INTRA VIRES

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LETTERS FROM THE EDITORS

Dear Readers,

As the Editors-in-Chief of *Intra Vires* for the 2022-2023 school year, we are proud to introduce Issue 7.2 of the *Intra Vires Undergraduate Law Journal*! This issue features six academic undergraduate pieces all of which focus on insightful and pressing legal issues, ranging from the use of artificial intelligence for predictive policing to the philosophical doctrine of religious freedom. The undergraduate law journal stands as a voice for all undergraduate students to express their views and perspectives on the law and the role it plays in our lives. We are very proud and grateful for the work our editorial team and authors have dedicated to the journal. For this issue, we have received an immense number of submissions from the University of Toronto's (UofT) undergraduate community, and we hope you enjoy the selection we edited and designed.

This year, the UofT community transitioned from remote work to in-person interactions, and given the circumstances, our experience was particularly memorable. From working with our editorial team to reading the submissions of talented writers, we have compiled a collection of works that upholds the long-standing tradition and values that Intra Vires stands for.

To open issue 7.2, Cassandra Branson exposes and condemns the flaws of the U.S. incarceration system in their article, "The Case for Prison Abolition and Transformative Justice in the Context of Sex Crimes and Gender-Based Violence." They explore the ways in which it fails to appropriately accommodate the needs of victims of sexual violence and hold perpetrators accountable.

Next, Sumayyah Shah illustrates the "starlight tours", a practice where police have brutalized Indigenous bodies by arresting Indigenous people for disorderliness and deserting them in and around cities at night, and in subzero temperatures. In her paper, "Evicting the Undesirable: The Disposal, Devaluation, and Dehumanization of Indigeous Bodies in Starlight Tours", Sumayyah asserts that police violence against Indigenous people during starlight tours is produced and condoned through colonialism's purification of the deviant Indigenous body from the white settler city.

Following Sumayyah's piece, we have Rory Banvalvi writing on AI Driven Predictive Policing Algorithms. In her paper, "When Marvel's Project Insight Becomes a Reality; Positivism Versus Critical Race Theory on AI Driven Predictive Policing Algorithms", Rory analyzes

legal positivism and Critical Race Theory, and demonstrates that the implementation of AI-driven predictive policing programs reinforces existing inequalities in the legal system, rather than eradicating them as AI purports to. She identifies how predictive policing moves the sphere of morality further and unjustly into the sphere of law.

Shruti Nistandra then critiques the use of the psychological model in the jury selection process. In her paper, "Peremptory Challenges: A Necessity for the Legitimacy of the Judicial Process within a Psychological Model", Shruti argues that as society slowly moves towards the psychological model, Canada was wrong to abolish peremptory challenges. A purely psychological model leads to a complete loss of impartiality and brings identity politics into the law, which reduces the legitimacy of the judicial system. Thus, although unnecessary in the traditional legal model, peremptory challenges are necessary to "balance the biases" in a psychological model.

Next, Anthonie Fan takes us into a philosophical discussion of religious freedom. In his paper, "Not Really About Religious Freedom: A Libertarian Rejection of Accommodationism", Anthonie discusses Martha Nussbaum's argument for accommodationism: the doctrine of exempting people from laws burdening their conscience. He explains that this theory requires the state to move away from formal neutrality and show deference to individuals in religious matters. Anthonie argues against this tenet of accommodationism: religious freedom should be rejected as grounds for exemption from secular laws punishing people only for harm to others.

Lastly, to close the issue, we present you with Variam Manak's research paper, "Justice Denied: Applying a Critical Race Lens to Explain s. 718.2(e) and Gladue's Failure", where he addresses the problem of the disproportionate number of Indigenous peoples in Canada's federal prison system. Despite attempts to solve this issue such as enacting s. 718.2(e) of the Criminal Code, and landmark case R. v. Gladue, Variam illustrates the insignificant impact these attempted solutions had. Variam uses Critical Race Theory to explore and understand s. 718.2(e) of the Criminal Code and Supreme Court decision in R. v. Gladue, while also explaining its inability to remedy Indigenous overincarceration.

Sincerely,

Sommer Pesikan and Janus Kwong
Editors-in-Chief, 2022-2023

EDITORS

EDITORS-IN-CHIEF

Janus Kwong is a fourth-year student at the University of Toronto, pursuing an English Specialist and Economics Major degree. She has a deep fascination with bookstores, sunsets, and coffee shops and will likely be found lost in her own thoughts at any time of the day.

