CREATING CHOICES IN THE UK: RE-IMAGINING THE FEMALE CRIMINAL JUSTICE SYSTEM

by

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ABSTRACT

The prison system of the UK is riddled with sexual inequality, substantially the same procedures and facilities being extended to both male and female prisoners, representing a failure to realise that the two genders experience incarceration in materially different ways. The current formation of the system is blind to the social inequalities and difficulties which construct the identities of the majority of female offenders, resulting in an array of fundamental human rights abuses. Furthermore, decisions which significantly disadvantage female inmates are made daily, with little consideration given as to the correct bases for making such life changing choices.

Time and time again however, proposals for meaningful and radical reform are met only with lethargic stalling by the Government, which seems content to pander to a punitive public desire heavily constructed by unjustified media representation.

While similar processes have also operated in the Canadian context, federal female prison reform has taken a decidedly feminist tilt over the last 20 years. It is in light of this that thorough comparative examination and analysis of North American penal reform will provide a body of information which will eventually constitute an invaluable resource upon which to draw in planning the UK’s next moves towards a more substantively equal and effective female criminal justice system.
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I also wish to thank my parents for all their support and encouragement, without which none of this would have been possible.
For Aunty Jan
INTRODUCTION

1. An Overview of the Women's Prison System

The women's prison population of the UK has risen rapidly in a short amount of time, more than doubling in the last ten years. An average figure of 1,998 women were in prison or police cells in 1995 and by the year 2000 that figure had risen to 3,355. Alarming, the total number of women in such custody in 2005 reached 4,514. Although the numbers saw a slight decline in 2007 they are still unacceptably high and are rising once again. In May 2007 4,433 women were in prison and this figure rose to 4,474 in May 2008. And why is this? Why have these figures spiralled so out of control? The Prison Reform Trust, a registered charity which campaigns to improve prison conditions and find alternatives to incarceration, explains this trend by citing "a significant increase in the severity of sentences". So what arguments are there to justify this leaning towards greater punitive sanction? For what reason are thousands of women being locked away each year? Is it a benevolent attempt at reforming delinquent

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2 ibid. This figure is for the "population in prison establishments and police cells"
3 ibid.
4 Prison Reform Trust, Bromley Briefings: Prison Factfile, May 2007 (London: Prison Reform Trust, 2007) at 14. The figures show that the women's prison population fell by 45 from the previous year, to 4,390
6 Prison Reform Trust, supra note 4 at 14
women's lives? Surely not, for in 2004 it was found that 64.3% of women discharged from prison were re-convicted in the two years following their release.7

So how about politics and specifically punitive populism.8 This phenomenon became very pronounced in the 1990s when John Major announced in the Mail on Sunday, 21st February 1993, that “society needs to condemn a little more and understand a little less” and still continues to this day.9 Fuelled by the media, which has served to inflate fear of crime by portraying offending in an exaggerated and sensational manner, highlighting only the most violent and newsworthy stories, politicians have sought to gain public trust by taking a heavy handed approach to tackling crime.10 Women throughout the UK have paid the price.

The majority of women are sentenced to prison for non-violent crimes. For example, “more women were sent to prison in 2005 for theft and handling stolen goods than any other crime.”11 Violent offences are the exception for female offenders, yet, as Pat Carlen, Professor of Criminology at the University of Keele in the UK clearly articulates, the treatment these women receive has the force of a punitive “sledgehammer”.12

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11 Prison Reform Trust, supra note 4 at 14
What makes this all the more disturbing though are the reactions of these women to prison. Unlike the majority of male inmates, female prisoners tend to turn in on themselves, experiencing prison in fundamentally different ways from males. For example, the HM Prison Service has reported that about 30% of the women's prison population have self-harmed every year since 2003, whereas the figure is only 6% in the case of males. This is a staggering disparity, highlighting the vast difference in reactions of males and females in prison. Reinforcing this frightening notion is the high rate of female suicide in prison — in the first six months of 2007 alone, six women committed suicide in prison while in 2006 three incarcerated women took their own lives. The problem is getting worse and now is the time to do something to reverse this frightening trend.

The Corston Report, commissioned as a response to a number of deaths at Styal Prison for women in Cheshire, re-affirms that “prison is disproportionately harsher for women because prisons and the practices within them have for the most part been designed for men”. The prison structure is failing to take account of the fundamental differences in the lives of men and women. A one-size fits all approach is not the answer here and is at present leading to appalling infringements of imprisoned women’s human rights every day. As such this work sets out to challenge not only the conditions in which female

15 Corston, supra note 13 at 3
offenders are habitually incarcerated but also the imprisonment of such vast numbers of women as unjustifiable.

A large proportion of women who are imprisoned in the UK have unstable backgrounds, characterised by abusive childhoods and violent relationships throughout their lives, while shockingly a quarter of female inmates have been in care as children. As a result of this, it is not surprising to find that the Corston Report has announced that “women in custody are five times more likely to have a mental health concern than women in the general population”. There is an obvious pattern here, one which needs urgently addressing. There is a failing of the system which is allowing women to reach the point where they offend. Therefore, not only does the situation of women who are already in prison need addressing, but also the circumstances which lead to their offending in the first place.

The Corston Report additionally emphasises the fact that approximately 66% of the women’s prison population are mothers who are separated from their children by incarceration, the effects of which can be devastating on the prisoner as feelings of loneliness and isolation are inflamed, encouraging and propagating self-destructive behaviour. The small number of women’s prisons in the UK further compounds the problem by meaning that most women are imprisoned at an average distance of 62 miles

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16 Nicola Singleton et al., Psychiatric Morbidity Among Prisoners in England and Wales (London: Office of National Statistics, 1998) at 27. See also Social Exclusion Unit, Reducing Re-offending by Ex-prisoners (London: Social Exclusion Unit, 2002) at 138 which revealed that 50% of female inmates admitted to being the victim of domestic violence and a third to being the victim of sexual abuse.

17 Corston, supra note 13 at 11.

18 Ibid. at 20
from where they live, although, as the Corston Report has pointed out, the average distance is now likely to be far further due to the recent re-classification of the Brockhill and Bullwood Hall prisons as men's facilities.\textsuperscript{19} Such a problem is not faced by male prisoners who, as a result of the large number of male prisons, have far less trouble arranging visits from family members.\textsuperscript{20}

So, the shockingly high proportion of female deaths in prison and the numerous accounts of self-harm can be somewhat explained by the above observations, leading to the conclusion that the prison environment is not suitable for these fragile and unstable women. As a consequence of a greater understanding of women's experiences and reactions to incarceration, many studies are now advocating various approaches to the problems inherent in the system. However, the difficulties still persist and the answers are still incomplete. Therefore, in light of the many pervasive problems in this area, this thesis is essential in attempting to resolve some of the issues which are gnawing away at the bones of both the women's prison system and, perhaps more profoundly, society itself.

Canada has faced similar problems in terms of its female prison system, including over-incarceration and poor conditions in female prison facilities. Originally, female offenders were imprisoned in the same prisons as male offenders, however in 1934 the Prison for Women in Kingston Penitentiary (P4W), then the only federal women's prison in Canada, allowed women offenders to serve their sentences within it. It seemed like a

\textsuperscript{19} Ibid. at 21
\textsuperscript{20} Ibid. On average men are imprisoned only 51 miles from their homes
step forward - women would now be separated from male offenders in a prison of their own. However, from the very beginning cracks were appearing in P4W. It quickly became clear that it was not suitable to hold female prisoners.

Significantly, in 1990, Creating Choices: The Report of the Task Force on Federally Sentenced Women was released. This invaluable piece of work revolutionised the federal women’s prison system and will be examined in greater depth in Chapter III. A number of serious flaws were highlighted in the prison, including the structural inadequacy of the building, which had been built to a design created for male prisons which did not fit the specific needs of the women within its walls. The report recommended the closure of the prison and advocated the creation of four new relatively small regional prisons for women, plus a prison specifically designed for aboriginal female offenders. The debate was spurred on by a number of deaths at P4W and Kelly Hannah-Moffat, Professor of Sociology at the University of Toronto, notes that “for many, these deaths underscored how our mental health system and penal institutions had failed to respond to the needs of incarcerated women”.

It appeared that the recommendations of the Task Force were taken seriously and subsequently implemented. In May 2000 P4W closed its doors for good and the five new regional prisons envisaged in Creating Choices became a reality.

It is to be hoped that throughout this research and study of both the Canadian and United Kingdom women’s prison systems valuable lessons can be gleaned. Creating Choices helped to shape a more responsive prison environment for women in Canada, though there are certainly still vast areas for improvement and a plethora of problems remain which mirror the many troubles blighting the UK system. It is for this reason that it is important to investigate the failings of both the Canadian and UK systems to formulate strategies for the improvement of both systems.

Now is an important time to carry out a comparative study of the Canadian and UK women’s prison systems. The Canadian Charter of Rights and Freedoms has embedded human rights in Canada for 26 years and it is in view of this that it must be considered appropriate to examine the impact of human rights on the women’s prison system. In the UK, human rights were delivered in 2000 when the Human Rights Act 1998 (HRA) came into force. It is in light of this that the time is right to conduct an analysis of the impact of the HRA thus far and speculate on the appropriateness of the women’s prison system’s development, drawing on the lessons of Canada to highlight where the UK may be failing to deliver valuable rights adequately.

Professor Michael Jackson has conducted extensive research into the issue of human rights in prisons throughout Canada, most recently in his book Justice Behind the Walls.

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23 See for example Canadian Association of Elizabeth Fry Societies, Criminalized and Imprisoned Women, online: CAEFS <http://www.elizabethfry.ca/eweek07/pdf/crmwomen.pdf> which explains that the women’s prison population in Canada is still growing steadily, yet over 50% of federally convicted women are charged for non-violent drug and property offences

and although a wealth of invaluable research is embodied in this book, the issue of the rights of female inmates is not dealt with in any substantial form. Ghedia has also conducted research into imprisonment in both Canada and England focusing on the human rights issue, yet again the topic of women in prison is skirted over.\textsuperscript{25} Stephanie Hayman though has conducted important work in this area and is one of the only academic researchers to perform any real analysis of both the British and Canadian experiences of female incarceration with the aim of teasing out lessons from the two countries.\textsuperscript{26}

It is thus time to focus on women’s rights, and Canada and the UK will benefit from learning on each other for the answers to a number of important questions. Although the primary goal of this paper is to fashion a definitive core of reform for the UK system \textit{from} the Canadian system, it is also hoped that failings in the Canadian system might benefit from UK approaches. Where no positive lessons can be extracted from either system, perhaps it will be prudent to look to other countries for answers, or eventually formulate entirely fresh ideas for reform. It is hoped that this paper will take concepts which have already been touched upon further and add to the debate on this very serious and topical issue by allowing two systems of law to combine in a pool of analysis which will enable the extrapolation of strengths and weaknesses. Hopefully this will facilitate a move towards a women’s penal system which truly recognises the unique needs and

\textsuperscript{25} Jayshree Ghedia, \textit{Prisoners: Rights, Rhetoric and Reality} (LL.M Thesis, the University of British Columbia Department of Law, 2002) [unpublished]

\textsuperscript{26} Stephanie Hayman, “Prison Reform and Incorporation: Lessons from Britain and Canada”, in Kelly Hanah-Moffat and Margaret Shaw, \textit{An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada} (Halifax, Nova Scotia: Fernwood, 2000) 41
experiences of the female gender and effectively and supportively delivers fundamental human rights in an appropriate and inclusive manner.

2. Approach to Reform

Firstly, the particular reasons for women’s criminality will be examined both in the UK and in Canada in order to determine the root causes of offending. This will primarily involve asking the question: what types of crime do women commit and why? and will necessitate an investigation into the differences between the offending of males and females. The rationale behind this approach lies in a desire to develop a formula for treating the disease itself rather than the mere symptoms. There are reasons women commit crimes and it is imperative that something is done to tackle the issues which lead to criminality in the first place, whether this be by improving the existing social support structure or by creating a fresh new scheme.

Secondly, the structure of the women’s prison system itself will be scrutinised. This will involve examining the prison buildings and their geographical placement, the suicide and self-harm rate in women’s prisons in great detail and the provision of services to meet the needs of female offenders. The state of the composition of the men’s prison system will be contrasted with that of the female system in order to illustrate the unique problems experienced by women as the result of a systematic failure of a scheme which does nothing to tend to specific female needs and thus fails in almost every respect to do anything to change the lives of delinquent females in any meaningful sense. The situation will be compared with that in Canada in an attempt to determine whether
particular problems which are created and sustained by the women's prison system itself have also been experienced in Canada and whether suitable methods of curing these problems have been unearthed, which may eventually assist in the evolution of penal policy and structure in the UK. A great portion of this section will be comprised of an overview and analysis of recent reports. The area of corrections is much debated at present and as such it is very important to examine current proposals and plans in order to determine what shape prison reform might take in the future. This will also be useful in focussing thoughts on the direction of progressive change.

Thirdly, an important part of understanding the prison system involves understanding the specific issues that women, and especially mothers, face at the stage of sentencing. It is arguable that the sentencing criteria which are applied to women for a range of offences are unduly harsh and fail to take into consideration the subtle and often not so subtle differences between the lives of men and women. When women are sentenced leniently, the effect is usually to embed stereotypical assumptions of femininity and this approach will be seriously questioned. This brings into play Article 14 of the European Convention on Human Rights, which prohibits discrimination, as it will be shown that it is possible to construct arguments that sentencing criteria, when applied to women discriminate on the grounds of sex and also on the Article 8 ground of the right to respect for private life. The point of this is to construct a sensible structure for sentencing women, with a primary focus on mothers, which works within the context of women's true experiences and difficulties, to provide fully and clearly, fundamental human rights. A great part of this analysis will be concerned with the issue of motherhood and prison,
entailing an in depth examination of sentencing criteria applicable to offenders who are also mothers. This will lead into a discussion of prisons which allow children to remain with their mothers upon incarceration. For instance, in the UK children are allowed to remain in prison with their mothers for up to 18 months, while in Canada the maximum age is four years. The justifications for these cut-off points will be looked at in order to decide upon the correct method of treatment of mothers and children in prison, which will take into account human rights arguments.

The thesis will conclude by setting out a thorough proposal for reform of all the above sectors of the UK women’s prisons system. Throughout the thesis flaws in the Canadian approach will also inevitably be exposed and thus an incidental task of this work is to find remedies for these faults too. A comprehensive package of reform will therefore emerge which will hopefully fully take into account the differences, similarities, individual characteristics and realities of the lives of women throughout the UK and Canada.
1. METHODOLOGY

1. Comparative Method

(a) The Power of Comparison

The method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.27 - Zweigert and Kötz, 1998

Comparative method is a critical tool. It allows research to be conducted through examination of different legal systems in the hope that the approach of other countries towards various problems may inspire change and constructive evolution in one's own country. It is for this reason that the research presented in this thesis will rely heavily on comparative law in order to tease out solutions with which to remedy the cracks in the women's prison system in the UK (and incidentally, in Canada), through the employment of the various descriptive and analytical techniques that the method entails.

So what is it about Canada and the UK that make them appropriate for comparison? What is it about these two legal systems which will focus and make the best use of the power of the comparative method? Firstly, the fact that Canada is part of the Commonwealth, the roots of its legal system lying firmly in the UK and the common law

system, means that a bedrock of similarity exists between the two countries. It is upon this that the author wishes to build. The two prison systems have diverged at different points, yet there are evident similarities in the problems faced in each of the countries. To compare where two alike systems have taken different paths and to examine the consequences of each of those paths, set against the background of similar laws and experiences will provide a more meaningful idea of what will work in each system and what, evidently will not.

One important issue to address at this point is the fact that the Canadian incarcerative system is split between federal and provincial jurisdiction, with those prisoners sentenced to two years or more falling under the responsibility of the federal sector overseen by the Correctional Service of Canada (CSC). The whole of the UK prison system is comprehensively handled by the HM Prison Service which reports to the Ministry of Justice. This is a very significant difference between the two countries which must be dealt with from the outset. I have decided to make the federal women's system of imprisonment in Canada the focus of the comparison with the UK system, for the reason that this is the area of Canadian penalty which has experienced the most extensive reform over the last 20 years. The radically different style of federal imprisonment which has emerged will hopefully hold a greater range of innovative possibilities for the UK system in its entirety, while the provincial system may still at points be used comparatively where necessary.

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28 Criminal Code of Canada, R.S.C. 1985, c. C-46, Part XXIII, s. 743.1
In addition to this, human rights have an obvious and integral role to play in the area of prison law.\textsuperscript{29} Both Canada and the UK recognise and apply the concept of fundamental human rights however there is one major difference. Human rights have only been enshrined in English law for eight years thorough the operation of the HRA.\textsuperscript{30} However, in Canada the \textit{Canadian Charter of Rights and Freedoms} (the Charter) came into force on 17\textsuperscript{th} April 1982, meaning substantive rights protection has been afforded against the actions of the State for 26 years.\textsuperscript{31} It is in light of this that an examination of the effect of rights rhetoric on the Canadian penal system may be informative for the UK. Perhaps fresh rights arguments will be found for the UK system, where it is arguable many fundamental human rights of female prisoners are being blatantly ignored. For example, Articles 8 and 14 of the \textit{European Convention on Human Rights and Fundamental Freedoms} (ECHR) taken together provide a right to freedom from discrimination based upon private and family life.\textsuperscript{32} It is possible that the inadequate prison visitation provisions and the distance women prisoners are generally kept from their families in the UK is a violation of these rights for the principal reason that, based on their gender, they

\textsuperscript{29} "Human rights" is a term used here to cover norms which are binding on governments

\textsuperscript{30} \textit{Human Rights Act} 1998 (U.K.), 1998, c. 42 [HRA] came into force in 2000, importing the \textit{Convention for the Protection of Human Rights and Fundamental Freedoms}, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [ECHR] into UK law. Under s.6(1) of the \textit{Human Rights Act} "It is unlawful for a public authority to act in a way which is incompatible with a Convention right" and under s.6(3) a "public authority" includes

"(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."


\textsuperscript{32} ECHR Article 8(1) provides that "everyone has the right to respect for his private and family life, his home and his correspondence." and ECHR Article 14 provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"
are denied meaningful access to their families. Male inmates tend not to experience familial deprivation in the same way as women in the UK because they are usually imprisoned far closer to their homes, thus the element of discrimination on the basis of gender is evident. Does Canada face the same problem? If so how has it reacted in terms of rights? What solutions have been posited to resolve the issue? Has Canada faced up to this and similar failings at all in terms of a section 15 Charter challenge or is Canada too in need of a rights rethink? This is merely one issue which can be addressed by means of the comparative method and analytical reasoning, drawing on the Canadian experience.

Prima facie this appears to advocate a hunt for a uniform set of answers and all-encompassing prison policy, based on the belief that there are certain fundamental civil liberties applicable to all people in every part of the world. It must be submitted that this is, to an extent, the correct approach, however societal realities dictate that rights may vary from country to country and that the means of delivering those rights may not follow one set formula. Cotterrell puts it thus:

The drive for universalism, seeking similarity in human rights jurisdictions, is challenged by so-called cultural relativism that demands the appreciation of difference. Nonetheless, the drive for legal uniformity is very strong

33 See text accompanying note 19
34 s.15(1) of the Charter states that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
given that the universality of the values to be represented in human rights law is powerfully championed.35

This is a sensible statement – a universal approach is appealing however it would be ignorant to assume that dissimilar strategies may never be necessitated in the different countries. However, it must be submitted that as two developed countries with significantly similar legal systems and cultures, Canada and the UK are calling out for the deliverance of substantially similar human rights and penal policy approaches and it is only the method of delivering those rights which may require a slight element of tailoring to take account of any actual differences between the countries.

(b) Aims of Comparative Method

The objectives of comparative law are noted as academic study, law reform and policy development, to provide a tool for research towards a universal theory of law, perspective to students, aid to international practice of the law, international unification and harmonization – common core research, a gap filling device in law courts, and aid to world peace.36 - Esin Örüçü, 2002

Evidently some of the goals of comparative law are more appropriate than others in terms of this research. Twining notes that many see “an increased understanding of one’s own

system” as a laudable goal of comparative law. A comparison of the Canadian system will inevitably lead to a deeper comprehension of the way the prison system in the UK operates and hopefully how this affects female prisoners. One must first understand one’s own system before one can profess an ability to do something to change it and through a comparison of a variety of primary sources and a range of academic analysis and comment the author hopes to gain a full enough understanding of the UK system to be able to discover exactly where the mental glue needs applying.

As Örücü notes though “since, to compare means to observe and to explain similarities and differences, the emphasis can be sometimes on differences and at other times on similarities.” This is something that must not be overlooked. Looking for similarities between systems can be just as helpful as focusing on the differences and this is something the thesis will rely on, since similarities can show where the strengths and weaknesses of a system truly lie. If a particular method is being utilised in both countries and is failing in both, perhaps this points to the notion that a radically new approach in both countries is necessary. An approach which is a raging success and which draws approval from both societies reveals where a great strength lies and may provide an impetus for similar approaches in similar areas.

Closely linked to the idea of learning from the experiences of other countries is the aim of creating a framework for reform out of comparative study and it must be stressed that

38 Örücü, supra. note 36 at 8
this is the quintessential target of this work. Bringing each strand of discovery together to create a comprehensive strategy for reform is a necessary result of comparative method, otherwise the lessons learnt will merely represent pieces of an unfinished puzzle. The focus must be on reaching a cohesive conclusion which brings strategies and ideas together to improve the women’s prison system in a wholesome and overarching way.

(c) Structure of the Comparison

Zweigert and Kötz provide invaluable guidance on the best way to approach structuring a comparative study. They suggest that “the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of his own system”.39 The complexity of this study and the issues involved make it more appropriate to tackle the comparison in stages, i.e. “devote separate treatment to each sub-question ... and provide a country report on each”.40 In this way, each different section of the thesis will focus upon a particular issue. For the most part, the comparison will be constructed to firstly address the situation in the UK and then, separately, address the same or similar issue in Canada. Only then will it be appropriate to draw conclusions and collect together the fruits of comparison. While this will be the overarching technique, there will be times when a more integrated comparison is necessitated letting “the contrasts ... build toward [the] the

39 Zweigert and Kötz, supra. note 27 at 6
40 Ibid. at 43
overall conclusion”, a technique advocated by John C. Reitz in his useful article *How to Do Comparative Law*.41

There are many different components of the comparative method and throughout the thesis a number of comparative techniques will be employed. One facet which will be used in examining the workings of each penal system will be descriptive comparative law and this will be the starting point within each section of the thesis. It will involve a mere depiction of each legal system – the structure, the policy, the legislation, the cases, the problems, the successes and so on and so forth. However, as Zweigert and Kötz point out, without more, descriptive comparative law really is devoid of any meaningful comparison.42 Something extra is needed and this is where “specific comparative reflections” will really bridge the gap between the mere sketching of a scene and the proactive mechanics of the comparison.43

It is implicit in the above that an element of what is called “historico-comparative perspective” will work its way into the descriptive comparative reports presented throughout the thesis.44 This approach will combine historical research into the prison systems with the comparative method in order to examine the history of penal policy in the UK and Canada, thus allowing conclusions to be drawn as to which practices and strategies have worked in the past and which have failed. Thus a number of reports from

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42 Zweigert and Kötz, *supra*. note 27 at 6
44 Örãcü, *supra*. note 36
both countries will need to be examined and contrasted. This will ensure that strategies which floundered in Canada for example will not be replicated in the UK and indeed that the mistakes of the past in the UK are not repeated.

Comparative law contains many sub-categories, such as the two listed above (historic and descriptive) but there are two other categories which will be of great importance in this study. These are macro-comparison and micro-comparison. Macro-comparison involves comparison on a large scale, focusing not on the legislation and the specific problems themselves but rather on the “methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law”. It is more abstract and would involve an examination and evaluation of the success of the methods by which one country solves a particular problem or employs a particular policy. It might, for example entail an inspection of the reasoning behind sentencing decisions and indeed part of this work will focus heavily on such issues. It might also involve scrutiny of prison policy, in terms of the approach to dealing with mothers in the prison system who have young children. These are just two areas of macro-comparative analysis which will be interesting to explore with the aim of working to the root of policy in both the UK and Canada. Investigation of the approaches adopted in both countries will hopefully allow conclusions to be drawn as to where the balance of policy should lie.

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45 For example Creating Choices by the Task Force on Federally Sentenced Women, supra note 21 and the Corston Report by Corston, supra note 13
46 Zweigert and Kötz, supra note 27 at 4
Micro-comparison on the other hand “has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests”. This might involve detailed examination of certain legislation which governs the women’s penal system or perhaps, zooming in even further, particular rules which govern the running of prisons. From an analysis of the operation of such rules and legislation in the UK it will be possible to discern whether they are, for example, discriminatory in any way, and if so perhaps lessons can be learned from a comparison of similar legislation and rules in Canada.

So which road should be taken at this point? Should the focus be largely macro-comparative or micro-comparative? In fact, this author sees no reason to place a definitive barrier between the two. In reality this would be impossible, for, as Twining recognises “micro-comparison pre-supposes macro-comparison; they are complementary rather than alternative approaches.” The result of fully merging the two methods of comparative law is the production of a framework of analysis which contrasts the overall legal processes of countries on a grand and comprehensive scale. In fact it may be prudent to go so far as to say that the two approaches are equal halves of a comparative whole. At least, in the case of this research this must be true, for the picture of each penal system would not be complete without both macro and micro-comparative assessment and any lessons would be only half learned.

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47 Ibid. at 5
48 Twining, supra note 37 at 32
A good example of this principle in practice could be put thus: Article 8 of the ECHR\textsuperscript{49} may be examined in detail and judicial treatment of this right could be scrutinised to determine exactly what the right requires. This could then be compared with s.7 of the Charter\textsuperscript{50} in order to discover whether the UK has missed something; whether perhaps the right might require something more. This micro-comparative analysis with nothing else is of limited value. Only when a macro-comparative take on the issue is layered over the top of our micro-comparative analysis will the full picture emerge. For example, the right to respect for private and family life may now be understood, but what treatment outside the realms of the rules may be having an effect here? What aspects of prison policy in the UK for example give inadequate weight to this right? What policy decisions in Canada may shed light on the issue? Both macro and micro-comparative analysis will consequently be integral methodological components throughout this work.

(d) Widening the Comparative Net

Although this work will focus predominantly on a comparison of the British and Canadian women’s penal systems, there may be times when it will be appropriate to cast the net a little wider and to include other countries in the comparison. This may be fitting where certain failures are discovered in both the Canadian and the British systems and thus the approach of neither country holds any significantly positive answers for the other.

\textsuperscript{49} Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, “Article 8:
(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

\textsuperscript{50} s.7 of the Charter provides for the “right to life, liberty and security of the person.”
One particularly controversial issue is that of mothers and their children in prison. A question which could be asked is how long a child should be allowed to remain in prison with his or her mother. In the UK the maximum age is 18 months. In Canada it is four years. Where does the correct balance lie? Such a difference in the ages here shows that the approaches to mothers of young children in prison are drastically different. It may be difficult to come to a conclusion as to the correct age limit, if indeed there should be one at all, thus it might be appropriate at this point to switch one’s attentions to other countries and the policies and structures they employ in their own mother and baby units.

2. Feminist Legal Theory

Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead “recreate the illegitimate power structures [that they are] trying to identify and undermine.” Katharine T. Bartlett, 1990

It is important, and almost inevitable, that throughout this research feminist legal reasoning will play a significant role through comparing and contrasting women’s prisons in both Canada and the UK and also by comparing and contrasting the experiences of males and females in prison. It is hoped that a feminist methodology will assist in revealing and dealing with the differences between the manner in which men

51 See HM Prison Service, Inside HMPS Mother and Baby Units, online: HM Prison Service <http://www.hmprisonservice.gov.uk/prisoninformation/prisonservicemagazine/index.asp?id=5730,18,3,18,0,0>


and women experience society and react to the prison environment and thus the role that
gender plays in the prison context. There are many different aspects to feminist legal
theory and it is vital to recognise that there are various approaches which could be taken
in applying such theory. Indeed, Bartlett, in her article *Feminist Legal Methods*
highlights a range of techniques suitable for attaining the best results from research when
placing an emphasis on analysis of problems from a feminist perspective.53

Feminist legal methods arguably allow one to get to the nub of complex issues and will
enable exploration of the prison problem from a different angle, focusing on the gender
specific issues which plague the system of incarceration. By looking at the subject from
a feminist perspective one can endeavour to unveil the deeper problems faced by women
as women in prison, rather than as abstract prisoners, reduced to numbers, and faceless
criminals. One can begin to set the matter in context and delve beneath the surface to
tackle issues which may at first glance be invisible.

Bartlett champions feminist legal methods as a tool for conducting research, stating that
such methods “value rule-flexibility and the ability to identify missing points of view”.54
And this is the central rationale for the use of such method – it gives women whom for
too long have been silenced, a voice. Rather than looking at the problem from a typically
male point of view, which cannot necessarily comprehend the situations of imprisoned
women, it allows a fresh outlook on problems which as yet, other methods have failed to
remedy.

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53 Bartlett, *ibid.*
54 *Ibid.* at 832
Essentialism of women must however, be avoided. It is a trap into which many have fallen and serves only to marginalise further particular women as individuals or as groups within the gender ‘woman’ – to muffle their voices ever more greatly as an ironic, yet benevolent and unintended consequence of attempting to help. However, this thesis does indeed examine the broad and general patterns surrounding women and the criminal justice system. While doing this it is important to bear in mind that not all women are the same. Not all react the same way and the gender is comprised of a variety of groups which in turn are comprised of a variety of individuals. This is something of which one must not lose sight.

At the same time, there is an equally insidious trap that lays in wait of feminist researchers and may also flow from the mistake of envisaging a “universal womanhood”\textsuperscript{55} – stereotyping. It is important to recognise the differences between men and women during the course of this research, however reliance on certain views of women, i.e. the use of sweeping generalisations concerning their place in society and their reactions to the world around them can have unfortunate results: “difference as a category of analysis can reinforce stereotyped thinking and thus the marginalized status of those within it”.\textsuperscript{56} It is important to remain ever conscious that in attempting to do good for a certain group of women, the knock-on effect on women as a whole, as a gender, can be very damaging. Thus the author will seek to look at the bigger picture and keep issues of gendered traits in context when embarking upon any analysis.

\textsuperscript{55} Gayle MacDonald, Rachel L. Osborne and Charles C. Smith, \textit{Feminism, Law, Inclusion: Intersectionality in Action} (Toronto: Sumach Press, 2005) at 10
\textsuperscript{56} Bartlett, supra note 52 at 835
This research will draw heavily upon one aspect of feminist legal method advocated by Bartlett – “asking the women question”.57 This will involve challenging certain laws, policies and practices which prima facie appear gender neutral and fair in their treatment, but which upon closer examination have the inconspicuous effect of disadvantaging women in often silent but disastrous ways. It may be as simple as the fact that women’s needs have not been taken into consideration when formulating a particular rule, practice or procedure. A good example is the structure of the prison system itself – on the face of it, the buildings which house the women’s prison population are like any other prison building, built to strict regulations. Equality with the male prison population is assumed to be achieved. However, on closer inspection these designs disadvantage women in discreet yet thoroughly objectionable ways; from failing to provide for the psychological problems which afflict a large proportion of women in prison, to placing sturdy barriers between familial relationships which many imprisoned women cannot cope without - ways in which men often find little or no disadvantage.

When “the woman question” is asked, a smokescreen which denies progress is cleared and one can begin to think about how to find solutions which really hear women’s voices and tackle the sometimes elusive problems which have been built into the women’s prison system.

57 ibid. at 837 Professor Bartlett explains that “asking the women question” is a feminist methodological device for “examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.”
More specifically, a wide range of feminist academic thought needs to be consulted in order to gain a good foothold on the issue. In terms of sentencing for example, Pat Carlen takes an interesting approach by advocating sentencing criteria which take note of the differences between males and females but which can be applied in a gender neutral way. Her ideas and suggestions, based on the lives and realities of female offenders, are just one small part of the many worthwhile feminist commentaries from which can be gleaned an insight into the pervasive problems faced by women in the criminal justice system today and the potential solutions which are available to remedy these.

Carol Gilligan's “ethic of care” and “ethic of justice”, as another example, provide an interesting angle from which to view female offenders and may provide intriguing results when applied to the prison system. She believes that “... boys tend to reason in terms of autonomy, individualised justice and rights ... girls tend to focus upon relationships and sustaining those relationships”. This is merely one feminist theory which may be drawn upon to attempt to analyse and explain the behaviour and experiences of female offenders. It is well documented that women in prison cite losing contact with their children as one of the most crushing consequences of incarceration, while the reality of the matter is that the same cannot be said of men in prison. However, Gilligan seems to

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59 Carol Gilligan In a Different Voice: Psychological Theory and Women's Development (Cambridge MA: Harvard University Press, 1982) at 25-31
61 Corston, supra note 13 at 16 and 20-21 See also Brenda Hale QC, The Sinners and the Sinned Against: Women in the Criminal Justice System, (Lecture for the Longford Trust, December 5th 2005) at 16 in which
fall into the trap of essentialising the two genders, something which needs serious consideration as part of this thesis.

Undoubtedly such theories will be very useful in the analysis which is to follow and a range of feminist legal theory will be invaluable in the construction of this author's arguments.

Baroness Hale went so far as to say that “separating [a woman] from her family is for many the equivalent of separating a man from his job.”
II. WHO IS THE FEMALE OFFENDER?

1. Introduction

Crafting solutions to the “prison problem” is a complex task and policy papers, debate and research shrouded in an endless sea of jargon have often had the unfortunate tendency to cloud the already murky waters. As a result it is all too easy to lose sight of the very individuals whose liberty is routinely stripped from them by the current criminal justice regime. For this reason the work begins with an examination of the people who are at the very centre of the debate – the prisoners themselves.

It is important to look carefully at the characteristics of offenders and the factors which contribute to their criminal behaviour. Only when we understand the people whom prisons are built to hold can we begin to appreciate the subtleties of their offending and draw out appropriate solutions. One of the major themes running through this thesis is a determination to illustrate that prevention is unquestionably better than a cure. An examination of the offender and the reasons they commit crime is therefore an essential element in composing preventative measures and is consequently imperative in reducing the number of people coming before the criminal justice system. It is not of course suggested that any one particular strategy might eradicate all traces of offending behaviour so that “cures” become obsolete, rather that close scrutiny of delinquency may allow us to unravel the convoluted tangle of experiences and characteristics which are so often the impetus for offending, in order to address as far as possible criminal behaviour.
While male offending behaviour is evidently in need of tackling, this work specifically focuses upon methods of lessening female offending. It is especially important to target females in this context because of the stark and numerous differences between their offending and the offending of males which sets them apart from the general offending community and as such this work will begin with an exploration of such differences. I will attempt to explain that these necessitate the implementation of specifically tailored schemes and approaches aimed at radically reducing female offending.

Unlocking the female offender it is hoped, will assist in exposing a number of misconceptions about delinquent women and the reasons they offend. Once such erroneous perceptions are deconstructed we will be one step closer to composing enduring concrete solutions.

As has been explained, the female prison population of the UK is rising at an almost unimaginable rate. Many studies and proposals broaching the issue of female incarceration have encouraged the use of non-incarcerative methods of dealing with women offenders in an effort to divert the flow of women from prison and into the community. Baroness Corston for example has recommended a radical new community-based approach to dealing with female offenders, something which will be discussed in great depth in the following chapter of this thesis. Additionally, Pat Carlen has written extensively on this topic, exploring a range of potential “alternatives to women’s

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62 See text accompanying note 1
63 Corston, supra note 13
imprisonment." While such an approach to reforming the criminal justice system is laudable, and is indeed an avenue that this thesis will pursue in detail, it is suggested that the most appropriate strategy is to start at the very core of the problem and work outwards; pinpointing exactly what drives female offending and working to erase the factors which contribute to the criminality.

