

DRUG MULES, DRUG MOMS AND CRIMINAL JUSTICE: MOTHERING AND REDEMPTION IN FILM AND IN LAW

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1. INTRODUCTION

This article analyzes the representations of motherhood in sentencing decisions and in two international films, *Maria Full of Grace* and *Clean*, where drug involvement was a factor. The article provides an important example of how analysis of film provides lawyers and decision-makers with a way into understanding legal constructions of motherhood that have deep and systemic implications.

In the cases and the films discussed in this paper, the main character or the “offender” was either a trafficker bringing drugs across international boundaries, a user of illicit narcotics or both. The international drug trafficking cases before the court in *R v. Hamilton*, at both the lower court and the appellate levels, are the mainstay of our investigation.¹ *R. v. Hamilton* determines the sentences for two Jamaican women living in Toronto and convicted of importing cocaine in violation of the *Controlled Drugs and Substances Act*.² Both women, Marsha Hamilton and Donna Mason, were granted conditional sentences of imprisonment by the lower court judge, who took direction from subsection 718.2(e) of the *Criminal Code*, the stated aims of which are de-incarceration and the consideration of race-based disadvantage, particularly for Aboriginal offenders.

This case was featured in the mainstream media and has engaged scholars and decision-makers in debates on the appropriate response of the criminal justice system.³ For a brief period of time, chivalry (modestly) trumped drug war ideology in sentencing cases for traffickers whose offences were spawned by disadvantage due

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¹ *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114, [2003] O.J. No. 532 (Ont. Sup. Ct. J.) (QL) [*Hamilton*, Superior Court] and *R. v. Hamilton* (2004), 72 O.R. (3d) 1, [2004] O.J. No. 3252 (C.A.) (QL) [*Hamilton*, Court of Appeal].

² *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

³ See for example Carmela Murdocca, “National Responsibility and Systemic Racism in Criminal Sentencing: The Case of *R. v. Hamilton*” in Nicholas Blomley and Sean Robertson, eds., *The Place of Justice* (Vancouver: Fernwood Publishing, 2006) 67.

to race, gender and class.⁴ Relying on section 718.2(e), the judge crafted arguments that imprisonment outside of an institution was appropriate due to the influence of systemic racism on the criminal involvement of Ms. Hamilton and Ms. Mason. The sentences were ultimately overturned by the Court of Appeal for Ontario, which stated that drug trafficking was too significant to warrant community-based justice. While imprisonment was mandated, the Court of Appeal ordered that both women could serve out their conditional sentences.

At both levels, however, the courts positioned themselves as fair and even compassionate arbitrators of drug-related crimes by drawing from the discourse of restoration and re-integration. The offenders' capacities as mothers were influential on whether a restorative or conditional sentence was appropriate. *R. v. Spencer*,⁵ decided in the same timeframe, further illustrates the influence of care-giving on sentencing, particularly in the restorative-based context established by section 718.2. Ms. Spencer, who was not deemed to have acted altruistically, was ordered by the Ontario Court of Appeal to serve her sentence in a custodial setting.

The decision in *R. v. Hamilton* has been reviewed elsewhere. It appeared to us that examining the role that motherhood played in the sentencing determinations was a subject that warranted further investigation.⁶ Scholars have alternatively praised the cases for advancing restorative sentencing and critiqued them for reifying gender and race in sentencing determinations.⁷ The role that women's care-giving plays in the courts' decisions on when a conditional sentence is the appropriate sanction for the illegal transportation of drugs—the feature of the decisions that remains underexplored—is examined throughout this paper.

This work fuses the worlds of visual media (film) and text (case law) to see if patterns of the representation of women of colour necessarily adhere to proscriptions of the “good mother.” The issue of whether motherhood hinders or “helps” the women avoid punishment is examined. As insightful as the films are for their honest and bleak portrayal of the protagonist, we question whether they accept or counter the dominant society's vilification of drug involvement, particularly for women of colour. In particular, the work of feminist criminologist Dianne Martin on the theory of race and

⁴ Dianne L. Martin, “Casualties of the Criminal Justice System: Women and Justice Under the War on Drugs” (1993) 6 Can. J. Women & L. 305 at 312.

⁵ *R. v. Spencer* (2004), 72 O.R. (3d) 47, 241 D.L.R. (4th) 542 (C.A.).

⁶ See for example Murdocca, *supra* note 3.

⁷ See Josephine Savarese, “Gladue was a Woman: The Importance of Gender in Restorative-Based Sentencing” in Elizabeth Elliott & Robert M. Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland, OR: Willan Publishing, 2005) for one of the author's earlier thinking on the cases, which has expanded through the insights of other critical scholars such as R. Devlin and M. Sherrard, “The Big Chill?: Contextual Judgment after *R. v. Hamilton*” (2005) 28:2 Dal. L.J. 409.

law in relation to the drug war is looked at to explain the intersections. The claim that courts respond in problematic ways to the (usually racialized) woman who embodies what are taken to be the contradictory social subjects of the nurturing mother and the deviant criminal is emphasized in Martin's work. This paper restates her claims and illustrates them with contemporary examples.

2. MOTHERING AND RESTORATIVE JUSTICE

Due to the centrality of motherhood, the cases appeared to have direct connections to two international films: *Maria Full of Grace* and *Clean*. The films resemble the cases because they feature women involved in the drug trade. In *Maria Full of Grace*, the protagonist, Maria, is a drug trafficker and a "swallow" who has carried cocaine into the United States inside her body cavity. Maria's pregnancy is essential to the outcome of the film. In *Clean*, the main character, Emily, is a drug user and addict. Her effort to re-establish a connection with her son, Jay, is the main theme of the movie.

