cases of *R. v. Kendi*,<sup>34</sup> *R. v. Char*,<sup>35</sup> and *R. v. Diamond*,<sup>36</sup> for example, Kaiser-Derrick finds that the judges assessed the accused separate and apart from the victimization–criminalization continuum.<sup>37</sup> In these cases, the judges appeared to believe that the accused’s experiences of victimization could be dealt with adequately through incarceration.<sup>38</sup> Hence, while the complexities associated with overlapping social, racial, economic, and political factors that condition the lives of Indigenous women are recognized, they are criminalized through conditional prison sentences that are regarded as

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30. *Ibid* at 120, citing *Gregoire, supra* note 27 at paras 38, 50.

31. See Kaiser-Derrick, *supra* note 1 at 179-80.

32. See *ibid* at 195, 205.

33. See *ibid* at 156.

34. 2010 NWTTC 8 [*Kendi*].

35. 2007 BCCA 346 [*Char*].

36. 2006 QCCQ 2552 [*Diamond*].

37. See *supra* note 1 at 185.

38. In *Diamond*, the judge ordered a conditional sentence (with a probation order) after a community treatment centre accepted the offender. See *Diamond, supra* note 35 at para 41. While this decision is not entirely similar to *Kendi* and *Char*, *Diamond* could have also had a punitive sentence if there was no additional support. For additional reading, see *Kendi, supra* note 33; *Char, supra* note 34.

“healing” and “restorative.”<sup>39</sup> These outcomes raise important questions about how the stories of Indigenous women and their life experiences are filtered through institutional constraints and the unique pathways that bring them into conflict with the law.

Kaiser-Derrick also highlights how rehabilitative sentences that do not resort to incarceration are achievable if judges provide a careful analysis that appropriately contextualizes the accused’s histories with victimization and their pathways to criminalization.<sup>40</sup> In *R. v. Shore* (“*Shore*”), for example, Tracey Shore was given a conditional two-year sentence after she pleaded guilty to driving while impaired and causing death.<sup>41</sup> Shore was in a physically and emotionally abusive relationship with the deceased, and she got into the vehicle to escape a violent confrontation after a night of drinking.<sup>42</sup> Despite Shore urging in the pre-sentence report that her Indigenous origins had no impact on her life, Judge Snell considered Shore’s history of substance abuse, dysfunctional family upbringing, and physical abuse as a child and throughout her common-law relationships to play a significant role in her decision to commit the offence. Judge Snell determined that Shore presented “a low risk to re-offend” and that imprisonment would not “help in addressing her alcohol and personal problems.”<sup>43</sup> Judge Snell declared that “[t]he length of the conditional sentence will be longer than a jail term would have been, in light of the fact that the accused will be allowed to serve it in the community.”<sup>44</sup> *Shore* is significant because Judge Snell reached an appropriate sentence that considered how experiences of victimization impact the lives of Indigenous women, and declined to respond with incarceration. Thus, a thoughtful *Gladue* analysis is enhanced by a racialized and gendered analysis, which in turn relies on the victimization–criminalization continuum.

What *Shore* highlights is that a punitive prison sentence is not an appropriate sentence for women who have experiences with violence, victimization, and trauma. Kaiser-Derrick effectively describes why the most sensitive judgments are ones where judges produce a sentence that combines a *Gladue* analysis with a consideration of the victimization–criminalization continuum. Many sentencing judges assume that Indigenous women will access culturally appropriate healing programs within federal prison.<sup>45</sup> However, Indigenous women’s histories with

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39. Kaiser-Derrick, *supra* note 1 at 187.

40. *Ibid* at 160.

41. *Ibid* at 158.

42. See *ibid* at 158.

43. *Ibid* at 160, citing *R v Shore*, 2002 SKPC 42 at para 62 [*Shore*].

44. Kaiser-Derrick, *supra* note 1 at 159-60, citing *Shore*, *supra* note 43 at para 62.

45. Kaiser-Derrick, *supra* note 1 at 282.

violence, trauma, and victimization impact both their physical and mental health. Incarceration separates and isolates Indigenous women from their communities, children, families, and support networks, which often worsens their mental health.<sup>46</sup> Kaiser-Derrick presents evidence from *Shore* and other sentencing decisions to suggest that prison negatively affects mental health,<sup>47</sup> and finds that the court does not always consider the differing realities and needs of women in relation to prisons.<sup>48</sup> For the author, rehabilitative sentences and treatment are better alternatives as they ensure the protection of the public and reduce the likelihood of re-offence.<sup>49</sup> A thoughtful and careful integration of the gendered understandings of Indigenous women's histories with victimization in *Gladue* reports can be meaningful when seeking alternatives to imprisonment. If their *Gladue* reports are appropriately contextualized, Indigenous women can receive sentences that adequately reflect their rehabilitative needs. Kaiser-Derrick thus illuminates how community sentences can meet "rehabilitative objectives," whereas "institutional incarceration can sometimes impede the rehabilitation of an offender."<sup>50</sup>

For Kaiser-Derrick, the ultimate goal of *Implicating the System* is to recognize the judicial decisions that "listened" to institutional accounts of Indigenous women's lives, and the decisions that can "hear, and respond more effectively."<sup>51</sup> Judges have a powerful role in contextualizing *Gladue* factors in the sentencing of Indigenous women. Kaiser-Derrick's research reveals how judges organize, interpret, and use information about offenders to create a discourse about the victimization and criminalization of Indigenous women. This becomes critical to the explanation of the criminal justice process and its outcomes. These cases involving *Gladue* thus provide snapshots of the ways that judicial discourse about victimization intersects with discourse around rehabilitation and treatment, suggesting associated problems. *Implicating the System* does a wonderful job of providing a comprehensive assessment of legal discourse and its implications for Indigenous women as defendants. Kaiser-Derrick's research confirms that assessing systemic problems case-by-case sheds some light on why Indigenous women continue to receive sentences that frame prison as being a necessary

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46. See *ibid* at 283.

47. *Ibid* at 182-83.

48. See *ibid* at 45-46, citing Smita Vir Tyagi, "Victimization, Adversity and Survival in the Lives of Women Offenders: Implications for Social Policy and Correctional Practice" (2006) 25 *Can Woman Studies* 133 at 134.

49. Kaiser-Derrick, *supra* note 1 at 294-95.

50. *Ibid* at 187, citing *R v Fineday*, 2007 SKPC 2, Turpel Lafond J.

51. Kaiser-Derrick, *supra* note 1 at 311.

place for healing.<sup>52</sup> By examining the gender-specific implications that punitive sanctions have on Indigenous women, Kaiser-Derrick illuminates how the legal system operates within particular cultural and institutional contexts. This book is an important read for anyone concerned with restorative justice practices, human rights, and feminist scholarship. Each case is carefully described in a sensitive manner, retaining the individual integrity of each Indigenous woman's story and history. Kaiser-Derrick's insights and critiques make *Implicating the System* a valuable contribution to the ongoing conversations about systemic violence, trauma, and the disproportionate rate of incarceration among Indigenous women.

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52. See *ibid* at 45.