While many studies refer to the need to reduce women's crime, few seem to forcefully pursue the issue. Carlen for example refers only briefly to "accommodation schemes for women in trouble" which she proposes should have the aim of reducing offending and re-offending. Baroness Corston on the other hand, has made admirable progress in this context, professing "it seems to me that it is essential to do more to address issues connected with women's offending before imprisonment becomes a serious option". It is encouraging that such a necessity has been so clearly and emphatically stated in the report and Baroness Corston does make a number of potentially very useful recommendations concerned with tackling the root causes of female offending. One example of such progressive reasoning can be seen in Baroness Corston's following statement:

The courts have community options available to them for treating women with substance misuse problems but women should have improved access to

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64 Pat Carlen, Alternatives to Women's Imprisonment (Milton Keynes: Open University Press, 1990)
65 Ibid. at 116
66 Corston, supra note 13 at (i)
appropriate community services, especially drug treatment, before coming before the courts.67 (Emphasis added.)

I propose to go one step further than traditional attempts to lessen women’s offending and create a proposal for reform which builds on current suggestions, emphasising the vital importance of innovative preventative approaches which stand a real chance of reducing female crime rates.

This section will therefore begin by explaining and bringing together relevant literature and facts and figures relating to the general offending behaviour of women, detailing the types of offences committed. This will reveal that although “female offenders do clearly appear in all categories of lawbreaking behaviour, they appear much less frequently in some categories of offences than others.” The proportional difference in the volume of particular types of crimes committed by males and females is very revealing and the patterns divulged through research provide a construction of the female offender which can firmly be engaged with. It is equally important to explain the potential of statistics to present misleading results and also the ability of the media and politicians to skew and shape societal perceptions of offending. This author is wary of such pitfalls and accordingly will seek to circumvent their effect by thoroughly examining such phenomena.

It is also essential to explain not only the particular types of crimes committed by women but also the forces which are at work in compelling them to engage in such deviant

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67 Ibid. at 75
behaviour. Consequently, the motivation underlying female criminality must be substantially unpacked in order to clearly reveal the injurious aspects of women’s lives which are potentially amenable to constructive change. This will require a comprehensive examination of the backgrounds and life circumstances of the female offender. In all areas of research embarked upon in this chapter, comparison with the Canadian female offender will be enlightening. This author will seek to establish whether patterns of offending in Canada mirror those in the UK and if not, pinpoint where they diverge. It is important to discover whether similar catalysts for offending exist in North America and if so what devices the Canadian state has implemented to address such issues. Perhaps the UK can draw on Canadian approaches or, as is possible, perhaps Canada too is in need of greater resourceful preventative activity in this context.

2. Types of Offences Committed by Women

(a) United Kingdom

Statistics and research reveal a number of startling patterns running throughout the offending behaviour of women. Perhaps most striking is the unwavering acceptance that “crime is largely a male activity”. A range of authors have noted that this has led to a remarkable pre-occupation with the study of male offending and imprisonment at the expense of a smaller, yet equally important, population of female offenders who are crying out for relief. While the body of research in this area is growing steadily it is

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69 See for example Carol Smart, Women, Crime and Criminology: A Feminist Critique (London; Boston: Routledge and Kegan Paul, 1976) at 1 “The underdevelopment of this particular area of study seems to be
vitally important to keep the debate alive and this work is greatly concerned to stoke the fire by drawing greater attention to the important issue of the female offender.

As time progresses, some consistent patterns have emerged surrounding women offenders. For example, Home Office Statistics on Women and the Criminal Justice System released in 2003 revealed that "in 2002, 316,000 or 19% of 1.65 million known offenders were female ... The proportion of female known offenders remained unchanged from 2001". Males remain severely over-represented in the criminal justice system and 2002 saw that "males convicted of all offences at all courts outnumbered females by almost four-and-a-half to one."71

While such disparate levels of offending are striking, the dissimilarities between the types of offences committed by males and females is perhaps more telling. As has been explained, women's offending is far more prevalent in some categories of offences than others. Most generally, it can be stated that "overall women commit less serious crime than men."73 The Home Office's Statistics on Women and the Criminal Justice System 2002 clearly reveal that the indictable offence most often committed by females was theft and handling with 60% of female offenders in 2001 either cautioned or found guilty of

in part a consequence of the pervasiveness of the belief in the relative insignificance of female criminality."

71 Ibid.
72 See text accompanying note 11
this offence.\textsuperscript{74} The Prison Reform Trust, a charitable organisation created for the purpose of improving the UK prison system, confirms that such trends persist. The charity explains that about 31\% ‘of all women sentenced to immediate custody in 2005’ were there as a result of committing non-violent theft and handling offences.\textsuperscript{75}

An additional category in which females are seriously over-represented is that of fraud and forgery, another non-violent crime. In 2002 approximately 8\% of female ‘offenders found guilty at all courts or cautioned for indictable offences’ had committed fraud and forgery crimes, compared to around only 4\% of males.\textsuperscript{76} Drug offences constitute an additional category in which we can locate a large proportion of female offending. 31\% of sentenced female offenders in February 2007 had committed drug offences.\textsuperscript{77} However, males do tend to commit proportionately greater levels of drug crimes according to the 2003 \textit{Statistics on Women and the Criminal Justice System} with approximately 21\% of males committing such offences in 2002 compared to only 11\% of females.\textsuperscript{78} In any case, the statistics show that drug offences are the second most prominent crime among females after theft and handling.\textsuperscript{79}

What is especially noteworthy about the offending of women is that it is primarily non-violent in nature, as evidenced by the above figures. The Home Office has revealed that

\textsuperscript{74} Home Office, \textit{Statistics on Women and the Criminal Justice System: A Home Office Publication Under Section 95 of the Criminal Justice Act 1991} (London: Home Office, 2002) at 4 The document also reveals that only 36\% of offending males committed theft and handling offences
\textsuperscript{75} Prison Reform Trust, \textit{supra} note 4 at 14
\textsuperscript{76} Home Office, \textit{supra} note 70
\textsuperscript{77} Prison Reform Trust, \textit{supra} note 4 at 14
\textsuperscript{78} Home Office, \textit{supra} note 70 at 4 Figures are for ‘offenders found guilty at all courts or cautioned for indictable offences’.
\textsuperscript{79} Ibid.
20% of males had engaged in a violent offence in 2003 as compared with only 11% of females. Additionally, the Violent Crime Overview 2004/2005 showed that 342 homicide suspects were male, whereas a mere 35 were female. This is clearly indicative of the very different manner of offending between males and females. There does appear however to be mounting public concern over the seriousness and levels of female offending despite little evidence to substantiate these worries, and shortly I will examine exactly why this is so.

(b) Canada

Similar trends to those cited in the UK context can be revealed in relation to Canada. Holly Johnson and Karen Rodgers, in their article A Statistical Overview of Women and Crime in Canada succinctly sum up the situation thus; “women account for a minority of all persons charged by police in Canada each year, and rarely pose the kind of threat to public safety as do men who commit more numerous and violent offences.”

Statistics Canada figures revealed that in 1991 33.7% of females had been charged with theft compared with only 14.9% of males, while a mere 13.6% of women were charged with violent offences as opposed to 21.3% of males. The figures also tell us that 12.5% of women were charged with fraud offences whereas only 5.6% of males were charged
with such crimes.\textsuperscript{84} The minority of women committing violent offences is underscored by the Statistics Canada \textit{Canadian Crime Statistics 1992} report which sets out that only 0.06\% of females charged in 1992 in Canada had committed homicide.\textsuperscript{85} Evidently the situation closely mirrors the patterns of gendered offending in the UK.

Upon examination of offences involving drugs, the \textit{Canadian Alcohol and Drug Survey} of 1994 demonstrated that 10\% of Canadian males had used cannabis in the preceding year, compared to only 4.9\% of females.\textsuperscript{86} Walter S. DeKeseredy explains that “in sum, then, Canadian females are less likely than males to ingest illegal substances. However, the lower female rates described ... are related in part to women’s greater consumption of legal drugs, such as alcohol”.\textsuperscript{87} This then may also provide an explanation for the lower numbers of females committing drug offences in the UK in comparison with males.\textsuperscript{88} Despite this, a very large amount of female offending is comprised of drug related crimes, with 5,400 women in Canada charged with such offences in 1991.\textsuperscript{89}

What can be concluded from these figures is that “female offenders in Canada do not pose a serious threat to public safety ... Instead the overwhelming majority of female offenders are arrested for petty property offences and morality offences.”\textsuperscript{90} The same

can ostensibly be said of offending women in the UK and it is therefore highly disturbing to see such large numbers of women being imprisoned year after year both in Canada and the UK. There are obvious patterns in the offending behaviour of female deviants across the two countries and such trends should certainly be at the heart of any attempt to bring about a reduction in the number of females committing crime.

This analysis is merely the first step in unlocking the reality of female offending but already such results should be informing us that a distinct and specific approach is required to curtail female criminality. Strategies must be tailored and well thought out if they are to have any chance of success.

3. A Statistical Nightmare? Muddled by the Media?

It is no secret that statistics can lie. They can exaggerate and distort the truth to render the desired outcome and crime statistics are just as vulnerable to such treatment as any other data. It is for this reason that it is important to outline at this point the potential inadequacies of certain facts and figures in order to illustrate that the results presented may not always be so clear cut as they initially appear. The data that is used in this thesis is therefore to be examined broadly. The point of this section of the work is to emphasise the possibility that certain of the problems associated with female offending may in fact be far worse than the statistics suggest, making work to resolve issues of female deviance even more important. However, the operation of certain forces may conversely emphasise aspects of female criminality which are not in reality prominent, having the effect of cultivating unwarranted perceptions about offending women. Such
perceptions can be just as damaging as any factor contributing to delinquency and are something of which we must be equally aware if we are to rectify the situation.

Tim Hope explains for example, that reported figures may be made somewhat unreliable by a number of factors. For one, he states, “there are a variety of reasons why the police do not record incidents.”\(^91\) Reasons might include a lack of evidence that a certain crime was actually committed and also a desire to give the appearance of lessening crime rates in order to achieve “police targets” which are set by the government.\(^92\) It is thus clearly possible for the police to adjust the figures up or down to suit their own purposes.

Hope also explains that not all victims report crime to the police and Carrabine et al find that certain crimes are more likely to be reported by people than others, especially theft of vehicles “in order to obtain help in recovering their vehicles for insurance purposes.”\(^93\) It is possible that this is an explanation for the large proportion of females revealed to be committing theft offences in both Canada and the UK. However, as already explained such occurrences might be underestimated as a result of lower levels of recording by the police, perhaps in a bid to give the impression of achieving targets. This may indicate that the problem of theft by females is far more serious than even the existing figures reveal, making work to reduce such offending all the more vital. Since the theft figures for women are very high in any case we may conclude that it is at least a significant issue

\(^{92}\) Ibid. at 44
to address when examining the female offender. Whether increased reporting of theft crimes has boosted the figures or decreased police recording has reduced the figures seems to be irrelevant. There is a tension here which makes it very difficult to determine exactly how pronounced the problem of theft is however what can clearly be seen is that theft offences are a prominent crime committed by women offenders and therefore are a very relevant aspect of feminine offending.

Of great concern to the female offending population must be the public perception of crime. While Baroness Corston assures us that “the public is not as punitive in outlook as some suppose” it is difficult to locate exactly from where she draws this conclusion. The Home Office Statistical Bulletin on *Crime in England and Wales 2006/07* explains the results of the British Crime Survey from that period, noting that “around two-thirds (65%) of people thought crime in the country as a whole had increased in the previous two years, with a third (33%) of people believing that crime had risen ‘a lot’”. This was despite the fact that the Survey “shows no significant change in crime”.

What is very interesting about such revelations pertaining to the malleability of societal perceptions is the role crime reporting plays in perpetuating inaccurate views. Joycelyn M. Pollock and Sareta M. Davis of Texas State University have exposed a range of

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94 Corston, *supra* note 13 at 11
96 *Ibid.* at 1
techniques which can be used to exaggerate female violent delinquency. From something as simple as arguing “against the proposition that women aren’t violent at all and then [showing] examples of violent women” (perhaps picking out exceptional cases of female violence) to using “percentage increases to show that women are becoming more violent even though the percentage of total numbers show hardly an increase at all in homicide and robbery,” the media, statistics and researchers are able to shape and perpetuate unfounded fears about women’s offending. Indeed it does appear very few women commit violent offences at all.

The media itself plays a significant role in constructing public perceptions of women offenders and even in encouraging more punitive responses to the offending of women. In 1995 Anthony Bottoms described a process of “populist punitiveness” and this process it is argued has a number of distinct negative implications for the female offender in particular. A large part of the process is concerned with the way in which the media, especially news media, represent particular societal factions and “promote damaging stereotypes of social groups”. The effect of such reporting has historically been the emergence of “moral panics”. Moral panics are a visible symptom of the public’s escalating fear of crime, fostered very often by the media. The problem is that newspapers and news programmes thrive on sensationalist stories. Robert Reiner for

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98 Ibid. at 6
99 Bottoms, supra note 8
100 Carrabine et al, supra note 93 at 335
102 Carrabine et al, supra note 93 at 331-348
example, explains that "analyses of news reports have found that crimes of violence are featured disproportionately compared to their incidence in official crime statistics or victim surveys." What this has done is fuel a political fire over the years, with certain political parties in the UK viciously competing to apply the most heavy-handed policies on crime, delivering the kind of action the public calls for in order to win support. Each party has spurred the other on, exemplified by the Conservative Party’s production, in the run up to the 1992 election, of a poster reading “Labour’s soft on crime”. Labour’s response: to come down hard. The phenomenon is a self-perpetuating cycle which continues to this day: The Home Office Statistical Bulletin on Crime in England and Wales 2006/07 for example is evidence of this. It revealed that “readers of national ‘tabloids’ were around twice as likely as those who read national ‘broadsheets’ to think the crime rate in the country as a whole (43% and 21% respectively) and in their local area (18% and 9% respectively) has increased ‘a lot’ in the previous two years.”

This process is still well underway. On April 24th 2008 the Home Office released a report which explained that “the level of violence against the person recorded by the police showed a ten per cent fall in October to December 2007.” David Cameron, leader of the Conservative Party, was content however to focus on violent crime,

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103 Reiner, supra note 10 at 383
105 Nicholas et al, supra note 95 at 97
emphasising a 4% increase in gun crime from December 2006 to December 2007.\textsuperscript{107} This is notwithstanding the fact that this percentage boost was created by a rise in firearm incidents involving "slight injuries" (5%) and "threats" (also up by 5%).\textsuperscript{108} In actuality "fatal injuries" connected with firearms fell by 13% and "serious injuries" by 16%.\textsuperscript{109} Mr Cameron went on to tell BBC News that "the worry about the guns and the knives and the violent crime on our streets has got to be dealt with".\textsuperscript{110} It is ironic that Mr Cameron should express this desire in the same interview in which he emphasises the rise in violent crime while skimming over the fact that the British Crime Survey of December 2007 showed that the risk of becoming a victim of crime had fallen to 23% from 24% in December 2006.\textsuperscript{111} Once again politics instils unnecessary fear and summons up punitive public reaction.

While this issue is a problem for many different groups of offenders, notably young offenders,\textsuperscript{112} it must be argued that female offenders are hit particularly forcefully by such processes. Firstly, women face the problem that when they commit offences they are viewed as committing two crimes: they "break both the law and gender

\textsuperscript{107} Ibid. at 7 and see Mr Cameron's comments in "Tories Want Crime 'Hotspots' Map" BBC News (24 April 2008), online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/politics/7365569.stm>
\textsuperscript{108} Home Office, supra note 106 at 7
\textsuperscript{109} Ibid.
\textsuperscript{110} "Tories Want Crime 'Hotspots' Map" BBC News (24 April 2008), online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/politics/7365569.stm>
\textsuperscript{111} Home Office, supra note 106 at 2
\textsuperscript{112} See for example Matt Drake, "Ban the Hood for Good" Sunday Express (30 March 2008), online: Daily Express <www.express.co.uk/posts/view/39622/Ban-the-hood-for-good> In response to a number of violent incidents by hooded offenders, the article goes so far as to suggest that "high streets and public transport would be safer if hoods were outlawed and exclusion zones imposed."
constructs.” This has been termed “double deviance” and arises because, as Frances Heidensohn explains:

women’s low share of recorded criminality is so well-known that it has significant consequences for those women who do offend. They are seen to have transgressed not only social norms but gender norms as well. As a result they may, especially when informal sanctions are taken into account, feel they are doubly punished.

From this it can be concluded that punitive populism is especially damaging for women as compared with men, amplifying the double deviancy concept. The first two layers of punitivism arise out of the double deviancy thesis as described: the public detests crime per se since it represents the defiance of social expectations. Additionally the public perceives women to be rebelling against their gender roles when they commit crime, i.e. “where a woman does not conform, she is punished for departing from the behaviour expected of the ideal Woman/Mother.” On top of these rests the third layer of punitivism, elicited by the sensationalist media reporting which leads the public to believe that female criminality is rising in general (i.e. punitive populism). The result is

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113 Bridgeman and Millns, supra note 60 at 614
114 See Smith, supra note 68 at 352
116 Bridgeman and Millns, supra note 60 at 614 For example, one particular assumed gender role of a woman is wrapped up with mothering. A woman’s biological capacity to bear children leads to the assumption that mothers are best suited to take on primary childcare responsibilities (See Clare McGlynn, “Ideologies of Motherhood in European Community Sex Equality Law” (2000) 6 European Law Journal 29 at 33). When a mother transgresses this assumed norm by offending, she might be seen as doubly deviant for committing a crime and also for stepping out of her assigned role as mother. Additionally, assumptions revolving around the female body, for example, about feminine norms such as the inherently caring nature of women (see Gilligan supra note 59) are shattered when a woman commits a crime. A man may be seen as living up to his masculine role, while a woman is seen as transgressing her feminine role. This leads to her being viewed as doubly bad.
a punitive amplification effect, i.e. even though greater numbers of women may not be committing crime the public perceive that greater numbers of women are becoming criminal and therefore that greater numbers are stepping out of their gendered roles. Thus it is suggested that ideological and stereotypical views of women in society are exacerbated by sensationalist media reporting culminating in the greater demonization of female offenders and potential female offenders.

One very extreme example of this process of punitive amplification through media hysteria comes from Canada; the case of Karla Homolka, who assisted her husband Paul Bernardo in abducting, sexually assaulting and killing two young girls. Homolka herself had been repeatedly abused and raped by her husband. Jennifer M. Kilty and Sylvie Frigon make the important point that “while the image of Paul Bernardo has faded from the limelight, the media has consistently maintained its gaze on Homolka.” They explain that Homolka is “frequently misrepresented as overtly dangerous” and that “women criminals are constructed as the antithesis of acceptable femininity”. Indeed it is this which makes such offenders particularly newsworthy. The mass media frenzy which has raged around this case, clearly focussing on Homolka, emphasises to the public that this woman stepped out of her gender role. It highlights that Homolka failed to conform to the public ideal of womanhood: “Women who commit violent crimes are often constructed in an extreme and sensationalistic fashion, which serves to reinforce

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117 See Dirk C. Gibson, Serial Murder and Media Circuses (Westport, Connecticut: Praeger, 2006) at 143-158
118 Jennifer M. Kilty and Sylvie Frigon, “Karla Homolka From a Woman In Danger to a Dangerous Woman: Chronicling the Shifts” (2006) 17 Women and Criminal Justice 37 at 39
119 Ibid. at 40
standard stereotypes and myths about the inherently violent nature of women criminals.”

When the media sensationaly reports on such women, it ingrains these stereotypes and encodes fear in society, giving the impression that the numbers of “evil” women are on the rise. Kilty and Frigon reiterate this point:

Homolka’s involvement in these crimes created a moral panic, and posed the question that if a white middle-class woman from a good home could commit such crimes, then how are we supposed to differentiate between good and bad women? ... The construction of Homolka as simply a monster, or as an aberration, is demonstrative of the over-focus on her capacity for dangerousness.

Assumptions about female roles in society fuel the process. Punitive attitudes and fear take hold as a result of sensational reporting and all women in society pay the price. Such assumptions about women need attacking in order to attempt to reverse the process. Kilty and Frigon suggest unwrapping the layers of female offenders’ experience, in order to reveal the realities surrounding their criminal behaviour: “rather than re-constructing [Homolka] as the new criminal monster to be feared, it is imperative that we contextualise her experiences in order to generate a more holistic understanding of her case and personhood.” Once again this could encapsulate fairer and less sensational media reporting. It could also include educating the public about the circumstances

\[120\] Ibid. at 41
\[121\] Ibid. at 56-57
\[122\] Ibid. at 43
which can lead to female offending, in order that society may become more understanding and less critical and fearful of women who offend. This may result in more public support for initiatives which aim to divert females away from criminal lifestyles.

However, the current environment is in no way suitable for or conducive to responding to and reducing women’s offending behaviour before it occurs. Certain facets of society needs tackling immediately in order to forge a forum in which we can begin think about deeply effective ways of reducing female offending. The public needs to actively support initiatives aimed at the prevention of offending and as such, ingrained societal imagery surrounding female roles needs cleansing through education.

Additionally, “labelling” groups of women as particularly violent in combination with the rising perception of groups of women as violently deviant may have the unintended effect of impelling certain women to live up to their label. 123 Stanley Cohen called this phenomenon the “deviancy amplification spiral” in 1972 and it is arguable that the same

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123 Newspapers have recently begun painting females as worse than males in their offending behaviour, especially in relation to youth gang involvement. See Matt Born, “Harry Potter Heroine ‘Encourages Violence in Girls’” Mail Online (30 May 2006), online: Daily Mail <http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=388169&in_page_id=1766> who explains that “indeed, there was evidence that girls are sometimes even more aggressive than boys – particularly when they are afforded a degree of anonymity, such as within a gang.” Rowan Pelling, “Be Very Afraid of Britain’s Teenage Girls” Telegraph (13 Feb 2008), online: Telegraph <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2008/02/13/do1305.xml> reveals that the message seems to be; “be very afraid of Britain’s teenage girls” – This bolsters the idea that females are viewed as doubly deviant – girls in gangs are being characterised as worse than their male counterparts. They are unfeminine and therefore somehow more criminal than males who live up to masculine ideologies when they commit gang crime. These views of deviant females and the labelling of young females in this way may perpetuate or even cause their offending through unintentionally encouraging females to live up to such labels.
process may be applicable to potential female offenders at the present date.\textsuperscript{124} For example, the Youth Justice Board of England and Wales published a report in 2007 which warned of the dangers of mislabelling youth groups and consequently glamorising them, inadvertently encouraging young people to enter into more serious forms of offending.\textsuperscript{125} Words have consequences and thus we must choose our words very carefully. Recent reporting of female involvement in gangs in the UK is therefore very worrying, having the damaging potential to inadvertently foster a gang mentality among young women.\textsuperscript{126}

What must be taken from this is a realisation of the desperate need for wider social change. If we are to reduce dramatically the rate of female offending, the public must first truly desire such a reduction. At present it seems that what the public really wants are swift and tough responses to crime. The smoke needs clearing so that the public can see the reality of female offending, so that labels can be removed,\textsuperscript{127} and so that we can accurately pinpoint the actual offending of women. Eradication of common fears and stereotypes in society could be one method of stemming the growth or continuance of

\textsuperscript{124} Cohen, supra note 101 Also see Chris Greer, “Crime and Media: Understanding the Connections”, in Charles Hale et al., eds., Criminology (Oxford: Oxford University Press, 2005) 157 at 173
\textsuperscript{125} Youth Justice Board, Groups, Gangs and Weapons (London, Youth Justice Board, 2007)
\textsuperscript{126} See Sandra Laville, “Caught on CCTV: The ‘Happy Slapping’ Killers” The Guardian (24 January 2006), online: Guardian <http://www.guardian.co.uk/uk/2006/jan/24/ukcrime.topstories3> in which the actions of a female gang who beat a man to death in the UK are reported
\textsuperscript{127} Supra note 123 The growing public concern over female gangs in the UK might serve to encourage female gang offending. See for example Michele Burman et al., A View from the Girls: Exploring Violence and Violent Behaviour (British Economic and Social Research Council, 2000), online: Royal Holloway, University of London <http://www1.rhnc.ac.uk/sociopolitical-sciece/vrp/Findings/rfburman.PDF> at 2 Burman et al explain that “media accounts sensationally present girls’ violence as a new and growing phenomena. Headlines such as the ‘rising tide of female violence’, the growth in girl gangs, girls becoming ‘more like boys’ – exacerbate this lack of understanding.” However, girl gangs do exist in the UK and perhaps it is public perceptions that are fuelling and encouraging to an extent their growth.
female offending and as such it is essential to educate the public. What is needed then are more accurate statistics and fairer reporting of women offenders in the community. Crime must not be glamorised by the media, so that young females are no longer enticed by alluring deviant lifestyles.

There are potentially identifiable differences in Canada in relation to fear of crime, media construction of the offending community and certain stereotypes. To begin with, a 2001/02 report entitled *Fear of Crime and Attitudes to Criminal Justice in Canada: A Review of Recent Trends* has highlighted that in 1970 29% of Canadians reported being afraid to walk out at night, while this figure had dropped to 27% in 2000. The report additionally explains that in terms of public levels of fear England and Wales ranked 7th out of 15 countries, indicating a fairly high level of fear, while Canada ranked 12th, five places ahead, indicating far lower fear of crime. Crime rates in Canada do indeed appear to be much lower than in the UK. The report explains that research has found a link between fear of crime and support for incarcerative reaction. The important point is that it is possible that lower levels of fear of crime in Canada might have resulted in a less punitive public outlook, since the report specifically details that “Canadians appear less supportive of “Get tough” policies.” It is difficult to pinpoint the reason for lower levels of fear in Canada. Perhaps lower levels of crime per se have resulted in reduced

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129 Ibid. at 6 The rankings are based on questions asked to respondents concerning whether they were afraid to walk out in their local area at night time
132 Roberts, *ibid.* at 19
public fear. Or perhaps other forces are at work as well. It might be argued that media representation in Canada plays a part in keeping fear of crime in check. There appears to be "generally positive coverage of corrections by news media" in Canada. Crime rates in Canada "have been declining now for eight consecutive years" the report by Julian V. Roberts reveals and "public perceptions appear to be changing, perhaps in response to media coverage of the official crime statistics."\(^{134}\)

However, this may be quite a generalisation. Many news stories in Canada do appear to focus on CSC failures.\(^{135}\) This includes coverage of escapes and the CSC policy of allowing murderers to serve their sentences in minimum security facilities which has recently been condemned by both newspapers and the public.\(^{136}\) Additionally, the Conservative Government introduced mandatory minimum sentences for gun and gang crime via the *Crime Bill* (Bill C-2) which was given Royal Assent on 28\(^{th}\) February 2008.\(^{137}\) This signals that the Canadian Government is developing a tougher stance on crime. Robert’s report pre-dates this development and media and public support for the Bill may in fact indicate that Canadian society is now not as lenient as Robert’s once professed it to be.\(^{138}\) Despite Canada’s generally low crime rate, public intolerance for

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\(^{133}\) *Ibid.* at 21
\(^{134}\) *Ibid.* at 17
criminality may be on the rise, perhaps in response to the media’s growing thirst for tantalising stories.

Public perceptions are evidently sensitive to media exposure and the UK and Canada should perhaps begin to adopt more representative coverage of crime levels and correctional responses if they wish to cultivate well rounded, informed public opinions. It logically follows that a more lenient public outlook, encouraged by fairer media reporting and government action, may ameliorate the effect of the double deviancy thesis by fostering a lesser degree of fear and punitivism, especially since stereotypes and labelling of certain groups of females as deviant may be tempered by the potentially more favourable reporting. As has been explained above, such stereotypes per se can contribute to the offending behaviour of females and consequently lowering the levels of public fear and punitivism has the potential to reduce the rate of female criminality. What I am suggesting here is that females may be encouraged to live up to stereotypes and demonized images which circulate in society. If the public are better informed, a less punitive attitude may emerge and demonization of young females will be less likely to occur. This in itself may have some role to play in reducing female crime participation. Conversely it might be argued that media reporting can have little effect on female youth via unintentionally encouraging girls to live up to the labels applied to them, since few young people read newspapers. In response to this, it must be argued that news reporting operates through a type of trickle-down effect. Though young

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139 *Supra* note 123 and accompanying text
140 National Statistics, *Time Spent on Main Activity by Age Group With Rates of Participation*, 2005, online: National Statistics Online <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=9497> In the UK for example this study revealed that only 15% of people aged 16-24 spent time reading
women may not directly watch or read news stories about female crime which label them as dangerous or antisocial, it is rather exposure to societal reaction to the reporting which might serve to encourage offending behaviour. It is when a community expects female delinquency, treating young females indiscriminately with suspicion, that girls may seek to live up to such expectations. In this way sensationalist media reporting may be indirectly encouraging female crime.

More research needs conducting to discover whether media crime reporting in Canada is any fairer on the whole than in the UK and whether the Canadian public are more lenient in outlook than the UK public. This would go some way to revealing whether greater public leniency genuinely influences levels of offending. However Robert's report does explain that media massaging of public views does occur to an extent in Canada since, as is the tendency with media outlets, stories of “little editorial allure” are passed over in favour of more newsworthy and sensational stories.141 “Clearly,” Julian Roberts explains in the report, “ways have to be developed of presenting crime and justice statistics in a manner which both emphasizes their limitations and communicates the realities underlying the statistics.”142

Roberts proposes a number of techniques which might assist in producing more representative reporting; from educating newspaper editors as to the effects of their news

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141 Roberts, supra note 128 at 24
142 Ibid. at 24
coverage, to providing media personnel with access to helpful staff, such as statistical experts who are able clearly to interpret results.\textsuperscript{143}

Once again, it must be emphasised that such practices might be particularly beneficial for potential female offenders: A community which is willing to understand the factors which contribute to female criminal offending, rather than simply adopting a harshly punitive stance and demonizing certain women (for example young females) who have as yet committed no crime, will offer a much more nurturing and active arena for change. The UK would therefore do well to look to Canada for answers which might stem the growth of punitive populism which is so damaging for all offenders and those at risk of offending, especially in this context, women.

This portion of the work has shown how public attitudes to offending in general can have doubly deep implications for female offenders and potential female offenders in particular as a result firstly of committing crime and secondly of stepping out of a gender role. Punitive populism amplifies the process of double deviance. It is a phenomenon which affects all offenders and groups of potential offenders, in particular for example, gangs, but has a disproportionate negative effect on females. Not only do attitudes, shaped by the media flow of sensationalist reporting, in some way have the potential to encourage otherwise law abiding females to live up to the assumptions society makes about them, they encourage harsher punitive responses by the criminal justice system. Canadian society’s relatively non-punitive outlook as compared with that of the UK may

\textsuperscript{143} Ibid. at 26
signal that the UK needs to embark on a sharp learning curve to quell public fear of crime in the hopes that this might reduce crime levels themselves. Canada though must also be wary of allowing punitive measures such as Bill C-2 to spiral out of control – initiatives to keep populist punitiveness in check in North America will also be very valuable in the coming years.

4. Who are Female Offenders and Why do they Commit Crime?

(a) Why is this important?
Harnessing the power of the media in order to cultivate representative public attitudes is only the start of any attempt to resolve issues of female criminality. Offending females in the UK (and in Canada) share a number of common characteristics and life experiences which set them apart from the majority of male offenders. These characteristics have the potential to substantially contribute to deviant behaviour and accordingly this section of the work will detail patterns and trends which appear to spark criminality in women. From the picture painted it is hoped that a range of strategies for tackling the underlying causes of offending will emerge, allowing greater numbers of women to be diverted away from the criminal justice system at the outset.

(b) Economic and Social Factors
Perhaps one of the most troubling and deep-seated problems faced by the female offending community in the UK is the relatively low economic and social status of a great proportion of the group. Not only do fiscal concerns blight the lives of many female offenders but also a worryingly large proportion of the general female population
of the UK. The Fawcett Commission on Women and the Criminal Justice System reported in November 2003 that “40% of women have a gross individual income of less than £100 a week compared to just over 20% of men.”\textsuperscript{144} The situation in Canada is comparable; Helen Boritch notes that “many more women than men in Canada continue to live below the poverty level, to be dependent on welfare, to be unemployed or to work in low-paying, part-time jobs, and to be the sole supporters of children.”\textsuperscript{145} Such hardship has the potential to encourage women to commit crime, for example to provide for themselves and their children. This phenomenon has come to be known as the “feminisation of poverty.”\textsuperscript{146} It is this concept which might account for the large volume of female property crime (e.g. theft and handling) both in the UK and in Canada.\textsuperscript{147} In the UK too, the reality is that “women are far more likely to have caring responsibilities and nine out of ten lone parent households are headed by a woman.”\textsuperscript{148} It is therefore hardly surprising to find that a UK based survey in 1994 of 1,057 imprisoned mothers revealed that the largest proportion of interviewees (54%) cited a lack of money as a reason for offending while 38% said it was a need to support children which elicited their criminal behaviour.\textsuperscript{149}

\textsuperscript{144} The Fawcett Society, \textit{Interim Report on Women and Offending} (London: The Fawcett Society, 2003) at 1
\textsuperscript{145} Boritch, \textit{supra} note 85 at 13
\textsuperscript{146} Roger Matthews, \textit{Doing Time, An Introduction to the Sociology of Imprisonment} (New York: St Martin’s Press, 1999) at 123
\textsuperscript{147} See Boritch, \textit{supra} note 85 at 66 where it is stated that “the fact that crime statistics reveal that it is poor, working-class, minority women, charged with various nonoccupational petty property offences, who continue to make up the vast majority of women arrested is seen as further support of the economic marginalization thesis.”
\textsuperscript{148} The Fawcett Society, \textit{supra} note 144
\textsuperscript{149} Home Office, \textit{supra} note 70 at 6 take from Diane Caddle and Debbie Crisp, \textit{Home Office Research Study 162, Imprisoned Women and Mothers} (London: Home Office, 1997)
What is illustrated by these statistics is that females “often commit acquisitive crimes ... for the purpose of gaining something material such as money or clothes.” Conversely, males are more likely to steal “items that are not necessary for their survival” since they tend to have lower levels of economic responsibility for dependents. Such revelations also go some way to explaining higher levels of fraud related crimes committed by women.

This is not to say that males never offend for reasons of poverty, indeed such an assertion would be absurd. What can be said however is that females are disproportionately impacted by this factor, most notably as a result of the gender division of domestic and public work which persists both in Canada and the UK. It is this, coupled with the fact that a far greater number of women are single parents as compared with men which results in such a great amount of financial burden being placed on females in society.

150 Crimeinfo, Women, Gender and Crime (England and Wales), online: Crimeinfo <http://crimeinfo.org.uk/servlet/factsheetservlet?command=viewfactsheet&factsheetid=110&category=factsheets>
151 DeKeseredy, supra note 86 at 27
152 See Walklate supra note 73 at 6-9
153 See Lisa Philips, “There’s Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving”, in Law Commission of Canada, New Perspectives on the Public-Private Divide (Vancouver: University of British Columbia Press, 2003) 3 at 8 where it is explained that “although women have made gains in terms of paid labour force participation, they have fewer opportunities to take up the most lucrative market opportunities, even when they are highly qualified, due to their disproportionate responsibilities for care work as well as employers’ presumptions that women are secondary workers and less committed to career progress.” See also Linda McDowell, “Love, Money and Gender Divisions of Labour: Some Critical Reflections on Welfare-to-work Policies in the UK” (2005) 5 Journal of Economic Geography 365
154 See Home Office, supra note 70 at 37 where it is explained that in 2001 “just over a quarter [of female prisoners] were living as lone parents before imprisonment (compared to 3% of adult males before imprisonment).”
In the Canadian case of *Brooks v. Canada Safeway Ltd.* [1989]\(^{155}\) it was held that an employment insurance policy which covered accident or sickness but excluded pregnancy discriminated against a pregnant employee on the basis of sex under section 6(1) of *The Human Rights Act of Manitoba 1974.*\(^{156}\) The public policy reasoning underlying the judgement was stated to be that "... those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged."\(^{157}\) Such a fundamental principle, acknowledged in human rights terms, should apply equally in this context. In a number of respects women are funnelled into domestic roles.\(^{158}\) They are left with a heavy social and economic burden and are imprisoned in increasing numbers for committing acquisitive crimes with the purpose of fulfilling the responsibilities heaped on their shoulders by society. Not only do women in general bear the economic and social cost of domestic labour and childcare, they face the secondary burden of imprisonment upon the perpetration of property crime committed to provide for their children.\(^{159}\) Society needs to reduce such pressures on women, re-structuring gender roles to allow males to take a greater share of childcare responsibilities. Relieving these pressures will reduce the numbers of women in economic need and hopefully will therefore reduce substantially their offending, especially in terms of fraud and theft offences.