In developing this paper, we were curious about the ways that mothering assists filmmakers and the courts in navigating the strains that occur when characters, often with sympathetic motives, are involved in the highly stigmatized world of drug use. In relation to the criminal law, we wanted to explore whether the presence of children permitted the courts to valorize altruistic mothering while allowing them to avoid social policy critiques on the collapse of the social safety net. The cases focus on individual accountability, suggesting that black men's failure to provide for their offspring was the source of the women's impoverishment. As a result, the cases mask the state's failure to adequately provide for women and children, particularly racialized women and children, through full employment, the achievement of substantive equality, or the establishment of an adequate social-welfare system.

In the lower courts, the judges were sympathetic to what they construed as the defendants' predicament of impoverished motherhood. In the appellate decisions, the courts responded differently to the specific coalescences of race-gender-class-motherhood. They make several arguments: that it is "aggravating" for a mother to import drugs that harm (other women's) children; that harsh deterrent sentencing is required to send a message on the harms of illegal drug use, that the mothering by poor black women burdens Canada through social assistance reliance and criminality.

3. MOTHERING IN THE CRIMINAL LAW: *R. v. Z.Z.V.F.*

As a starting point, the case of *R. v. Z.Z.V.F.* provides a clear indication of the tensions sought to be illustrated in this paper.⁸ *R. v. Z.Z.V.F.* predated and provided authority for *R. v. Hamilton*, although this is not specifically stated by the trial judge. Decided in 2000, the Court broke with the tradition of imposing custodial sentences for drug

⁸ *R. v. Z.Z.V.F.*, [2000] O.J. No. 5222 (Ont. Ct. J.) (QL).

trafficking offenses that were common prior to the revisions of the *Criminal Code* in 1996.⁹ Duncan J. emphasized the importance of individualized sentencing and the need to consider alternatives to incarceration, where appropriate. The Court broke with the pattern of overemphasizing the sentencing principle of general deterrence typically stressed in drug-trafficking cases. Notably, the sentence in *R. v. Z.Z.V.F.* was not appealed—thus the case escaped the debate and scrutiny granted to *R. v. Hamilton* and, to a lesser extent, *R. v. Spencer*.

In justifying the conditional sentence, the Court goes through a lengthy description of the facts. Z.Z.V.F. was a young 23-year-old mother of three children, ages 7, 5, and 4, surviving on a limited income. Z.Z.V.F. presented favourably to the Court, which lauded her for perseverance in job-readiness programming and for her devotion to her children. According to the Court, she possessed “an indefinable spark” distinguishing her from the “usual customers.”¹⁰ A friend encouraged her to work as a courier transporting hash or “gum” and Z.Z.V.F. stated that her involvement as a drug courier resulted from her impoverishment. While in Jamaica, the plan went awry. Placed in a locked room, Z.Z.V.F. was ordered to insert a cocaine-filled pouch in her vagina.

Z.Z.V.F.’s desperate straits and economic need were accepted as a strong factor in the commission of the offence. She supported herself and her three children on welfare payments and the “baby bonus” totaling \$1,285 per month. She received no child maintenance from either of the two men that fathered her children. The court summarized Z.Z.V.F.’s acute financial challenges and their influence on her criminal involvement:

Around July 1998, she was feeling particular financial pressures. The children’s bunks were broken and they were sleeping on the floor. Her oldest child would be starting school in the fall.¹¹

Because her circumstances were desperate, Z.Z.V.F. decided to serve as a drug courier on this one occasion. Her inexperience and her altruistic motivations led the court to impose a community-based sentence. The negative impact that imprisonment could have on the children is also emphasized in the sentencing decision. It was noted that:

The defendant is still the sole caregiver to her 3 children, now aged 7, 5 and 4. If the defendant is incarcerated, the younger two will be taken in by their father who has provided little financial or other support in their lives

⁹ See, for example, Hill J.’s overview of the case law on sentencing for drug trafficking in *Hamilton*, Superior Court, *supra* note 1 at paras. 70-101.

¹⁰ *Supra* note 8 at para. 23.

¹¹ *Ibid.* at para. 16.

to date. The older girl would have to go into foster care through [Children's Aid Society].¹²

Z. Z. V. F.'s parenting was a strong factor in the Court's decision to impose a community-based sentence. While "good mothering" kept Z.Z.V.F. from a sentence in an institution, it failed to rescue her from the criminalization experience. In one of the final paragraphs in the judgment, the judge emphasizes that "the defendant will spend over 6 years under restraint and supervision of court order."¹³ The time Z.Z.V.F. would spend under the supervision and control of the justice system is longer under the community-based sentence imposed than it would have been had an institutional sentence been ordered.

4. DISCUSSION OF THE INTERNATIONAL FILMS

Maria Full of Grace

In keeping with the theme of law and film, two international films were viewed and analyzed to investigate the prominence of the mothering as a powerful social policy trope in cultural and legal institutions. Joshua Marston's 2004 film *Maria Full of Grace* takes the viewer inside the world of international drug couriership through the protagonist, Maria. After losing her job and discovering that she is pregnant by a young man that she tolerates rather than loves, 17-year-old Maria becomes a "mule" who couriers narcotics into the United States from Colombia. While in transit she meets up with Blanca, an acquaintance with whom she shares a similar fate. Frustrated with life in an impoverished nation, family demands and low-paying work, Maria and Blanca swallowed heroin-filled rubber pellets for delivery to dealers for street distribution.

At one point, Maria is detained at a customs checkpoint, but she avoids arrest when the border agents discover that she is pregnant and, to avoid harming the fetus, refuse to x-ray her to confirm their suspicions that she is transporting illegal substances. The remainder of the film leads the viewer through the harrowing world of the illegal drug underground, complete with the drug overdose of another courier named Lucy, ruthless dealers, and disappointed family members troubled by the involvement of the young women in the drug trade. Maria and Blanca resolutely maneuver this new world with courage and determination to beat the odds. By uniting forces, they manage to escape serious danger.