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Anthonie Fan is a third-year student at Trinity College, majoring in Ethics, Society, and Law and minoring in Portuguese. Besides being an editor for Intra Vires, he is the Canadian Captain of the UTPLS Moot Team.

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AUTHORS

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Cassandra Branson is in their fourth year at the University of Toronto studying Indigenous Studies and Critical Studies in Equity and Solidarity. They are passionate about spreading non-violent transformative justice efforts and hopes to continue this work after graduation.

Rory Banfalvi is now a second-year student at the University of Toronto, St. George, double majoring in Ethics, Society & Law, and Women & Gender Studies. Her academic focus lies at the intersections of law and privilege, and hopes that with an interdisciplinary approach, to dismantle the continually oppressive forces latent in our legal system. Beyond academia, Rory has enjoyed a long history of trial and oral advocacy in law related extracurriculars. She aspires to attend law school, and eventually use her position as a criminal defense attorney to combat carceral practices and organize to promote the abolition of prison systems as they exist in Canada today.

Shruti Nistandra is a fourth-year undergraduate student double majoring in Ethics, Society & Law and Criminology and Socio-legal studies, with a minor in English Literature. She is passionate about research and the inter-disciplinary nature of the social and legal structures which govern our society. She aims to pursue a legal education and use her skills and experiences to contribute to the academic discussion surrounding pressing legal issues.

Sumayyah Shah is a fourth-year student double majoring in Peace, Conflict & Justice and Criminology and minoring in Diaspora & Transnational Studies. She is interested in studying how processes of history-making are shaped by and feed into colonial narratives, specifically in relation to the experiences of marginalized communities within legal/political systems in both Canada and the Global South.

Variam Manak is a fourth-year student who is currently completing a double-major in Criminology & Socio-legal Studies and Ethics, Society, & Law. He is passionate about issues of equity within the criminal justice system and hopes to become a criminal defense lawyer one day.

The Case for Prison Abolition and Transformative Justice in the Context of Sex Crimes and Gender-Based Violence

By: Cassandra Branson

I. Introduction

Abolition movements have existed throughout history, from the abolition of slavery to current movements working to abolish the prison industrial complex. The American prison system boasts the largest in the world, with over 20 percent of the world's incarcerated population (Davis, 2003, 11). Despite having been proven ineffective at fostering safer communities, mass incarceration continues to be used as a tool to put more people in prisons (12). The proliferation of the prison industrial complex into modern society and the still-felt effects of Jim Crow laws, segregation, and slavery perpetuate a system of white supremacy and colonialism. Thus, the abolition of the American prison system will assist marginalized and oppressed communities in the U.S. in resisting and eventually dismantling the colonial project which is today's America. Contrasting the current carceral system, transformative justice approaches are crucial in honoring victims and holding communities accountable. This essay will discuss the failures of the current justice system in the United States, focusing on recidivism of sex-offenders, the multiple ways in which the justice system fails victims, and the pitfalls of carceral feminism. Following this, the essay will suggest how transformative justice strategies can assist survivors of sex crimes, examining organizations in the United States that have successfully implemented transformative justice.

II. Normalization of violence within the US prison system

The U.S. prison system is a hyper-misogynistic space where sexual assault, violence against women, homophobia, and transphobia are normalized (Taylor, 2018, 30). This often-sexual violence has been shown to be a "ubiquitous aspect of prison life, perpetrated approximately equally by staff and inmates" (30). On a larger level, structural violence takes the form of nonconsensual pat-downs, frisking, mandatory strip searches, and body cavity searches (30). In fact, many formerly and currently incarcerated people like Corey Devon Arthur state that these actions are a "perfectly legal way to rob incarcerated people of [their] humanity," and are, by definition, sexual assault (Arthur, 2021). Furthermore, it is not just legal violations of privacy and bodily autonomy perpetrated by prison staff that make prisons sexually violent; the prison itself is a space that "normalizes rape in a population" that will return to society (Taylor, 2018, 30). Nearly one out of ten American inmates reported being raped in 2008, and about half of these reported rapes were perpetrated by staff (32). Additionally, queer, trans inmates and sex offenders make up the majority of sexual assault victims in prisons, demonstrating that even in the instance of a conviction, violence is re-perpetrated (32). Such normalized sexual violence perpetrated onto marginalized incarcerated people extends and intensifies systems of oppression seen outside of prisons. The continued oppression of racialized and marginalized communities inside prison walls only reinforces the existing barriers experienced outside prison. Coupled with the added financial and legal consequences of a felony record, racialized and marginalized peoples face an added disadvantage from their white, abled, cisgendered counterparts. Prisons cannot be seen as a method to achieve justice if the same crimes and injustices are re-perpetrated inside. Rape is a crime, whether it is inside or outside a prison.