\(^{156}\) *The Human Rights Act of Manitoba*, S.M. 1974, c. 65, s. 6(1)  
\(^{157}\) *Supra* note 155  
\(^{158}\) See Chapter IV, pages 175-179 below for a discussion of the forces contributing to the sexual division of labour between public and private work and how these issues might be addressed  
\(^{159}\) See for example the case of *R v. Bowden* [1998] 2 Cr App R (S) 7 at 8-9
So, how is such re-structuring to be brought about? What exactly can be done to reduce the societal and economic forces weighing on women? We need to dig deep for the answers and delve to the root of the issue, acknowledging that it is the very structure of both UK and Canadian society which is leeching opportunities from women. As has been explained, women are lagging behind men in the economic arena. Stereotypical views of appropriate feminine roles continue to mar the face of society and perpetuate the gender division of labour, denying females the same opportunities as their male counterparts. Ideological assumptions about the correctness of female responsibility for childcaring for example dominate in society, grounded in beliefs surrounding the female biological capacity for childbearing. Such views help to relegate women to the realms of private childcare work and domestic labour, leaving males unencumbered to climb the ladder of economic success. Dorothy E. Roberts, a well-renowned US academic in the field of gender and the law, explains how such assumptions contribute to pushing women into such roles: “A woman’s status as childbearer determines her identity. Society assigns women the enormous responsibility of childrearing. Society not only does not pay women for this labour, but degrades it as well.” She goes on to explain that “society considers women who fail to meet the ideal of motherhood deviant

160 See McGlynn, supra note 116
161 Ibid
162 Philips, supra note 153 Also see Val Singh and Susan Vinnicombe, “Why so Few Women Directors in Top UK Boardrooms? Evidence and Theoretical Explanations” (2004) 12 Corporate Governance: An International Review 479 at 480 who explain that women find it harder to reach higher paid positions in work, running into the “glass ceiling” for a number of reasons including for one “gender stereotyping of leadership”. It may thus make more economic sense upon starting a family for a male to continue to work in his higher level job than for his female partner who cannot break through the “glass-ceiling”. This is one reason women are more likely to be funnelled into domestic childcare work.
or criminal.”¹⁶⁴ In a later section of this thesis I will describe the numerous ways in which child custody law and sentencing decisions have the effect of further perpetuating the stereotypes and inequalities associated with female social roles.¹⁶⁵ The arguments made are just as relevant in aiding the battle to reduce women’s offending. Societal values need a drastic shake-up and, as I have argued, we need to start at the beginning – with the future of society: children. Both the UK and the Canadian governments must commit to a far-reaching program of education for our youngest citizens, teaching in gender-neutral terms and inculcating in them the notion of equality in all areas. As these children grow, their learning will filter down the generations and the seeds of a gender neutral society, where economic and societal pressures are evenly spread between the sexes, will be sown.

Obviously education of children must not be the only focus. Education of judges who have the power to sustain the gender division of labour through their sentencing¹⁶⁶ in gender neutral thinking will be vital. Education of employers concerning interview techniques and hiring and promotion practices need addressing to ensure women have the same ability as men to earn and achieve greater vocational success. Another strand to the approach should be ensuring that males have greater opportunity and greater desire to be involved in childcare and domestic responsibility, freeing women up to pursue the higher echelons of public work. This may be achieved through education as described above

¹⁶⁴ Ibid. at 98
¹⁶⁵ For more on this see Chapter IV below
¹⁶⁶ Ibid.
and also by tweaking approaches to legal decision making involving a father’s participation in his child’s life.\textsuperscript{167}

The general aim of these initiatives should be social and economic re-structuring which promotes gender neutrality throughout both the UK and Canada, with the aim of delivering greater financial stability to women.\textsuperscript{168} Once this result is achieved, we will potentially have gone some way to resolving certain of the major issues which contribute to inducing female offending – societal inequality and financial hardship.

(c) Histories of Victimisation and Substance Abuse

It is unsettling to learn the truth about female offenders. Far easier is it for society to remain blind to the reality of the issue, eagerly assuming the worst of female deviants. Prison is justified in the eyes of the masses; the women placed behind bars are malevolent and inherently bad. This is notwithstanding the overwhelming evidence of habitual past victimisation and suffering of the greater proportion of the female offending population. The Prison Reform Trust for example reports that “over half the women in prison say they have suffered domestic violence and one in three has experienced sexual abuse”\textsuperscript{169} while Crimeinfo emphasises the point that “a relationship has been shown between women’s victimisation and their subsequent offending behaviour.”\textsuperscript{170} In the Canadian context research has revealed similar patterns and the Canadian Association of Elizabeth Fry Societies (CAEFS), a non-governmental organisation concerned with penal

\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid.
\textsuperscript{169} Prison Reform Trust, supra note 4 at 15
\textsuperscript{170} Crimeinfo, supra note 150
conditions and policy, explains that “82% of federally sentenced women have been physically or sexually abused in the past.”  

This is not to say that a large proportion of male offenders have not suffered similar problems. For example, the Homicide in Britain study showed that prior to reaching the age of 16, 25% of 786 male homicide offenders examined had alcohol abuse issues, 17% had drug abuse issues and 24% came from families with a father who had violently abused their mother. The situation is similar in Canada where a CSC study on federally sentenced male offenders found that “almost ½ of the inmate files showed that the offenders had been a victim of child abuse ... as children/adolescent, or had witnessed family violence.” The issue is even more pronounced when aboriginal offenders are examined and John-Patrick Moore has made clear in his research for CSC in 2003 that “the over-representation of First Nations [in federal prison] is inseparable from their personal struggles with alcohol and substance abuse”. He concludes that “family-related difficulties are central to understanding the over-representation of First Nations in corrections.”

171 Canadian Association of Elizabeth Fry Societies, CAEFS’ Fact Sheets: Human and Fiscal Costs of Prison, online: CAEFS <http://dawn.thot.net/election2004/issues32.htm>
172 Russell P. Dobash et al., Homicide in Britain (British Economic and Social Research Council, 2001), online: Royal Holloway, University of London <http://www1.rhbnc.ac.uk/sociopolitical-science/vrp/Findings/rfdobash.PDF> at 2
175 Ibid. at 27
Triggers of male criminality are of course in need of attention, however this thesis does not seek to attempt reform of the male prison system. This does not mean that certain proposals intended to address the root causes of female offending will not also be relevant in addressing the root causes of male offending also. While improved social support structures and community assistance may benefit potential male offenders and aboriginal offenders in Canada in particular, this thesis focuses on specific courses of action to tackle female precursors of criminality. Dr Judith Rumgay of the London School of Economics recognises explicitly that “it should not be forgotten that experience of victimisation among male offenders is higher than is often thought and also requires appropriate responses.”\textsuperscript{176} However, she goes on to highlight that “mental health and self esteem are significantly greater problems for women and [she suggests] that they are also very likely to be the product of victimisation.”\textsuperscript{177} It is for this reason that I focus solely on schemes which may be beneficial in responding to issues of potential and actual victimisation of women which may lead to offending behaviour.

In addition to histories characterised by maltreatment and neglect which in some cases verges on torture, it is not surprising to find that in the UK “up to 80% of women in prison have diagnosable mental health problems”\textsuperscript{178} and that “four in ten women in prison have previously attempted suicide, a much higher figure than for both male prisoners and the general female population.”\textsuperscript{179} A report entitled \textit{Psychiatric Morbidity}

\begin{footnotesize}
\begin{enumerate}
\item Judith Rumgay, \textit{When Victims Become Offenders: In Search of Coherence in Policy and Practice} (London: Fawcett Society, 2004) at 23
\item \textit{Ibid.} at 24
\item Corston, \textit{supra} note 13 at 19
\item The Fawcett Society, \textit{supra} note 144 at 9
\end{enumerate}
\end{footnotesize}
among Prisoners in England and Wales revealed the startling difference in the mental states of male and female prisoners in 1997: “In the 12 months before entering prison, about 20% of male prisoners ... had received help or treatment for a mental or emotional problem. The proportion among female prisoners was double: 40%.” What this tells us is that there are certain experiences common to a large proportion of female prisoners which are linked to their offending behaviour, becoming manifest in criminality and mental health problems. This phenomenon is of course not specific to the female offender; such circumstances also contribute to male offending. However, the above observations and facts illustrate that these issues are a more widespread problem for females than for males.

A link can be made between such high levels of female psychiatric disorder and female drug offences, which, it has been explained, account for a large proportion of female offending. In the previously mentioned Imprisoned Women and Mothers study it was revealed that 35% of female respondents cited drink or drugs as a reason for offending. None of these figures can be viewed in isolation. The factors are all linked. Dr Rumgay refers to Green et al’s 1999 survey concerning the physical and sexual abuse of women in evidencing this point: “In general, abused women report greater health care utilization,

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180 Singleton et al, supra note 16 at 9
181 See Jane Laishes, The 2002 Mental Health Strategy for women offenders (Ottawa: Women Offender Program, Correctional Service of Canada, 2002) at Appendix D which reveals that the same results can be seen in Canada where imprisoned women were found to be three times more likely than men to suffer from depression
182 See text accompanying note 79
183 Caddle and Crisp, supra note 149 Once again, while male inmates also cite drink and drugs as reasons for their offending behaviour, this thesis focuses on addressing issues connected with female offending.
increased drug and alcohol problems and higher levels of psychological distress. What Dr Rumgay draws from this is that the; 

associations between victimisation histories and a range of psychological problems, substance misuse and criminal involvement do not necessarily imply simple causative relationships. They do, however, suggest a complex adaptation to traumatic experiences, in which multiple behavioural problems, including antisocial activity, may be intertwined and may perhaps mutually reinforce or exacerbate each other.

This appears to necessitate a comprehensive approach capable of addressing each piece of the puzzle comprising the female offender. An all-encompassing plan of action is called for by the complex mesh of difficulties and experiences faced by women who offend or who have the potential to offend and any proposals must take this into account.

Similarly high rates of drug crime amongst Canadian female offenders have been revealed – in fact one quarter of federally sentenced women in Canada were in prison in 2006 for offences involving drugs. DeKeseredy explains that men and women tend to take illegal drugs for very different purposes:

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185 Rumgay, ibid. at 7
186 Rebecca Kong and Kathy AuCoin, “Female Offenders in Canada” (2008) 28 Juristat: Canadian Centre for Justice Statistics 1 at 12 See also Boritch supra note 85 at 25 who explains that the proportion of Aboriginal female offenders committing crimes involving alcohol and / or drugs is even larger than the proportion of non-Aboriginal female offenders. It therefore seems that initiatives aimed at addressing Aboriginal female substance abuse will play a large role in reducing female offending in Canada.
Men mainly use these substances for excitement, pleasure or because of peer pressure, while women are more likely to ingest them for “self-medication” to dull the pain of poverty, unemployment, family violence, and other symptoms of class, race, and gender inequality.\textsuperscript{187}

This certainly seems to bolster Dr Rumgay’s assertion that the issues surrounding female criminality are complex, interrelated and self-perpetuating. It is therefore vital that we work towards untangling the sticky web of difficulties which amalgamate to ensnare women, prompting their deviance.

(d) Solutions, the Gender Equality Duty and the Importance of Education

The solution it would seem is to ensure that women are never exposed to the experiences and circumstances described above. This would indeed by an idyllic resolution and to begin to take the first steps towards such a lofty goal profound changes need to be made to the way in which society is organised.

It is thus encouraging that Baroness Corston has put forward crystal clear recommendations with this target in mind: “There needs to be an extension of the network of women’s community centres to support women who offend or are at risk of

\textsuperscript{187}DeKeseredy \textit{supra} note 86 at 19-20 See also Boritch, \textit{supra} note 85 at 25 who additionally explains that in Canada mis-use of drugs and alcohol are prominent among Aboriginal male offenders and especially among Aboriginal female offenders. See also John Weekes, Gerald Thomas and Greg Graves, \textit{Substance Abuse in Corrections FAQs} (Ottawa: Canadian Centre on Substance Abuse, 2004) which tells us that “38% of male Aboriginal offenders have serious problems with alcohol versus 16% of non-Aboriginal males. On the other hand, 71% of female Aboriginal offenders have a serious drug use problem compared with 66% of female non Aboriginal offenders.” These issues are therefore equally as important to address as issues of more general female substance abuse which leads to criminal activity. As such the substance abuse issues experienced by male and female Aboriginal offenders are of great concern and are in need of attention by society as a whole.
offending and to direct young women out of the pathways that lead to crime."¹⁸⁸ (Emphasis added).

She has suggested increased reliance on the use of community services provided by organisations such as the Asha Centre in Worcester, UK, a facility created to assist women in disadvantaged circumstances.¹⁸⁹ “Women”, says Baroness Corston “should have improved access to appropriate community services, especially drug treatment, before coming before the courts.”¹⁹⁰ Baroness Corston’s comments and recommendations must be applauded, however, as will be described in more detail in the following chapter, the Government has disastrously failed to pledge any fiscal resources to implementing her vision.¹⁹¹ Perhaps then it is time the argument is put a little more forcefully in the hopes that a more potent argument might give the government the shake up it needs. Improvement of any social support structure will inevitably be only the first step in diverting women away from criminal pathways. Entrenched problems of poverty and unemployment will need tackling directly as well, perhaps via Government commitment to enhancing the financial opportunities of women. As will be explained, the deepest method of addressing such issues may be by beginning to stamp out the inequalities faced by women in society in order to remove the social gender divide between private and domestic labour, increasing female prospects of financial stability.

¹⁸⁸ Corston, supra note 13 at 2
¹⁸⁹ See Jenny Roberts, “A View from the Voluntary Sector”, in Judith Rumgay, When Victims Become Offenders: In Search of Coherence in Policy and Practice (London: Fawcett Society, 2004) at 21 who explains that “the aim of the Asha Centre is to link disadvantaged women with community resources.”
¹⁹⁰ Corston, supra note 13 at 75
¹⁹¹ See Chapter III below
For a start, and as Baroness Corston herself has emphasised repeatedly, the gender equality duty found in the Equality Act 2006 now requires public authorities to "promote equality of opportunity between men and women". This new duty brings the law one step closer to the substantive equality approach usually applied in Canadian case law. Such a development is very welcome, the legislation, being crucial in fundamentally changing the social reality of women's lives, has the potential to substantially deliver greater levels of sexual equality. The major change that this duty will bring about is "a significant shift from the current complaints-driven approach to tackling discrimination once it has happened, to a proactive approach with the onus on the public body to address inequality before it happens." The duty requires recognition that the differing needs and experiences of men and women may in some cases require that dissimilar services are provided to men and women, in order that equality of outcome is achieved.

With this in mind, one of the first areas in which pressure must be applied is the education system. It cannot be too forcefully stressed that education is a powerful tool therefore it is perturbing that all current proposals and recommendations merely briefly touch upon the issue. While Baroness Corston focuses upon the responsibility of public

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192 Equality Act 2006 (U.K.), 2006, c. 3, s. 84(1) which imports the gender equality duty into the Sex Discrimination Act 1975 (U.K.), 1975, c. 65, s. 76A
193 See for example the application of Canadian Charter of Rights and Freedoms, s.15(1) (supra note 34) in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 in which a substantive equality approach was approved of: "It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality." i.e. recognising that different approaches between different individuals may be necessary to achieve equality in effect.
194 Corston, supra note 13 at 23
195 Supra note 192
authorities such as the police force\textsuperscript{196} and "other criminal justice bodies" to apply the equality duty\textsuperscript{197} she says little about the role the Equality Act might play in the education sector. Most reports concerning female offending and the gender equality duty concentrate on the government’s role in fulfilling its obligations or on bodies with a direct relationship with the criminal justice system, seemingly underestimating the role the education system might have to play in controlling potential criminality.\textsuperscript{198} This is, it is suggested, a fatal oversight. While the police and government departments are public authorities which offer services to women involved with (or who have the potential to become involved with) the criminal justice system, the same can equally be said of state schools. The education sector provides counselling services and Personal and Social Education classes amongst other facilities which have the capacity to touch upon the potential offending of females. As such, schools should be put under just as much pressure as any other public authority to adhere to the gender equality duty in respect of criminality.

It is arguable that at present education establishments are failing actively to promote gender equality. Section 76A(2)(a) of the Sex Discrimination Act 1975 sets out that the gender equality duty will apply to a “public authority” and that this “includes any person who has functions of a public nature”.\textsuperscript{199} Presumably state schools are caught under this definition, as they are caught by the same definition in section 6(3)(b) of the Human

\begin{footnotes}
\item[196] Corston, supra note 13 at 24
\item[197] Ibid. at 31
\item[198] Ibid. at 23-24 and The Fawcett Society, Women and Justice: Third Annual Review of the Commission on Women and the Criminal Justice System (London: Fawcett Society, 2007) at 31
\item[199] Sex Discrimination Act 1975 (U.K.), 1975, c. 65, s. 76A(2)(a)
\end{footnotes}
Baroness Corston explains that “gender specific operational requirements” in women’s prisons may now be called for. This logic can equally be extended to schools, which should now be put under pressure to actively promote gender equality. As has been explained there are certain aspects of female experience which are more likely than others to contribute to delinquency, such as poverty and abuse. Schools should therefore implement more greatly comprehensive schemes to address such issues at early stages of children’s lives. The argument is not that the needs of male pupils’ in this context be sidelined, rather that schools may now need to take a differential and more specifically tailored approach to the education of female pupils, aimed at addressing facets of life which are more likely to affect girls, culminating in offending. Such an approach would be inescapably complex and would require further research and planning to operate successfully in schools. I do not intend to propose specific packages of development for use in the education system but recommend at this stage that detailed investigation into the potential of learning facilities to address gender related criminal precursors be embarked upon. One example of the possible application of this approach might include the establishment of classes and programs in schools which are designed specifically for girls and which centre on the dangers of domestic abuse. This could include advice on how to identify when abuse is occurring in any given relationship and an explanation of the options available to support women in abusive situations. The issue of abuse is of course also relevant to male offenders and consequently classes

200 Human Rights Act 1998 (U.K.), 1998, c. 42, s. 6(3)(b) For a discussion on the application of the HRA to public authorities and bodies performing public functions see Poplar Housing and Regeneration Community Association Ltd and Secretary of State for the Environment v. Donoghue, [2001] 4 All E.R. 604 CA
201 Corston, supra note 13 at 22
should not seek to deprive males of education in this area. However, specific classes or modules of Personal and Social Education should be devoted to educating girls about these issues, since disproportionately large numbers of female offenders are victims of domestic abuse.  

Another example of this technique might be seen in the type of counselling offered in schools or perhaps more appropriate and in depth education relating to the dangers of drug use and links to offending. This may involve for example, showing videos to girls in school which specifically focus on substance abuse and domestic violence and the ways in which these experiences can lead to female offending. Early intervention in female upbringing in this manner may help to address the causes of female offending at an early stage, assisting in preventing young girls embarking on a hazardous road to the criminal justice system. In light of the generally different pathways into crime experienced by males, it may be appropriate to have a different strand of teaching aimed at addressing those factors specifically.  

Education of young women which is aimed at providing them with the tools to circumvent criminal behaviour stemming from abusive situations is important, however other educational initiatives could more usefully be given even greater weight.

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202 Social Exclusion Unit, supra note 16 at 138
203 Different videos may be shown to boys which specifically educate as to substance abuse by males and the pathways into male offending.
204 The high rate of female crime committed to provide for children could be focussed on when educating young women for example, something perhaps not as relevant in the education of young men. In some cases completely different classes for males and females may not be necessary. In these situations it might be appropriate to give both sexes the same teachings while stressing issues contributing to female criminality, so that equality is promoted in that particular class
Specifically, it must not be overlooked that domestic violence is carried out heavily by males against females. This suggests that the educative focus may more appropriately be placed on discouraging male violence through teaching young males about such abuse; delivering lessons in equality and the wrongs of treating women as subordinate objects. Such an approach indicates that the problem of domestic abuse lies not with female victims themselves; rather it is male culprits and the subjugation of females by those culprits, which needs rectifying. All young males have the potential to grow into violent abusers of females and all young females have the potential to grow into abused women. This is the reason a new era in education is so vital and has the power to fundamentally alter the ways in which men view and treat women.

Male perpetrators of violence against women are not the only guilty parties where domestic abuse is concerned. The state must take a large portion of the responsibility in failing to adequately police male violence. The Canadian Association of Sexual Assault Centres, a group of sexual assault centres converging to work against the sexual subordination of females by males, recognises that political action is necessary in any effort to reduce male violence against women. Government scapegoating and attempts to shift the blame for this type of violence onto the shoulders of individual women or communities more generally is not helpful. The recommendation then, must be that while young girls are educated to allow them to avoid violence and cogently deal with it when it does occur, urgent and specific teaching should be given to boys, aimed at discouraging their potential role in domestic violence, signalling to all males that inequality and subordination of women is not tolerated in today's society. Supported by
true and committed state policing of male violence, such educational devices have the ability to alter unjust power structures between men and women and substantially reduce physical and mental male aggression towards women. The approach is ultimately one of substantive equality – using different teaching as between the sexes, aimed at contributing to the reduction of offending by males against females and by females as a result of their own victimisation.

Similar reasoning could also be applied to all government agencies and indeed Baroness Corston does recommend that “every agency within the criminal justice system must prioritise and accelerate preparations to implement the gender equality duty and radically transform the way they deliver services to women.”\(^\text{205}\) This is an important point however every public body which plays any part in female offenders’ lives must be prepared to promote gender equality in its working. It is worrying that Baroness Corston has “seen little that gives [her] confidence that much preparatory work is at hand or, moreover, evidence of any real understanding that treating men and women the same results in inequality of outcome.”\(^\text{206}\) It is for this reason that it is so important to teach lessons of substantive equality in schools. Children should be taught of the variety of gender specific troubles females may encounter in society, thus raising awareness of the factors which contribute to female offending. Education of the public in a wider sense might also help to ease punitive attitudes, something more likely to create a forum which focuses on helping females before they commence their offending behaviour.

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\(^{205}\) Corston, supra note 13 at 25  
\(^{206}\) Ibid. at 23
Similar arguments can be made in the Canadian context, especially in terms of education. Additionally s.15 of the Charter could be used to place pressure on government bodies akin to that created by the Gender Equality Duty in the UK. Undoubtedly the country would benefit from school education specifically aimed at addressing the specific root causes of female offending, in a manner similar to that explained above in relation to the UK.

(e) Violence and Homicide: Why do Women kill?

Finally it is important to say a few words about the minority of female offenders who commit the most violent offences, especially crimes of homicide.207 When women kill it is very often for different reasons than men. Aileen McColgan has researched extensively in this area and notes that “although statistics are not available for the UK, S. Edwards states in ‘Battered Women Who Kill’ (1990) NLJ 1380 that 75% of women in the US who kill their husbands have been battered by them.”208 It is disturbing then that Home Office research reveals that “nearly one in four women have been assaulted by a partner at some time in their lives, one in eight repeatedly so.”209 What can clearly be drawn from case law in this area is that women who have been continually abused by violent partners often feel a distinct sense of hopelessness and kill as a last resort.210 Many women who kill have made attempts to escape violent relationships but often find

207 See text accompanying note 81
“they have nowhere else to go.” In the case of *Ahuwalia* [1992] for example, Kiranjit Ahluwalia was abused by her husband from the beginning of their marriage ... years later the torture was still being inflicted upon her. She was threatened with a knife and pushed down the stairs while pregnant. She did not leave. Eventually, she could take the violence no more. She waited until her husband was asleep in bed and then set him alight. She was charged with murder. The law relating to partial defences to murder is woefully inadequate and has disproportionately detrimental implications for women who kill their abusive husbands. The defences are framed in a way which appears gender neutral but in fact encompass abusive males who kill their partners and medicalise abused females, leaving unprotected those women who endure years of torturous treatment and kill as a last resort. What is important to understand from the cases of abused women who kill their partners is that support services are ultimately failing to

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211 See *Walklate*, supra note 73 at 129-132 for more reasons why abused women stay in violent relationships and information about the public misunderstanding of the reasons women stay in abusive relationships


213 *Ibid*. Again, there are a number of reasons Mrs Ahluwalia felt unable to escape the relationship. For example, the court explained that she did not leave “partly because of her sense of duty as a wife and partly for the sake of the children.”

214 A partial defence to murder reduces the charge to manslaughter. The significance of this is that murder carries a mandatory life sentence whereas in relation to a manslaughter case a judge has discretion to decide the sentence length. Diminished responsibility is a partial defence to murder available under the *Homicide Act 1957* (U.K), 1957, c. 11, s. 2(1) It requires the defendant to have been suffering from an “abnormality of mind”. See Katherine O’Donovan “Defences for Battered Women Who Kill” (1991) 18 Journal of Law and Society 219 at 230 who states that the problem with this for battered women is that it “prevents attention being given to cumulative violence and appropriate responses.” Indeed, the defence completely disregards the violence inflicted upon a battered woman by her partner and focuses the attention on a defect in the woman’s mind.

215 For example, the partial defence of provocation, provided for by the *Homicide Act 1957* (U.K), 1957, c. 11, s. 3 This requires provocation which causes the defendant to lose their self control. The case of *R v. Duffy* [1949] 1 All E.R. 932 makes it clear that the requirement is in fact “a sudden and temporary loss of self-control” See also Bridgeman and Milins, supra note 60 at 633: Bridgeman and Milins criticise the state of the law after Duffy: “The Court, applying the supposedly gender-neutral law, looked to the male response in such a situation, expecting someone who was provoked to respond immediately. In so doing the court ignored the effect which the husband’s abuse might have upon his wife, and the difference in physical size between them.” The application of the law to women in this sense results in inequality of outcome based on human biology.
effectively assist them in leaving violent relationships. It is a failure of the social system, allowing women to be backed into corners, left helpless and alone. Such services therefore need to be dramatically improved in order that women no longer feel trapped in relationships. Society needs to provide much more support for abused women. Such assistance could reduce the numbers of women who feel the need to lash out to protect themselves (and often their children) from the violent actions of their partners.

In Canada the situation parallels that of the UK substantially. Elizabeth Comack pinpoints the major cause of battered women’s trouble as "rooted in social and economic—not psychological—determinants." This, it must be agreed is a key point. Socioeconomic causes of women’s criminality certainly need tackling. Prevention, once again, is the answer.

The Canadian case of Lavallee [1990] represented a victory for abused women. Angelique Lyn Lavallee was continually physically abused by her partner and eventually shot him in the head when he turned his back on her. A psychiatrist testified that "the appellant’s shooting of the deceased was a final desperate act by a woman who sincerely believed that she would be killed that night." The question in issue was whether this expert evidence was admissible. It was held that since such evidence could assist a jury

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218 Ibid.
in dispelling myths surrounding battered women which could result in the denial of the
defence of self-defence, it would be admissible.  

The Supreme Court of Canada’s feminist approach to self-defence in addressing battered
woman syndrome and bringing the defence within the reach of abused women is
admirable. In the UK self-defence is denied to battered women who use excessive force
in killing their abusive partners. Debate has raged around whether self-defence should
encapsulate abused women who use disproportionate force in killing, however a 2004
report by the Law Commission on Partial Defences to Murder rejected “a specific
separate partial defence to murder based on the excessive use of force in self-defence.”
The complete defence of self-defence is denied to many abused women who may be
unable to rely on even the partial defences of diminished responsibility and provocation

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219 See Kwong-Leung Tang, “Battered Woman Syndrome Testimony in Canada: Its Development and
at 619 who explains that “the judges in Lavallee set out to correct the gendered interpretation of women in
abusive relationships by admitting the [battered women’s syndrome] evidence.”

220 It is made clear in the case of Palmer v. The Queen [1971] A.C. 814 that in order to utilise the complete
defence of self-defence a defendant “may do, but may only do, what is reasonably necessary.” In addition
to this common law defence, the Criminal Law Act 1967 (U.K.) 1967, c. 58, s. 3(1) states that “such force
as is reasonable in the circumstances” may be used. See also McColgan, supra note 208 at 514 who
explains that “it is probable that the jury would be directed, in accordance with common law self-defence,
that the use of force could not be reasonable unless it was both necessary and proportionate.” McColgan
goes on to explain that this standard is gendered and weighted towards accommodating male defendants.
This is because, for example, the defence may require a defendant to have no alternative but to defend
themselves. It may appear that a woman who kills her abuser had the option of leaving, thus denying her
the defence, however McColgan (at 516) explains that this might require a woman to leave her children in
a house with her violent partner. Additionally a woman’s use of a weapon against an unarmed partner may
be constructed as a disproportionate reaction involving excessive force capable of removing the defence of
self-defence from her. The problem with this, McColgan explains (at 521) is that females generally have
lesser physical strength than males and may feel the only way to protect themselves is by using a weapon.
The defence may thus appear gender neutral on its face but in fact has the potential to substantially
disadvantage female defendants.

2004) at 6
due to their framing.222 The UK needs to take a feminist approach here, as did the court in *Lavallee* and expand the defences to murder or create an entirely new defence to fully encompass the situation of battered women who kill. A full critique of the construction of such UK defences and their possible reform is beyond the scope of this work. It is sufficient to note that the law in this area needs significant overhaul if it is ever to promote equality.223

In other respects Canada seems more reluctant to recognise the effect of domestic abuse on women. The country has unjustifiably retreated a step from acknowledgement of these problems. Noellee Mowatt is a 19 year old pregnant woman, who has suffered physical abuse at the hands of her boyfriend. She reported the abuse to the police and her boyfriend has been charged with assault with a weapon, three counts of breach of probation and forcible confinement. Shockingly on April 1st Mowatt was arrested. The reason for the arrest: police were concerned that she would fail to appear at court to testify against her boyfriend. Michele Henry, crime reporter for the *Star* newspaper explains that Mowatt had stated that “no one ever asked her to pick up a subpoena or tried to drop one off.”224 Despite this, she was jailed on a material witness warrant though she faced no charge.

Amanda Dale, of Toronto’s YWCA vented her frustration at this situation: “It’s counterproductive to the broader goal of getting women to leave violent situations ... It

222 *Supra* notes 214 and 215
will have a chilling effect on anyone coming forward and reporting to the police." The situation is very worrying, representing the blocking of one possible escape route for battered women, who may now feel less safe than ever before in speaking out against their abuse. Such developments betray a complete misunderstanding of battered women's circumstances and may potentially result in greater numbers of women living in violent relationships feeling forcefully backed into a corner. Retaliation may be the result. More victimised women may become offenders and this is something which must be prevented at all cost. Once again, education may be the answer. Enlightening policy makers and criminal justice officials as to the realities of battered women's lives might pave the way for a new approach to law making which recognises the true experiences of abused females and the reasons they may feel unable to leave violent relationships. Assisting greater numbers of women to get out of such relationships must therefore be the first step in further lowering the numbers of females killing their abusive partners.

In supporting battered women leaving abusive partners, the UK government and the Canadian Government must commit to improving services aimed at helping to free women from violent relationships. A sense of safety and control needs to be delivered to these women who must be provided with viable alternatives to retaliatory fatal violence. They need somewhere to go and someone who can help them; an integral component of any plan to reduce the offending of women.

225 Ibid.
5. Conclusion

Prevention in this context is about pinpointing and removing triggers for female offending, which include sexual inequality, financial instability and domestic abuse to name but a few. Measures aimed at reducing female criminality might come in many forms, from an overhaul of packages of support provided for young women through the education system, to intensive intervention strategies implemented by the government and community outlets. While such practices would hopefully contribute to usefully reducing rates of female offending, parallel measures must be adopted to buttress these efforts. This might be through cultivation of more understanding public attitudes by channelling the power of the media for example. Only when the people truly desire change, putting aside their punitive mentality, will effective reform become possible. Once again, this process necessitates steps to enhance women’s equality in society in a more general sense, so as to improve female opportunity in all areas of life. A more even spread of domestic and private labour as between the sexes for example would assist this, allowing women superior fiscal prospects thus reducing pressure to commit offences designed to support a woman and her family financially.

This section of the work has provided an overview of the female offender herself and has attempted to analyse broadly the reasons she might engage in deviant behaviour. It is hoped that the suggestions put forward will be beneficial in steering women away from criminal lifestyles both in Canada and the UK, a strategy which indeed has valuable implications for women and the criminal justice system in a wider sense.
III. RESTRUCTURING THE WOMEN’S PRISON SYSTEM IN THE UK

1. Introduction

The previous chapter was aimed at exploring the identity of the female offender and the experiences and circumstances which have the capacity to cultivate criminal tendencies in women. The focus now shifts to the construction of the prison system itself, comprising an exploration of its composition and female reaction when placed within an incarcerative institution, something clearly linked with pre-prison identity.

Disproportionate suffering is inflicted upon women in the UK’s prison system where specific female needs and situations are disregarded in almost every respect. With this in mind, a primary goal of this chapter is to expose the many ways in which the system disadvantages female inmates through a misunderstanding of the various life experiences which have constructed their identities, needs upon being submerged within the system and subsequent reactions to the prison environment. I concentrate here upon the structure of the system itself and its inadequacies in an effort to depict how that structure can be revolutionised to accommodate the very specific needs of female offenders.

(a) The Approach

The most general aim of this chapter is to provide a comprehensive summary of relevant developments in Canada and in the UK and consequently academic literature will be
scrutinised in an attempt to build up a picture of the areas most in need of reform. The approach will be wide in nature, examining the systems broadly in order to give an indication of the nature of the issues and problems existing. Firstly then, the structure of the women's prison system in the UK will be sketched out, providing an overview of the type of prison configuration utilised at present. The objective of this will be to illustrate how the prison buildings themselves, their geographical location and importantly their infrastructure have had an unacceptably detrimental effect on female prisoners, largely as a consequence of being based on a male model of imprisonment.

Secondly, the Canadian situation will be examined. The study will focus primarily on the new federal women's prisons scattered throughout Canada. Stephanie Hayman, a senior lecturer in criminology at Kingston University in the UK, recently published a book entitled *Imprisoning Our Sisters* which takes a thorough look at the development of the federal women's prison system, focusing on the progress of the regional prisons.\(^\text{226}\) This book will therefore be heavily relied on throughout the chapter in describing the successes and failures of evolutionary progression. In addition to this, Kelly Hannah-Moffat has conducted similar research in *Punishment in Disguise* which constitutes another invaluable resource which will be drawn upon throughout this chapter of the thesis.\(^\text{227}\) The section will begin by scrutinising the geographical location of the Canadian prisons, the buildings themselves and the internal machinery which keeps them running. A brief outline of the history of the prison system will be necessary in order to


\(^{227}\) Hannah-Moffat, *supra* note 22
examine the successes and failures experienced in the hopes that lessons may be learned, possibly adapted or expanded upon and applied in the UK context. The “woman question” must be at the forefront of this chapter and will be applied rigorously throughout in an effort to determine any adverse and unequal effect the prison walls themselves have on women prisoners in comparison with their male counterparts (the hope being to carve out a path for substantive equality in the system).\textsuperscript{228} While the issue of provision for mothers in prison is certainly very relevant to prison structure this will be dealt with sparingly at this point. The entirety of the following chapter will be dedicated to this large and important topic.