However, tensions surface at times. In a pivotal scene, Maria is chastised by Blanca for her choice to traffic the drugs. Blanca's anger results from her belief that Maria has endangered the developing fetus. Alarmed, Maria heads to a medical clinic where is assured that she has not harmed the potential newborn. Maria is joyful and

¹² *Ibid.* at para. 22.

¹³ *Ibid.* at para. 47.

relieved—she is truly filled with goodness or grace. Her future as a mother instills the courage needed to break away from her old life of destitution and struggle to start a new life in the more prosperous United States. The unborn child frees Maria from the stigma and stain of the illegal drug world she entered.

Maria does not completely avoid penalty and sanction, for she endures considerable hardship in an unfamiliar city where she has limited support to forestall the street dealers that she has shortchanged. When the film concludes, however, she has avoided the serious penalties of a lengthy jail term from a trafficking conviction or death at the hands of the dealers. Throughout the film, Maria's pregnancy is read as a pathway towards redemption from her impoverished origins and her restrictive life in Colombia. While the United States is not entirely presented as the "land of milk and honey," the audience is expected to sigh with relief when Maria turns back at the airport, refusing to follow Blanca on the plane returning to their home country. Because she has made the "right choice," Maria creates a future for herself and her child. She selected the path of the good mother.

Clean

In most films, as in life, drugs are demonized. The only thing worse than being an addict, apparently, is being a female addict, especially if one is a mother. In *Clean*, another 2004 film, French director Olivier Assayas leads the viewer into the world of drugs through the character of Emily, a young widow who loses her "rock star" partner, Lee, to a drug overdose. Following Lee's death and her own imprisonment, Emily decides to become "clean" to obtain the custody of her son, Jay, who is living with his grandparents in British Columbia. Emily's struggles to address her own addiction coupled with the disdain she experiences from mainstream society are the subject of the film.

In *Clean*, the sentencing of the protagonist for heroin possession occurs offstage and beyond the gaze of the viewer. We know that Emily is given the maximum sentence through a conversation that occurs with Lee's agent, who visits her in jail where she is remanded. The agent tells Emily that she is likely to get six months in jail with "the best-case scenario." When pressed for the worst-case scenario, he restates the earlier number of six months. The audience is left with the impression that this measure is warranted. Emily was "irresponsible," was "living a lifestyle beyond her means," was not a mule but an addict and was neither poor nor virtuous: just another addict being held "accountable." The agent concludes the interview by telling Emily never to call him again.

Once she is released, we follow Emily through her efforts to reconnect with her son. She returns to Europe where she still has a few family connections and a friend willing to support her. While she generally insists on independence and autonomy, she warms to her father-in-law, Albert, who takes a non-judgmental approach to her and is

genuinely concerned about her well-being. Unlike Maria in *Maria Full of Grace*, who is seen to be acting for her unborn child, Emily is often scorned and ridiculed. She must prove to us that she is clean and therefore worthy of our trust and acknowledgement. At the end of the film *Clean*, we see her leaving with her son, granted acceptance by his grandfather. The whole scene, not unlike the ending in *Maria Full of Grace*, has a clear message: motherhood will save you from addiction (Emily), from uncertain violence in the drug-trafficking trade (Maria), and from, ostensibly, oneself.

5. WOMEN, DRUG TRAFFICKING AND SENTENCING

The decisions on the sentencing of women involved in international drug trafficking reviewed for this paper bring into play competing directives in Canadian law. Section 215 of the *Criminal Code* provides that parents are required to bestow the “necessaries of life” on their children. This provision, along with provincial family legislation, requires parents to provide their children with the basic necessities, including food, clothing and shelter. Increasingly, this responsibility is falling to women as the number of single-parent families in Canada grows. A Statistics Canada report in 2000 found that single parenting was particularly pronounced among black women:

About 40 percent of black children in Canada grow up without a father. Among Toronto’s Jamaican-Canadians, the numbers are even more dramatic: two out of three children grow up without a father.¹⁴

The links between single parenthood and poverty, particularly for black women, was acknowledged by the lower court in *R. v. Hamilton* as a factor that underscored the women’s decisions to become involved in trafficking.

Because the Canadian law criminalizes certain income-generating behavior that might otherwise be available to women to support their families, including fraud, sex work, and drug trafficking, it leaves women vulnerable to the claim that they are failing to meet their children’s needs when their lawful efforts to provide for their families fall short. It is precisely this tension that the cases of *R v. Hamilton* and those that followed must work to address to preserve the legitimacy of the Canadian criminal law power. In *R. v. Hamilton*, the challenge of preserving the discourse on good, self-sacrificing mothering and emphasizing the anti-drug discourse surfaces in the lower court and in the Court of Appeal. The Court of Appeal decision states:

It is explicit in the case of Ms. Hamilton and implicit in the case of Ms. Mason that their impoverished circumstances and poor economic prospects played an important role in their decision to commit these crimes.

¹⁴ Statistics Canada, 2000, cited in CBC Toronto, “Growing up without Men” online: CBC News <<http://www.cbc.ca/toronto/features/withoutmen/>>.

The reason for their desperate financial circumstances was relevant on sentencing.¹⁵

The Court proceeds to identify the reason, stating:

On the evidence, the respondents were not poor because they did not want to work, were irresponsible or because they had a lifestyle beyond their means. The respondents were in direct economic circumstances for two main reasons. First, they assumed the responsibilities of parenthood at a very early age thereby substantially limiting their economic and education prospects. Second, at an almost equally young age, they were burdened with the full responsibility for raising young children when the fathers of their children abandoned them.¹⁶

The lived realities of drug muling as seen in the film *Maria Full of Grace* and in the case law highlight women's selflessness in exposing themselves to the perils inherent in trafficking for the betterment of their children's lives. In both mediums, film and law, the women protagonists skirt the edges of danger. Maria's unborn child protects her against death. As a future mother, it is important that she escape this fate. The demise of Lucy, another drug trafficker who expires from an overdose when the capsules she ingested burst, reminds the viewer of the serious consequences of trafficking. As the film's central protagonist and as a mother, Maria avoids the worst sanctions.

