

Elspeth Kaiser-Derrick

Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women. Winnipeg: University of Manitoba Press, 2019. 408 pp.

I came across this book in its first iteration as an LLM thesis in the course of research I was conducting concerning the impact of mandatory minimum sentences on Indigenous women for a case in which I was acting as an expert witness. The case, *R. v. Sharma*, concerns Cheyenne Sharma, a young Cree woman from the Saugeen First Nation, surviving the structural, intergenerational, and racialized gendered effects of ongoing settler colonialism. She was charged and convicted of importing cocaine into Canada. Her “crime” was one of economic survival that befits the profile of Indigenous, Black, and racialized women charged with drug offences. Kaiser-Derrick’s research proved useful in showing the adverse effects of mandatory minimum sentences and the prohibition on conditional sentences for Indigenous women.

Now revised and published in book form, Elspeth Kaiser-Derrick’s *Implicating the System: Judicial Discourse in the Sentencing of Indigenous Women* explores how criminalized Indigenous women’s histories appear in sentencing judgments. In this work, Kaiser-Derrick is particularly interested in the discourses that inform judicial reasoning and in how information presented through presentence reports (PSRs) and *Gladue* reports are translated into “what information the sentencing judge hears, and how this influences sanctions” (p. 3). Kaiser-Derrick amassed an impressive number of reported sentencing decisions concerning Indigenous women (175 in total) spanning the period from when *Gladue* was decided (April 1999) until December 2015. She observes that sentencing decisions, although filtered through legal and institutional constraints, are a crucial, if not sufficient, site to consider Indigenous women’s experiences of life and law. The range of Kaiser-Derrick’s engagement with individual sentencing decisions provides a critical contribution to how sentencing decisions incorporate gendered understandings of Indigenous women’s historical and ongoing victimization and criminalization.

Central to the book is the notion that existing feminist literature on the victimization–criminalization continuum may be implicated in the crafting of sentences for Indigenous women. Leaning heavily on the work of Patricia Monture, Gillian Balfour, Dana DeHart, and others, the first chapter examines how the criminalization–victimization continuum accounts for the socio-economic reasons for Indigenous women’s encounters with the criminal justice system, and their particular gendered and racialized vulnerabilities and individual responses to sustained victimization. These experiences of victimization frequently occur in a sustained manner throughout their lives, often involving physical or sexual violence and exploitation, in addition to neglect and substance abuse. Kaiser-Derrick is cautious not to imply a deterministic view of victimization, insisting that “the continuum should be framed in terms of how (personal, collective and state-based) experiences of victimization are marginalizing and constrain the life options available to [Indigenous women], which

may leave them vulnerable to criminalization” (p. 9). Indeed, as Indigenous scholars insist, victimization does not dispossess Indigenous women of agency and choice.

The second and third chapters contain the major contributions of the book. The second chapter is structured through a series of short sections highlighting particular decisions where the criminalization–victimization continuum overlaps with *Gladue* factors offered to the court. In the presentation of certain cases, Kaiser-Derrick is careful not to conflate the victimization–criminalization continuum and *Gladue* factors. As she assesses, “the victimization–criminalization continuum most directly focuses on gendered vulnerabilities and responses to victimization, whereas the *Gladue* analysis most directly focuses on the reverberations of colonialism (and how that should impact sentencing)” (p. 88). The decisions in *R. v. Shore* and *R. v. Audy* feature prominently in the analysis for what they reveal about the complexity of weighing *Gladue* factors with the victimization–criminalization continuum. For example, in *R. v. Audy*, the judge considers historical experiences of victimization in colonialism and leads with this analysis “to decide that a perfunctory adherence to the presentence report would produce an unjust sentence per *Gladue*” (p. 164). In both decisions, Kaiser-Derrick suggests that such a welcome approach must be “refracted through a nuanced, contextualized lens that does not pay blind fealty to the trajectory to criminalization mapped by PSRs that overemphasize risk assessments, at the expense of a broader picture” (p. 165). Importantly, Kaiser-Derrick is advancing and writing into an emerging critique that observes how *Gladue* factors are translated as risk factors and may work to designate Indigenous people as high risk.

Chapter 3 involves a closer examination of the “overlap” between the victimization–criminalization continuum and *Gladue* factors in sentencing outcomes. Kaiser-Derrick focuses in particular on misguided judicial reasoning that describes conditional sentences and prison sanctions as healing. This approach is connected to a legislative regime that currently restricts the availability of alternatives to incarceration including, though not limited to, conditional sentences. Conditional sentences, Kaiser-Derrick observes, “may also be effectively unavailable for Indigenous women experiencing housing insecurity or instability, or may be actively dangerous for Indigenous women ordered to serve them where that means forced confinement with an abusive partner” (p. 181). Kaiser-Derrick hones in on how an individualized and decontextualized approach in judicial reasoning obscures a more nuanced account of Indigenous women’s victimization histories.

Throughout the book, Kaiser-Derrick is concerned with how Indigenous women are systematically “unheard” by law and the state. She concedes that a focus on sentencing decisions does not address the historical problem of “not listening” to Indigenous women. Indeed, a focus on gendered sentencing outcomes may work to invariably naturalize imprisonment and carceral regimes even as our analyses and best efforts aim to unsettle and challenge these very regimes. Our research engagement with sentencing and punishment requires attention to how racial gendered violence is furthered by carceral regimes that uphold the settler colonial project and the erosion of sovereignty and self-determination

of all Indigenous peoples. Kaiser-Derrick concludes that “it remains necessary for legal and policy-based work to engage and incorporate the actual voices and directives of Indigenous women themselves” (p. 3). Indigenous women have been advancing this very call for decades.

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