(b) Creating Choices, Learning Lessons

\textit{Creating Choices: The Report of the Task Force on Federally Sentenced Women,}\textsuperscript{229} released in 1990, was a groundbreaking document and in this author’s opinion a near seamless piece of collaborative planning. It laid out a blueprint for a radically new federal women’s prison structure in Canada and revolutionised the system. While the document admittedly contains certain flaws\textsuperscript{230}, which will be closely scrutinised, failures in the resulting prisons can largely be put down to inadequate implementation by the Correctional Service of Canada (CSC) rather than to any insurmountable weakness in the report. Having said this it cannot be assumed that the planning itself was perfect and it will indeed need closely examining in order that failures can be illuminated.

\textsuperscript{228} See \textit{supra} note 57 and accompanying text. Through asking the “woman question” it will be shown that the structure of the prison system in the UK was designed with men in mind and as such it effectively disadvantages women prisoners because of the reality of female offender’s lives and the differential manner in which they experience and react to the prison environment.

\textsuperscript{229} Task Force on Federally Sentenced Women, \textit{supra} note 21

\textsuperscript{230} See generally Hayman, \textit{supra} note 226
There is a great deal which the UK can learn from this document and the following assessment will deal explicitly with this point. Although the report focuses on federally sentenced women, the radical approach to the style and layout of the new prisons in Canada, it is suggested, offers much in terms of innovation for the UK where no federal/provincial divide exists.

When in March 2007 the Corston Report was released in the United Kingdom it was welcomed with open arms by a multitude of campaigners and organisations.\textsuperscript{231} What is compelling about the document is that it comprises proposals which bear similarities to those put forward and indeed, eventually implemented, in \textit{Creating Choices}. It will be argued that Baroness Corston’s recommendations can be expanded upon and clarified through an examination of the Canadian experience. The challenge is to ensure that any proposals are implemented \textit{fully}, in a meaningful manner and it is in this sense that the UK has something valuable to learn from North America. To this end, the various reports and responses to these will be a major focus of this chapter in examining the development of the approaches to the issue of the women’s prison structure.

\section*{2. The UK Women’s Prison System and its Impact on Female Inmates}

In a number of ways women are held to experience the ‘pains of imprisonment’ more acutely than men. This is not because women prisoners are any less resilient than their male counterparts, but because the material,

\textsuperscript{231} Supporters of the \textit{Corston Report} include the Fawcett Society, SmartJustice for Women and the Prison Reform Trust to name but a few
physical and social conditions of their confinement are significantly different.232 Roger Matthews, 1999

As has been explained, the number of women in prison in the UK has risen rapidly over the last decade, while no corresponding increase in the seriousness of the offences committed by females can be identified.233 The vast majority of the female offending population appears to commit non-violent crimes associated with past victimisation.234 The Prison Service has accordingly been significantly tested by the influx of women into the incarcerative regime and by all accounts it has failed. The problem is that the structure of the system remains wholly deficient to fulfil the needs of the women it envelops.

The volume of females in the system puts extreme pressure on the service and it seems all institutions have been filled to bursting point. Up until last year there were 17 women’s prisons in the UK, this figure now having dropped to 15 with the closure of both the Brockhill and Bullwood Hall prisons, which have been reclassified to accommodate men; a result of the rapidly growing male prison population.235 Once again it seems the pressures of the system are too much for the Prison Service to deal with as the strain takes its toll. Ultimately it is the female sector of the prison population

232 Matthews, supra note 146 at 196
233 See text accompanying notes 1 and 11. Also see generally Chapter II above
234 See text accompanying note 169. Also see generally Chapter II above
235 See Will Woodward, “Overcrowding Blamed for 37% Rise in Suicides Among Inmates in ‘Failing’ Prison System,” The Guardian (02 January 2008) at 4 for information on the rapidly rising prison population and the tragic impact this is having in terms of suicide rates: “There were 92 self-inflicted deaths in prison in 2007, 25 more than in 2006”
which bears the brunt of such developments as women are forced into plainly unsuitable institutions.

The stress of the number of women in prison is felt throughout the system but detrimentally impacts on females in a number of unique ways. The very structure of prisons, their location, and the facilities provided (or as may be the case, those not provided) contribute to a wholly unnecessary and indeed unfair level of suffering amongst an often overlooked section of the female population. The prison walls themselves have a disproportionately negative effect on women when compared with men and it is no stretch to say that the very bricks of the institutions in which these women are held contribute directly to their suffering.

In 2004 the Fawcett Society’s Commission on Women and the Criminal Justice System straightforwardly reinforced the idea that a system designed for men was unfair and cruel towards a female population because of inescapable differences between the two genders:

women accused or convicted of committing criminal offences are shoe-horned into a system which was not designed for them and which consequently fails to meet their needs. The consequences of this ‘shoe-horning’ takes different forms depending on which part of the system is being examined.236

Women experience and react to prison differently from men and a significant reason for this is the geographical location of the prisons, a problem both caused by and exacerbated by the small number of institutions. The main point is that the fewer women’s prisons found in the UK, the further from home women are imprisoned.\(^{237}\) For example, in July 2004 almost 25% of women prisoners were imprisoned over 100 miles from their committal court town.\(^{238}\) Male prisoners are affected far less in this respect due to the very large number of prisons in existence for male inmates. The Prison Reform Trust states that “only half of the women who had lived, or were in contact with, their children prior to imprisonment had received a visit since going to prison” and it is not a stretch to say that this is in large part due to the vast distances families have to travel to conduct a visit.\(^{239}\) Inadequate visiting facilities aggravate the problem. The result of this is that women have far more difficulty than men in maintaining links with family and friends, which in turn has devastating consequences, as will be detailed below. As Baroness Corston has appreciated, the reclassification of both the Brockhill and the Bullwood Hall prisons has most likely inflamed this effect.\(^{240}\) Not only does this reclassification mean that women are further from their families, it also means they are thrown, yet again, into unfamiliar surroundings to which they once again have the difficult task of adjusting. Scattering women about the country, juggling female lives, is

\(^{237}\) It does not follow however that a greater number of women’s prisons are therefore needed in order to allow women to be located closer to their homes. Improving visiting facilities, while encouraging and assisting contact between inmates and their families and friends would go some way to solving the problem. Reducing the number of women in prison would also mean that fewer women would be separated from their families.


\(^{239}\) Prison Reform Trust, supra note 4 at 16. See also Marissa Sandler and Deborah Coles, Dying on the Inside: Examining Women’s Deaths in Prison (London: Inquest, 2008) at 96

\(^{240}\) Corston, supra note 13 at 21
totally unacceptable. Instability has been a continuing theme in the lives of large numbers of imprisoned women and more instability once in prison can only make matters worse.

While the distance is an issue in itself, the impact of being further from home can be felt much more deeply in general by women than by men. Once again this is a result of the very real differences that exist between males and females who are exposed to the prison system. It is a fact that two thirds of women in prison are mothers of young children.241 It is also a fact that only 33% of women in prison have the security of living with a partner prior to imprisonment.242 This figure is much higher for males, with 55% confirming that they had been living with a partner before they were sent to prison.243

The ramifications of such figures are readily obvious and serious. Scottish research has shown that a mere 17% of fathers took responsibility for childcare upon the imprisonment of the mother.244 Conversely, 87% of mothers looked after the children of their imprisoned male partners.245 When a male enters prison, he is therefore much more likely to have the support of his partner who remains in the family home and takes care of children. When a woman enters prison, she is less likely to have this security, meaning the effects of prison ripple through to the next generation as we see that 12% of females in prison have had their children removed from their home and placed in care as

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241 Prison Reform Trust, supra note 4 at 16
242 Ibid.
243 Ibid.
245 Ibid.
a result of their imprisonment.246 Separation from children in this manner can have devastating consequences for female prisoners. According to Jessica Rimmington, the manager of the Holloway Prison visitor centre in 2002, “for the majority of mothers in prison, coping with separation from their children is the most painful aspect of imprisonment.”247 It exacerbates feelings of isolation and can generate greater mental health problems. Males generally have the peace of mind that their children are being looked after by their partner and thus do not experience the deprivation in the same way.

Linked with this is the generally higher number of women who lose their homes upon entering prison. Because fewer women have male partners who can look after the home while they are absent, it is more likely they will have their housing taken away from them. In 1999 it was established that 33% of women lose their homes once they are incarcerated.248 Geography has a lot to answer for indeed, especially when we look at the overall management structure of the women’s prison system at present. In 2004 it was decided that all women’s prisons in the UK would be managed dependent upon their geographical location, along with the male estate. This has led to significant disruption and inconsistency within the system, since “due to the small number of women’s prisons, any gender-specific issues arising in women’s prisons are easily sidelined as they do not affect the majority of prisons within any geographical area.”249

246 Prison Reform Trust, supra note 4 at 16
248 Loucks, supra note 244 at 150 citing research by Toby Wolfe, Counting the Cost: The Social and Financial Consequences of Women’s Imprisonment (London: Prison Reform Trust, 1999)
A primary explanation for the differential in reaction between males and females can be found upon deeper examination of prisoner backgrounds and relationships prior to imprisonment. When we look at the life experiences of a great proportion of offending women, as detailed extensively in Chapter III, the picture begins to become slightly more clear: Rumgay drums in the fact that the majority of women who enter the criminal justice system have histories of continued victimisation: "Morris et al (1995) found that nearly half a sample of 200 women prisoners reported a history of physical abuse and almost one third reported experience of sexual abuse" she explains. A large proportion of the female prison population thus suffers from deep-seated mental health problems meaning that most react to prison life differently than men, turning in on themselves in response to their inappropriate prison surroundings.

Suicide and self-harm are common occurrences as a result of the above, often triggered by the current prison structure; a stark reminder of the frightening differences between the manner in which female and male inmates react to the prison environment. Nancy Loucks explains that "the stresses of imprisonment increase the risk of suicide and self-harm amongst a group already vulnerable to such behaviour." It is startling to discover that "fifteen per cent of suicides in prison in 2003 (14 out of 94) were committed by women, yet they account for only six per cent of the average daily population". The situation seemed to be improving a little when the number of self-

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250 Rumgay, supra note 176 at 4 citing Alison Morris et al., Managing the Needs of Female Prisoners (London: Home Office, 1995)
251 Corston, supra note 13 at 3 See also Loucks, supra note 244 at 146
252 Loucks, supra note 244 at 153
inflicted deaths by women dropped from four in 2005 to three in 2006. It is deeply disheartening that this positive statistic is merely a blip on a disturbingly bleak record, with the number of female deaths in custody rising to eight in 2007. It must again be stressed that the prison structure itself is largely to blame for these upsetting figures. Self-harm is a directly related problem and research shows that “40% of women in prison self-harm”.254 It is evident then that female prisoners tend to focus their physical reactions to the inappropriate prison environment and psychological difficulties on themselves, internalising their feelings while men react very differently. The Fawcett Society notes that “male prisoners express their disturbances externally, in extreme cases by rioting.”255 Rioting in the 1990s by male prisoners in fact had a seriously detrimental impact on the female prison system, when increased security measures were imposed across the board despite no evidence that female prisoners posed any serious violent threat to anyone but themselves.256 This sucked resources from programs and initiatives aimed at addressing the psychological and other issues common to female inmates, diverting the focus and the finances to unnecessary security. Once again the female prison population was suffering as a consequence of the Prison Service’s pre-occupation with male inmates.257 Another factor which aggravates the issue is that too many women are placed in single cells. As Baroness Corston points out, sharing a cell can be beneficial as a preventative check on suicide attempts.258

254 The Fawcett Society, supra note 236 at 5
255 The Fawcett Society, supra note 144 at 10
256 The Fawcett Society, supra note 236 at 45
257 Ibid. at 45-46
258 Corston, supra note 13 at 32
Baroness Corston comments directly on an upcoming report from the Department of Public Health concerning the state of the conditions experienced by remanded female prisoners and this serves as a helpful illustration of the physical conditions experienced by the women:

Women recounted the stress that came from newly encountering the prison environment. Crowding, noise and the threatening atmosphere were the immediate factors. They recounted their alarm and concern at finding themselves sharing cells with women with mental health problems and who self-harmed; being frightened and unprepared when confronted with women who were suffering severe drug withdrawal or seizures.\(^{259}\)

The *Corston Report* continues to provide more details of the living conditions experienced:

Almost all agreed that the physical prison environment did little to promote health. Women complained that the prison environment was dirty with unhygienic sharing of facilities. For example, five women in a dormitory could be sharing one in-cell sink, which was being used for personal washing as well as cleaning eating utensils. There was a lack of fresh air and ventilation. Enforced sharing of rooms with smokers was especially problematic for non-smokers. Women gave vivid accounts of vermin present in the areas where they ate, slept and stored their personal food items. Prison facilities hindered them from maintaining self-care, including limited access to personal hygiene products and restricted access to bathing. Shower facilities were often dirty. Despite their reluctance, women made use of in-

\(^{259}\) *Ibid.* at 29
cell sinks where available to ‘strip-wash’ but this was less than ideal. Women were also critical of the absence of materials to clean the facilities they used such as toilets and washing facilities. Women felt disempowered to have to rely on other designated prisoners, whose standards were not their own, to carry out cleaning tasks.260

So it can be seen that the situation is wholly inadequate. Despite their sex and gender female prisoners seem to have been subsumed into a very male model of imprisonment. They are marginalised within the system and are being overlooked as a small and therefore insignificant sector of the prison population, notwithstanding the worrying rise in the number of female deaths in custody this year alone.

A whole host of problems plague the system and staffing is arguably the lynchpin of an infrastructure which is letting women down. This is not to say staff members are not hard working and dedicated. The problem lies not with the work of the staff members themselves but rather in the level and appropriateness of training they receive. Currently it is evident that the principally female staff at all women’s prisons are inadequately trained to deal with the mental trauma experienced by prisoners on a daily basis. Everyday women self-harm in prison. Everyday there are women who attempt to take their own lives. Everyday it is down to staff to intervene. They deal with emotionally disturbed women, many of whom have experienced physical and sexual abuse in their pasts and cannot function within the prison environment, yet their training is altogether inadequate:

260 Ibid.
Equally shocking is the apparent acceptance that this is the norm and the expectation that prison staff will take on the management of these women, insufficiently trained and sometimes uncomprehending of the motivation that drives women to injure themselves, as part of their normal daily (and nightly) routine.\textsuperscript{261}

Again, staff structure is obviously affected by the reclassification of female prisons. Coherent staff work, routine and, coincidentally any sense of stability are eradicated by scattering women further afield and essential programming for women is interrupted or cut-off, something which has the potential to be disastrously harmful to prisoner development. It seems ludicrous that women with such deep-rooted problems, cultivated by their past victimisation and culminating very often in declining mental health and self-injurious behaviour, are placed in institutions where staff have little prospect of being able to do anything to address their suffering. If therapeutic intervention is in fact hindered by the prison experience what other reasons are there to keep these women locked away? Protection of the public? This seems unjustifiable, since the majority of crimes committed by women are non-violent. Rehabilitation? If we consider that 55\% of women re-offended in the two years following their release in 1999 this seems unlikely also.\textsuperscript{262} Time after time, report after report, article after article we hear that mass imprisonment of vulnerable women is serving no useful purpose in society and is damaging to the women themselves.\textsuperscript{263}

\textsuperscript{261} Ibid. at 12
\textsuperscript{262} The Fawcett Society, supra note 236 at 48
\textsuperscript{263} See for example Carlen, supra note 12, Corston, supra note 13 and The Fawcett Society, supra note 236
In a multitude of areas the UK women's prison system is contributing to the further misery and suffering of a generally non-violent, troubled group of women whose crimes are often a result of personal, emotional problems brought on by experiences of past abuse and difficult upbringings. Of course it would be misleading and inaccurate to assume that every woman in prison is there as a result of traumatic past experience. Regardless, women's reactions when confronted with the prison environment are clearly different from men's, seemingly as a result of socially influenced factors which do not sit well with a prison setting unsuited to their unique needs. The system is a failure. It has been said before and, unless something drastic occurs in the very near future, it will doubtlessly be said again and again and again.

3. The Canadian Women's Prison System

The system in Canada has faced a multitude of problems similar to those experienced in the United Kingdom and it is for this reason that it is essential to provide the reader with a brief summary of the history, problems and solutions realised in North America in relation to its female prison system. This section will focus on the federal women's prison system, which comprises of female offenders who receive a sentence of two years or more. Although many women in the UK prison system are serving sentences of a much shorter length, it must be suggested that the structure and new regime of the regional federal women's prisons which appeared following the recommendations of Creating Choices (1990) could hold very important lessons for the UK in terms of a suitable replacement prison structure. By examining the development in Canada and the

264 Supra note 28
mistakes of the past it is hoped that some clarity may be achieved and that a suitable women’s prison structure in the UK will result.

Initially women in Canada were incarcerated alongside male prisoners - it was in 1835 that the first three women moved into Kingston Penitentiary in Ontario. The conditions in which they lived were practically the same as those provided for the male inmates - unsanitary and austere, and they were unjustifiably subjected to the same treatment applied to men. Staggeringly, it was only in 1913 that the first true separation of male and female inmates was seen as women were moved to a prison of their own, yet this was still located within Kingston Penitentiary. It consisted of 32 cells, suitable to hold one person each, yet over the following years the population of female inmates grew and in 1916 about 40 women were imprisoned in the squalid and cramped conditions, eventually resulting in the shuffling of women to other institutions in an act of geographic juggling.\(^{265}\) It is clear from this that, as was (and arguably always has been) the case in the UK, women were seen as merely a problem incidental to that of the male prison population and consequently were carelessly dealt with by crushing them into a male model of imprisonment. The similarities with the structure of the UK system are apparent from the outset.

In 1921 The Nickle Commission released the Biggar-Nickle-Draper Report.\(^{266}\) The main recommendation was that the women’s prison within Kingston Penitentiary be closed

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\(^{265}\) Hannah-Moffat, supra note 22 at 81

\(^{266}\) Biggar-Nickle-Draper Committee on the Penitentiary Act and Regulations, *Report on the State and Management of the Female Prison at Kingston Penitentiary* (Ottawa: King’s Printer, 1921)
down and replaced by a new prison for women, entirely separate from the prison holding male inmates. In response to this, planning for a new prison began and the Prison for Women (P4W) opened in 1934 taking in 40 women. If hopes were high for a new era in female corrections they were certainly dashed by the new prison. A mere four years after the prison opened, the *Royal Commission Report on Penal Reform in Canada* (the Archambault Report) recommended its closure.²⁶⁷ The report criticised the lack of appropriate programming and stated clearly the need for women to be imprisoned at locations closer to family members and friends. Despite this and a multitude of additional reports recommending similar measures P4W remained open as the women’s prison population continued to grow.²⁶⁸

In 1949 CAEFS became involved in P4W.²⁶⁹ CAEFS members began visiting the prison regularly, providing classes for the inmates, including both educational and leisure orientated activities. As time progressed representatives from CAEFS became even more incorporated in prison life at P4W, providing counselling for women and helping in numerous ways.²⁷⁰ Despite these compassionate advances, between 1834 and 1970 the programming offered to women remained inadequate for their needs and, as Kelly

²⁶⁷ *Report of the Royal Commission to Investigate the Penal System of Canada* (The Archambault Report) (Ottawa: King’s Printer, 1938)
²⁶⁹ See CAEFS website, online: CAEFS <http://www.elizabethfry.ca/caefs_e.htm>
²⁷⁰ See the Elizabeth Fry Society of Kingston website, online: Elizabeth Fry Society of Kingston <http://www.arolland.com/efk/about.html>
Hannah-Moffat points out, it “reinforced conventional gender stereotypes”. Classes in knitting for example contributed to this effect and serve as an illustration of benevolent infrastructural development that managed to damage the female gender in a more general sense, through entrenching dominant ideologies of womanhood; i.e. that women are suited to certain types of work, primarily domestic tasks.

Despite the efforts of the individuals associated with CAEFS, P4W was riddled with further catastrophic faults and flaws and was patently doomed from the outset. A major problem, which to an extent echoes the experience in the UK, was that the existence of one single prison in Ontario capable of accommodating federally sentenced females meant that such women were commonly held intolerably great distances from their families and friends, physically detached from any part of their pre-prison lives. In fact the Correctional Service of Canada reports that in the year spanning 1963 to 1964 81 female inmates were imprisoned in P4W, yet 33% of these women were not visited by family. While the problem is exacerbated in Canada by the size of the country, the problem of imprisonment far from home, resulting in severed family connections is vividly evident in the UK and solutions imposed in Canada will therefore be of importance in the UK setting.

271 Hannah-Moffat, supra note 22 at 87
272 For an explanation of how such practices serve to ingrain stereotypical views of women in society, see Susan Boyd, ed., Challenging the Public/Private Divide: Feminism, Law, and Public Policy (Toronto: University of Toronto Press, 1997). See also Ruth Fletcher, “Feminist Legal Theory” in Reza Banakar and Max Travers, eds., An Introduction to Law and Social Theory (Oxford; Portland, Oregon: Hart Publishing, 2002) 134 at 140 where one particular dominant ideology is stated to be “the supposed naturalness of women’s responsibility for domestic tasks and men’s responsibility for public tasks.”
273 See Correctional Service of Canada website, online: Correctional Service of Canada <http://www.csc-scc.gc.ca/text/pblct/brochurep4w/7-eng.shtml>
It was only in the 1990s that real progress became apparent with the release of *Creating Choices*.\(^{274}\) It is shocking that action in the form of production of such a document only seemed to be taken following a number of deaths at P4W in consequence of the squalid conditions in which women were forced to live. It must be stated that although the deaths highlighted the gloom and misery which women were forced to endure, these were not the only events which called attention to the failings of the system. Cracks in the structure of the system were blatantly apparent from the beginning of P4W’s life in 1934. The Correctional Service of Canada should have taken action immediately attention was drawn to the inadequacies yet it chose to bury its head in the sand and let a gaping wound in the prison service fester away for almost 70 years. The 1990 report itself and the resulting system of federal imprisonment will now be examined in detail.

4. *Creating Choices in Canada*

*Creating Choices* was a monumental document and finally, after years of ignorance, deliberation and side-stepping the issue, the structure of the federal women’s prison system was to change dramatically.

(a) The Task Force and Consultation

There are a number of factors which make the report so groundbreaking in its entirety and one cannot overlook the actual composition of the Task Force itself, which was co-chaired by the Correctional Service of Canada and importantly CAEFS. The voluntary

\(^{274}\) Task Force on Federally Sentenced Women, *supra* note 21
sector, "whose alternative voices add legitimacy to the public debate" was indeed crucial to the work, and the mix of civil servants and individuals from non-governmental organisations was a vital ingredient in a very powerful recipe. Bonnie Diamond, the Executive Director of CAEFS, and James Phelps of the CSC headed the steering committee, while Felicity Hawthorn, a past president of CAEFS, and Jane Miller Ashton of the CSC headed the working group. Interestingly, as Stephanie Hayman notes, the working group actually consisted of a greater number of voluntary representatives than CSC representatives. Aboriginal representation was also present in the form of the Aboriginal Women's Caucus and the Native Women's Association of Canada. On the surface this was a very advantageous collaborative development for correctional planning however for a number of reasons there remained tensions between the civil servants and the voluntary organisations. For one, CAEFS was to receive Government funding throughout the course of its participation in the Task Force and as was inevitable "this reliance on government money led to tension between its independence as an advocacy organization and its status as a paid agent of the state". In addition to this the civil servants could be said to have been constrained in their own decision making by their role as CSC employees.

Equally special was the inclusion of two federally sentenced women on the Steering Committee and the level of consultation with federally sentenced women themselves in

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275 Hayman, supra note 226 at 32
276 Task Force on Federally Sentenced Women, supra note 21
277 Hayman, supra note 226 at 34
278 Ibid. at 32
279 Ibid. at 57
general — "This degree of consultation with imprisoned women – and, indeed, deference
– was remarkable, even within its Canadian context, and without parallel in other
jurisdictions." This input was vital in tailoring a system suited to the true needs of
imprisoned women as expressed by them.

CAEFS faced a dilemma early on in the process: whether it was appropriate to co-chair
the report at all. It is at this point that it is prudent to consider both the long term and the
short term goals encompassed by Creating Choices. The document set out clearly that it
was a dual track proposal, with two separate goals. Firstly, the aim in the short term was
to take "immediate action" to respond to the "urgent need now to create choices which
will reflect the experiences and meet the needs of women". This included the need to
close P4W immediately. The idea was to tackle the most venomous problems in the
women’s prison system at the time by improving the conditions of imprisonment more
generally. Secondly, the long term aim of the Task Force read thus:

This goal, shared by members of the Task Force, looks toward social change
which will reduce inequities in the ways people are treated, and the crimes
which stem from these inequities. This goal looks toward a time when harm
done to people will be repaired in creative, supportive, non-incarcerative
ways. This goal looks toward a future in which all communities will take
responsibility for the causes of and responses to inequality and suffering.

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280 Ibid. at 104 - 105
281 Task Force on Federally Sentenced Women, supra. note 21 at 127
282 Ibid. at 126 See also Ibid. at 2
While the Task Force expressly recognised that the long term goal was not achievable at that stage, due to legislative constraints, it nonetheless made clear that eventually the way forward in dealing with female offenders should not be focussed on imprisonment.

Without a doubt, it was the short term goal which troubled CAEFS and “many of its members questioned the wisdom of being involved in a government project that might conceivably lead to the building of new prisons”. The decision to participate was fundamentally occasioned by the perceived urgency of the situation and the desire to prevent more deaths in prison.

So, where should the balance lie in voluntary involvement? Stephanie Hayman clearly believes that voluntary organisations “helped legitimate the institution of imprisonment”. Emphatically, she states that:

Their role is to publicize the fact that “the prison” damages more people than it assists – and that the damage is not confined to the prisoner but extends through the prisoner’s family and into the wider community. They should remain advocates for prisoners, pressing for community dispositions rather than legitimate imprisonment through their participation.

While this argument is compelling, it must be said that rather than adhering strictly to a non-collaborative role, voluntary institutions would do well to regard Hayman’s words rather as a cautionary warning about the dangers of involvement with governmental

283 Hayman, supra note 226 at 32
284 Ibid. at 253
285 Ibid. at 257-258
institutions. When lives are at stake, it must be argued that the voluntary sector has no option but to step in to further a short term goal. As long as the function of promoting a reduction in the use of imprisonment as a form of dealing with female prisoners is also espoused insistently to the public and to the government, as occurred during the process of Creating Choices and in the aftermath, lives will be saved and further work can be engaged in to alter the system in the future. It my take time and work, but such major upheaval will inevitably not come easily and a lack of voluntary participation merely leaves the government relatively unchecked in its planning of a new system, free to repeat the mistakes of the past. As will be discussed below, the major problems with Creating Choices lay less in its planning and more in the total lack of involvement of CAEFS and most of the other voluntary organisations in its implementation. Hayman notes this too\(^{286}\) however the answer, it would appear to this author, is not to withdraw input by voluntary organisations altogether, but rather to ensure those organisations are involved in every step of the process, from planning to implementation and beyond. Arguing for change whilst resisting hands on governmental collaboration is understandably less controversial for voluntary organisations but true pro-active, integrative work of all interested parties is what is needed to make significant progress, both in the short term and the long term.

The involvement that the voluntary organisations had with Creating Choices was truly beneficial, CSC simply needed to listen a little more and include CAEFS and all voluntary organisations more extensively in all aspects of the project. Rather than

\(^{286}\) *Ibid.* at 250
eradicate the voluntary sector from direct collaboration on any penal project, perhaps Canada should be content to take lessons from the mistakes of CAEFS and the government in the case of Creating Choices, and try again.

(b) The Task Force's Starting Point

The most important aspect upon which to focus at this juncture are the proposals themselves, put forward by the Task Force in Creating Choices in relation to the structure of a new prison system for women. However, first it is necessary to say a little bit about the basis on which the Task Force's decisions were made.

The approach was "women-centered" from the outset and recognised the needs of women as distinct from those of men explicitly, specifically referring to a Canadian Human Rights Commission ruling that federally sentenced women had been discriminated against on the basis of sex. The reasoning behind the Commission ruling was that P4W was the only prison within which federally sentenced women could be located at that time and as a result women imprisoned there received inferior facilities than those offered to male inmates. The desire of the Task Force was thus clearly to achieve substantive equality through its recommendations.

The Task Force proceeded upon five "Principles for Change". The first was the need to empower federally sentenced women to be able to make their own choices, thus

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287 Task Force on Federally Sentenced Women, supra note 21 at 2
288 "Liaison", Vol. 8, Number 3, Solicitor General, Canada, March 1982
289 Task Force on Federally Sentenced Women, supra note 21 at 126
assisting in combating the low-self esteem experienced by the majority of female prisoners. The second was the need to provide the women with “meaningful and responsible choices”, the third to act with “respect and dignity”, the fourth to provide a supportive environment and the fifth that “shared responsibility” must be taken by the government, the voluntary sector and the community in general with a view to a “holistic approach” to reform.\(^\text{290}\)

Although it may be suggested that Creating Choices was a benchmark in correctional planning one major error must be addressed. The Task Force fell into the trap of essentialising federally sentenced women, unintentionally sowing a seed that was destined to grow rapidly, choking the prison system as it developed. The fault stemmed from the Task Force’s failure to properly define the scope of the needs of federally sentenced women, as a desperately hopeful tunnel vision led it to frame an unrealistically large proportion of female offenders as low risk / high needs victims. It was this naivety that resulted in unfortunate consequences in the subsequent implementation:

The report was heavily influenced by the task force’s reluctance – for complex reasons ... to label women as potentially violent. Federally sentenced women were seen to be victims as much as victimizers, and this lead to the task force’s failure to be prescriptive about the type of accommodation that should be provided for the 5 percent of women it unwillingly decided might need higher levels of security. This failure left Creating Choices with a potentially fatal flaw at its heart because the

\(^{290}\) Ibid. at 128-135
absence of such decisions subsequently allowed CSC, rather than the task force, to decide what type of secure accommodation should be provided.291

The Task Force simply avoided reality and in doing so managed to make invisible an important sector of the women’s prison population – those who were high needs, high risk and would thus not respond positively to the community environment eventually provided by the regional prisons.

(c) Structural Proposals

The most important proposal was the immediate closure of P4W and its replacement with five regional federal prisons for women.292 The idea was to allow female prisoners to serve their sentences closer to their families and gain improved access to a more diverse range of community resources while employing “non-intrusive security measures”.293

What was unique about the proposals was that the structure of the prison buildings themselves would be radically different from anything the country had seen before. Cottage style units would be created, each building becoming a living space to a small number of inmates, the idea being to replicate a community environment. Each woman would have her own room within the cottage and access to a communal living area and kitchen, reflecting the style of a typical house outside the prison walls. Certain of the cottages, the Task Force decided, would be designated for the use of particular groups of

291 Hayman, supra note 226 at 7
292 Task Force on Federally Sentenced Women, supra note 21 at 100
293 Ibid. at 139
imprisoned women, focussing on helping them work through common problems.\textsuperscript{294} Importantly it was recommended that each regional facility have its own cottage reserved specifically for family visits and visits from friends and also that provision be made within the cottages to allow children of imprisoned women to live alongside their mother.\textsuperscript{295}

Support and organization within the buildings themselves was also given prime attention and focus was placed on ensuring staff within the facilities would be more adequately suited to their positions in dealing with distressed women, many of whom experience severe mental difficulties turning to self-harm as a coping mechanism: “All staff working in a Regional Women’s Facility must be sensitive to the issues that face federally sentenced women and responsive to their needs.”\textsuperscript{296} Greater care would therefore be taken over the staff selection process and training would be carefully tailored to encompass the specific situations commonly thrown up within federal women’s prisons.

The tone of \textit{Creating Choices} was explicitly “holistic” and nowhere was this fundamental concept more evident than in the proposals for programming.\textsuperscript{297} Each facility was to determine the needs of its prisoners and offer programming tailored to these needs. As part of this, there were certain programs to be provided in every facility: individual counselling and groups, health care, mental health services and addiction programs. Bolstering these provisions, the Task Force envisaged additional program

\textsuperscript{294} Ibid. at 140
\textsuperscript{295} Ibid. at 144
\textsuperscript{296} Ibid. at 140
\textsuperscript{297} Ibid. at 142
deliverance by means of community contribution and volunteer involvement in prison programs. The report concluded by recommending immediate implementation of its proposals and made clear that CAEFS should be actively involved in the process that was to ensue: "The Task Force members support an implementation approach that is holistic, pro-active and reflective of the partnership which created the vision."²⁹⁸

The final paragraph of the report emphatically emphasises the importance of immediate action in an obvious effort to instilling a sense of urgency: "The time for ACTION is NOW! We must not compromise our shared vision. We must not fail federally sentenced women ... AGAIN!"²⁹⁹

It is unfortunate that these two most crucial proposals were not heeded. They constituted major components of the foundations upon which the Task Force envisaged the new federal women's prison system would be built. Without CAEFS' continued participation in the project those foundations weakened under the pressure which was piled upon them, undermined further by the numerous delays in implementation that were experienced. If it was not for these underlying mistakes it is likely the visionary document that is Created Choices may have resulted in a greater degree of success. These points will be considered in greater detail below and the triumphs and failures of the system born out of the report will be addressed in the hope that lessons emerge which will be of use to the UK in its daunting task of structural prison reform.

²⁹⁸ Ibid. at 156
²⁹⁹ Ibid. at 158
(d) Implementation of Creating Choices

There were a number of major problems with the implementation of Creating Choices and, as described above these can be attributed in great part to the effective ousting of CAEFS and other voluntary organisations from the process. Also, it will be stressed, the lack of speed with which the process developed was very damaging to the project as a whole.

The first point of interest is that despite forcefully urging the closure of P4W, the government failed to accomplish this until 2000, a full 10 years after Creating Choices was released. A prison which witnessed the deaths of numerous inmates and to all intents and purposes tortured countless women was kept operational despite repeated warnings. It was in 1994 that the situation at the prison reached breaking point, as events within the walls shocked the public worldwide. A violent incident at the prison resulted in six female inmates being placed in segregation – an intense form of punishment consisting of continuous separation from fellow prisoners. What caused the greatest concern however were the events which were to follow. The six women were subjected to lengthy strip searches by male officers. They were returned to the area of the prison reserved for segregation and left in separate cells, given only paper gowns to wear and placed in leg irons. The six women involved in the original incident remained in segregation for months.

The Commission of Inquiry into Certain Events at the Prison for Women in Kingston, headed by Madam Justice Louise Arbour, commenced an intensive examination of the
incident at P4W and in 1996 released its report (the *Arbour Report*). The report revealed a number of rights violations, including a failure to allow the women in segregation adequate exercise and failure to allow them access to legal advice while in segregation. The strip searching of the female inmates by male officers was also found to be a violation of the law. Professor Michael Jackson draws the following from Madam Justice Arbour’s report:

> It is not unfair, however, to conclude from Madam Justice Arbour’s findings that, at the beginning of the twenty-first century, Canadian correctional practices associated with the use of segregation continue to dehumanize and degrade prisoners and are inconsistent with fundamental principles enshrined in international human rights covenants, the *Canadian Charter of Human Rights and Freedoms*, and correctional law.

Ultimately, the report made a number of recommendations intended to bring the female prison system in line with the law and deliver rights to prisoners.

In fact, implementation of *Creating Choices* was conducted by civil servants and the project was headed by Jane Miller Ashton. As Hayman notes, some were very unhappy at CAEFS non-participation at the implementation stage “because it left CSC free to interpret *Creating Choices* as it wished, yet still able to claim that CAEFS shared

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300 Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Canada Communication Group, 1996)
301 *Ibid.* at 41 and 46-47
302 Jackson, *supra* note 24 at 353-354
responsibility for the document”.303 This is something of which future organisations must beware, however as has already been suggested the benefits of active involvement throughout implementation have the potential to far outweigh the disadvantages. Thus NGOs should not be deterred from continually striving for positive participation at all stages of any reform movement.