In the cases before the Court in *R. v. Hamilton*, motherhood is a shield against imprisonment in an institutional setting. In their representations to the lower court, Ms. Hamilton and Ms. Mason emphasize their care-giving role in their calls for non-custodial sentences. Ms. Hamilton states:

All I have to say is I'm sorry, I'm truly sorry, but I made some mistakes in the past, and I look forward to getting a job and taking care of my kids for now.¹⁷

Ms. Mason makes lengthier statements on her familial obligations.¹⁸ She asks for a second chance to create a better life for herself and her children. She would not make the choice to traffic drugs if given the chance to go back in time. She says:

... I have learned my lesson the hard way; that it does not pay to do crime because crime is bad and it's killing me inside. And it's not only killing me,

¹⁵ *Hamilton*, Court of Appeal, *supra* note 1 at para. 136.

¹⁶ *Ibid.*

¹⁷ *Hamilton*, Superior Court, *supra* note 1 at para. 60

¹⁸ *Ibid.* at para. 69

but it's killing my children. Just knowing that I will be separated from them is killing me inside, that I might be separated from them and not knowing where my life is going.¹⁹

Citing compliance with her bail conditions as proof that she is now law-abiding, she states: "I'm just asking you just to forgive me. Those are my words."²⁰

In rejecting the conditional sentences, the Court of Appeal was not swayed by their pleas for leniency and showed less deference to the women's responsibilities as a factor in the commission of the offence. The Court was not persuaded by the argument that social and economic conditions pre-determine criminal behaviour. Criminality, asserts the appellate court, reflects personal choices. According to the Court:

The respondents had a choice to make and they made that choice knowing full well the harm that the choice could cause to the community. The economic circumstances of the respondents made their choice more understandable than it would have been in other circumstances, but it remains an informed choice to commit a very serious crime.²¹

In making these statements, the Court of Appeal opens the door to retribution. By casting offending as a product of autonomous choice-making, the decision-makers curtail analysis of the factors related to gender, race, and class that formed the context for offending. The trial judge is said to have wrongly incorporated broad societal issues into the sentencing analysis. While the Court of Appeal rejected the notion that sentencing should have a sociological aspect, this paper argues that both levels of court were strongly influenced by the discourse of the "good mother" that predominates in social policy. Mothers who satisfy the demands of their role are altruistic and motivated by the collective interests of the family unit. The Court of Appeal rejected community-based sentences in drug-trafficking cases, yet made an exception for Ms. Hamilton and Ms. Mason. We assert that because Ms. Hamilton and Ms. Mason presented evidence of their conformity with this image they were eligible for community-based sentences in the eyes of the courts.

6. REVISITING "WOMEN AND JUSTICE UNDER THE WAR ON DRUGS"

In its analysis of drug trafficking in law and in film, this paper is grounded in the body of work that explores the social and legal reactions to the criminalization of women who are also mothers. The groundwork for our investigation, particularly

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Hamilton*, Court of Appeal, *supra* note 1 at para. 140.

of the criminal law, is established by Dianne L. Martin's "Casualties of the Criminal Justice System: Women and Justice Under the War on Drugs," written in 1993.²² As Martin clarifies, the war on drugs is a set of laws and policies that work against the trade and use of illicit drugs through the criminal law power. Martin advocates for the imposition of a gender lens on the criminal justice response to drug importation. Due to their addiction and substance abuse, as well as their associations with drug-using partners, women are brought into contact with the criminal underworld of drug sales. As part of this network, it is not surprising that women are involved in the transportation of drugs, typically at the lower end of the echelon as mules. Martin outlines the contradictions that emerge for feminists who argue for state protection for women through the criminal justice system. She argues against the likelihood of the state acting on behalf of women given its role in prosecuting and punishing them, particularly in relation to drug-related crimes.

While coined and initiated in the United States in the 1960s, the policy framework of the war on drugs, with its goals of retribution and incarceration, has become a fixture of Canadian law, most recently through the *Controlled Drugs and Substances Act* enacted in 1996.²³ In its own laws and as a signatory to international drug conventions, Canada has committed itself to a law and order approach characterized by enforcement.²⁴ While the Canadian version is softer, it adheres to the American rhetoric that the drug problem must be contained through surveillance and punishment. Critics point out that the war on drugs in both the United States and in Canada is little more than a thinly veiled attack on the poor and disadvantaged, who are subjected to scrutiny and punishment.²⁵

This paper refines the understanding of the tropes that Martin discusses by comparing and contrasting recent case law and by juxtaposing images of drug trafficking in law and film, two powerful institutions that produce knowledge and meaning. Since the publication of Martin's paper, the *Criminal Code* was amended to allow for the imposition of community-based sentences. Our research updates Martin's analysis to incorporate the ways that the restorative justice lexicon allowed judges to negotiate the retributive continuum when otherwise law-abiding citizens and devoted mothers traffic with sympathetic motivations. In *R. v. Z.Z.V.F.*, the judge stated in support of a community-based sanction:

...it is now clear that the provisions of Bill C-41, now contained in Part XXIII of The [*sic*] Code, represent not just a restatement of sentencing principles but a significant change and reform in sentencing law and practice. Those

²² *Supra* note 4.

²³ *Supra* note 2.

²⁴ Barney Sneiderman, "Just Say No to the War on Drugs" in Brian Burtch and Nick Larsen, eds., *Law in Society: Canadian Readings* (Toronto: Thomson Nelson, 2006).