The homophobia, transphobia, and misogyny that saturate prison culture are beyond problematic. Violence is encouraged and even praised in such a culture. When released, these same people bring the violence of the prison system back into society (32). Specifically for rapists, longer prison sentences—and even prison sentences at all—may exacerbate the problem "by placing the rapist in a masculine culture which reinforces the misogynist fantasies that were part of his behavior patterns outside the walls" (33). If sex offenders are subjected to the most intense forms of surveillance, like "sex offender registries, community notification, and indefinite detainment inside psychiatric institutions" (30), then why has it been demonstrated that despite these intrusive forms of disciplinary power and costly measures, communities are no safer than they were before? Studies show that reintegration and maintaining social relationships are key to rehabilitation and curbing recidivism rates (van den Berg, 2018). Yet, the social isolation of sex offenders often starts in prison, purposefully practiced by staff and fellow prisoners. Sex offenders who experience

ostracization and social isolation exhibit higher levels of aggression and recidivism as opposed to their peers who are the recipients of social reintegration programs (2018).

III. Trials, Arrests, and Laws: How they contribute to the cycle of violence

In addition to prisons re-perpetrating harm under the current legal system, the process of reporting sexual assaults is often traumatizing. Police frequently invalidate survivors who bring forward allegations of sexual assault (Taylor, 2018, 31). Moreover, oppressed people such as immigrant women, queer and trans people, and women of color are often wary of reporting sexual assaults as a result of systemic discrimination. Black women have been re-assaulted by police officers when submitting reports; immigrant women have been detained and deported after calling the police to intervene in domestic violence situations (31). In fact, sex workers, houseless women, and queer and trans people are rightfully wary of police in handling sexual and gender-based violence because the police are "among the most frequent perpetrators of sexual crimes" against them (32). Furthermore, sexual assault trials are "antithetical to the justice needs" of survivors (31). Judges invalidate survivors and their experiences, and the trials and reporting processes "sideline, silence, disempower and doubt the accounts" of survivors (31). Rather, the justice needs of most survivors are better met through validation and vindication, not incarceration. Additionally, sex crime trials reinforce cis-heterosexual scripts and gender roles (37). Plaintiffs in sexual assault trials are forced to "present a narrative of suffering"—a narrative that relies on the notion that a woman's sexual accessibility is central to her femininity, and whose violation is "a fate worse than death" (37). This coercive framework under which gender-based violence survivors are held is defined by racialized and strict gender binaries. Furthermore, these victims' narratives reinforce constructs of the "ideal rape victim," which re-entrenches norms of white supremacy, heteronormativity, homophobia and transphobia, and victim-blaming (37).

Additionally, hyper-incarceration harms minority women and increases the risk of domestic violence (Coker and Macquoid, 2015). Increasing prosecution and arrest rates have failed to curb the rates of domestic violence (Balfour, 2021, 2). In fact, female survivors of domestic violence who report are often criminalized and at times, prosecuted themselves if they act in what is clearly self-defense (8). Technical errors such as dual charging practices in the application of the law further re-traumatize survivors. For instance, Marcela Rodriguez is a survivor who called the police during a domestic violence incident. When the police came, they arrested her and turned her over to Immigration and Customs Enforcement (ICE) who then detained her and forced her into deportation proceedings (Survived and Punished, 2020). In both

Rather, the justice needs of most survivors are better met through validation and vindication, not incarceration.

Canada and the U.S., Indigenous communities are most impacted by compulsory charging practices in domestic violence situations. Indigenous women are the most harmed when they are jailed for refusing to testify and face the dual charging practice when they act in self-defense against their abusers (Balfour, 2021, 8). Domestic violence survivors are also held to strict binaries, which reinforce harmful narratives as well as excluding those who are most marginalized. Survivors who do not fit the "good victim" narrative are "not only excluded from services through failure to meet program criteria or guidelines but may be entrapped in the web of surveillance that casts them as criminals rather than survivors of violence deserving of safety, dignity, and resources" (Jacobs, 2020, 45). This group of people tends to be Black and Indigenous people, transgender and queer people, immigrants, youth, sex workers, and disabled people.