The regional prisons were to be located in Edmonton (Alberta), Joliette (Quebec), Kitchener (Ontario), Truro (Nova Scotia) and Saskatchewan, and all were built with cottage style accommodation. Each facility was designed separately and care was taken to ensure they were tailored according to geography to foster a harmonious existence with surrounding communities. Prompted by Creating Choices the prisons were built on the assumption that imposing security features were unnecessary due to the low risk posed by the federally sentenced women: “With the exception of the Healing Lodge, which had none, all the new prisons had relatively low fences, conveying to the community the low risk federally sentenced women generally presented.”304

Within a cottage each woman was allocated a room of her own and expected to participate in daily chores, such as cleaning and cooking meals. It was part of the strategy to force women to take responsibility for themselves. The events at P4W in 1994 spurred CSC to increase the number of places available for maximum security women in the regional facilities – it was clear that the Task Force had not adequately labelled enough women as high risk and had thus failed to plan for those women who

303 Hayman, supra note 226 at 137
304 Ibid. at 141
needed greater levels of security and help.\textsuperscript{305} This allowed CSC to swoop in and impose increased security. An example of this failure was the provision of an enhanced unit in each of the regional facilities (apart from the Healing Lodge) which was designated as a maximum security area, intended for the use of the small proportion of women who did pose a serious risk. This was far beyond Task Force planning. Because more women were high risk / high needs than realised the pressure on the enhanced units was very great and consequently they were expanded, having the effect of further segregating groups of women and fostering feelings of isolation and otherness within the prisons.\textsuperscript{306}

This work is not of sufficient length to allow an in depth look at each of the new prisons.\textsuperscript{307} However, in an effort to exemplify their general structure it will be beneficial to focus purely on one prison and the spotlight will now turn upon the Edmonton Institution for Women, the first of the regional facilities to open after \textit{Creating Choices} was released. The facility was officially opened on 20\textsuperscript{th} November 1995 and major problems with the prison were apparent from the outset. When the first women were moved in, the main administrative building, where all programs were to be held, was incomplete, resulting in classes being transferred to the enhanced unit. This was small and inappropriate for such a purpose. In addition to this security was stepped up because of the larger than anticipated population of maximum security women: “In order to prevent the passage of drugs, any woman taking a program was strip-searched every time

\textsuperscript{305} \textit{Ibid.} at 141-143
\textsuperscript{306} \textit{Ibid.} at 186
\textsuperscript{307} For a fully comprehensive and detailed examination of the development of the Canadian federal women’s prison system and in depth discussion of the new regional facilities see Hayman, \textit{supra} note 226.
she entered or left the enhanced unit, irrespective of her security classification.\textsuperscript{308} By February 1996, 25 women were being held in the Edmonton facility and in the first few months after opening there had already been an attempted suicide and ten instances of self-harming behaviour.\textsuperscript{309} Denise Fyant became yet another victim of the prison system when she was found in the enhanced unit with severe injuries. She died the following month. Hayman blames these events on the following issues:

Edmonton had been asked to take a larger than anticipated number of maximum security women, that the prison was not designed to cope with such numbers, and that management had no choice in the matter. The difficulties were compounded by the fact that the prison was incomplete when the first women were transferred, which led to the institutionalizing of strip-searching for all the women, and that there was a great deal of pressure on the few amenities available.\textsuperscript{310}

During 1996 there were a number of successful escape attempts which prompted a further increase in security at the prison. Both the maximum and medium security women were removed from the facility and placed in maximum security units in men’s facilities. None of the maximum security prisoners were allowed to return to the prison despite the fact that \textit{Creating Choices} had planned for all federally sentenced women to live together in the regional facilities regardless of their security classifications.\textsuperscript{311} This policy was extended to all of the regional prisons on September 12\textsuperscript{th} 1996.\textsuperscript{312}

\textsuperscript{308} \textit{Ibid.} at 148
\textsuperscript{309} \textit{Ibid.} at 148
\textsuperscript{310} \textit{Ibid.} at 152
\textsuperscript{311} Task Force on Federally Sentenced Women, \textit{supra} note 21 at 110-112
\textsuperscript{312} Hayman, \textit{supra} note 226 at 157
The focus was now well and truly removed from the low risk / high need women the community surrounding the prison had been led to expect. CSC's concern was indisputably with security and managing the much greater numbers of high risk / high need women left unaccounted for by Creating Choices. Plainly visible signs that security was at the forefront of CSC's agenda included the construction of a higher barbed wire fence and the placing of locks on the doors of rooms in the cottages. Once again all women prisoners were exposed to completely disproportionate security measures. History was repeating itself yet again. The result: the continuance of self-harm and self-inflicted death in the new regional prison.313

5. Creating Choices in the UK?

(a) The Corston Report

The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System, conducted by Baroness Corston, was released in March 2007. Much like Creating Choices the report is arguably a groundbreaking document, putting forward recommendations for radical change in the UK and interestingly containing a number of suggestions akin to those made in the Canadian report. The review took place over nine months and Baroness Corston utilised a range of resources in compiling her work, including academic documents, visits to prisons and community centres and meetings with various groups and organisations. It is largely comprehensive although as will be discussed, there are some major holes in the document which swiftly need filling.

313 Most recently the self-inflicted death of 19 year old Ashley Smith on 19th October 2007 in the Grand Valley Institution in Kitchener attests to the fact that the regional prisons are still failing female offenders
Baroness Corston’s approach is not entirely abolitionist. She makes it clear that “there are some crimes for which custody is the only resort in the interests of justice and public protection”.314 She proposes confronting and dealing with the root causes of the offending behaviour of women and in this sense the report displays preventative overtones. Substantive equality is at the forefront of the strategy advocated, a thread which runs throughout the document and in this way Baroness Corston follows in the footsteps of the Task Force when she states that “women and men are different. Equal treatment of men and women does not result in equal outcomes.”315 This theme is bolstered by the introduction of the new Gender Equality Duty.316 As Baroness Corston explains, this puts an obligation on public authorities to take positive steps to prevent inequality issues arising, rather than tackling problems after they occur. The problem, she highlights, is that public authorities are unaware that an approach based on substantive equality is necessitated by the gender equality duty and is essential in addressing the reality that “women have been marginalised within institutions not designed with them in mind”.317 Thus the suggestions she makes are geared towards fulfilling the requirements of this duty and promoting substantive equality. What seems truly necessary now (both in the UK and in Canada) is that an awareness of the distinct needs of women is fostered amongst public authorities and the public in general in order to combat entrenched notions that formal equality is the pinnacle of penal application.

314 Corston, supra note 13 at i
315 Ibid. at 16
316 Supra note 192 and accompanying text
317 Corston, supra. note 13 at 24 See also Corston, supra note 13 at 23 – “I have seen little that gives me confidence that much preparatory work is in hand or, moreover, evidence of any real understanding that treating men and women the same results in inequality of outcome. Equality does not mean treating everyone the same because similar treatment affects people differently.”
A number of parallels can be drawn between the *Corston Report* and *Creating Choices* and these are highlighted by the use of commonly identical terminology which is sprinkled throughout both. For example, “a woman-centred approach” is called for regularly by Baroness Corston, language which was placed at the very heart of *Creating Choices*. The concept of “empowering” female inmates is demanded also, another central principle espoused by the Task Force. Most strikingly Baroness Corston impliedly calls for a stronger element of choice in the prison system when she speaks of a need to assist female offenders to “feel more in control of their lives”. This directly mirrors the central goal of the Task Force and illustrates clearly how the UK report has taken on a rather Canadian tone. For this reason it is essential that the UK government looks closely at the mistakes and successes of *Creating Choices* and its subsequent implementation.

Pat Carlen has strongly commented on the governance of the women’s prison system in the UK, highlighting that a multitude of various agencies are taking differing approaches to the problems faced. This has led to fragmented, incoherent management, prompting Carlen to describe the criminal justice system of the UK as “a monster with several heads and no brain” - “If there is ever to be a co-ordinated approach to women offenders,” she says, “there will certainly need to be a Ministry of Women’s Justice (or some such body),

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318 *Ibid.* at 2 and also Task Force on Federally Sentenced Women, *supra* note 21 at 27
319 Corston, *supra* note 13 at 18 and also Task Force on Federally Sentenced Women, *ibid.* at 128
320 Corston, *ibid.* at 18
with sufficient clout to ensure that policies towards women as victims of crime, as offenders and as citizens do not pull in entirely different directions."321

Carlen's reasoning is difficult to criticise, thus it is encouraging that the Corston Report directly addresses the need for a more efficient and cohesive management structure within the system, once again displaying an evident desire for governance more akin to that utilised in the Canadian federal women’s prison system where the CSC is charged with overall responsibility. The nub of the problem at present then is that there is no brain to control the body:

No one person or body is responsible or accountable for provision of care and services for women coming into contact with the criminal justice system ... Roles and responsibilities are split over a number of government departments and non-statutory agencies. The voluntary sector has a significant role but there is no one at a senior level who brings all this (in many cases admirable) work together or, moreover, takes responsibility when things go wrong.322

Because of this Baroness Corston recommends the establishment of an Inter-Departmental Ministerial Group for women who offend or are at risk of offending which would govern a new Commission. This would mean a range of government departments would be responsible for the development of the women’s prison system and would work together to ensure a more coherent strategy would evolve. Also a “champion” for

321 Carlen, supra note 58 at 74
322 Corston, supra note 13 at 36
women would be required to ensure that the needs of women in the criminal justice system are adequately dealt with.\textsuperscript{323}

At the end of the document Baroness Corston details what she calls “a blueprint for a distinct, radically different, visibly-led, strategic, proportionate, holistic, woman-centred, integrated approach”.\textsuperscript{324} There are three crucial recommendations upon which it is important to focus because of the dramatically radical impact they would have upon the structure of the women’s prison system in the UK. Those are:

1. That women’s community centres be extended to create alternatives to the use of custody, which could play a part in provision for community sentences and importantly engage in a preventative function in attempting to address behaviour that could lead to offending and life experiences which have the potential to elicit criminal responses.\textsuperscript{325}

2. That in the short term, the conditions in which women prisoners are kept need urgently improving.\textsuperscript{326}

3. That over the coming years women’s prisons should be phased out and replaced with a number of small units spread around the UK that would accommodate women offenders who commit more serious crimes.\textsuperscript{327}

\textsuperscript{322} Ibid. at 2
\textsuperscript{323} Ibid. at 79
\textsuperscript{324} Ibid. at 69
\textsuperscript{325} Ibid. at 69
\textsuperscript{326} Ibid. at 35
\textsuperscript{327} Ibid. at 86
What is significant here are the similarities to the Canadian approach when we consider the regional prisons in the various Canadian provinces. Despite the geographical and political differences between the UK and Canada, the beginnings of a system that may in time come to resemble the Canadian federal system in numerous ways can already be seen. As has been noted above, the importance of this is that lessons can now be drawn from the Canadian experience as to how to implement these ideas.\textsuperscript{328} Clearly Baroness Corston is suggesting a two track approach by separating her recommendations into both short term and long term goals – the short term being the improvement of conditions in the current prison system, the long term being the dramatic reduction in the use of imprisonment and the creation of “suitable, geographically dispersed, small, multi-functional custodial centres” for serious offenders.\textsuperscript{329} Yet again this approach starkly mirrors the style of planning utilised by the Task Force.

Unfortunately “lessons are not being learnt” stresses Baroness Corston in her report. She is undoubtedly correct judging by the state of the prison system at present; lessons have certainly not been learnt. Time and time again papers have been published and reports released calling for a reduction in the use of imprisonment for women offenders. Time and time again the advice has not been heeded by the government. The UK is making the same mistakes Canada made prior to the closure of P4W and the opening of the

\textsuperscript{328} While the provincial prison system in Canada is certainly open to attack in terms of its similarities to the UK prison system and could equally benefit from reform along the lines proposed by Baroness Corston, such detailed reformative investigation is beyond the scope of this work. However, a brief overview of the potential application of Baroness Corston’s proposals to the provincial women’s prison system will be conducted at the end of this chapter.

\textsuperscript{329} Corston, \textit{supra} note 13 at 5
regional facilities. It is time the UK learns its lesson and draws heavily upon Canadian federal teachings and experience in reforming a presently failing system.

(b) Government Response

The Government’s Response to the Report by Baroness Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System was released on the 6th December 2007. David Hanson MP, who was responsible for creation of the document, listed all 43 of the recommendations made by Baroness Corston and encouragingly accepted 39 of these. Only certain of these points are relevant to this piece of work, thus only the most pertinent of them will be discussed.

Importantly Mr Hanson set out that the recommendation for the establishment of the Inter-Ministerial Group has been accepted, meaning governance of the system has the potential to be greatly improved and a more co-ordinated approach to the running of the system will be pursued. This means government departments working together to produce a more effective prison system. Also, Maria Eagle MP (Parliamentary Under-Secretary-of-State, Ministry of Justice) has been cited as the “champion” Baroness Corston called for. She is to ensure changes in the system are made and promises are kept. So it seems some backbone is finally being inserted into the UK’s presently monstrous system; the scarecrow will finally have its brain.

The report provides for the establishment of a “new cross-departmental Criminal Justice Women’s Unit” in the Ministry of Justice.331 The Unit is intended to carry forward the proposals in the Government’s response and it is encouraging that “a ‘virtual’ strand to the Unit will also be developed where individuals from other departments and non-government organisations where appropriate, would be invited to contribute proportions of their time to working on issues in the Delivery Plan.”332 While this marks a degree of admirable progression, there is not enough emphasis on the vital importance of continuous involvement of voluntary organisations. As described above it is essential that such organisations participate fully in the planning of and implementation of any new system. Worryingly, prisoner input in the process is not mentioned at all. If female offenders themselves are excluded from assisting in reform their choices are substantially restricted from the outset, something which would further marginalise a group of people who are arguably an invaluable resource in the development process.

Significantly, the government has accepted that greater community measures must be utilised and the range of community facilities expanded to cater for women in the criminal justice system.333 These will not only be available to help supervise women who are given community sentences but will also help tackle the root causes of women’s offending and serve a preventative role in this respect. The idea is for community centres to provide a “one-stop-shop” facility for women. Disappointingly, the only commitment

331 Ibid. at 8
332 Ibid. at 14
333 Ibid. at 6, 19, 22 and 24
at present is to begin "detailed assessment" of the existing centres to ascertain how the
process may work in the future.\textsuperscript{334}

The short-term approach to improving the women's prison system is accepted by the
government, accompanied by a seemingly strong commitment to providing higher levels
of hygiene and importantly "Gender Specific Standards".\textsuperscript{335} Effectively this means
women will be supplied with improved cleansing facilities and improved washing
facilities and a greater range of everyday necessities. However, apart from these brief
comments little attention is paid to substantially improving the infrastructure and
physical environment within prison walls at present.

Regrettably Mr Hanson seems to have skimmed over the long-term plans which were in
any case only briefly mentioned in the \textit{Corston Report}. The proposal is effectively
brushed aside:

Further work will need to be undertaken to consider whether small custodial
centres would be the most appropriate and effective way forward for women
sentenced to custody. However, the Government accepts in principle the
underlying intent that custodial provision in the women's estate must be
configured appropriately to meet women's needs.\textsuperscript{336}

There is a distinct lack of commitment to the development of small prison units around
the UK, with a notable absence of discussion regarding such a vital element of any long-

\textsuperscript{334} \textit{Ibid.} at 24
\textsuperscript{335} \textit{Ibid.} at 11
\textsuperscript{336} \textit{Ibid.}
term solution to problems inherent in the system. Such a radical alteration in prison provision is essential to the development of an effective system and the sweeping statement made in the Government’s response illustrates a disregard for its fundamental importance. The intention regarding this point is merely to set up a small project to look into the possibility of such units. This kind of stalling is unnecessary and a clear commitment to putting this proposal into effect needs adopting. 11 Million, an organisation headed by the Children’s Commissioner for England, supports this urging and has backed Baroness Corston’s proposals explaining that “the Government should fulfil the commitments set out in its response to the recommendations of the Corston Report.”

More pressure of this type needs applying in order that the Government take such proposals seriously.

The major worry is that there is absolutely no sign of any clear financial commitment to re-structuring the women’s prison system. The director of SmartJustice for Women, an organisation which supports custodial alternatives, shares this apprehension: “The Corston review was a comprehensive blueprint for a more effective way of treating women who offend, but with no money behind the government’s support for the recommendations, nothing will fundamentally change.”

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337 11 Million, Prison Mother and Baby Units – do they meet the best interests of the child? (January 2008), online: Office of the Children's Commissioner for England <http://www.11million.org.uk/resource/c0me5jxy7vmsatd6nuc0b3a.pdf> at 28
On the 5\textsuperscript{th} December, the day prior to the release of the government’s response to the \textit{Corston Report}, it was announced that the government would spend £3 million on building what have been termed “super prisons” for men, which would provide some places for women prisoners. Not only does this highlight the lack of financial commitment to the birth of a new prison system for \textit{female} offenders, it concretely worsens the present system for women who will again be treated as an insignificant problem to be dealt with as merely incidental to the male system. Unbelievably the mistakes of the past are \textit{still} being made. Frighteningly, Justice Secretary Jack Straw had this to say about the proposed prisons: “The extra capacity will help to modernise the prison estate, close some of the older inefficient prisons on a new-for-old basis, reconfigure some of the smaller sites to accommodate female or juvenile offenders.”\textsuperscript{339}

Once again the approach seems to force women into prisons which were designed by men for men and which are totally inappropriate to accommodate their distinct needs. How many times will these same mistakes be repeated?

\textbf{(c) Dying on the Inside: Female death in UK Prisons}

Women’s self-inflicted death in prison continues to be a major concern, especially given the high incidence of fatalities in this tragic category. This is underscored by the publication of \textit{Dying on the Inside} on 2nd April 2008 by Inquest, an organisation set up

\textsuperscript{339} “New ‘Super-Prisons’ to be Built” \textit{BBC News} (05 December 2007), online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/7128181.stm>
to support the families of women who die in custody and which provides advice concerning custodial death to numerous groups and agencies.\textsuperscript{340}

The report follows detailed investigation of female prison death between 1990 and 2007. This unique document is vitally important to examine at this juncture because its focus is solely on the issue of female self-inflicted death, a devastating potential consequence of a prison term. While many reports touch upon this subject few have embarked upon such rigorous exploration of the very worrying incidence of female death in prison in the UK, making \textit{Dying on the Inside} an invaluable piece of research.\textsuperscript{341}

Inquest details numerous failings of the current UK women’s prison system which are contributing to the rising number of female deaths in custody. For example, “extended periods of time in a cell” was cited as a prominent trigger of self-inflicted death.\textsuperscript{342} The charity explains that “in a number of cases women were locked in their cells up to 23 hours a day in the period immediately prior to their deaths.”\textsuperscript{343} It is unsurprising that such intense deprivation has catastrophic consequences, especially given the vulnerable state of many imprisoned women.\textsuperscript{344}

Movement between different incarcerative facilities was also found to increase the likelihood of suicidal tendencies; a lack of stability, structure and familiarity

\textsuperscript{340} Sandler and Coles, \textit{supra} note 239
\textsuperscript{341} \textit{Ibid.} at 4
\textsuperscript{342} \textit{Ibid.} at 63
\textsuperscript{343} \textit{Ibid.}
\textsuperscript{344} \textit{Ibid.}
exacerbating feelings of isolation. Additionally, levels of physical and mental healthcare were found to be woefully inadequate, having the potential to contribute to female death in prison. Inquest explains that “while prison managers describe healthcare as being “at the heart of the care provided to women in prison”, prisons are not hospitals and have difficulties meeting these needs. In fact, the focus on security and discipline can seriously compromise the healthcare provided to women.”

Linked to this, prison-based counselling was found to be counterproductive in many respects. One reason for this is that once a counselling session has ended, the woman must go back to her cell, back to the bleak and isolated prison experience, with a lack of support in dealing with fresh issues that may have been exposed in the session.

What is particularly interesting about this report, are its overarching recommendations, which substantially echo Baroness Corston’s proposals. Like Baroness Corston and many other penal reformers, Inquest’s focus is on reducing the use of imprisonment for female offenders and “putting in place alternative strategies to deal with women’s offending.” The aim is to create a system which is capable of recognising the difference between males and females, which is “gender-appropriate” in nature and which encourages prevention of contact with the criminal justice system as a central theme. Inquest’s obvious affiliation with cultural feminism, evident through its

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345 Ibid. at 62
346 Ibid. at 72-75
347 Ibid. at 73
348 Ibid. at 75
349 Ibid. at 161
350 Ibid. at 158 and 160
constant affirmation of the need for gender specific action is applauded. Again this is nothing new and mirrors Baroness Corston’s approach.

Once again, “small therapeutic units” are recommended for women who “need to be removed from society due to the threat they pose.” Inquest sets out that they should be geographically placed to allow women to serve their sentences close to their families.

Dying on the Inside is a reminder that a year after the Corston Report was released, very little has changed. The same action is being called for yet again. It is disheartening that as of June 2008 there is still no evidence that the UK is committed to reforming the women’s prison system in any meaningful and positive way. What is it going to take?

In the final part of this chapter the above findings will be pulled together and combined with theoretical reasoning and historical lessons in order to identify what the UK can now do to improve upon the admirable proposals put forward by Baroness Corston and to guide what should be the Government’s practical response to those recommendations. Although reform of the Canadian system has been radical and impressive, problems remain to which solutions have not yet been found. In light of this the Canadian experience can be used only as a guide to improve the UK system, not as a framework on which to hang perfect development. Where the Canadian experience does not provide guidance or adequate answers, suggestions will be made as to the most appropriate ways of tackling the issues in both the UK and in Canada.

351 Ibid. at 162
6. Beyond Corston: Lessons from Canada

(a) Prisons that Work

The prison's essential discipline cannot be masked by its spacious grounds, attractive architecture, and seemingly benevolent programming. As Rothman, Cohen, and others have consistently demonstrated, prisons are always in a state of being transformed, or re-formed, in the hope that an adjustment here, or rebuilding there, will provide the solution to the intractable problem of why prisons do not work. Prisons are not places of healing: they are sites of coercion, repression, and pain.352 Stephanie Hayman, 2006

Hayman's distrust of the prison system as holding any answers for female offenders in Canada could not be more clear. It must be agreed that for the majority of women experience has taught that the traditional and even reformed prison is not the ideal place for female offenders. However to maintain that prison can never be appropriate for offending women is to give up on a potentially reformable system because the proper solution has not yet been uncovered. As Hayman herself has indicated, Creating Choices was a powerful document and it was CSC's failure to swiftly and fully implement it that resulted in the majority of the failings of the present day institutions.353 Perhaps if the document had been carried into reality in the way in which it was intended by those who produced it, prison would work for the federally sentenced women who find themselves in the regional prisons. The challenge is to find that perfect solution; a prison which fits

352 Hayman, supra note 226 at 257
all who are kept within its walls and to achieve this a truly individualistic approach in
needed, not only in Canada but in the UK.

As has been illustrated there were a number of major deficiencies in the implementation
of Creating Choices and also certain flaws built into the document from the outset.
Stephanie Hayman identifies many of these but purports to pinpoint the core of the
problem as lying in the reality that prison is inherently a place of punishment. As such
she says, prisons cannot work because their “coercive context” allows only restricted
choices to be made by inmates.\textsuperscript{354} However, she qualifies this by acknowledging that
“the new prisons have an infinitely better record than did the Prison for Women, and on
that basis alone the task force has fully justified its work.”\textsuperscript{355} The conflict in Hayman’s
mind is evidently elicited by the tensions between the long term goal of reducing
imprisonment and the short term goal of improving current incarcerative facilities to save
lives and reduce unnecessary suffering in the here and now.

What Hayman sees as restricted choice could more usefully be reframed and viewed
from a different angle as the resistance of a group of women straining against a dominant
system. Prison inevitably asserts its power over inmates, an inescapable fact and a
consequence of the inherently forced nature of participation in such a system. Perhaps
then any future approach should focus on ensuring that only those women who cannot be
provided for in the community are imprisoned in the regional prisons. Women who pose
no threat to society would benefit from the free range of choices available in the general

\textsuperscript{354} Hayman, supra note 226 at 254-255

\textsuperscript{355} Ibid. at 255
community and to this end, community services throughout Canada (and incidentally the
UK) need further developing and expanding to deliver such unrestrained choice. The
trick then is to ensure that while prisons will always provide restricted choices by their
very nature, the range of choices offered are greater and more flexible and greater
assistance in learning how to deal with and make responsible choices is provided to
“difficult to manage” inmates. In this way women’s resistance to the system would be
lessened as the need to strain against a dominant force is diminished and a more co-
operative system would emerge. This principle holds true both in Canada and the UK.
The approach realises that full abolition is unnecessary and indeed undesirable as a
number of difficult to manage women will always be present in society. Until the root
causes of the offending behaviour which lead to the construction of “difficult to manage
women” are tackled by society as a whole, and until prevention becomes the prime
method of addressing the prison problem, the need for a well tailored prison system will
always remain.

(b) The UK Government: Putting its Money where its Mouth is

One of the central differences between the implementation of Creating Choices and the
UK government’s proposed approach to the difficulties posed by the issue of the female
offender is that Creating Choices was taken thoroughly seriously from the outset. The
Canadian government used not only words to support the document, but actively
demonstrated its commitment to reform through substantial fiscal contribution. At
present there is little indication that the UK government intends to devote any significant
amount of finance to the development of the female prison system over the coming years.
If true progress is to be made in the UK the government must send out a clear message that change is genuinely necessary by investing considerably in a project which has the potential to beneficially alter the very structure of society itself.

(c) A Document for Change: Rapid and Thorough Implementation and Inclusivity

What is now required is the prompt development of a document similar to *Creating Choices* which takes Baroness Corston’s proposals a stage further and is implemented in full. The Fawcett Society is indeed in favour of this course of action viewing Baroness Corston’s work as the essential design for constructive progress in the UK. With this it must largely be agreed, however as explained above there are holes in Baroness Corston’s work which have the potential to de-rail reform efforts if not addressed. For example, little is said about the small prison units she suggests as a long term goal of reform. In the relatively small section discussing the possibility of such custodial units however, Baroness Corston expressly acknowledges that “there are “urban prisons” in the USA and Canada that provide models” for their development.

This is a welcome realisation, yet Baroness Corston does not elaborate on how she sees the units progressing. The same can be said of Inquest’s similar proposals for “small therapeutic units” with only one paragraph of the 184 page document dedicated to

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356 See Hayman, *supra* note 353 at 51 Here Hayman adds weight to the idea that the UK needs such a document. Referring to the unsatisfactory re-development of Holloway Prison in the UK she makes the point that “the lack of a British *Creating Choices* meant that there was nothing to which the voluntary sector could point and demand an official response as to why things had gone so terribly wrong.”

357 See The Fawcett Society, *supra* note 198 at 6: “The Corston Report’s recommendations set out a clear pathway to addressing the failures of the prison system to meet the needs of women offenders and reduce reoffending. Having commissioned the review, and pledged to respond by late autumn, the Government must now take action to implement its recommendations in full ...”

358 Corston, *supra* note 13 at 35
discussion of this recommendation. While a focus on community alternatives to prison and short-term improvements is very much approved of, the issue of the small number of women who would be sent to a custodial unit in the future seems to be being sidelined not only by the Government but disturbingly also by academics and prison reform organisations.

Angela Devlin's book *Invisible Women* goes some way to explaining why we should be worried by the apparent lack of concern with the inevitable continuance of at least a degree of incarceration. Her book is based around a quote by Stephanie Hayman: "The smallness of the female prison population has contributed to their invisibility." Such sentiment should set academics and campaigners alike on guard, for if the UK Government finally does decide to take notice of numerous warnings and recommendations, the female prison population may shrink dramatically. If the women's prison system is "invisible" at present, we must be very careful that through reduction in numbers, those few women who will always require custodial reaction are not entirely submerged and forgotten beneath a sea of concern for the male prison estate. This is not to imply that the male prison system is not in need of reform, only a warning that if reform of the much larger male prison population does ever occur, it may dwarf consideration of the female system. Female offenders have always been seen as "add-ons to the male system", which is exactly why concern should be piqued by the prospect

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359 Sandler and Coles, *supra* note 239 at 162
360 See *Ibid.* at 164 for short term improvements suggested by Inquest. Inquest makes a large number of impressive proposals throughout its document for improvements to the current women's prison system
362 *Ibid.* at vii
of reform which would potentially increase the numerical difference between male and female prisoners even further.\textsuperscript{363} A reduction in the female prison population is desperately required in any case but care must be taken that any few remaining women prisoners are not forgotten. The first step in ensuring their visibility must be an emphasis on the form of incarceration envisaged for females in the future, specifically what shape the new units proposed by Inquest and Baroness Corston would take. It must be suggested that due to the similarities between \textit{Creating Choices} and the \textit{Corston Report} as detailed above, an in depth examination of the regional prisons in Canada would be beneficial in the UK’s strategic development of its female prison structure.

Despite Baroness Corston’s failure to fully discuss the nature and scope of her proposed units, the government should seize upon this recommendation as one of the most important aspects of imminent reform and work rapidly with the voluntary sector, academic experts and indeed female offenders themselves to create a comprehensive, unambiguous blueprint for their development. The inclusion of the voluntary sector and female offenders themselves will be invaluable, as many of those who had the opportunity to work on \textit{Creating Choices} would agree. Without input from these sources both in planning and implementation, the UK government would have the opportunity to interpret Baroness Corston’s proposals (and the blueprint for development flowing from them) in any way it sees fit - which would not necessarily be the most advantageous interpretation. This lesson is taken straight from the doomed implementation of \textit{Creating Choices}, which was not carried out swiftly or fully and excluded voluntary organisations.

\textsuperscript{363} Corston, \textit{supra} note 13 at 21
from participation. Gaps and ambiguities in the document were thus left open and CSC, relatively unrestrained as it carried these into practice, sealed the holes with ill-considered solutions.

As Hayman articulates in her article *Prison Reform and Incorporation: Lessons from Britain and Canada*, it was in the 1960s that planning for the rebuilding of Holloway prison for women in the UK began. This is mentioned as an example of failed reform efforts: “those involved in the English project were not working in accordance with a public document such as *Creating Choices*. The Holloway planning committee included no independent voices from the volunteer sector, let alone representatives of minority groups; the venture was purely an in-house Prison Service initiative”. It was this, in part, that has led to the failure of the restructured Holloway prison. Lessons from history seem to echo lessons from Canada and the UK government would be wise to bear this in mind. The *Corston Report* is a brave step forward but both UK and Canadian history teach that greater voluntary group participation, and participation from women offenders, is essential to ensure a blueprint is produced around which to structure the building of the small custodial units and forge a more community based approach which will run parallel to the custodial strand.

Once a *Creating Choices*-like document for progress is created, illuminating the way for a new prison system, there will be no time to waste. The new units must be rapidly built to the exact specifications of the document. A key problem with the implementation of

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364 Hayman, *supra* note 353 at 42
365 *Ibid.* at 42-43
Creating Choices was that by the time the new regional facilities were constructed society's views on imprisonment had changed: “the new prisons, faithful to the vision of Creating Choices, no longer reflected what the public thought appropriate for imprisoned women by the time they opened.” Hayman also observes that the development of the new Holloway prison faced a similar problem. “Perhaps”, she says, “one lesson of the English experience is the inevitability of significant time lapses between conception and implementation of any new venture.” While such inevitability may be inescapable, the problem can be addressed if a timeless, well planned solution is promptly implemented, whilst at the same time ensuring that the public is well educated and informed about the benefits of the new approach. This will require raising public awareness of the desirability of substantive equality within the prison system and revealing the true nature of women’s current imprisonment and is something of which Baroness Corston is well aware. Once the precise problems within a female prison system are pinpointed and planned for, as long as implementation is carried out as quickly as possible, reducing delays by any suitable means, any lapse in time need not be fatal.

(d) Long Term Goals: Geographically Scattered “Secure Units”

Although it is anticipated that the majority of female offenders will be dealt with via community dispositions the proposed custodial units will be integral in any new system and a great deal of thought should be given to their design. The new units should

366 Ibid. at 45
367 Ibid.
368 Corston, supra note 13 at 68 Supporting the need to educate, Baroness Corston illustrates that an increase in sentence length may be, as Lord Phillips has suggested, a result of “lack of public awareness in part [due] to unfair reporting by the media.” Misconceptions as to the seriousness of female offending need rebutting in order to enlighten the public as to the reality of the female prison system and rally support for proposals. Only then will any new system be successful and welcomed by society.
resemble the format utilised in the Canadian regional prisons, replicating closely the style of living experienced by the outside community. The units must be well spread throughout the UK and well planned to ensure inmates are able to keep in contact with families and friends. Incidentally, visitation must be actively facilitated. The regional Canadian prisons contain units which allow children to live with their mothers within the prison and special units which are used specifically for family visits. Such contact is vital in addressing female offender’s difficulties and at present UK prisons are failing to do enough to enable ease of visitation and contact. The new units must rectify this and the Prison Service must be educated as to the critical importance of continued contact with family and friends.

The document upon which the units are to be based should look something like Creating Choices but must recognise that there were problems inherent in that work from the beginning, the most gangrenous of which was injected from the outset: the failure to plan for women who were “difficult-to-manage”. In other words, any plan flowing from Baroness Corston’s recommendations must take account of the fact that there will be a number of women who will not be suited to a community response to their offending and will thus enter one of the units, yet they may not be framed solely as “victims” and may very well not be low risk. The approach at present seems to be to classify women offenders as victims of their own backgrounds, of society’s failings. The Task Force

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369 It is only unfortunate that the regional prisons seem to make little use of mother-child facilities. See Chapter IV below for a discussion of this.
370 Hayman, supra note 226 at 183
made this mistake as Hayman enunciates: "it seemed the group was reluctant to take the next step and see federally sentenced women as both victim and victimizer ..." 371

To fail to realise that some women will be both high risk and high need would lead to catastrophe, as has been seen in many cases in Canada's federal prisons and indeed in women's prisons throughout the UK. Some women will be victims but they will also be victimisers; they will not necessarily respond positively to a unit which closely replicates a community environment. Not all women respond in the same way to the same stimuli and the Task Force made the mistake of essentialising women, assuming that all were in need of the same kind of help, that all were victims, that all were reformable by the same methods. MacDonald and Watson recognise that there was an "assumption inherent in the design and approach of the regional facilities that "one-size fits all" and this, it is suggested, is a trap into which the UK must not fall.372

Rising levels of security in the Canadian regional prisons in consequence of higher than anticipated numbers of difficult to manage women illustrate that such an approach was naive. In light of this, security levels will be of great concern in the UK. It is essential to ensure that all women in the proposed UK units are subjected to appropriate security levels and this means planning the units to accommodate and deal with all women imprisoned while being realistic about their level of risk.373 This will necessitate the

371 Ibid. at 93
373 See Hayman, supra note 353 at 44 who points out that after escapes at Edmonton Institution for Women, security measures were increased across the board and maximum security women were removed.
provision of a variety of areas within the units appropriate for containing women of different levels of security. What this does not mean is that traditional segregation will result. Very difficult to manage women who do not respond well to the community-feel units, similar to the Canadian design, should have alternative options within the unit. There should be other accommodation more suited to their needs. Perhaps this will require them to be separated from other prisoners but this does not mean that the stark, harsh concept of separation in a bleak environment is the only answer. Comfortable living areas away from others may be used, coupled with individually tailored programming, in an effort to help women as individuals. The key then, as this author sees it, is to make the units incredibly flexible in their structure and to be as individualistic as possible.

Hannah-Moffat has made some interesting discoveries in this area which should be borne in mind when designing the new units. A risk / needs style analysis is used in prisons today to decide what course of action to take when dealing with certain offenders, what programs they would benefit from and how best to structure their stay in prison. If the new units in the UK are to utilise this approach there are some pitfalls which must be planned for and avoided. The risk / needs analysis is dubious in itself and this can be seen in the Canadian experience as Hannah-Moffat has explained. She has quite rightly questioned whether a gender responsive approach (tailoring the units to accommodate from the regional facilities. The lesson here is that the UK units should be capable of coping with all levels of offenders and provide for them on the same site.
women) is compatible with a risk / needs approach at all. “Taking gender seriously,” Hannah-Moffat explains, “in other words, requires us to view the individual in the context of her socioeconomic background”, however the risk / need system of running a prison “[governs] offenders as members of statistical distributions rather than as unique cases.” The UK must be careful not to continue such practices without substantially questioning their impact on female prisoners. Hannah-Moffat notes that at present the focus is on women’s criminogenic needs, meaning needs relating to their offending, which are assessed by prisons in an effort to halt recidivism. “Correctional program narratives speak of interventions that “target criminogenic needs” and stratify service delivery, not of empowering women or responding to their “needs.” This results in little emphasis being placed on working with a woman as an individual to address her non-criminogenic needs. The UK units must be aware of this in their initial and continuing assessment of inmates, specifically tailoring programs and staff approaches to the women, by conducting more in depth assessment of the general needs of inmates which a traditional risk / need analysis may otherwise overlook. Perhaps a new classification system needs devising, which will move away from categorising women based on their propensity to re-offend and which focuses more closely on enabling an individualistic understanding of all the needs of each woman. In this way, a more rounded approach to female offenders could feasibly emerge.