²⁵ *Ibid.*

provisions reflect a considered decision by Parliament to reduce the use of imprisonment as a sanction and to expand the use of restorative justice in sentencing. Drug cases are one area where this Parliamentary Intention [*sic*] may find application.²⁶

One of the ways that the courts gain entry into the restorative justice discourse is by downplaying the women's involvement with the trade in drugs on the street. In *R. v. Z.Z.V.F.* and *R. v. Hamilton*, for example, the judges at both levels of court emphasize that the women are merely "bit players," or small-scale suppliers, rather than dealers selling drugs to the detriment of other women's children. In relation to Ms. Mason and Ms. Hamilton, the judge states that both the Crown and the defence were in agreement that their involvement was limited to transportation into the country, not distribution within Canada. Justice Hill states:

It is conceded that the offenders committed the importation crime for financial gain of a one-time payment but not participation in the equity or profit-sharing associated with trafficking distribution.²⁷

Even as bit players, portrayed as desperate for money, the women are ultimately subject to retribution and punishment for their involvement in the world of illegal drugs through the imposition of custodial sentences, which were suspended by the Court of Appeal. In *R. v. Spencer*, decided shortly after the lower court's decision in *R. v. Hamilton*, the appellate court emphasizes the following:

The fact that Ms. Spencer has three children and plays a very positive and essential role in their lives cannot diminish the seriousness of her crime or detract from the need to impose a sentence that adequately denounces her conduct and hopefully deters others from committing the same crime. Nor does it reduce her personal culpability.²⁸

7. CRIMINALITY AND MOTHERHOOD

As Martin points out, criminality and drug addiction are typically viewed as evidence of bad mothering.²⁹ It is often equated with selfishness and greed, as well as the inability to serve as a moral role model instilling the virtues and values of dominant society. Martin identifies the gendered consequences of the enforcement drive policies, stating:

Women who violate laws that have entered the public consciousness as "in the public interest", such as those punishing welfare fraud or drug

²⁶ *Z.Z.V.F.*, *supra* note 8 at para. 25.

²⁷ *Hamilton*, Superior Court, *supra* note 1 at para. 24.

²⁸ *Spencer*, *supra* note 5 at para. 47.

²⁹ Martin, *supra* note 4 at 314.

trafficking, are almost never perceived as “good mothers”, and thus are rarely the beneficiaries of leniency.³⁰

The fact that social and economic inequality often prompts women’s involvement in the international drug-trafficking cases that are prosecuted in the courts presents a challenge to Canadian law-makers. In *Creating Criminals: Prisons and People in a Market Society*, Vivien Stern places “drug muling” within an international context, providing insight on the Canadian version evidenced in the case law. She writes that persons who have committed crimes associated with illegal drugs fill the world’s prisons.³¹ While the most significant players escape prosecution, persons who occupy smaller roles in the circulation of drugs often endure severe consequences when processed through justice systems. It is the bit players who are coming to occupy a large portion of those incarcerated in prisons in numerous countries, including Canada and the United States. A growing percentage of those prosecuted and imprisoned for drug offences are women. Because their motivations are often altruistic, their cases underscore the contradictions in global criminal and social policy. Stern writes:

A particularly sad and vulnerable group are the people, most of them indigent women from poor countries, who are persuaded to carry something with the lure of enough money to put a child through school or to open a small trading business. The situation of these women, often called ‘drug mules’, illustrates the illogicalities and injustices of the drug laws.³²

The circumstances of women’s involvement in international drug trafficking present a challenge to Canadian law-makers who seek to preserve their role as moral agents and actors by determining “just” outcomes in the face of fact situations that call the criminal law into question when it punishes women motivated by poverty and motherhood. In sentencing drug mules, judges are saddled with the task of navigating the complexities of—and contradictions within—international drug policy. In the lower court’s decision in *R. v. Hamilton*, Justice Hill makes a statement that captures the tensions in women’s lives when they are required to care for children with inadequate resources. He states:

The cocaine courier importation cases in Brampton [Ontario] are, almost invariably, not about greed in the sense of an offender reaping profits to maintain a lavish lifestyle or to acquire luxuries. These individuals, highly dispensable throwaways of elusive overseers, live in the despair of poverty – single mothers and subjects of systemic racism. The reward for

³⁰ *Ibid.*

³¹ Vivien Stern, *Creating Criminals: Prisons and People in a Market Society* (London: Zed Books, 2005) at 138.

³² *Ibid.*

the risk taken pays rent, feeds children, and supports a subsistence level of existence.³³

The Court of Appeal, in overturning the decisions, argued for more weight on denunciation and deterrence. However, while arguing that conditional sentences were generally not appropriate in trafficking cases, the appellate court refused to order the women into custody, allowing them to complete their sentences in the community.

8. THEMES IN LAW AND FILM

Through our analysis, we have discovered several contradictions in the treatment of motherhood in the case law and in the films. In both mediums, the women are lauded for putting their children first. Maria is positioned to earn the audience's full respect when she refuses to board a plane back to Colombia at the end of the film, confirming her alignment with first-world sensibilities and turning back on her "corrupt" and impoverished home country. Near the end of *Clean*, Emily is discovered plotting to take her son with her to a music recording in San Francisco. She is caught by an "authority"—her father-in-law. In the end, he allows her to leave for the United States, without her son, with the promise that she will stay clean and will continue her efforts to regain custody.

While the valorization of selfless motherhood emerges as a powerful discourse in the films and the cases, it co-exists with the conservative discourse of the war on drugs, a set of enforcement-directed laws and policies that demands that the women be held "accountable" for their drug involvement, however noble their reasons were for becoming traffickers or even a user. This paper illustrates that the discourse of motherhood ultimately gives way to punitive justice policy, particularly in relation to drug use. While the pull of retribution remains strong in the cases and in the film, the women's wish to be "good mothers" presents a powerful counter to the punishment agenda. Through the restorative-justice oriented lexicon of compassion and reintegration, punitive justice policy is challenged, albeit with insufficient strength to fully discredit it as the dominant sentencing paradigm.

Community-based sentences as the solution to women's poverty and their criminalization

In the last scene in *Maria Full of Grace*, Maria is seen making her way back into American society, having refused to return to Colombia. Maria makes it to the airline gate and then turns back. Both Maria and Blanca give each other a long look; both of them know they will probably never see one another again. Blanca turns first, stubbornly stamping up the gate ramp to the plane. Maria turns, a proud confident

³³ *Hamilton*, Superior Court, *supra* note 1 at para. 191.

look on her face. Music rises: the young, pregnant girl is set to conquer America. This ending plays heavily on the American dream, which mythologizes the individual: how everyone can make it, and, in this era of conservative politics, the trope lingers on of how America protects mothers and motherhood.

Symbolically, and in line with criminal justice terminology, Maria will serve a community-based sentence. While Maria is “safe,” she has been forced into responsibility by the growing life inside her. Like offenders on community-based sentences, Maria lives under restrictive terms. She will reside under the surveillance of the health professionals whose care she has accepted. She will also live under the watchful eye of several people whom she has met in the United States. With these conditions in place, the audience sighs in relief knowing that Maria is subject to “conditions” that will facilitate a positive outcome for her and her future offspring. America’s benevolence is presupposed and assumed. Maria’s integration into American society is presented optimistically. The race stratification of American society is ignored and glossed over. Maria’s language challenges and her lack of employment history appear to present no obstacle.

These messages are similar to those in *R. v. Z.Z.V.F.* Z.Z.V.F. is described as a person who “has persevered through a very rough life” and “is continuing to attempt, under difficult circumstances to improve her lot.” The Court downplays the significant challenges that Z.Z.V.F. faces as a young, black woman living in Toronto raising three children on her own with limited education and work history as well as a past history of sexual abuse. The conditional sentence is presented as the solution to a range of complex social problems. With the grit and determination that Z.Z.V.F. portrays, distinguishing her from other offenders, she will succeed in establishing a pro-social lifestyle.

In film and even more so in law, gender equality is made invisible. The justice system, whether symbolic or real, is presented as fair and wise. Deserving offenders are imprisoned in the community are, either in reality or by practical effect, under the watchful eye of the state. The hardships of women’s lives, compounded by race and class, are overlooked or ignored. The community-based sentence is presented as the pathway to success. In *Doing Time on the Outside: Deconstructing the Benevolent Community*, Madonna R. Maidment comments on the factors that are influential in women’s “offending” behaviour. She states:

Even a cursory analysis of women’s encounters with the criminal (in)justice system makes clear that laws (and, by default, the entire representation of the criminal justice system) are more precisely *in conflict with women*. The overwhelming preponderance of women’s crime can be directly linked to social, cultural, economic, sexual, and political oppression in a society that negates women’s work in the private sphere, undervalues women’s work in the public sphere, and continues to restrict the full civic engagement of

women through misogynous institutions. The criminal (in)justice system is just one of the systems blocking women's equality by criminalizing poverty, mental illness, past abuses, and race/ethnicity.³⁴

The imposition of a community-based sentence, while often preferable to a jail term, does little to address the preconditions that arise for criminalized women. As Maidment points out, the justice system is a source of oppression that reinforces, rather than curbs, disadvantage.

Demonization of drugs

In the cases reviewed for this paper, the demonization of drugs that has become integral within Canadian policy is apparent. *Z.Z.V.F.*, whose case was decided prior to *R v. Hamilton*, was granted a conditional sentence, with stringent conditions including a requirement that she address high schools and community groups to educate listeners on "the evils connected with illegal drugs and crime in general," clearly a throwback to the view that addiction is a moral evil.³⁵ The imposition of conditional sentences by the appellate courts in *R. v. Hamilton* and *R. v. Spencer* is rejected as failing to sufficiently denounce and discourage the trade in illicit narcotics. In the sentencing appeals of Ms. Hamilton and Ms. Mason, the Court of Appeal for Ontario stated, for example, that importing cocaine into Canada was "both a violent and serious offence."³⁶ It stated:

The importation of dangerous drugs like cocaine has always been considered among the most serious crimes known to Canadian law. The immense direct and indirect social and economic harm done throughout the Canadian community by cocaine is well known. The use and sale of cocaine kills and harms both directly and indirectly.³⁷

The Court explains:

Viewed in isolation from the conduct which inevitably follows the importation of cocaine, the act itself is not a violent one in the strict sense. It cannot, however, be disassociated from its inevitable consequences.³⁸

³⁴ Madonna Maidment, *Doing Time on the Outside: Deconstructing the Benevolent Community* (Toronto: University of Toronto Press, 2007) at 16.

³⁵ *Z.Z.V.F.*, at para. 45, point 7.

³⁶ *Hamilton*, Court of Appeal, *supra* note 1 at para. 104

³⁷ *Ibid.*

³⁸ *Ibid.*

The harshest penalty in all of the cases reviewed was the 2005 case of *R. v. Katz*.³⁹ Michelle Katz, was a 36-year-old American citizen who resided in a Las Vegas, Nevada, suburb. She was apprehended at the Toronto Airport with two kilograms of heroin in a false bottom of her suitcase. She pled guilty and was sentenced in Ontario. She had some college education and was a former employee of American West Airlines; she was married to a man employed as a supervisor of operations for the Airline. Importantly for our analysis, the couple had no children.

The judge described the importation of heroin as a violent offence, following the Court of Appeal decision in *R. v. Hamilton*. The Court saw heroin as “most destructive and addictive of the hard drugs.”⁴⁰ Due to the large amount of heroin, its purity and the seriousness of the offence, the judge imposed a sentence of nine years, which was reduced to seven for the two years she spent in pre-trial custody.