375 Ibid. at 185
376 Ibid. at 188
The problems encountered as a result of the Edmonton Institution’s incomplete status upon opening hold valuable lessons for UK implementation. The units must be ready in full for women moving into them when the time comes or the authorities will have the opportunity to respond by carelessly patching holes in an incomplete structure. Resulting inadequacies would be left to fester, serving only to legitimate Hayman’s argument that all prisons do not work. It is not prisons that do not work; it is their incompleteness which contributes to failure, part of which is a tendency to unsuccessfully provide for all inmates by refusing to adhere to well thought out plans. These are all weaknesses which can be pinpointed and removed and this is what the UK government must do in order to create small prisons for a small number of women, that work.

(e) Which Female Offenders Should be Sent to a New Unit?

Pat Carlen, as well as Hayman and indeed Baroness Corston all seem to be heading in the same direction in their desire to severely reduce the number of women in prison. Carlen for example proposes that no women should be sent to prison apart from those committing “abnormally serious crimes”, for whom 100 custodial places should be reserved. Barones Corston too wishes to set aside places in new prison units for “the minority of women from whom the public requires protection”. What both Carlen and Baroness Corston have failed to do however, is elaborate on exactly who these women should be – what grounds would justify imprisonment? This is a very tricky question but it must be suggested that the issue is not so clear cut as to simply say all women who pose a threat of violence to society should be sent to a custodial unit. For example, drug

377 Carlen, supra note 64 at 123
378 Corston, supra note 13 at 5
offences, commonly committed by female offenders, may not be violent on their face, but *indirect* violence may flow from the initial wrongdoing. When a woman deals drugs, she passes on substances which will have a detrimental effect on another person's health, in the worst cases having the potential to kill. Is this not a serious threat from which the public requires protection? When a woman steals in order to pay for drugs, has she not helped sustain a cycle of socially damaging behaviour by increasing demand for such substances? Does this not in turn result in potentially violent drug dealers attaining greater power within a community? These are indirect forms of violence and while a drug offence may be dealt with perhaps through a community sentence and through drug counselling, it cannot be guaranteed that an end will be put to the offending behaviour immediately. This ensures that society is left vulnerable. Such indirect violence can be prevented within the prison walls by physically restricting the offending behaviour and this is why prison will always be necessary to some degree. Thus it can be seen that the issue of which offenders will be sent to the proposed custodial units in the UK needs careful consideration. This is not to say that great numbers of women must be sent to such units, as the plan must be to tackle more offending through community intervention and response, only that the issue of *which* women will be sent to a unit is perhaps a little more complicated than Baroness Corston has anticipated.

(f) Women's Prisons in the Present: Short Term Answers

The short term goal of improving the existing structure of the female prison system is equally important as the long term goals envisaged and must not be overlooked. The UK government seemed to put little emphasis on this in its response to the *Corston Report*,
merely indicating that women should be provided with more hygienic facilities.\textsuperscript{379} Such measures only scratch the surface of what is required. The UK can most definitely draw lessons from the Canadian experience here – P4W was allowed to remain open for 10 years after Creating Choices was released. Little substantially improved and the price paid was a heavy one – the lives of women. If for the time being existing women’s prisons are to remain open while a long term plan for reform falls into place, drastic improvements in the service will be required. Plans to open ‘super prisons’ for men onto which women offenders will be tagged are not encouraging. There is only one sure outcome of such developments: more women will die. The UK has an obligation under Article 2 of the European Convention on Human Rights to prevent such deaths in custody.\textsuperscript{380} The answer in the short term is to plough money and effort into substantially improving the current prison environment for women until widespread community alternatives and small custodial units become an overarching reality.

\section*{7. A Lesson for Canada: Female Provincial Imprisonment}

Finally, it is important to reiterate that so far only the federal women’s prison system of Canada has been analysed. Provincial imprisonment is reserved for those sentenced to two years less a day and in many ways, this section of the Canadian female prison population also resembles the majority of female prisoners in the UK. This thesis does not concentrate on a detailed comparison of the UK female prison system and the Canadian female provincial prison system, however there are substantial flaws in

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\textsuperscript{379} Ministry of Justice, \textit{supra} note 330 at 11
\textsuperscript{380} See Keenan \textit{v. United Kingdom} (2001) 33 E.H.R.R. 38 for an explanation of the ambit of Article 2 of the ECHR in this context
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provincial approaches which might be remedied by application of the ideas suggested for UK reform. These are briefly considered in this section.

While federal reform in Canada has been progressive and innovative, provincial incarceration generally leaves much to be desired. The situation in Ontario provides a good example. In 2003 the Vanier Centre for Women, based in Brampton, Ontario, was closed down and moved to a new site at Maplehurst in Milton, Ontario. Writing on this topic, Rana Haq expressed her dismay at the relocation, explaining that the Brampton prison was “one of the most successful and reputable institutions for women in the province, and the only one based on a woman-centred approach.”381 The major problem is that the Maplehurst establishment is also a male provincial prison. It seems women are once again being sidelined, over-looked and re-shuffled; treated as a population to be dealt with incidentally to men.

Similar mistakes are being made in British Columbia. In January 2008 it was reported that the Fraser Regional Correctional Centre and Alouette Correctional Centre for Women in Maple Ridge would be receiving hundreds of new jail cells to accommodate the rising provincial female prison population.382 It was explained that the “inmate population in B.C. has risen by more than 500 over the past three years and is currently increasing by about four per cent every year.”383 Solicitor General John Les announced

383 Ibid.
the reasoning behind the new additions: “More cell space will help to ensure the safety of communities, correctional staff and inmates.”384 Based on evidence of the experience of the majority of female prisoners, academic warning and numerous lessons from history, can the building of yet more prison accommodation justifiably be founded on a concern for prisoner safety? Prison Justice, an organisation calling for prison activism recently spoke out about the prison expansion, explaining that “community advocates argue that instead of expanding and building new prisons, the money could more effectively be spent on housing, treatment for addiction and toward alleviating other factors that lead people to break minor laws.”385 This is quite right. While Canada’s federal system has boldly taken a step forward, it seems its provincial system is railing against change, declining progression in favour of continual regression.

One of the few details that Baroness Corston does give about the type of women who still might require imprisonment in one of the custodial units she proposes for the future, is that they would typically be serving sentences of greater than two years.386 This sentence length corresponds with that served by women in Canada’s federal prisons. She envisages that those women serving sentences of less than two years and who are not dangerous could be dealt with in the community or within a residential community centre for example.387 The relevance of this is that Baroness Corston’s recommendations could thus be extended to the majority of Canada’s female provincial prison population.

384 Ibid.
386 Corston, supra n 3 at 86
387 Ibid. at 85
Women serving their sentences in Canadian provincial prisons are generally non-violent offenders, who have experienced past victimisation, much the same as many UK female inmates. Elizabeth Comack’s detailed study of women in Canada’s provincial prisons vividly illustrates that a large number of provincially sentenced female offenders have suffered “histories of abuse,” resulting in drug and alcohol problems. CAEFS also reports that 72% of women serving provincial sentences have past experiences of sexual or physical abuse. The picture painted is very familiar. Prison Justice makes the valid point that the number of provincial prisoners is likely to rise further in the near future due to the passing of Bill C-2 and the introduction of new tougher measures. Seemingly the provincial women’s incarcerative system is on a very similar track to the UK’s entire female prison system. It is for this reason that Canada’s provincial governments may benefit just as much from Baroness Corston’s proposals as would the UK and might do well to begin thinking about whether prison really is the correct place for vulnerable, non-violent women. Unfortunately, with current developments in the provincial system and a failure to take any significant cue from the women-centred federal approach, the future looks bleak for Canadian female offenders.

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389 Elizabeth Comack, Women in Trouble: Connecting Women’s Law Violations to their Histories of Abuse (Halifax, Nova Scotia: Fernwood, 1996) at 41
390 Ibid. at 119
391 Canadian Association of Elizabeth Fry Societies, supra note 171
392 Supra notes 385 and 137
8. Conclusion

There have been some very encouraging moves in the UK over the last year signalling that potential improvements to the women’s criminal justice system might be on the horizon. This is most strikingly illustrated by the release of the commendable Corston Report. The burning question now is; what will the Government do next? What it must not do is allow history to repeat itself. It must take Baroness Corston’s proposals and rapidly develop them into a scheme resembling that employed in the federal women’s system in Canada. Existing prisons must be radically improved as a short term response, with a view to extensive utilisation of community alternatives in the long term. This will involve dismantling the existing women’s prison system as soon as possible, removing women from prisons over the next few years and treating them in the community, while building smaller units similar to the Canadian federal women’s prisons, designed to hold a small proportion of female offenders. They must be capable of accommodating all women, from those who respond well to a communal environment, to those who may need more individualised and intensive support and be constructed thoughtfully and realistically to ensure all levels of risk posed by female inmates are accounted for.

Time is running out for some of the UK’s most vulnerable women and unfortunately the Government’s current response seems largely paper based. There is no more time for stalling. What is needed is forceful commitment to productive and truly beneficial improvement.
IV. MOTHERS AND THE CRIMINAL JUSTICE SYSTEM

1. Introduction

(a) Scope of the Discussion

Chapter III was intended to provide a broad, yet comprehensive outline of the prison systems in the UK and Canada. The ultimate aim was to devise a strategy which would result in the transformation of the primary structure of the female UK incarcerative regime, re-configuring the face of penal organisation. It is now time to take a deeper look into one particular aspect of the criminal justice system, focussing tightly in on the issue of mothers who clash with the law. This area of corrections was touched upon briefly in Chapters II and III above, however Chapter IV will narrow the approach significantly, centring primarily on decision making policy which directly relates to those women and mothers who face the prison system or are already encompassed by it.

(b) Overview and Approach

This year, Lisa Anne Whitford of British Columbia, Canada was sentenced to four years in prison for shooting and killing her male partner and while in custody in March last year she gave birth to baby Jordyn. The decision was made to allow Ms Whitford to keep her baby in prison with her and for the foreseeable future that is where Jordyn will grow up. Conversely, in the UK the situation is very different. In 2001 a woman who was in prison for smuggling drugs into the country was told that her baby, who was

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393 Lori Culbert and Gerry Bellett, “Baby Stays with Jailed Mom”, The Vancouver Sun (8 February 2008)
living with her in prison at the time, would be taken from her in compliance with an 18
month age limit.\textsuperscript{394} How can the disparity in these decisions be reconciled? How have
the authorities justified their decisions? What is the basis for sentencing women such as
these at the outset? And where is the logic in both sentencing policy and policy
revolving around criminally sentenced mothers and their children? These are all vitally
important questions and what are needed now are hard-fast answers.

Sending a mother to prison may have far-reaching consequences, not only for the woman
incarcerated but also for her children, the rest of her dependants and her extended family,
which can stretch right into the heart of society, the damage rippling intensely outwards.
It is for this reason that any decision of the criminal justice system which touches upon a
mother’s life necessitates careful consideration and consequently this chapter is
imperative in beginning to scrape away the toxic layers of inequality which so often mar
these decisions.

The fundamental principles which permeate the recommendations of this chapter are
clouded by a strong and complex tension between a desire to achieve gender neutrality in
decisions relating to parents in the criminal justice system and the equally strong desire
to recognise the points at which male and female social realities diverge. Consequent
upon this, the overarching objective is to achieve decisions which take as their starting
point a gender neutral stance but which may be adjusted to take into account, the
sometimes subtle, differences and inequalities which continue to exist between the sexes.

\textsuperscript{394} R (P) v. Secretary of State for the Home Department and another and R (Q and another) v. Secretary of
State for the Home Department and another [2001] EWCA. Civ 1151
Running parallel to this suggestion, it will be explained that there is a desperate need to look towards the future and promote gender equality in society in general so that, gradually, the gender specific facets of any criminal justice decision may fade away, paving the way for a pure form of gender neutral decision making.

A good place to start this investigation is with an examination of judicial reasoning, i.e. where the decision pertaining to the sentencing of a mother is made. Thus an exploration of this issue will constitute the first part of the chapter. The approach of the judiciary in the UK will first be analysed and then contrasted with the practice applied in Canada. This issue is of vital importance for a number of reasons, not least that “the logic of the judges and magistrates who continue to send women (and men) to prison for relatively minor crimes is as obscure as it ever was”. Pat Carlen has made it clear that “in the immediate future, there should be less emphasis on what makes female criminals tick and a much closer scrutiny of the sentencing logic and behaviour of the judges and magistrates who send them to prison in increasing numbers.” It is upon this premise which this section proceeds, placing a particular focus on decisions affecting mothers.

As this thesis has repeatedly emphasised, the female prison population is rising at an alarming rate. Women are being disproportionately disadvantaged by the operation of the current system and it must be argued that the construction of sentencing decisions is at the core of the problem. Such decisions seem to treat certain women more harshly

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395 Carlen, supra note 58 at 71-72
396 Ibid. at 72
397 See text accompanying note 1
than male offenders for the perpetration of the same offence and a large part of this chapter will be dedicated to the study of this phenomenon. Through examination of such decisions it is hoped that gender bias and inequality can be pinpointed and removed to make way for fairness in all sentencing determinations.

Compounding the problems highlighted are the observations and conclusions drawn in Chapters II and III above, not least that women tend to commit crime for reasons which differ from those of their male counterparts. A large proportion of female offenders have been severely affected by childhood histories of abuse and neglect and such victimisation has the capacity to contribute to offending behaviour and also negatively affect the way in which such women experience the prison environment.

Subjection to the inappropriate regime presented by a female prison system predicated on a male design necessarily means that sentencing has deep implications for female offenders in particular and the potential to seriously damage subsequent development. For this reason, issues surrounding sentencing need to be carefully thought through.

Intensifying the urgency of such considerations is the fact that 66% of women in prison in the UK are mothers of children under 18 years of age. This factor will be placed at the heart of this chapter because at present, though the prison system has disproportionate

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398 See Chapters II and III above
399 Ibid.
400 See text accompanying note 15
401 See text accompanying note 241
effects on all female inmates, it represents an aggravated negative experience for offenders who are pregnant or who already have young children.402

An issue at the centre of this chapter is therefore whether the fact of motherhood should be taken into account in the sentencing decision. In attempting to formulate a response to this, the section will begin by laying out the current approach to the sentencing of women and mothers in the UK and will investigate the factors which currently have an impact on sentencing, incorporating a review of the current literature on the subject. Canada will be used as a comparator and it will be revealed that Canadian literature on this topic is sadly lacking. Despite this gap, an attempt will be made to discern influences in Canadian sentencing decisions concerning mothers and the study will endeavour to uncover where the correct balance should lie in considering the fact of motherhood both in UK and Canadian decisions.

The term “substantive equality” has been used frequently throughout this thesis, however the concept is so central and integral a part of the proposals put forward in this chapter that it is appropriate at this point to spell out exactly what the approach entails. Most simply put, substantive equality in this context means acknowledging that male and female needs and experiences are different and as such, approaches to dealing with the two sexes need to recognise those differences in order to promote equality in any outcome. In terms of decisions relating to mothers in the criminal justice system gender

402 For example, the small number of female prisons in the UK means that on average mothers are held much further away from their families than fathers, with all the related problems that this entails. See Belinda Brooks-Gordon and Andrew Bainham, “Prisoners’ Families and the Regulation of Contact” (2004) 26 Journal of Social Welfare and Family Law 263 at 266. See also pages 86-88 above
specific reasoning would be a method of achieving such equality, e.g. by making decisions based on facts about the distance a woman will be kept from her family. It is thus encouraging that Brenda Hale QC, the UK’s only member of the highest UK court, the House of Lords, has stated, directly in relation to the imprisonment of female offenders, that “there seems to be less understanding of the ways in which women’s lives are still very different from men’s”. Quoting Professor Dorothy Wedderburn, she goes on to explain that “equal treatment – which we fully endorse – does not mean identical treatment”. While this approach is agreed with in principle and is appropriate in a number of contexts, it will be argued that within the sphere of sentencing, whenever possible and appropriate gender neutral sentencing principles must be utilised. For instance; it is suggested that the fact of “parenthood” rather than the fact of “motherhood” should be taken into consideration in any sentencing decision, and more persuasively the fact of being “primary-caregiver”. This being said, the issue is far more complex than simply applying this standard in all decisions. The various disparities between the experience within the male and female prison systems will require that certain gender specific considerations be taken into account in order to reflect the realities of the situation, i.e. women’s ongoing inequality. Only then will substantive equality be achieved.

The second part of this chapter will extend the study to an examination of what happens when a mother (or pregnant women) actually is sentenced to a prison term. Certain

403 See Hale, supra note 61 at 3
decisions need to be made concerning what will happen to a child when his or her mother is imprisoned and this section of the thesis will attempt to highlight factors which are taken account of in such decisions and which factors arguably should be taken account of.

Again, the situation in the UK will be scrutinised in an effort to explain considerations in allowing a mother to keep her child with her in a mother and baby unit while she is in prison and an investigation of relevant literature will be relied upon to reveal where the balance should lie in the decision making process. So, for example; should a father’s rights play a part? How best can both the mother’s and child’s human rights be protected by any decision? What role does the age of the child play in the decision? And how can all of these factors be moulded around the need to keep as a priority the best interests of the child?

It will be suggested that at present, facilities for mothers to keep their children in custody with them must be dramatically improved but that in the long term, as suggested in Chapter III imprisonment of women, especially mothers, needs to be seriously reduced to allow the vast majority of women to retain custody of their children in the community, serving their sentences in a more supportive environment which is conducive to rehabilitation. The situation in Canada will be useful to examine here, especially in terms of the imprisonment of federally sentenced women with their babies. It will be

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405 This will involve a particular focus on Article 8 of the ECHR (the right to respect for private and family life) See supra note 49
406 Culbert and Bellett, supra note 393
explained that Canadian literature is lacking in this area but the literature which is available will be carefully reviewed to reveal how the system operates and to determine whether Canada holds any lessons for the UK (or vice versa) in this respect.

Family law concepts will necessarily constitute an important focus at this stage. The reasoning behind this is that ideas and arguments that are used in the family law context can be drawn upon when looking at decisions as to whether to allow a mother to keep her child in a correctional facility with her once she is sentenced. These ideas will be equally relevant to examine when exploring sentencing decisions relating to mothers. In light of this it is especially important to draw upon feminist and women’s rights arguments in family law. An additional strand of exploration will involve consideration of fathers’ rights arguments in relation to custody. Such an investigation, it is hoped, will reveal whether and to what extent the wishes and rights of a father should be taken into account when deciding where a baby is best placed upon imprisonment of the mother and how far the biological and social roles of motherhood should impact directly on such decisions.

The analysis will require an understanding of the gender divide faced by society in both Canada and the United Kingdom in terms of caro-giving and breadwinning roles and the special emphasis which is so often placed by society on the role of the “mother” in a child’s life.407

407 See for example Anne Oakley, Woman’s Work: The Housewife, Past and Present (New York: Pantheon, 1974) at 186 “that all women need to be mothers, that all mothers need their children and that all children need their mothers”. Note that Oakley was critical of this notion. Since this work, much emphasis has been placed by the courts on the role of the father in a child’s life and such developments must also be explored and related to the imprisonment of mothers.
It will be argued that a gender neutral approach to parents and sentencing should be taken where possible, giving priority to the role of primary caregiver and that where necessary substantive equality may require an approach based on difference in order to take account of the reality of any given situation, e.g. that women are imprisoned farther in general away from their children than men. General literature and Prison Service documents emphasise that the overriding concern should be the best interests of the child and this is something which is not disputed in any way.\textsuperscript{408} The ultimate argument is that societal forces are heavily at work in the construction of mother and baby units and their operation and that until the gendered imbalance in breadwinner / caregiver roles is redressed, decisions need to take account of reality (for example, disproportionate female responsibility for caregiving and the various ways in which prison represents a harsher experience for female inmates) if they are to provide for the best interests of the child.

2. Sentencing of Women and Mothers: Patterns, Assumptions, Consequences

The first questions to ask are; what are the actual trends in the sentencing of women and mothers in the UK and to what extent do the courts take into account the gender of the accused or the fact of motherhood when sentencing? This section of the chapter will outline a range of academic observations and opinions on this topic in an attempt to give a general outline of the development of the law and to highlight the forces at work in the making of such important decisions by the judiciary.

\textsuperscript{408} HM Prison Service, \textit{The Management of Mother and Baby Units}, Prison Service Order 4801, 3\textsuperscript{rd} ed. (London: HMSO, 2005) at para. 2.2
A good place to start is with the work of Professor Carlen. From a historical standpoint she explains that research conducted in the 1980s indicated that women in the UK were sentenced more harshly than men.\footnote{Carlen, supra note 58 at 76. Carlen citing Susan Edwards, Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and Criminal Justice System (Manchester: Manchester University Press, 1984); and N Seear and E Player, Women in the Penal System (London: Howard League, 1986) in making this determination} She continues to say that “the most recent English research concludes that women are not sentenced more harshly than men; they are sentenced less harshly.”\footnote{Carlen, ibid. at 76. Carlen evidenced this citing Carol Hedderman and Loraine Gelsthorpe, eds., Understanding the Sentencing of Women, Home Office Research Study 170 (London: HMSO, 1997)} The reason for this apparent shift in sentencing severity is not immediately clear. It may well be that very little has changed in reality and that skewed figures have resulted in anomalous results.\footnote{For a discussion on the power of statistics to disguise the truth, see Hope, supra note 91. See also Chapter II above}

This however, is not the end of the story. Carlen explains that she;

has always argued that, although the majority of women are, in comparison with men, treated more leniently by the criminal justice system, certain women – that is, those who have been in care, have transient lifestyles, have their own children already in care, are living outwith family and male related domesticity or are members of ethnic minority groups - are more likely to proceed through the criminal justice system and end up in prison.\footnote{Carlen, supra note 58 at 76}

Researchers have tended to explain the more general lenient sentencing of female offenders as a result of “chivalrous treatment” by judges “who may explain female offending in very different terms to male offending and who may be reluctant to send
women to prison, especially if they have children." Gelsthorpe and Loucks, in a section of a report for the Home Office which examined influences on sentence makers’ decisions as identified by the sentencers themselves, seemed to locate the reason behind this chivalrous attitude in the notion that Magistrates tended to view female offenders as “troubled” as opposed to “troublesome.” The research revealed that Magistrates had a propensity to characterise male and female offenders in very different ways, which contributed to shaping sentencing decisions. It was highlighted that “magistrates commonly referred to women as stealing to feed their children where men stole to support drug habits.” It is quite possible that such assumptions, whether true or not in any given case, directly affect sentencing, and judges’ sympathy for such women tends to lead to ameliorative sanctioning. The situation is summed up admirably by Allison Morris thus: “provided a woman acted her part – modest, humble, remorseful – and references could be made to her previous good character, domestic pressures or competence in the home, she was not seen as ‘criminal’. She was a ‘proper woman.’”

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413 Smith, supra note 68 at 359-360
414 Loraine Gelsthorpe and Nancy Loucks, “Magistrates’ Explanations of Sentencing Decisions” in Carol Hedderman and Loraine Gelsthorpe, eds., Understanding the Sentencing of Women, Home Office Research Study 170 (London: HMSO, 1997) 23 at 26 See also Walklate, supra note 73 at 179-180 Walklate explains that judges have a tendency to medicalise deviant females and as such women are “much more likely to receive a sentence from the court that includes some form of medical or psychiatric treatment ... the resultant effect is that men are, for the most part, attributed with a sense of agency and responsibility for their actions, whereas women defendants are denied this.” It is thus possible that women may be more readily sent into the mental health system if they are medicalised in this manner, i.e. seen as troubled. See also Rumgay, supra note 176 at 28 Rumgay examines the other side of the coin and notes concerns over the appropriateness of any increase in therapeutic and medical services in prisons, the fear being that if greater therapeutic and medical facilities are provided in women’s prisons, judges will more readily send “troubled” women to prison to make use of such services. Obviously this is undesirable and the focus should instead be on improving health and therapeutic services outside the prison and improving services which have the potential to address any psychological issues which may lead to offending in the first place, in the hope this will divert women away from prisons and indeed the criminal justice system in general.
415 Gelsthorpe and Loucks, ibid.
Dorothy Roberts also accepts that “a woman’s role in the family determines the criminal sentence that a court will impose upon her”. She thus pinpoints the reason for lenient sentencing outside the realm of outright chivalry in relation to female offenders per se, stating that the courts place more emphasis on the effect of the sentence on a woman’s children than on the mother herself. She goes on to explain that the courts do in fact give consideration to both the role of mother and father in sentencing but states that the role of mother is given precedence because “judges consider caretaking to be more indispensable than economic support to children’s welfare.”

So, why exactly are certain groups of women singled out by the judiciary for harsher sentencing? Why are women with children in care, for example, punished more fiercely? Perhaps one reason is that where children are already in care the mother’s caregiving role is assumed by a judge to be obsolete and therefore dismissed as an ameliorative factor. A more general answer to this though, as alluded to above, is that women “who do not conform to gender roles” are seen as less deserving of sympathy by sentencers. The mother who has allowed her children to be taken into care becomes a “bad mother” in the eyes of the judiciary, undeserving of leniency. She has let her gender down. So it seems, women become viewed by the court as “doubly deviant” as they have firstly committed a

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417 Roberts, supra note 163 at 103
418 Ibid. at 103-104
419 Ibid. at 104 See also Kathleen Daly, “Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing” (1989) 3 Gender and Society 9 Daly makes identical observations, also in the U.S. context, asserting that the issue of chivalry in a paternalistic sense is not so clear cut as many have argued, explaining that the impact of a sentence on the accused’s children is also of great concern to judges. She reveals that there is evidence of “a labour hierarchy in the judges’ minds in that they believed that care giving was more important than wage earning for the maintenance of families.”
crime – deviant by normal social standards, and secondly have stepped out of their gender role.\textsuperscript{421} For this, doubly deviant women are doubly punished.\textsuperscript{422}

Recent research by the Women in Prison Project Group (August 2007) has affirmed these findings, asserting that “contravening social mores may lead to women being criminalised.”\textsuperscript{423} Dorothy Roberts makes similar findings, giving the example that “courts often consider Black women less fit to mother”, because, she says, as Nicole Rafter has revealed, “it is harder for them to meet the test of ideal motherhood”.\textsuperscript{424} One of the groups which are dealt with most aggressively by the courts has been identified by Roberts as “women who commit crimes as mothers.”\textsuperscript{425} Roberts explains this phenomenon thus: “Although the law treats mothers who commit general crimes relatively leniently so that they may fulfil their traditional role, it treats women who commit crimes as mothers the harshest for violating the traditional role.”\textsuperscript{426}

Roberts goes on to identify mothers for example who fail to protect their children from familial abuse, as a group more harshly sentenced by the courts. The presumption is “that a woman’s obligation to her children always takes precedence over her own interest in independence and physical safety.”\textsuperscript{427}

\textsuperscript{421} See pages 44-45 above for an explanation of the double deviancy theory
\textsuperscript{422} Carrabine et al., supra note 93 at 86-87
\textsuperscript{424} Roberts, supra note 163 at 106 citing Nicole Rafter, Partial Justice: Women, Prison and Social Control, 2nd ed. (New Brunswick: Transaction, 1990)
\textsuperscript{425} Roberts, ibid. at 107
\textsuperscript{426} Ibid. at 107
\textsuperscript{427} Ibid. at 112
Failure to protect children in such circumstances may more usefully be re-characterised as a failing of society rather than a failing of a mother, for the reason that society has failed to provide adequate support for such women. For example, society does not provide enough support for battered women who fear for the safety of their children, who consequently have no one to turn to in gaining assistance in protecting those children and few places to go to escape such abuse. What can be drawn from this is that a woman should not be penalised at the sentencing stage as a result of societal inadequacies. Such disadvantageous treatment arguably breaches Article 14 of the ECHR on the basis that women are receiving harsher treatment based on their sex.

So it is clear that certain very powerful assumptions about the role of women and mothers in society are playing an important part in the sentencing of female offenders. In order to further illustrate the impact the role of motherhood has on sentencing decisions, it is now appropriate to examine some case law in this area. It serves to highlight how the role of “mother” is put on a pedestal by the courts during sentencing, in a way which unacceptably entrenches dominant gender stereotypes, such as a woman’s assumed natural suitability to engage in childcare tasks. While I argue against such an approach by the courts and advocate gender neutral standards in principle it must be made clear that this is a flexible concept which must be moulded to allow reality to be weighed in the equation, a strategy which is explored below.  

 Ultimately, the question that needs to be asked is; how can the assumptions evidently at work in the following

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428 This might be achieved when sentencing for example, by starting from a gender neutral perspective and then factoring in the areas where the female prison system imposes disproportionate and unjustifiable hardship on women as compared with men.
cases be addressed and how can attitudes and sentencing practices be engaged with in order to redress inequalities apparent in the present system?

(a) Review of Relevant Case Law

The first significant case to examine is *R v. Whitehead* [1996]. In this case Mrs Whitehead, a married woman and mother of three pleaded guilty to perverting the course of justice and was sentenced to two months in prison. She appealed and the Court of Appeal quashed her prison sentence. The court explained;

> The matter which, in our view, tips the balance in favour of a non-custodial sentence is the position of the three children ... As a result of both parents being sent to prison they are deprived of the care of both their father and their mother. *The courts are always very reluctant to send the mother of young children to prison.* Sometimes they have no alternative ... *Clearly, it is desirable and obvious that a mother should be permitted, if at all possible, to continue to look after her children.* We consider that the factor relating to the children is decisive in coming to the conclusion that we should quash this prison sentence. (Emphasis added).

This statement reveals a deep-seated preoccupation on the part of judges with the mothering role. The constant use of the word “mother” throughout the judgement rather than the use of a more gender neutral term such as “parent” betrays that such stereotypical assumptions are held by sentencers. The court gave no consideration to the actual participation of either parent in the children’s lives. Nowhere does the judgement

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429 *R v. Whitehead* [1996] 1 Cr App R (S) 111
430 Mrs Whitehead had lied to the police about a car accident involving her husband.
431 Supra note 429 at 114
mention which parent was the primary caregiver. This suggests that the court simply disregarded the idea that Mr Whitehead could be very actively involved in his children’s lives and assumed that Mrs Whitehead took the majority of the caregiving tasks. That such assumptions weigh on sentencers’ minds is underscored by the fact that Mr Whitehead, who had been sentenced to a four month prison term, was refused leave to appeal. Clearly, for the court, the father’s role in his children’s lives was considered of less value than the mother’s. Mrs Whitehead seemingly slotted neatly into her gendered role as defined by the court and for this she was rewarded. To clarify, I would not dispute the outcome of the case, assuming of course that Mrs Whitehead was in fact the primary caregiver. It is the approach which is disagreed with rather than the result.

In *R v. Bowden* [1998] similar gendered forces can be seen at work. Mrs Bowden was sentenced to twelve months’ imprisonment for the theft of substantial amounts of money from Parent-Teacher Co-operative funds. She had four children, all with disabilities. The Court of Appeal quashed the sentence and replaced it with a suspended six month sentence, providing the following explanation: “... the circumstances do appear quite exceptional and *this is a family which does need its mother*, however lamentable and disgraceful her behaviour was in this case, as it undoubtedly was.” (Emphasis added).

Once again the court specifically singled out the function of a mother as a mitigating factor by characterising such a role as particularly vital in children’s lives. The ex-husband of Mrs Bowden was only briefly mentioned in the judgement, when it was

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432 *R v. Bowden* [1998] 2 Cr App R (S) 7
433 *Ibid.* at 9
explained that Mrs Bowden thought it possible that he might care for the children if a prison sentence was handed down. The court did not appear however to consider this point further, failing to reflect on how important the father might be in the children’s lives. It did not explore the extent of the father’s current involvement in childcare, nor was a substantial assessment of Mrs Bowden’s contributions to caregiving work conducted. Once again the fathering role had been sidelined, as the court placed the full burden of caregiving on the mother, implying once again that such a role should specifically be reserved for women. Additionally Mrs Bowden appeared to be a “good mother” since her crime was committed to provide clothes and necessities for her children. She was rewarded for her compliance with her assigned gender role.

Another very relevant case is that of R v. Mills [2002]. Mrs Mills had been sentenced to eight months in prison for two offences of obtaining credit services by deception. The Court of Appeal overturned the decision, replacing the sentence with a six month community rehabilitation order. The reasoning of the court at first appears to be gender neutral, the main consideration in the case of a dishonesty offence expressed to be the role of the “sole carer” of young children and an assessment of how a prison sentence would affect the children. While the use of terminology such as “sole carer” is indicative of a step in a gender neutral direction the overall tone of the judgement signals that the court fell back on assumptions about the mothering role in coming to its decision. For example, the fact that Mrs Mills’ offending was “committed in an effort to

434 Ibid.
435 R v. Mills [2002] 2 Cr App R (S) 229
436 Ibid. at 232
make a home for her children” was important to the court.\textsuperscript{437} Mrs Mills was, despite her crime, a “good” mother since her offending was to provide for her children. Once again, she was a woman who fitted into the court’s gender ideals and once again she was a woman who was rewarded. Lord Woolf C.J. additionally fell into the gender specificity trap when he explained that the case involved determining the approach to sentencing in cases of dishonesty, “particularly when an offence is committed by a \textit{woman} of previous good character”\textsuperscript{438} (emphasis added). The fact that Lord Woolf focuses on the sex of the appellant indicates that that gender was indeed a relevant consideration in the decision making process. Apart from anything else, despite the court utilising a small amount of gender neutral language the word “mother” is used continually throughout the judgement. What can be drawn from all of this is that gender specificity in such decisions is alive and well. Very little has truly changed. Vanessa E. Munro, a Reader in Law at King’s College London in the UK, has expressed concerns about this dominant approach reinforcing gender stereotypes:

\begin{quote}
It is submitted that deploying this vision within sentencing policy indicates that fathers’ \textit{prima facie} role in a child’s development is, at best, incremental and, at worst, peripheral. What is more, it imposes a maternal-paternal dialectic upon child caring, within which this relegation of male parenting reinforces the tenacious ideology of women as inherently maternal and of mothers as uniquely situated to act as primary carers.\textsuperscript{439}
\end{quote}

\begin{footnotesize}
\textsuperscript{437} Ibid.
\textsuperscript{438} Ibid. at 231
\textsuperscript{439} Vanessa E. Munro, “The Emerging Rights of Imprisoned Mothers and their Children” (2002) 14 Child and Family Law Quarterly 303 at 313
\end{footnotesize}
I concur in this analysis. The judiciary certainly needs educating in this respect. Such education however will have to proceed very carefully. This is a delicate area and instruction must emphasise that judges should not ignore the social fact that mothers are still more often the primary caregivers for children. Fact-finding is imperative in the process and hard evidence of contributions to childcare tasks should be relied upon in reaching decisions. Outcomes such as those in Whitehead, Bowden and Millns reinforce the idea that women are best suited for caregiving; an unfounded supposition based on obsolete stereotypes. Apart from anything else, they arguably deny fathers their Article 8 right to respect for “private and family life” under the European Convention on Human Rights since the judges in these cases appear to be indifferent as to fathers’ participation in their children’s lives, relying on unjustified assumptions about the scope of motherhood.\(^{440}\) This arguably is having the effect of withholding ameliorative sentencing from fathers when they are primary carers, ultimately denying them their role in bringing up their children and it is from this point that an Article 8 breach might stem. With this in mind it is suggested that gender neutrality be the foremost principle in sentencing, with a focus on the role of primary-caregiver.