While concluding that she was relatively unsophisticated based on her demeanor and behaviour, the Court assessed Ms. Katz’s culpability as high, stating:

That she is 36 years of age, a mature adult without a drug addiction, again informs the sentencing range as opposed to those who are far younger, desperate for money or those who have addiction problems.⁴¹

To Ms. Katz disadvantage, she was found to have been motivated only by profit.⁴² The Court gives very limited weight to the seriousness of Ms. Katz’s health condition: evidence was produced at trial that she was diagnosed with multiple sclerosis in 1995 and in 2002 had become unemployable due to her level of disability. According to the summary of facts:

The severity of her illness varies from day to day. She endures a wide range of symptoms including great weakness and fatigue, loss of balance, vision deterioration and a variety of bodily dysfunctions. At times, she is bedridden for days and at other times she has very limited functionality.⁴³

Given her condition, Ms. Katz was often entirely dependent on her husband’s care. The medication she required was covered by her husband’s medical plan and cost around \$1,000 per month. Surprisingly, these factors did not mitigate against a lengthy custodial sentence. Ms. Katz suffered significantly while in pre-trial custody when she was denied needed medication, interferon, which was not on the approved list of

³⁹ *R. v. Katz*, [2005] O.J. No. 3876 (Ont. Sup. Ct. J.) (QL).

⁴⁰ *Ibid.* at paras. 39-41, quoting from *R. v. Nguyen* [1996] O.J. No. 2593 (QL).

⁴¹ *Ibid.* at para. 50.

⁴² *Ibid.*

⁴³ *Ibid.* at para. 12.

medications in the jail.⁴⁴ Even after a court order was made, Ms. Katz experienced problems getting other drugs she needed for side effects.

According to the Court, the most important factor on sentencing was the need to reflect the principle of general deterrence. The goal in sentencing Ms. Katz was “to send a clear message to others who would be tempted to import this most serious drug, to tell them that the consequences will be severe for those who are apprehended.”⁴⁵ Without dependants, and as a college-educated American citizen considered to be imbued with First World sophistication, Ms. Katz gleaned little sympathy from the Court. Consequently, she felt the full weight of the criminal law’s authority to rebuke and to punish.

The demonization of addicted women

One of the most interesting factors about the films and the cases is the treatment of addiction. In *R. v. Hamilton* and *R. v. Spencer*, care is taken to clarify that the women were not trafficking drugs due to their own addiction issues. A reason that conditional sentences were originally imposed was that the women were not motivated by a desire to support personal drug habits. In distinguishing drug users motivated by depravity from drug importers motivated by desperation, the courts further demonstrate their allegiances to the prohibitionist stance of the drug war. According to Martin, offenders who are addicted are viewed with alarm. She states:

Women, read mothers, are meant to represent security, selfless stability, and continuity. The peril to ordered society presented by mothers and mothers-to-be dominated by a compulsion so strong that it can turn them away from family, friends, and from children, challenges deep beliefs and frightens us all.⁴⁶

Accordingly, they are viewed as deserving harsher punishment. Martin explains: “...addiction is a condition that in and of itself serves to explain an incarceral sentence.”⁴⁷

Research supports Martin’s finding that women with substance abuse problems are harshly treated within the criminal justice system. *R. v. M.N.*, the sole case considered in this paper where the offender was addicted to drugs, demonstrates a reluctance to even consider a community-based sanction where dependency influenced the commission of the offence. At the time of her sentencing, M.N. was single and living alone. She was reported to have “a heavy dependency on cocaine... using it at

⁴⁴ *Ibid.* at para. 15.

⁴⁵ *Ibid.* at para. 55.

⁴⁶ Martin, *supra* note 4 at 319.

⁴⁷ *Ibid.*

least once or twice a month."⁴⁸ Her drug-use was reported to have begun in the early 1980s with cocaine finally becoming "her only drug of choice."⁴⁹ The Court expressed sympathy for M.N.'s difficult life-ending drug addiction and for the toll her substance use had taken on her and her family. It was noted that she had not been motivated by profit when trafficking the cocaine, as her evidence was that she was to receive a portion of the drugs. M.N. was apprehended in Ottawa after a trip to Jamaica. A swab of her suitcase indicated the presence of cocaine and she ultimately confessed to having digested 52 pellets amounting to 364 grams of cocaine. While M.N.'s partner was described as a caring man, her severe drug problem caused problems in the relationship. The family relocated to a farm in Quebec but this move was unsuccessful as a remedy to addiction. According to judgment:

Her drug use quickly spiraled out of control and [her partner] had to give her an ultimatum between her family and the drugs. She packed up her things, left her family and moved back to Ottawa, escalating her drug use to cocaine.⁵⁰

According to the judge, her addiction was somewhat mitigating. Due to M.N.'s inability to end her cocaine addiction, even after attempts at treatment, and to respond to her partner's efforts to keep the family united, she was sentenced to two years of incarceration within a confined setting.

Emily, in *Clean*, has a drug addiction. In her case, it is to heroin. Unlike law, which is highly regulated and functions as an ideological device, film is freer to explore the complexity of addiction. Although the script of *Clean* asserts that Emily must leave heroin behind, she is a multi-dimensional character. She is a capable mother who takes her son to the zoo and frankly answers his questions about his father, including ones that question whether she was responsible for Lee's death as the person who purchased the heroin. She is often feisty and assertive, standing up to her uncle who owns the restaurant where she serves as a waitress. When her uncle, confronts her, she quits the job (tolerable to her only through drugs) and storms out. In other moments, however, we are allowed to see her vulnerability as a recovering addict denied privileges by the dominant society. In one scene, she waits outside a rock concert, hoping to connect with a musician who, due to his past relationship with Jay's deceased father, may be able to facilitate access to her son. In another, she is tearful when her father-in-law shows up without her son, forestalling a promised visit.