One question we may ask at this stage however, is why should the fact of parenthood have \textit{any} influence on sentencing at all? Carlen addresses this issue and begins by arguing for gender neutral sentencing criteria. She maintains that there is no justification for sentencing women differently from men. She explains that justifications given for the differential sentencing of men and women are in reality gender neutral with the

\(^{440}\) \textit{Supra} note 49
potential to apply to both sexes. For example, she explains that “role worth” is often put forward in justification of the differential sentencing of mothers, i.e. “that women, as mothers, have especially important roles to play in relation to the upbringing of children ...” but that this need not be a gender specific argument.\textsuperscript{441} She explains her reasoning thus: if we are dealing with valuable social roles, we would then have to sentence doctors and nurses leniently! This strips such a criterion of any gender specific quality and indeed suggests that the role of a parent should play no part in sentencing decisions. It must be countered, however, that a child has only one set of parents, setting the role of parenthood apart from other social positions of value. Munro has noted that some may seek to overcome the argument that the role of a primary carer is more important than other social roles because of its non-transferable nature, by relying on “contented narratives from children adopted, or fostered, at an older age.”\textsuperscript{442} She goes on to contend that more recent cases have put great emphasis on the Article 8 ECHR rights of both parents \textit{and} children. Indeed this does shed fresh light on the issue. Once the argument is couched in human rights rhetoric based on a desire to protect rights to family and private life we can certainly see that the role of a doctor or nurse has far less relevance in any sentencing decision.\textsuperscript{443}

Despite Carlen’s arguments concerning the value of the parenting role, it is submitted that the fact of parenthood \textit{should} be relevant in sentencing decisions for the reason that:

\textsuperscript{441} Carlen, supra note 58 at 80
\textsuperscript{442} Munro, supra note 439 at 314
\textsuperscript{443} Ibid. Munro specifically cites the cases of R (P) v. Secretary of State for the Home Department and another and R (Q and another) v. Secretary of State for the Home Department and another [2001] EWCA Civ 1151 in addressing Carlen’s worries about role worth in sentencing, explaining that the recognition in those cases “of the importance attributed to protecting Article 8 rights \textit{per se} in the context of sentencing policy moves us beyond this lacuna.”
impact upon children is an important social consequence of any sentence and policy should accordingly acknowledge this. It should be clarified here that it is less the fact of "parenthood" per se with which sentencers should be concerned and more the fact of taking active and prime responsibility for parenting. The bio-genetic fact of parenting has little relevance; it is rather the social fact of parenting which is important. As described, the factor which sets the role of parenthood apart from other social roles most clearly is the presence of Article 8 ECHR in the mix. When looked at from this perspective, to fail to recognise the disruptive and damaging results of imprisonment on children is arguably a denial of this most important right. I would therefore argue that such reasoning should be put into action through encouragement of the use of gender neutral sentencing principles, placing a genuine emphasis on the role of "primary carer" rather than resorting to assumptions about the role of "mother" per se. Such an approach would arguably achieve the deliverance of Article 8 rights to mothers, fathers, non-biological carers and children upon sentencing. Conversely, the role of breadwinner can be placed in the category of transferrable social roles and thus should not play a part in a sentencing decision.

As has been previously mentioned, this should not be the end of the story. The inequalities which bear on the current women's prison system in the form of the harsher prison experience of female inmates as opposed to male prisoners (as a result of the inadequate facilities provided in women's prisons which do not cater for their specific needs for example) must necessarily be weighed in the balance of any sentencing evaluation. Sentencers must take account of reality in order to ensure substantive
equality is delivered. Gender neutrality in sentencing should therefore merely reflect the starting point in the sentencer’s reasoning. The concept of “reality” which I discuss may helpfully be clarified by example: Where a woman happens not to be the primary carer (or indeed a mother at all), there will be no primary caregiver presumption in favour of ameliorative sentencing. However the fact that she is to be imprisoned far farther away from her family than would be a man should be taken into account – it is a situational reality not faced by males (i.e. imprisonment farther away from family) that may tip the balance in favour of a more lenient sentence, in a manner compensating for the harsher effect of the imprisonment on the woman. In this way substantive equality may be achieved in the decision – the outcome for males and females is balanced by treating the two sexes differently, since a man in the same position would in general be imprisoned closer to his family than a woman. Refusing to lessen the sentence for the woman would result in unfairness – her imprisonment farther from her family. The unfairness is eliminated by lessening her sentence, to ensure she returns to her family sooner. Since a man imprisoned closer to home would presumably receive more familial contact, the best way of accommodating females will be to lessen their sentence so they too are able to receive similar amounts of contact, compensating for their imprisonment far away. Until reality changes, e.g. until better visiting facilities are provided in women’s prisons or a greater number of women’s prisons are built meaning women could be imprisoned closer to their families (although this exact approach is not suggested as a solution to the problem) such factors should lead to ameliorative sentencing. The starting point then is gender neutrality – the father being primary carer for example, produces the presumption that the mother’s sentence should not be lessened, however this may be offset by the
reality of her imprisonment. It is not an evaluation based upon generalised assumptions of the judiciary — it is based on a facet of women’s imprisonment. Only solid facts akin to these should be allowed to influence such decisions. This is what it is to take account of the reality of inequality. Until that reality changes, i.e. until women’s imprisonment becomes injected with substantive equality (such as a prison environment which caters specifically for female needs) and until a fairer and better tailored environment is created for women prisoners, this is the way sentencing must proceed in order to yield substantively equal and fair decisions.

Implementation of the recommendations set out in Chapter III above, based largely on Baroness Corston’s proposals would help to achieve substantive equality. If no female offenders convicted of non-serious crimes were imprisoned and geographically well-spread custodial units were constructed for more serious offenders, fully gender-neutral sentencing would perhaps become a reality. While the dissolution of the Prison for Women in Canada did result in a more accommodating and appropriate federal female prison system many problems still remain as detailed in Chapter III, meaning that inequality persists. Consequently, is it recommended that the approach of taking gender neutral sentencing as a starting point and weighing inequality in the balance should also be applicable to the sentencing of female offenders in Canada, especially considering the continuing inequalities common in provincial female imprisonment.444

444 For a discussion of the provincial female prison system in Canada see Chapter III, pages 143-146 above
(b) Gender Neutrality, Social Reality and Lessons from Child Custody Law

The ideal of gender neutrality is prima facie appealing and is a concept advocated in this work as has been explained and as will be further elaborated upon. However there are dangers if such principles are used improperly, as will be illustrated through an examination of child custody law. The main problem is that society in itself is not yet a gender neutral forum. Work remains neatly divided into two categories – female labour and male labour. Within the former category we find domestic tasks such as housework and childcare, while in the latter we find economic duties. While such statements are rather over-generalised, broadly speaking social trends do appear to disclose such labour divisions.

Professor Susan Boyd has noted that there is an “increasingly invisible reality of still overwhelming female responsibility for child care before and after relationships between parents dissolve.” The issue which complicates the situation is that in the 1990s great emphasis was put on “the importance of maintaining contact between men and children after divorce and separation” and this desire can be seen in emerging child custody law. The cases of *D v. D* [2001] and *A v. A* [2004] indicate a shift in judicial practice aimed at accommodating this desire to keep “biological fathers ‘in touch’ with ‘their’ children”. In both these cases shared residence orders were made, meaning the

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445 D v. D [2001] 1 FLR 495
446 A v. A [2004] 1 FLR 1195
447 Collier, supra note 446
children would live with both parents who resided separately. Both parents would have equal responsibility in law for the children.\textsuperscript{450}

The matter raised now is that of fathers’ involvement in childcare pre-separation. Men tend to be restricted in their participation in childcare “by the demands of [their] paid employment.”\textsuperscript{451} For the time being it seems that men are simply not as involved in domestic childcare work as women.\textsuperscript{452}

Cases such as \textit{D v. D} and \textit{A v. A} bring up questions of the appropriateness of awarding shared residence orders post-separation when male input in the childcare labour field appears absent prior to separation.\textsuperscript{453} The result is that a mother, who may have put years of work into raising the children while the father takes little interest in childrearing, has her work “devalued” by the imposition of a shared residence order which fails to recognise the extent of her contribution while elevating the importance of a father’s childcaring efforts which may only become apparent post-separation.\textsuperscript{454} As Professor Boyd, who has written extensively on the topic of child custody, makes clear in this quote by Louise Lamb, “equity cannot be achieved by granting equal participation after

\textsuperscript{450} Please note, these cases are also discussed in relation to decisions concerning mother’s keeping their children in prison with them in the second section of this chapter.
\textsuperscript{451} Collier, \textit{supra} note 446 at 531
\textsuperscript{452} See Carol Smart and Bren Neale, “I Hadn’t Really Thought About it’: New Identities / New Fatherhoods” in Julie Seymour and Paul Bagguley, eds., \textit{Relating Intimacies: Power and Resistance} (Basingstoke: Macmillan, 1999) 118 at 118: “... for the majority of fathers, fathering is something that they have to fit into a schedule dominated by paid employment.” In the Canadian context see Boyd, \textit{supra} note 272
\textsuperscript{453} See Collier, \textit{supra} note 446 at 530-531 Note that the issue of child custody holds particular lessons with regard to decisions relating to mother and baby units, as will be discussed in depth in the second part of this chapter.
\textsuperscript{454} See Boyd, \textit{supra} note 445 at 143 for a discussion of this
divorce, to parents who have not shared equally in parenting during marriage. So, in an as yet non-gender neutral world, gender neutral presumptions have the potential to do much damage when utilised improperly.

Despite this, in sentencing mothers gender neutrality should still be seen as desirable so long as the principle is applied appropriately. For example, courts should be wary of over-estimating the father’s involvement in a child’s life when sentencing the mother and not make assumptions about male caregiving work similar to those made in the shared residence child custody cases. Judges should explore which parent truly has invested in childcare responsibilities up to the point of sentencing rather than falling into the trap of assuming fathers are now more devoted to childcare. This is not to suggest that at present courts are over-valuing male childcare work in their sentencing of mothers. It is simply a warning that if gender neutral principles are applied, (i.e. utilisation of a primary caregiver presumption) the courts must not place too much emphasis on male childcare work when such input is not in reality evident, or the sentencing of mothers may become unjustifiably harsher.

If such warnings are heeded, even gender neutral sentencing in relation to parenting should tend to favour women simply because of current social patterns of behaviour, i.e. it is women who are most often the primary or sole carers of children. The point is that until these more broad social patterns change women will continue to be benefitted over men in respect to sentencing decisions involving children. Until men take a more

\[455\] Ibid. at 147 Boyd citing Louise Lamb, “Involuntary Joint Custody: What Others Will Lose if Fathers’ Rights Groups Win” (1987) 5 Herizons at 20
dominant role in childcare the law must mould to the shape of society. The situation may be evolving: in Re S [1991], a child custody case, Lord Donaldson announced that “it is much more common for fathers to look after young children than it used to be in bygone days.”\textsuperscript{456} If this is true, then men have little to fear from a gender neutral sentencing principle, since it is suggested that the fact of parenthood would lead to lesser sentencing for male offenders who are primary caregivers just as it would for females. Lewis and O’Brien question Lord Donaldson’s assertion however stating that “discussion about the “new father” far outweighs evidence to demonstrate his existence.”\textsuperscript{457} Once again child custody experience should teach us that any elevation of the male caregiving role before such a development is apparent in reality, which results in ameliorative sentencing of fathers for example (i.e. in a bid to maintain the father-child relationship which seems to be the impetus in the custody cases) would be premature. Unless there is hard evidence that a father is the primary carer, his sentence should not be lessened.

Before a primary caregiver presumption in sentencing decisions can encompass greater numbers of males, society needs to experience an influx of men into the private caregiving realm. Even more fair would be the outcome if men and women were able equally to share in economic and child-rearing roles: a more gender neutral world would then coincide efficiently with gender neutral sentencing principles that take parental

\textsuperscript{456} Re S [1991] 2 FLR 388
\textsuperscript{457} Charlie Lewis and Margaret O’Brien, eds., Reassessing Fatherhood (London: Sage, 1987) at 3 It is thus certainly clear that child care remains predominantly the domain of women in today’s society. See also Smart and Neale, supra note 452. The situation in Canada is similar and for more on this point see Glenda Wall and Stephanie Arnold, “How Involved is Involved Fathering?: An Exploration of the Contemporary Culture of Fatherhood” (2007) 21 Gender & Society 508 at 509: “Although there are indications that fathers are spending more time with their children than they did 30 years ago, their involvement in caregiving, especially with young children, is still a fraction of that undertaken by mothers.”
responsibilities into account. Education is very important in this respect – there is a need to tackle the problem at its roots by beginning to educate children in the ways of gender neutrality, in the hope that we may inculcate in the next generation of parents, offenders and sentencers the concept that stereotypical views currently permeating society and perpetuating the gender divide are outdated and only serve to cultivate inequality. How can this be achieved? Of course it will not be easy – gender diversity is ingrained in children from a young age. One place to start may be simply by encouraging both boys and girls to take part in domestic science classes to a greater extent, or at least encouraging schools to provide well thought out domestic science classes which are given the same status in the school as any class in engineering or business for example. For children to take such lessons seriously, schools must also take them seriously, indicating to the children that such work is of equal value and may be engaged in by either sex. Perhaps Personal and Social Education might include a module on childcare itself, including both boys and girls in the teaching, illustrating in the process that males may become just as involved in childcare and domestic tasks as females, even more so if desired. Such lessons would equip boys with more of the skills required to take an active part in private domestic labour, hopefully encouraging more males to engage in this area. At the same time, just as much emphasis should be put on girls’ participation in typically “male” classes, such as woodwork.

While education is undoubtedly a key component in dismantling the gender imbalance of the public / private divide, other initiatives will also be vital in ensuring success. The notable absence of fathers from the private caregiving realm is not caused merely by a
lack of education and understanding amongst society, although this is a very large part of the problem. It is a product of a variety of unfortunate ingredients. Writing from the Canadian perspective, Glenda Wall and Stephanie Arnold cite “policy shortcomings, workplace culture, and the wage gap between men and women” as elements which support the barrier between public based “male” work and private based “female” work.  

This reflects the situation in the UK where these same issues bolster the public/private divide. One strand in any plan to encourage more women to take up work in the public sector would be offering more and better day care for children, allowing women a greater degree of freedom to engage in economic labour. Linda McDowell explains the argument that the burden of achieving this should fall squarely on the shoulders of the state: “If the lack of available childcare is one reason why parents – and especially mothers – find themselves unable to take paid work and so trapped in poverty ... then the role of the state must be to remove this barrier.” She additionally states that the UK’s National Childcare Strategy of 1998 made some progress in this area by addressing the need to increase privately provided childcare and by initiating a tax relief scheme for lower-income families.

Daycare Trust, a charity working to achieve affordable childcare of a high standard which is available to all, conducted the Childcare Costs Survey in 2008 which disappointingly revealed that “childcare costs for children in England continue to rise.

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458 Wall and Arnold, *ibid.* at 509
459 See McDowell, *supra* note 153
460 *Ibid.* at 371
above the rate of inflation." Shockingly, the survey showed that parents desiring a full-time place in a nursery for a child under two years old would have to pay £159 per week for the service, coming out of an average weekly income of £457. Such costs are understandably restrictive for many women.

The release of the Government’s document *Choice for Parents, the Best Start for Children: A Ten Year Strategy for Childcare* in December 2004 seemed encouraging, explicitly designed with the aim of “[giving] parents more choice about how to balance work and family life” and “[ensuring] that parents, particularly mothers, can work and progress their careers.” The document detailed plans to allow mothers to transfer part of their maternity leave and pay to fathers. This would indeed be very beneficial in encouraging and allowing fathers to take a more active role in childcare responsibilities. It is likely that this provision will come into effect sometime in 2009. This is a positive step in the right direction indicating a Governmental realisation that society is ready for change. However, without more the strategy will fail. Education of young children and society in general, as described above, and cheaper, more accessible and higher quality childcare options are still desperately needed, constituting essential parts of what must be a comprehensive package of reform. Just because fathers will be able to take up a greater amount of paternity leave does not necessarily mean that they will do

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465 *Ibid.* at 30
so, which may be the case if ideologies of motherhood and fatherhood remain firmly in place.467

In addition to these initiatives the women’s prison system itself requires radical overhaul as extensively described in Chapter III, to eliminate inequalities in its operation via the creation of a new structure which is suitable to accommodate the specific needs and experiences of women offenders. This will include ensuring that when women are imprisoned, they are imprisoned closer to their families or perhaps simply that prison visits by families of women are more greatly facilitated by the Prison Service, potentially through subsidised travel costs.468 This is of course not to imply that such factors are more important to women that to men, simply that males already receive the benefit of being imprisoned closer to their families as a consequence of the larger number of male prisons, while women are in reality often imprisoned very far away. Once the prison system is more closely tailored to women’s needs, considerations such as distance from family need no longer offset the gender neutral criterion of primary carer in sentencing decisions since the reality of women’s imprisonment will have altered – their experience of imprisonment will be substantively the same as male imprisonment, i.e. it may not be outwardly the same, but it will be fair between the two sexes, since both will have equal opportunities to access family visits, only perhaps by different means. This is what substantive equality is. The idea at the core of these proposals then is the purification of both society (through bringing more gender neutrality to male and female social roles)

467 See supra note 116 and accompanying text
468 When considering a country as large as Canada, imprisonment close to family may never be possible for all prisoners. Efficient and economic facilitation of visitation will therefore be even more necessary in North America in ensuring that female prisoners have as much access to familial contact as possible.
and the women's prison system in terms of current gender stereotyping and inequalities (through creating a more substantively equal prison environment for males and females), in order that sentencing principles eventually may operate in a *purely* gender neutral fashion. It will be a continuing process of refinement.

While creating a more substantively equal prison system in the short term by improving the current conditions of female imprisonment, the ultimate goal of discontinuing the use of prisons for non-violent female offenders and utilising small, dispersed custodial units for more serious offenders must not be lost sight of. Sentencing women to prison will always be a reality. It is inescapable that some women will still require incarcerative measures. It is thus the case that the reasoning employed in the above discussion about sentencing policy would still be relevant even with a substantial decrease in the numbers of women facing a prison sentence. As long as inequalities in the prison system are stamped out as suggested above, upon dealing with more serious offenders who still require incarceration, gender neutral sentencing principles could be applied to men and women; to mothers and fathers, as I have explained. Put simply, a dramatic reduction in the prison population is desired. The remainder of offenders who still might require a prison sentence should then be subjected to the sentencing principles I detail here, which may not lead to a non-incarcerative sentence (perhaps because of overt dangerousness) but might lead to ameliorative sentencing or perhaps innovative sentencing which allows greater contact with children, e.g. home detention, dependent upon the seriousness of the offence committed. This, it is suggested, should be the long term aim of the system. At present however gender neutral sentencing principles must be routinely applied as
detailed (i.e. applying a primary caregiver presumption which is responsive to gender
specific tweaking where necessary, to take into account factors such as distance
imprisoned from family) until more radical proposals become a reality.

(c) Sentencing in Canada: What can be Learnt?

As already explained, research on this issue in the Canadian context is somewhat sparse.
However similar trends to those identified in UK sentencing have been revealed by some
researchers, i.e. women tend to be treated more leniently than men in general.469 Dianne
Martin makes some interesting observations about such trends, questioning the role of
chivalry in the sentencing of women. “Leniency”, she explains, “may be more apparent
than real in many cases ... That is, in many cases, the more lenient sentences were quite
justified, given the lesser involvement of the woman, or the fact that the crime was less
serious than originally described.”470 Perhaps then what is needed is closer scrutiny of
cases involving the “apparent” leniency of judges in both the UK and in Canada in an
attempt to determine whether the problem is quite as pronounced as it first appears.

Martin does concede that “it is also possible that certain women, in particular, those who
are physically attractive, young, and middle class receive preferential treatment.”471
This, she says, “does act to preserve certain social relationships and thus indirectly to
reinforce mainstream stereotypes.”472 As in the UK there evidently are certain

469 See Dianne L. Martin, “Punishing Female Offenders and Perpetuating Gender Stereotypes” in Julian V.
Roberts and David P. Cole, eds., Making Sense of Sentencing (Toronto: University of Toronto Press, 1999)
186
470 Ibid. at 189
471 Ibid.
472 Ibid.
assumptions at work in the minds of the judiciary which require further investigation and need tackling swiftly.

Martin expands the debate by describing the processes used by sentencers as medicalising women, since “women who do commit crimes are ‘abnormal’” in the eyes of the judiciary. A consequence of this is the perpetuation of stereotypes surrounding the offending of women. Again, mirroring the UK experience, Martin explains that in Canada “the inherently bad” woman may receive “very harsh dispositions in some circumstances”, such unsympathetic treatment again being ascribed to women who step out of their gender role, for example by committing a crime of violence.

In examining sentencing principles in Canada, Martin usefully reviews case law which provides an interesting contrast to the UK judgements reviewed in this paper. While the UK case law exposes the preferential treatment of women with children the Canadian cases, specifically in relation to deception offences, reveal a different picture. In these instances judges tended to disregard the mothering role and the impact of any sentence upon the defendant’s children, placing a greater emphasis on the importance of general deterrence in fraud welfare cases for example. This is clearly illustrated by the case of \( R \) v. \( Thurotte \) (1971) in the following passage:

Although this case is pitiful in many respects, this Court is unanimously of the opinion that the paramount consideration in determining the sentence is

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473 *Ibid.* See also *supra* note 414 and accompanying text

474 Martin, *ibid.* at 190
the element of deterrence. Welfare authorities have enough difficulties without having to put up with persons who set out to defraud them.475

Another example of such reasoning in operation can be seen in the case of R v. McGillivray (1992).476 Ms McGillivray committed welfare fraud in an attempt to provide for her children. The fact that she had children and had committed the crime for her children was disregarded by the court in sentencing her to a six month prison term and probation for a year. In cases of this type Martin notes that “the Courts have time and time again stressed deterrence both for the individual and the public at large must be the paramount consideration in these types of sentencing.”477

So, it seems from these cases that the fact of motherhood and the impact of a sentence on a defendant’s children in the context of dishonesty offences have traditionally been disregarded by Canadian courts, although, Martin clarifies, “sometimes this will shorten a prison sentence”.478 This result can be seen in the case of R v. Friesen (1994).479 In this respect though, sentencing in Canada seems to be harsher than the sentencing of mothers in similar situations in the UK who will more often receive community sentences. Perhaps mothers committing fraud offences in Canada then are regarded as “deviant” by the courts from the outset, this “abnormal” version of motherhood being taken into account in the decision to aggravate the sentence, the view being taken that these women have stepped out of their gendered role. They are “bad” women from the

475 R. v. Thuotte (1971) 5 C.C.C. (2d) 120. at 129 (Ont. C.A.)
478 Martin, ibid.
479 R v. Friesen (1994), 22 Weekly Criminal Bulletin (2d) 593 (B.C.C.A.)
beginning for allowing themselves to rely on welfare support and the court punishes them for this in the form of harsher sentencing.

Things may be looking up in Canada though Martin describes, due to the “availability of the conditional sentence.” In *R v. Jantunen* (1997) the defendant had her four month sentence reduced to a community sentence. In such cases though it still seems that Canadian courts are treating women convicted of crimes of deception more harshly than the UK courts: Professors Janet Mosher and Joe Hermer, in their 2005 paper for the Law Commission of Canada refer to Martin’s 1999 conclusions, stating that “little has changed since that time; general deterrence continues to be the paramount principle in sentencing in welfare fraud cases and in many cases, the sole principle considered.”

There is an apparent unwillingness to place any significant weight on the role of parenthood or the effect of any such sentence on a child. In light of this it must be suggested that the principles I have advocated above in relation to the UK would benefit the Canadian system significantly.

As described in Chapter II above, women’s inequality and past victimisation can directly contribute to their offending behaviour. Additionally, the greater number of single mothers than fathers means a large proportion of women bear the burden of intense

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480 Martin, *supra* note 469 at 195
481 *R v. Jantunen* (unreported), Ont. C.A., 4 April 1997
483 See generally Chapter II above
economic responsibility. The harsh treatment of women committing welfare fraud in Canada might therefore indicate that such women are being penalised for societal failings, with little regard being paid to the role of a parent in a child’s life. From the case law it appears that such issues are decided slightly differently in the UK, the focus being placed on the role of “mother” in a child’s life. It must be suggested that Canada would benefit from allowing the role of “primary carer” to influence sentencing decisions whilst weighing the reality of the female prison system in the balance. This will be beneficial as long as societal failings in Canada are rectified correspondingly in order to provide more social support for women.

Despite Martin’s findings in relation to deception cases, a range of other authors have, as previously mentioned, located trends running through sentencing in Canada which are very similar to those experienced in the UK. DeKeseredy clearly finds that in Canada:

sentence severity is more heavily determined by a woman’s “respectability”. For example, judges are more likely to hand down lenient sentences if a female offender is married, has children, and is financially dependent on her spouse or the government ... On the other hand, those who violate patriarchal gender-role expectations are given more severe dispositions.

If this is indeed the case, Canada would benefit from the ideas I have expressed in the UK context, especially in combating damaging gender stereotypes and assumptions.

484 See text accompanying note 154. Also, in 2006 for example, it was found that 47% of federal female prisoners were single (Kong and AuCoin, supra note 186 at 12
486 DeKeseredy, supra note 86 at 112
Perhaps then, what Martin’s work demonstrates is that the rationale behind the sentencing of female defendants may vary depending on the type of offending in question. In light of this a greater number of individual Canadian cases must be examined before it can definitively be concluded that women in Canada are in general sentenced more leniently than men. Maybe it is only in cases involving dishonesty in Canada (especially welfare fraud perhaps) that the courts treat women more harshly. There is no clear explanation for the harsher treatment and demonization of women by the courts in pointing to women contravening their gender role (unless as explained above the courts do see women on welfare as failed mothers and therefore deviant), especially in a case of dishonesty committed to protect children. It is interesting to contrast the UK position here: The Fawcett Society has explained that “there is a perception that individual women who transgress gender roles by committing ‘male’ offences such as burglary may be dealt with more harshly, whilst shoplifting and social security fraud may be seen as more socially acceptable.” There thus seems to be a difference between the assumptions underlying sentencing decisions in Canada and the UK which involve such fraud and both sets of assumptions need dealing with in order to ensure that women are not unfairly disadvantaged and that gender stereotypes are not further entrenched.

It is the lack of work in this area in the Canadian context which makes locating the ambit of the majority of sentencing decisions in this area so difficult. Hatch and Faith went so far as to say in 1989 that “on the basis of this limited research, no definitive statement

487 The Fawcett Society, supra note 236 at 31
can be made concerning sentencing disparity between the sexes in Canada." What is now needed is a thorough review of sentencing policy and sentencing practice to determine whether strong gendered assumptions really are operating to the disadvantage of certain sectors of the Canadian female offending community. Only then can truly useful suggestions for change be proposed.

3. Approaches to the Issue of Mothers with Children in Prison

The sentencing stage is not the only point at which a mother in the criminal justice system may be subjected to decisions which directly impact upon her future and the future of her child(ren). A mother, once sentenced faces possible separation from her child. Perhaps for instance she may be pregnant upon entering the prison system or perhaps she already has dependent children. These circumstances once again necessitate the making of life-changing decisions by criminal justice officials concerning whether or not to allow a mother to keep her child in custody with her, something which is possible both in Canada and the UK. This section of the chapter therefore sets out to decipher what principles should form the basis of such crucial decision-making and inevitably the answer is not a simple one, reflective of the complex nature of the relationships involved in such delicate situations.

(a) Mother and Baby Units in the United Kingdom

Mother and Baby Units (MBUs) in the UK provide an opportunity for some imprisoned women to spend all or part of their sentences with their children in prison. While officially any woman serving a prison sentence may apply for a place in an MBU, not all will be granted access to this facility. It may seem bizarre to some to allow children to spend their first months of life in an incarcerative setting where they are exposed to daily contact with a range of offenders but there are a number of reasonable justifications for such measures. The one most often relied upon by proponents of the system is that there is “strong evidence to show that attachment between babies and their mothers or primary caregivers starts in the early stages of life, and that babies become attached by around six months.”  

It is a desire to foster this bond which is at the heart of MBU policy. It seems strange that the Prison Service offers such opportunities only to sever contact after a few months and not at all in line with stated prison policy of encouraging bonding between mother and child. It is with this in mind that an extension of MBU age limits should be implemented, something which will be discussed in due course.

The number of MBUs has risen over the last few years, from only four in 1997 to seven at the present date. Of these, only one is located in an open prison which allows a greater degree of freedom for prisoners. The rules of access to each MBU differ from prison to prison – at Holloway Prison in London and New Hall Prison near Wakefield in West Yorkshire the general rule is that a baby may only remain in prison with his or her...

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489 11 Million, supra note 337 at 8
490 Askham Grange, near York, UK is the only open prison with an MBU, which has places for 30 mothers and 33 babies.
mother up to the age of nine months. At the remaining prisons the age limit for a baby’s access to an MBU is 18 months. Paragraph 9 of Prison Service Order 4801 (PSO 4801) sets out that it is an Admission Board which has control over recommending to a prison’s Governing Governor that MBU placement is appropriate.\textsuperscript{491} Such a Board consists of an Independent Chair, who will tend to be a social care employee or probation officer, a “responsible Governor or MBU Manager”, the mother and a friend, and Social Services and / or a probation representative.\textsuperscript{492} There are rules relating to separation once the baby reaches the relevant age and a plan will be drawn up well in advance detailing how best separation will proceed.

In making any decisions concerning the children of mothers in prison, the HM Prison Service must take into account Article 3, paragraph 1 of the \textit{United Nations Convention on the Rights of the Child 1989}, which reads:

\begin{quote}
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.\textsuperscript{493}
\end{quote}

The Board may also take into account the attitude and behaviour of the applicant mother, whether the she is drug free and undertakes to remain so and her ability to care for her

\textsuperscript{491} HM Prison Service, \textit{supra} note 408
\textsuperscript{492} \textit{Ibid.} Para. 9.2
child. Additionally Article 8 of the ECHR constitutes a very important legislative consideration in the context of MBU administration and it is appropriate at this point to briefly examine the development of case law relating specifically to this point in order to demonstrate the impact fundamental human rights have in this area.

(b) Review of Relevant Case Law

A relatively early case, *R v. Secretary of State ex p Hinckling* [1986], decided well before the introduction of the HRA, serves to demonstrate the unsatisfactory nature of decisions when human rights issues are left out of the equation. In this case a mother in an MBU acted in a disruptive manner and was removed from the unit in reaction to her behaviour, with the consequence that she was separated from her child who was put into care. The Court of Appeal upheld this decision and refused to allow judicial review, stating that the governor had acted reasonably in the interests of security.

Encouragingly in 1988 the European Court of Human Rights made it clear that contact was a right both of parents and children and clarified that State interference with such a right would have to be justified under Article 8(2) ECHR. Belinda Brooks-Gordon and Andrew Bainham extend this logic to the operation of prison decisions in MBUs, elucidating that “if these decisions are thought disproportionate and unnecessary, there will be a violation of the rights of both parent and child under Article 8.” It was

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494 HM Prison Service, *ibid.* at Para. 9.8 The admission criteria also set out that MBU accommodation is only available “in the best interests of the child.”
495 Supra note 49
496 *R v. Secretary of State ex p Hinckling and JH (a minor)* [1986] 1 FLR 543
497 Supra note 49; See *W and O, H and B v. United Kingdom* (1988) 10 EHRR 29
498 Brooks-Gordon and Bainham, supra note 402 at 269
therefore disappointing to see a similar separation upheld in *R v. Governor of HM Holloway Prison ex parte Sullivan* (1997) and a seemingly large degree of deference afforded to the prison service rather than any focus on human rights implications.\(^{499}\)

When the HRA came into force on 2\(^{\text{nd}}\) October 2000, officially importing the ECHR into domestic law,\(^{500}\) a new era for imprisoned mothers and their children was brought about, clearly evidenced by the emergence of the cases of *P* and *Q* [2001].\(^{501}\) These cases both involved challenges to the strict 18 month age limit for babies in MBUs. In *P* the court decided that the age limit must be adhered to for the reason that the mother’s prison sentence was very long and alternative persons were available to care for the baby. However, the result in *Q* was very different. In this case the baby was allowed to remain with its mother in the MBU, the reason being that the mother would be serving a shorter sentence and an appropriate person could not otherwise be located to care for the child. The reasoning was founded on recognition of the importance of Article 8 rights of mothers and babies and made clear that any interference with such rights would have to be fully justified. Ultimately the decision has resulted in a much more flexible MBU policy which is now more greatly responsive to “the best interests of the child”.


\(^{500}\) See *supra* note 30: s.6 of the HRA sets out that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right.” Under s.6(3) HRA the decisions of penal institutions would be covered.

\(^{501}\) *Supra* note 394
Conversely, in *R (F) v. Secretary of State for the Home Department* [2004] the decision to separate mother and child in an MBU prior to the child reaching the age of 18 months was upheld by the court as again being “in the best interests of the child”. The rationale behind this was that the child would have the opportunity to form an early bond with the person whom he / she would be placed in the long term and this would consequently reduce the distress associated with separation from the mother at a later date.

So it can be seen that MBU criteria have become more accommodating in the wake of the HRA. The next step is to expand upon the reasoning in these judgements through the application of a feminist critique which will hopefully lead to further sculpting of MBU policy.

(c) Arguments Against MBUs

Brooks-Gordon and Bainham explain that in terms of arguments against MBUs “the most commonly used is that prisons are unsuitable places for children.” Indeed, they go on to state that in a 1989 study Liza Catan discovered that babies who were kept in MBUs with their mothers for over four months experienced locomotor and cognitive decline in comparison with those babies growing up outside the prison walls. Carlen has also pinpointed separation of children in MBUs from “the extra stimulation of life beyond the prison walls” as a criticism of the system.

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502 Brooks-Gordon and Bainham, supra note 402 at 273
504 Carlen, *supra* note 64 at 24
As explained, women are generally imprisoned at greater distances from their families than men due to the smaller number of women’s prisons in the UK. This problem is exacerbated for mothers who wish to take up a place in an MBU because of the very few number of units in existence around the UK. 11 Million has very recently expressed well-founded worries that “the greater the distance between the MBU and the mother’s home, the more the contact between the baby and its father, siblings or grandparents will be significantly reduced.” The organisation points out a potential Article 8 infringement in terms of the “child’s right to family life” and explains that the current geographical placement of MBUs may leave a mother with the impossible decision of whether to stay in an MBU far from her other children, or forgo an MBU place in order to be imprisoned closer to home.

(d) Addressing Concerns

It is contended that none of the above problems highlighted by various researchers and academics are insurmountable. In the case of R v. Governor of HM Prison Holloway ex parte L (1999) the court refused to grant an application for judicial review of a decision to deny a place in an MBU to a mother and her baby. The Prison Service justification for the decision was that appropriate facilities could not be provided to accommodate the situation. Munro challenges this outcome, stating that in the wake of P and Q the result in similar circumstances may now have to be different. She explains that;

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505 See text accompanying notes 19 and 20
506 Wales, for example, has not one prison containing an MBU
507 11 Million, supra note 337 at 31
508 Ibid. See also Devlin, supra note 361 at 64 for a similar argument
509 R v. Governor of HM Prison Holloway ex parte L (1999) 23 December (unreported)
the prison service has traditionally been allowed successfully to hide behind the limitations of the current prison environment in order to justify restrictions upon the development of the mother-child relationship ... Arguably, however, the emerging rights-based approach will remove this possibility by requiring a far more compelling justification for separation. 510

The current facilities in MBUs are not perfect, although as 11 Million itself concedes, “attempts have been made to mitigate the worst of these”511 and PSO 4801 Paragraph 2.1 demonstrates a commitment on the part of the Prison Service to provide “a calm and peaceful environment”. 512 These are laudable steps forward but more must be done. Once a fully stimulating and supportive atmosphere is achieved the fears of those who see prisons as unsuitable places for children can be eased. This can be evidenced by the experience in other countries. In research for the Home Office, Diane Caddle has revealed that in the Netherlands children are allowed to remain with their mothers in the Ter Peel prison until they reach the age of four. 513 These children “have been found to have normal development.” 514 What this seems to suggest is that it is not the imprisonment of women with their children per se that is the problem but rather the current structure of the UK prison system which is failing to adequately provide for children’s needs within MBUs. Once such issues are rectified, it is suggested that the age limits for children in MBUs in the UK may be increased and may become more

510 Munro, supra note 439 at 310
511 11 Million, supra note 337 at 22
512 HM Prison Service, supra note 408 at Para. 2.1
513 Diane Caddle, Age Limits for Babies in Prison - Some Lessons from Abroad, Research Findings No. 80 (London: HMSO, 1998) at 3
514 Ibid.
flexible with no detrimental effect on the child, allowing mothers and children to remain together for greater periods of time in recognition of their Article 8 rights.