Emily's honesty around her addiction and her humility in her efforts to re-connect with her son undermine the dominant view of the ruthless addict only out for herself. Emily is aware that she must overcome her heroin addiction before she will be allowed to parent her son. She struggles to re-establish the markers of good

⁴⁸ *R. v. M.N.*, [2003] O.J. No. 406 at para. 13 (Ont. Ct. J.).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at para. 12.

parenting, including abstinence and employment. Emily takes on jobs in the service industry, in restaurant work and in a clothing store, even though her temperament and her talents are ill suited for such work. She moves in with a friend and makes plan for an overnight visit by her son. While the audience sees Emily struggle and often fail, we cheer her on, knowing that her desire to move forward in her life, as a parent and as an artist, is sincere. Unlike *Maria Full of Grace*, where the filmmakers are careful to distance Maria from substance use, and the cases, where dependence is vilified, *Clean* offers a sympathetic view of addiction, linking it to emotional pain and even creativity. In one important scene, Emily explains to her son that drug use is complicated and that dependency is hard to overcome. In the end, she also echoes the drug war critiques, stating that the price of drug use is higher than the benefits.

9. CONCLUSION

This paper investigated the contradictory ways that motherhood is treated in film and in the criminal courts. In both mediums, mothers are praised and valorized for their dedication to their children's well-being. Alternatively, mothers are scorned when their "risky" or criminal choices endangers their children's lives, whether through abuse, neglect or by bringing about their removal to a jail or penitentiary, thereby denying the children their primary caregiver.

The role that motherhood plays in sentencing determinations for women convicted of international drug trafficking is fascinating and deserved fuller examination. The connections between the images of drug traffickers emerging in the case law and those portrayed in popular culture, namely film, were explored. *Maria Full of Grace* and *Clean*, two international films, were examined to uncover whether motherhood is read for its redemptive qualities in both mediums. We looked for and evaluated the ways that mothering assists filmmakers and the courts in negotiating the tensions that surface when protagonists are involved in the highly stigmatized world of drug use, where significant criminal penalties are common. Sentencing judges in the criminal cases discussed offenders in favorable tones when evidence was produced that altruistic mothering, rather than profit, greed or drug addiction, was the motivation for the offending behaviour. While motherhood and provision for children was seen as a mitigating factor, it was neutralized or overcome by the call for tough sentences to support the war on drugs. In the end, a retributive law-and-order perspective emerged as a persuasive discourse to the courts. The case law and the films reveal, however, that mothering offers a powerful counter discourse that disadvantages the retributive dialogue common in drug-related cases and stories.

In the end, these seemingly contradictory tropes work largely in concert to affirm gender stereotypes and in support of the continued over-incarceration of racialized women. A close comparison of *R. v. Spencer* with *R. v. Hamilton* permitted a more nuanced argument about the responses of courts and allowed connections to be drawn between the films and the case law. A passage from the case of *R. v. Spencer*,

decided by the Court of Appeal after *R. v. Hamilton*, is illustrative. In rejecting the conditional sentence of the lower court and in ordering Ms. Spencer to serve 20 months in an institution, the Court emphasized Ms. Spencer's moral blameworthiness and her pro-criminal tendencies, evidenced by the commission of additional offences while on bail. The court states:

It must . . . be acknowledged that in the long-term, the safety and security of the community is best served by preserving the family unit to the furthest extent possible. In my view, in these circumstances, those concerns demonstrate the wisdom of the restraint principle in determining the length of a prison term and the need to tailor that term to preserve the family as much as possible. Unfortunately, given the gravity of the crime committed by Ms. Spencer, the needs of her children cannot justify a sentence below the accepted range, much less a conditional sentence.⁵¹

The Court emphasized the need to promote intact families and the requirement that drug crimes be deterred. As a result, both the punitive and re-integrative streams assist the appellate courts in maintaining the conservative criminal justice order where law-abiding citizens who truly care for the interest of family must be separated from those prone to criminal involvement. The Court emphasized the need to promote intact families and the requirement that drug crimes be deterred. As a result, both the punitive and re-integrative streams assist the appellate courts in maintaining the conservative criminal justice order

In such a world, law-abiding citizens who truly care for their families must be separated from those prone to criminal involvement. This decision leans, as one would predict, towards the maintenance of the status quo. Although women who act as drug mules can be differentiated on the basis of motherhood from, for example, simple profit motives, it is clear that the avenging war on drugs is the leitmotif that holds sway. It would appear, then, that for racialized women motherhood tempers, but does not ameliorate, the weight of criminal law in Canada. Motherhood as redemption, it appears, only really happens in the movies.

It appears, upon examination of the films and the cases analyzed above, that motherhood often serves as a valourizing, redemptive discursive lens through which the courts see the women as charged. If one is a mother, there can be a happy ending to life. Family life, it appears, will cleanse both the deviance of trafficking and the evil of addiction. This does not come as a surprise. Dominant hegemonic practices serve to reinforce the value of motherhood, the trope of family, and the pity/compassion that we often have for women caught in financial desperation. But she must be a mother, have some tie to family and be seen as selfless: in other words, acting as a drug mule to provide for child/family and not for oneself. This is clearly evident in our final

⁵¹ *Spencer*, *supra* note 5 at para. 47

case, *R. v. Katz*. Although clearly disenfranchised by her disability and her inability to work and provide for herself (she is totally dependent upon her husband), she has no children. Her sentence eclipses all the other cases that we have reviewed: she receives nine years of imprisonment (reduced to 7 for pre-trial custody) for acting as a drug mule. Without the most powerful trope of all—motherhood—women are seen merely as drug dealers, and serve as deterrence examples to the rest of us.