An additional explanation for any decline in development of children in MBUs may also be found in the admission criteria laid out in PSO 4801 itself.515 A study conducted in 2006 revealed that “admission criteria appear to select out women with psychiatric morbidity, child care problems, and other difficulties that may make them unsuitable for a mother and baby unit.”516 While this effect of the criteria may appear desirable, it seems that the policy allows women with depression to enter MBUs and this is a condition which “may have an adverse effect on the children’s development.”517 Perhaps then more effective programming within the prison walls and societal provision aimed at helping mothers deal with their depression more effectively pre-imprisonment would be another way of ensuring that MBUs work to further the best interests of the child. Incidentally, the same study also highlighted that “the selection process for mother and baby units may inadvertently discriminate against women with potentially treatable mental disorders” other than depression.518 If this is so, it must be suggested that in light of P and Q such an effect of the criteria may constitute a violation of mothers’ and children’s Article 8 rights under the ECHR. The Prison Service may have to rectify its admission criteria to address this problem, improve its program provision for women

515 HM Prison Service, supra note 408 at Para. 9.8
517 Ibid.
518 Ibid. at 402.
experiencing such disorders and allow more flexibility in its rules when considering accommodating women with treatable mental disorders in MBUs.

In relation to the problem highlighted concerning the distance women and children in MBUs are generally kept from their families, 11 Million has put forward proposals which have the potential to straightforwardly address the issue. The organisation looks to the recommendations of Baroness Corston, specifically her suggestion for the creation of “suitable, geographically dispersed, small, multi-functional custodial centres”. Such a scheme, say 11 Million, coupled with a drastic reduction in the numbers of women being imprisoned and more use of community sentencing, would provide a far more suitable regime, where fewer mothers would be imprisoned at the outset, meaning a greater number of offending mothers would never face separation from their children. The scattered nature of the small units would mean families would be separated by much smaller distances. As a long term plan, such proposals must be thoroughly applauded. If progress of this type were to be made, 11 Million suggests that such new geographically dispersed units could potentially admit women who have babies over 18 months of age, however they would not recommend an extension of the age limit in current MBUs or the proposed units before the introduction of a full range of community sentence alternatives which are utilised heavily by the courts. I would go one step further and recommend that in the short term prison MBU facilities could be radically improved to accommodate children over 18 months of age. If such improvements are made, overhauled MBUs have

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519 Corston, supra note 13 at 35
520 11 Million, supra note 337 at 7 and 31
521 Ibid. at 31
the potential to keep mothers and their babies together in the very near future with no detrimental impact, especially in the open prison. The Prison Service can no longer be allowed to hide behind an inadequate infrastructure in shirking its responsibilities under the HRA. It must act now to improve the situation of imprisoned mothers and their babies, while at the same time the judiciary and the legislature should be looking towards a future where imprisonment of mothers is the exception rather than the rule. MBUs will always be needed at some level; it is a case of finding the perfect mix of environmental elements which accommodate children’s needs safely yet simultaneously recognise the needs and rights of imprisoned mothers.

(e) Lessons from Canada

Federally sentenced women in Canada are in certain circumstances permitted to keep their children in prison with them. The Correctional Service of Canada provides the Mother-Child Program across the regional federal women’s facilities. The Program allows a child to remain in such a facility with his or her mother until the age of four.

Commissioner’s Directive 768 sets out that the aim of the program is “to provide a supportive environment that fosters and promotes stability and continuity for the mother-child relationship.” As in the UK the “best interests of the child” is the pre-eminent consideration in decisions relating to participation in the Program. A scheme which allows mothers to keep their children in prison with them for such a period of time in a

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523 Ibid at Para. 19 As in the UK, this age limit is flexible, since Para. 21 sets out that “alternate age limits may be considered.”
524 Ibid. at Para. 1
525 Ibid. at Para. 3
community environment is certainly attractive, however it is disappointing to see that such little use has been made of the provision. Until just recently only three federal women's prisons had made use of the Program, allowing only a few women to keep their children with them. In February 2008 the first federally sentenced woman in British Columbia was told she may serve her sentence with her newborn child in the Fraser Valley Institution. Lisa Whitford was arrested in 2006 after shooting her husband, and was sentenced to four years imprisonment for manslaughter. Ms. Whitford’s background of domestic abuse makes her typical of the female offending community both in Canada and the UK. It was the birth of her daughter which motivated her to do something about her problems. “Caring for this child gives her a sense of worthfulness, something to live for” said her lawyer, Bruce Kaun.

The UK should be taking notes on the Canadian approach and indeed Baroness Corsten’s proposals would bring the country a step closer to the Canadian scheme. Certainly the best interests of the child are the crucial factor but even in extreme cases where the mother has committed a serious crime such as manslaughter, the Canadian Program provides a mechanism to respect the continuing rights of mothers and children. The main criticism of the Canadian Mother-Child Program is that it is not used enough and while this is the case s.15 and s.7 Charter rights of both women and children may be being violated.

526 See Culbert and Bellett, supra note 393
528 Corston, supra note 13
(f) Towards a Gender Neutral Future

Extremely minimal reference is made to the role of a father in a child's life in the admission criteria for an MBU under PSO 4801. Very little emphasis is put on his involvement. Such factors are generally left to be considered under the "best interests of the child" criterion. As Brooks-Gordon and Bainham point out "it can be argued that the existence of MBUs privileges the mother's role with the child and denies the father's right of contact." While a gender neutral admission criterion of "the child's best interests" is espoused in Paragraph 9.8 of PSO 4801, this privileging of a woman's role as mother is clearly illustrated by the Prison Service through the use of statements such as "in normal circumstances in the community the best interests of the child are seen as remaining with the mother." The same approach can clearly be seen in the Canadian context in an examination of Commissioner's Directive 768 on the Mother-Child Program, where the "mother-child relationship" is continually emphasised with no regard to the role of the father in a child's life. This betrays a clear pre-occupation with the role of mother, ranking this position higher than that of father.

This treatment by a Prison Service Admission Board certainly seems to benefit female offenders, however it must be argued that such policies in fact serve to subjugate women in a wider sense by entrenching a dominant ideology of motherhood, i.e. that a woman's natural role is to look after children. While it might be argued that the policies merely

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529 Brooks-Gordon and Bainham, supra note 402 at 274
530 HM Prison Service, supra note 408 at Para. 2.2
531 Correctional Service of Canada supra note 522 at Para. 1
532 See McGlynn, supra note 116 at 33: "there remains one idealised vision of motherhood, that is 'exclusive, bonded, full-time mothering.'"
reflect the social realities of care, in actuality they are damaging in perpetuating those realities. They signal to society that a woman’s job is to care for children and that men are not supported in such endeavours. My following arguments set out to address this undesirable outcome through a comparison of child custody law which at this point once again becomes a salient consideration, debate around which may hold lessons in the context of MBU policy.

Over the last 20 years trends in UK child custody case law have shifted, purportedly becoming far more gender neutral in focus. In the 20th Century the courts preferred the mother’s role in a young child’s life; what has become known as the “tender years doctrine”. However, such a preference has since been held to be incorrect. In residence cases now, the paramount consideration is the best interests of the child, as dictated by the Children Act 1989. The case of Re S [1991] spurred development on a little, reiterating the gender neutral rule that the child’s welfare is the paramount consideration. However it was also made clear that “it was natural for young children to be with mothers, but where there was a dispute, it was a consideration rather than a presumption.” More recently, while again the best interests of the child remains the overriding factor, in assessing this, it has been held that the role of a father is very important in a child’s life. This was enunciated in both D v. D [2001] and A v. A [2004]

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533 Re A [1991] 2 FLR 394
534 Children Act 1989 (U.K.), 1989, c. 41, Part 1
535 Re S [1991] 2 FLR 388
536 Ibid.
where shared residence was ordered.\textsuperscript{537} Prima facie these cases seem to indicate a leaning towards gender neutral reasoning by the courts. The development of the law in Canada mirrors this pattern, and while such developments seem encouraging what they in fact do is mask societal realities, disadvantaging mothers in a number of distinct ways.

Professor Boyd identifies a main problem with judicial rationale “in applying this gender neutral assumption to an area of social relations which is not yet gender neutral, and where ideologies of male and female behaviour still prevail.”\textsuperscript{538} Indeed such a state of affairs is still evident in 2008. What courts seem to be doing very often when, for example they decide in favour of shared custody, is rewarding fathers who may have done very little in the way of caregiving prior to the case, in an attempt at “preserving parental contact almost at any cost.”\textsuperscript{539} In order to achieve this desire for “equality” courts are “too ready to assume that fathers who have engaged in at least minimal child care can easily adopt the role of primary caregiver of children, while minimizing the value of primary caregiving performed by mothers in the past.”\textsuperscript{540} This approach can clearly be seen in \textit{D v. D} and \textit{A v. A} where at no point did the court consider the involvement of either parent in the children’s lives \textit{prior} to divorce. It is possible that the mothers were the primary carers before separation from their partners and that the fathers only desired increased involvement upon divorce. The mothers may have put in years of childcare work and shared residence orders have the damaging potential to overlook this.

\textsuperscript{537} \textit{D v. D} [2001] 1 FLR 495 and \textit{A v. A} [2004] 1 FLR 1195 See also text accompanying notes 446-449
\textsuperscript{538} Boyd, \textit{supra} note 445 at 138
\textsuperscript{539} \textit{Ibid.} at 144
\textsuperscript{540} \textit{Ibid.} at 142
The root of the problem is the fact that in the UK and in Canada, as explained above, a gender division of work and childcare still exists. The courts are effectively attempting to paste onto society a gender neutral set of rules to address the issue of child custody and unfortunately society in itself, in reality, is not yet gender neutral. Professor Boyd explained in 1989 that:

the sexual division of labour remains largely intact, within both the heterosexual family and the paid labour force. Women continue to work mainly within ‘job ghettos’ for unequal wages, and they continue to assume the bulk of responsibility for domestic labour and child care in the home.

More recently, Richard Collier goes so far as to note that “research suggests something more akin to a widespread resistance, stalling, and reluctance to change on the part of men.” If such reasoning is applied in the context of MBU policy it is arguable that any shift in criteria which gives more weight to the role of a father in the child’s life may in fact be a premature development. Any purportedly gender neutral policy which automatically considers male caregiving as equal to female caregiving standards or which places greater value on the child care practices of the father than are demonstrated

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541 See ibid. at 148
542 Boyd, supra note 272 at 6-7 See also Jennifer L. Pierce, “‘Not Qualified?’ or ‘Not Committed?’ A Raced and Gendered Organisational Logic in Law Firms” in Reza Banakar and Max Travers, eds., An Introduction to Law and Social Theory (Oxford; Portland, Oregon: Hart Publishing, 2002) 155 Pierce finds that women are disadvantaged in the public sphere through an examination of women in the legal sector. Her study reveals that women in this sector are seen as “not committed”. This assumption hampers promotion, leading to males dominating in prominent positions within law firms. The logical outcome of this is that women are more likely to leave work upon having a child than men, since it makes economic sense for a man in a higher paid job to continue a breadwinning role. This process works to perpetuate the public/private divide.
543 Collier, supra note 446 at 537-538
in reality,\textsuperscript{544} may simply constitute a denial of the truth, i.e. that fathers may only want to become involved in the child’s life in any meaningful sense once separation is threatened by the mother’s potential imprisonment in an MBU. To give more weight to the fathering role than is deserved may certainly undermine the mothering role and to give care of the child to a father in such circumstances may deprive a mother of a child she has cared for, while rewarding a father for the little effort he has contributed. Despite this, there will be some fathers who, after investigation by the authorities, are found genuinely to be the primary or sole carer of a child. In response to this fact, father and baby units should be created in male prisons to accommodate the (present minority) of male prisoners who are prominently active in a childcare capacity. However there is no justification for adopting an MBU admission policy which automatically assumes equality of input by both fathers and mothers, or which places too much emphasis on any small amount of childcaring a father happens to do.

Conversely, an MBU admission policy which focuses too greatly on the role of a mother in a child’s life, as arguably the current criteria do, can also not be supported. As has been explained, and as Professor Clare McGlynn warns; “privileging of the mother-child relationship, replicates traditional assumptions about the separate spheres of the sexes”, which she says “legitimates the existing sexual division of labour”.\textsuperscript{545} This argument can be applied equally to MBU admission decisions and child residence disputes. Indeed the

\textsuperscript{544} By this I am hinting at an Admission Board policy in decisions which results in something akin to shared residence, e.g. the baby spending half the time with his or her mother in prison and half the time with the father outside prison, or a decision which gives full care to the father, denying an MBU place to mother and child.

\textsuperscript{545} McGlynn, \textit{supra} note 116 at 34
current Prison Service approach does appear to have the effect of further engraining in society the assumption that mothers are more uniquely suited to childcare responsibilities.

So the question remains: where should the balance lie? It is recommended that a truly gender neutral stance be adopted which is capable of recognising and responding to societal reality. The reasoning in cases such as *D v. D* and *A v. A* takes things too far, placing too much weight on a fathering role which in reality is generally not yet up to standard, in a desperate attempt to achieve the highest level of contact with both parents.546

The “best interests of the child” criterion must therefore be interpreted so as to allow a consideration of the role of “primary caregiver.”547 As has been mentioned, PSO 4801 attempts to remain gender neutral, however the Order betrays a preference for the mothering role.548 The assessment should be based on the reality of who took on the role of primary caregiver prior to imprisonment. Such a standard allows a father who has truly assumed primary childcare responsibilities to be considered the appropriate person

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546 *Supra* note 537 and accompanying text. See also Collier, *supra* note 446 at 527: Collier explains that research shows the reason judges are so eager to recognise and reward even minimal input of fathers into childcare routines is “the belief that the promotion and encouragement of ‘active parenting’ on the part of men is something which is, or should be, a desirable objective ...”

547 It must be remembered that families are constructed in many different ways. The gender neutral criterion of “primary caregiver” is actively able to accommodate all configurations of familial unit. It would for example, be an appropriate principle to apply in a decision involving a woman who is a lesbian co-parent. The woman in prison would have to show that she took a primary role in childcare labour in order to be granted a place in an MBU. The same standard could be applied equally to male homosexual co-parents, although this would require the establishment of father and baby units, a possibility discussed below. That the primary caregiver standard is capable of encompassing such a diverse range of situations makes its use all the more appealing in decisions relating to parenthood in prison.

548 See text accompanying note 530
for the child to stay with during the mother's imprisonment, presenting a legitimate and justifiable reason for denying a mother and child an MBU place, yet the same standard also respects a woman's caregiving function where that dominates in reality. However, to achieve substantive equality, such decisions may have to take into account female prisoner's experiences. Once again, it is appropriate to take the example of the greater distance mothers are in general imprisoned from their families in order to explain how substantive equality might work here. If both a mother and father share equally in childcare responsibilities, the fact a mother is imprisoned farther away might be allowed to tip the balance in favour of her keeping the child in custody with her. The same decision relating to a male prisoner who desires to keep his child in prison with him (something unheard of at present but a concept discussed below) would have to take into account that he is imprisoned closer to his family and as such would potentially be able to have increased contact with the child, thus the distance factor would not tip the balance in favour of him retaining the child in prison with him. The different approach to the two genders is necessitated by the genuine difference in the distance the prisoners are kept from home and results in a fair outcome.

If such measures are adopted, what needs to happen in society in a general sense is a breakdown of the public / private divide, as referred to above. Professor Boyd has advocated a similar use of the “primary caregiver presumption” in the child custody context and emphasises that if such a criterion is utilised “we must work towards legal and social policies which potentially enhance greater social responsibility for child care
and a wider range of choices for women in both ‘private’ and ‘public’ spheres. In order for such a presumption to operate positively for both sexes in the context of MBUs, fathers must become more involved in childcare. In this way reality and policy will have a chance to knit together to produce gender neutral outcomes which reflect a gender neutral world. To achieve a breakdown of the walls separating economic and child-raising work will undoubtedly not be easy, though it might be suggested that a good place to start tackling gendered roles be education of children at an early age in order to begin to facilitate a change in societal thinking. As expressed above, this is not to imply that education is the only way of dealing with the economic / domestic rift, just that children are the future of our society and as such have the potential to create a more gender neutral world if only they are encouraged to adopt gender neutral viewpoints. Hopefully sowing the seeds of gender neutrality in today’s children will begin a trickle down effect of knowledge and ideas through the generations which has a real chance of spawning far reaching social change.

Such a proposal additionally addresses the worrying statistic that around two thirds of women in prison are single. While the gender neutral presumption in favour of the primary caregiver in MBU admission decisions will benefit such women at present, such a focus in child custody law will also be to their advantage. However, as society’s views concerning male and female appropriate work patterns become more relaxed and fathers take a more active role in parenting, the result should be that more fathers gain

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549 Boyd, supra note 445 at 153 See also pages 175-179 above for comments on a range of potential initiatives which may help to break down the public / private divide of gendered labour
550 Social Exclusion Unit, supra note 16 at 137
residence or sole custody of their children. The knock-on effect of this would be that fewer women in prison would be primary caregivers and MBU policy would see the child remain with the father in an increased number of cases. This development would reflect a gender neutral world where the rights of both mothers and fathers are given due respect and the work done by each valued equally and fairly.\textsuperscript{551} As has been explained, in the long term, a dramatic reduction in the numbers of women imprisoned is hoped for which would necessitate a reduction in the need for MBU places. However, while ever women are being imprisoned (and it seems there will always be at least some need for incarceration even if we are to reduce imprisonment, as Baroness Corston suggests, through non-custodial sentences for non-violent offenders) MBUs will be required. The gender neutral arguments and proposals I have made in the hope of seeing more men become actively involved in childcare would, in any case, reduce the need for MBUs still further.

The above specifically addresses the issue of imprisoned women with young children. Where should the focus be though when the child is newborn or when a woman gives birth in custody? This is not an easy question to answer but it is submitted that fathers’ rights cannot be left out of the equation. Perhaps where a female inmate already has children, the role the father plays in caregiving in relation to those children should be considered in again applying a primary caregiver presumption. Otherwise “the best interests of the child” should be discerned in reliance on factual evidence of the ability of

\textsuperscript{551} See Boyd, \textit{supra} note 445 at 150 This would address the problem Professor Boyd highlights, that “judges tend to emphasize current and future participation in child care, often with an overly generous evaluation of any fatherly participation in parenting and good intentions for the future, and an overly punitive evaluation of any motherly deviation from full-time mothering, including those in the past.”
each parent to look after the child. The reasoning in *R (F) v. Secretary of State for the Home Department* [2004] discussed above is rather persuasive – separation some time before the MBU age limit may be desirable if the mother will be imprisoned for a very great period of time, in order that the ultimate primary caregiver be allowed to bond with the child (although if age limits are to rise, as I suggest this may be of less concern). Greater encouragement for men to take on more domestic roles would sit well with this approach, paving the way for a future where a larger number of men are more suited to care for a child while the mother is in prison; MBU admission criteria should take account of such factors. Another possibility is that, all things being equal between the two parents, and assuming radically improved MBU facilities, the sense of “worthfulness” which being able to keep a child in prison may give a female inmate, could be allowed to tip the balance in favour of the mother.\(^{552}\)

One final point that must be raised is the lack of crucial debate around the absence of “father and baby units”. There is evident recognition of the fact that “attachment between babies and their mothers or primary caregivers starts in the early stages of life” (emphasis added) but little acknowledgement of the fact that in some cases the primary caregiver may be an imprisoned father.\(^{553}\) Brooks-Gordon and Bainham for example, point to a Prison Service document published in 1999, entitled *Report of a Review of Principles, Policies and Procedures on Mothers and Babies / Children in Prison*, which

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\(^{552}\) Gandhi, *supra* note 527 at S3 See also Culbert and Bellett, *supra* note 393 at A1 where Professor Jackson has commented that “it’s not an argument that we should send some more kids to prison, but it does have an amazing impact on the atmosphere in prison. Playing with a child or a baby brings out the best in people, really.” In terms of social policy aimed at reformation of female inmates such considerations may be pertinent in MBU decisions.

\(^{553}\) 11 Million, *supra* note 337 at 19
made suggestions as to the proper ambit of MBU policy, in backing up such a notion.\textsuperscript{554}

"Way down the list", they say, "was the investigation of the needs of male prisoners who are fathers, have parental responsibility, or were primary carers before imprisonment."\textsuperscript{555}

Indeed the existence of MBUs without the corresponding provision of father and baby units seems to signal once again that women are best suited to child caring, entrenching this damaging stereotype further.

What then is to happen where an incarcerated father is the sole or primary caregiver to a child? At present, relying upon the reasoning in \textit{P} and \textit{Q} it appears that fathers and their children may be being denied their Article 8 rights to respect for their private and family lives based on the total lack of provision for fathers to stay with their babies in prison. Just as Munro would argue, such a violation of Article 8(1) may not be justifiable under Article 8(2), since it may be though a disproportionate and unnecessary interference with both fathers' and children's lives to deny them an opportunity to form a bond or to continue to bond in the prison context.\textsuperscript{556} The Prison Service could construct specific and appropriate units to accommodate imprisoned fathers and their children and arguably should not be able to justify this blatant denial of rights on the basis of infrastructural inadequacies. Taking this argument to its logical conclusion, a male prisoner who wishes to care for his child in prison may have a claim under Article 14 of the ECHR on the basis that he is discriminated against in relation to his Article 8 rights on the basis of

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\textsuperscript{555} Brooks-Gordon and Bainham, \textit{ibid.}
\textsuperscript{556} Munro, \textit{supra} note 439 at 310-311 Also see \textit{supra} note 49 for the text of Article 8 ECHR
\end{flushright}
sex. A similar argument could be made by a male Canadian prisoner who would also find himself denied the opportunity to care for his child in prison: His equality rights are arguably being violated by the Correctional Service of Canada under s.15(1) of the Canadian Charter of Rights and Freedoms. The argument could proceed on the basis of sex – that female inmates have access to superior facilities, or perhaps on the basis of “family status” which is likely an analogous ground of discrimination under s.15(1). It is possible however that justifications may be put forward for the discriminatory treatment in reliance on s.1 of the Charter, which states that; “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

For example, it may be argued that there is not a large enough number of men who require father and baby facilities to make alterations to the male prison structure necessary. It might also be argued that any such alterations would simply be too expensive. The same arguments might be made under Article 8(2) of the ECHR which allows interference of the Article 8(1) right in accordance with “the economic well-being of the country”.

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557 See supra note 32 for Article 14 of the ECHR
558 See supra note 34 for s.15(1) of the Charter
559 “Family status” is likely to be found analogous under s.15 of the Charter, especially since “marital status” has already been held to be an analogous ground in Miron v. Trudel [1995] 2 S.C.R. 418
560 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s.1
561 Supra note 49
If, as I suggest must happen, the public/private divide is to dissolve and more men begin to take on childcare responsibilities, the need for father and baby units may become self-evident. Any justifications for failing to establish father and baby units would be revealed to be unfounded as the need for them rises. Much work has been done on bringing down the walls of the public/private divide over a very long period of time and to date the gender division of labour remains mostly in tact. Bringing about change will not be easy but it is something to which we must aspire. In light of this, work must ferociously continue with a view to achieving gender neutrality in the economic and domestic realms. Additionally, we should begin to put pressure on prison authorities now to agree to accommodate fathers who are primary or sole caregivers and should continue to apply this pressure as societal boundaries shift and the need for such provision becomes greater. This approach is applicable and indeed desirable in both the UK and Canadian contexts.

4. Conclusion

Gender neutrality as an approach to decision-making which touches upon the lives of women with children in the criminal justice system is undoubtedly an ambitious target given the range of assumptions and stereotypes which persist around such issues. Where a gender neutral framework has been attempted already there appears to be a tension between judicial reasoning and social truth which has resulted in the de-valuing of female work, an example of which being decisions in UK child residence disputes.
This chapter has sought to re-draw the boundaries of gender neutral thinking in a manner applicable to decisions concerning the sentencing of mothers and decisions revolving around female inmates’ access to MBUs. The aim has been to devise a system which will allow a valuing of the primary caregiving role where it exists whilst eradicating assumptions about motherhood which serve to entrench outdated ideologies. An essential parallel initiative of the proposals is a re-structuring of society’s traditional gender roles which ideally would result in a greater number of men taking on the primary caregiving function. Social adaption of sufficient scale would result in decisions which encapsulate more equal numbers of male and female offenders, producing a more balanced system.

Despite a desire to see gender neutral principles fully utilised, there are aspects of female imprisonment which are disproportionately severe in comparison with the male prison experience and it must be considered appropriate to take such realities into account in any evaluation, while at the same time working to improve female incarcerative conditions in the long term.

While certain differences do exist in judicial and penal decision making in Canada and the UK, the recommendations made in this paper would address concerns evident in both countries. As has been stressed, the long term vision of reduced female (and potentially male) incarceration is pivotal in ensuring equality and fair treatment of offenders with
children. The greater the number of offenders dealt with in the community, the greater the number of families which will retain their primary caregiver, and this as a top priority, is what should be driving both sentencing and penal reformers in the coming years.

562 See Carlen, supra note 58 for her recommendation to eventually extend the treatment to the male prison system, reducing the numbers of male inmates drastically also
V. CONCLUSION

Numerous attempts have been made to reform the UK women’s prison system over the years. Report after report has been published in the growing effort to draw attention to the array of problems posed by the structure and the policy of the current regime. With each paper released, the situation is revealed to be getting a little more desperate. More women are being locked away, more mothers are being separated from their families, more inmates are harming themselves, taking their own lives in response to submersion in a world they do not understand and cannot cope with. It is a prison system not designed for them, a counterproductive cage into which thousands of women are being thoughtlessly thrown.

Yet still these women remain largely invisible, their pain and suffering shielded from view by a number of complex and interwoven processes. The media, governmental attitude, statistical misrepresentation, the overwhelming weight of the male prison system: these factors all contribute to the silencing of prison reformers who work for “woman-centred” development and help to legitimate the current criminal justice constitution. Not only do these forces perpetuate outdated penal policies, they also contribute to the wider disadvantaging of the female gender. Stereotypical views and attitudes concerning appropriate feminine roles and behaviour simply become further embedded in society.

563 See Devlin, supra note 361
These are not trivial and insignificant issues. A number of potential human rights violations can be pinpointed in the current system, including an abundance of arguable Article 8 ECHR abuses. Possible Article 14 sex discrimination infringements are also identifiable on the basis that women are effectively being subjected to a much more harsh and difficult prison environment than their male counterparts. With the introduction of the new Gender Equality Duty the time is certainly right for change and human rights issues should be swiftly dealt with. The duty represents a welcome realisation that formal equality is an inappropriate and archaic standard to apply, invariably resulting in unequal outcomes. The focus must now be on achieving substantive equality and it is encouraging that Baroness Corston so clearly enunciated this point in her report.

It is clear that something has to change. Society as a whole must begin to take the deplorable state of the female incarcerative system seriously. Governmental efforts at prison reform to date are patchy at best, many projects culminating in a lack of significant change and often, arguably abject failure. What can be concluded from this is that the baby steps the Government seems content to take are not nearly enough. Large scale, comprehensive change, meaningful change on all levels throughout society as well as directly throughout the prison system itself is called for.

\[^{564}\text{Supra note 49}\]
\[^{565}\text{Supra note 32}\]
\[^{566}\text{Supra note 192}\]
\[^{567}\text{See text accompanying note 206}\]
\[^{568}\text{For example, the failed Redevelopment of Holloway Prison: See page 134 above. The poor conditions throughout the female prison system in the UK additionally illustrate its most dramatic failures.}\]
The UK is fortunate in having the opportunity to draw on a number of experiences in the Canadian female penal context in making its next reformatory moves. Canadian incarceration has faced similar challenges to those levelled at the UK system. The women's prison system in Canada once very much resembled that of the UK, blighted by inequality and suffering. For example, the Prison for Women was a far cry from the sensitive well-tailored prison regime desperately required by federal female offenders. Its heavy handed, desolate atmosphere resulted only in the worsening of the existence of a group comprised largely of victimised and vulnerable women. Yes, mistakes have been made by the Canadian government and by penal reformers. Mistakes will always be made on the road to success. This is almost inevitable. It is a process of evolution, a system forming and reforming, being reconstituted in a struggle to reach perfection. This is not to say that Canada has attained this lofty penal goal, far from it. However, it has evolved a stage further than the UK, a step closer to a more responsive and effective scheme for female imprisonment. The UK has the chance to learn not only from the successes seen in Canada but also from the mistakes made along the way thus far. We should be looking to mould these experiences into a well planned, appropriate and suitable female prison system which is both productive and progressive.\(^{569}\) Perhaps most importantly, the Task Force on Federally Sentenced Women managed to put proposals for federal female prison reform on the table in 1990 through *Creating Choices*, sparking the desperately required age of "woman-centred" corrections.\(^{570}\) The UK cannot miss

\(^{569}\) At present, the system is benefitting no one. It is failing to do anything to improve the circumstances of the many vulnerable, victimised women who are sent to prison each year in greater and greater numbers, and it is failing to do anything to materially improve society more generally. Re-offending rates are still high (see text accompanying note 7) and women are still dying in prison. For the prison system to ever be productive the scope of its operation needs radically altering.

\(^{570}\) See text accompanying note 287
this opportunity to learn from the document and its implementation, recognising the successes but also taking note of the avoidable problems that the Task Force exposed itself to which ultimately led to a degree of failure in the new system it spawned. Effective reform is possible if only the UK Government will begin to truly listen, and listen carefully.

What UK penal reform history tells us, and what the Canadian story reaffirms, is that re-developing a well-ingrained system is no easy feat. There is no simple answer – a tweak here and there will achieve very little. Reform must necessarily consist of numerous strands of action knitted together to produce an effective, substantively equal criminal justice regime for women. At the outset it is important to appreciate that there is an inevitable tension between the need for immediate action to improve prison conditions at present and the need for deeper, strategic change. The overarching proposals I make in this thesis therefore come in two varieties, as did those of Creating Choice: long term and short term. It has long been realised that change on two levels is necessary for workable reform; rigorous improvement of the current model of imprisonment, benefitting female offenders in the short term, need not come at the expense of long term success assuming the ultimate goal of reduced use of custody is not lost sight of. In order to minimise the prospect of failure however, the time period between the transition to a totally overhauled prison structure must be minimised to as great an extent as possible.
There are a number of short term initiatives which require immediate implementation. To begin with, the amenities provided in the current prison establishments for women are highly inadequate and must be modernised and improved upon substantially if they are to meet the distinctive needs of female inmates. This must involve adequate provision of hygiene facilities, a greater range of more appropriate prison programs and more effective training of staff to ensure they are able to deal with the various reactions of female offenders in prison. In general, the facilities and the structure must be more suitably tailored to recognise and respond to the unique ways in which women experience prison, illustrating an understanding that males and females react differently in incarcerative settings.

Additionally, visiting facilities must be enhanced and access to familial contact actively facilitated by the Prison Service, in recognition of the generally greater difficulties faced by women as opposed to men with respect to separation from family and especially children. Linked to this, immediate attention should be paid to Mother and Baby Unit provision. At present, there are too many barriers to access, especially in the form of infrastructural excuses. Investment in significant improvement of MBUs should result in an extension of baby age limits for access, something fully justified in order to bring Prison Service policy in line with Article 8 of the ECHR.

Decision making policy relating to mothers facing the criminal justice system also needs rapidly reformulating. Currently the determinations of officials are disadvantaging women in many respects, from entrenching ideological assumptions about womanhood
to unjustifiably denying female inmates care of their children in prison. Both in sentencing and ruling on MBU access, the ambit of such decisions is clearly detrimental to females. The grounds upon which such decisions are made evidently need to be manifestly altered. The starting point in any decision involving mothers should be a gender neutral presumption that a primary caregiving role will result in ameliorative sentencing or access to an MBU. Such a presumption could then be rebutted by weighing in female prison experience in a bid to achieve substantive equality. Consequently, ideological assumptions about motherhood could be avoided while making fair decisions which take account of the reality of inequality presently running through the system. A simultaneous line of reform efforts will be required to address these inequalities, importantly for example via gender neutral education of children, criminal justice staff and the public in general. This must continue in order to achieve the ultimate long term goal of a society characterised by gender neutrality, the hope being that decisions pertaining to the incarceration of mothers may proceed on a purely gender neutral basis, reflecting the elimination of social inequality.

Ideally, a reduction in the number of women being sentenced to prison should be realised immediately. A range of strategies will help to make this a reality. Greater reliance on community measures rather than custodial sentences is essential, as is the immediate improvement of societal support to help in directing women away from the criminally justice system, pre-empting female offending behaviour. Once again, long term social restructuring through gender neutral education and the facilitation of greater female
involvement in public economic work and male involvement in private childcare work would help to reduce social gender inequalities which contribute to female offending.

With a major reduction in the number of women incarcerated, the need for a smaller, yet efficiently responsive and carefully planned custodial system will become evident. Planning for this development must begin now, drawing heavily upon Baroness Corston's proposals and leaning upon the experience of the Task Force in Canada to ensure a smooth development process, consisting of input from female offenders themselves and the voluntary sector; the UK Government must not be left unchecked to once again make the mistakes of the past. The Canadian federal women's regional prisons should be extensively researched and a solid commitment made to the production in the UK of units similar in style and purpose, a "women-centred" development of custodial provision emerging. These units must be suitable for all female prisoners, no holes must be left in the planning – a direct and very important lesson from Creating Choices.

Failure to learn from past mistakes will be disastrous. More women will lose their lives. What I propose in this thesis is not a range of bizarre initiatives, plucked out of thin air; many of these ideas have indeed been recommended by other prison reformers. I am simply taking things one step further, building upon what is already evident to many and highlighting that there are countless sources of invaluable experience which the UK Government may exploit to great social and penal advantage, pushing reform forward.
While the proposals I have detailed throughout this work are carefully picked from and adapted reliant upon North American penal history, as explained the Canadian federal prison system has not yet reached its evolutionary peak. Misconceptions surrounding the female offender, inadequacies and inequality in sentencing decisions and the prison structure itself persist. To a large extent the provincial female prison system suffers from the same inequalities and problems plaguing the UK structure. Women are still dying in Canadian prisons and while this is the case prison reform is unmistakeably incomplete. The range of recommendations put forward for beneficial development of the UK system are therefore also pertinent in the Canadian context; the regional women’s prisons must not mark the furthest development of feminist approach to penal reform in Canada, for there is still a long way to go. Unfortunately in the UK, the Government’s current apathetical demeanour is disheartening. It is to be hoped that groups and individuals such as the Fawcett Society, the Prison Reform Trust, 11 Million and Baroness Corston continue with their exemplary work in this area; perhaps one day the country will truly show a commitment to driving forward substantial, comprehensive reform. What is now imperative is that the Government rapidly acknowledges that actions speak louder than yet more reviews and investigative projects which are merely destined to recommend what has already been recommended so many times before, and accept that the time for ACTION is most definitely NOW!571

571 Task Force on Federally Sentenced Women, supra note 21 at 158 See also Ministry of Justice, supra note 330 at 9 where Government stalling tactics can be identified.
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