In addition to dual charging practices and mandatory sentences, the law itself plays a role in sexualizing the acts which they criminalize, especially in the context of sex crimes. Regarding sex crimes, prohibition may "produce, perpetuate, or accelerate desires for what the law is prohibiting" (Taylor, 2018, 36). Thus, the law achieves the opposite of its goal—increasing the desire for and attractiveness of the crimes, contributing to the production of deviance they seek to

criminalize (36). Codified law perpetuates and "actively creates sexual culture" instead of responding to it (Taylor, 2018, 37). For example, child pornography laws themselves are a "perverse expression of pedophilic desire" exactly because society itself is obsessed with the sexualized child and with sexualizing children (Taylor, 2018, 36). It is through these laws that society enables further contemplation of sexualized children under the guise of "law and order" (36). Essential to the allure of pornography is its perceived deviance. Thus, laws that criminalize obscene acts preserve the value of, without restricting the ability to get or act on, that which it seeks to prohibit (37). Obscenity law also legitimizes and encourages these acts by putting state power behind their prohibition (37). In the context of sex work and sex trafficking, legislation to criminalize sex trafficking has resulted in a myriad of systems that seek to arrest, force compliance with law enforcement, and subjugate victims (Jacobs, 2020, 45).

IV. Carceral feminism does more harm than good

One of the most used arguments against prison abolition is the importance of the prosecution and incarceration of those who commit sex crimes: rapists, abusers, those in possession of child pornography, child molesters, and sex traffickers. This argument has become the crux of a specific branch of feminism termed carceral feminism, where some anti-rape feminists will advocate for the incarceration of abusers and those they see as a threat to the family (for example, sexual predators, pornography, and sex work) to make communities "safer." The hatred and criminalization of sex work under the guise of eradicating sex trafficking can be traced to the allegiance between right-wing evangelical Christians and carceral feminists (Bernstein, 2010, 46). This allegiance exhibits a "shared commitment to carceral paradigms of social, and in particular gender, justice… and to militarized humanitarianism as the preeminent mode of engagement by the state" (47). This work has resulted in a criminal legal system expansion and investment in law enforcement (Balfour, 2021, 2). These carceral feminists, who are predominantly white and middle to upper-class, are most likely to approach feminism to control crime (Taylor, 2018, 34). They also are of a population that is least likely to have incarcerated loved ones or even imagine their loved ones being incarcerated. Carceral feminism has been influential only because it "works in the interests of a neoliberal, punitive state and its objectives of gentrifying urban spaces and neutralizing racialized and impoverished populations" (35). The state is therefore able to operate under a "feminist" lens while continuing to perpetrate violence and harm on marginalized and oppressed communities (35). The expansions of the legal system resulting from the work of contemporary carceral feminists, especially in the context of sex crimes, do not serve those who are harmed most. Instead, they are a form of racial governance that perpetuate and reinforce cis-hetero-patriarchal, white supremacist settler-colonial systems of power (Balfour, 2021, 9).

V. Transformative justice

Therefore, it is crucial to look towards other forms of resistance and justice such as transformative justice. Mia Mingus defines transformative justice as a "political framework and approach for responding to violence, harm, and abuse" (Mingus, 2019). Some may argue that turning to social work is an acceptable "fix" for carceral feminists; however, the very institutions that form the center of social work responses to gender-based violence "tie advocacy and care directly to law enforcement" (Jacobs, 2020, 45). Even social work is carceral. Thus, there is a necessity for grassroots organizations that embody transformative justice frameworks. Transformative justice seeks to respond to instances of violence without re-perpetrating violence and holding the original perpetrator and the community accountable. Transformative justice goes further than other alternative forms of justice such as restorative justice by attempting to understand the societal underpinnings of violence as well as understanding how violence is sustained by the community (Taylor, 2018, 42). Furthermore, transformative justice is prepared for offenders refusing to participate in the accountability process without resorting to the carceral justice system or incarceration (42). In the context of sexual assault, survivors' needs are "diametrically opposed" to those of the criminal system (41). Most survivors only want respect, dignity, agency, and accountability for the person and community who perpetrated the harm (41). In the context of sex work,

carceral responses to sex work and sex trafficking do not eliminate sex work but rather just drive it indoors (Taylor, 2018, 34). Carceral responses thus perpetrate more harm to sex workers because those who remain on the streets are the poorest, most vulnerable, and almost always racialized – they are the ones who engage with sex work as a form of survival (34). Additionally, it has been demonstrated that what is effective at eliminating sex work is providing affordable housing and fulfilling basic needs (34).

Many progressive grassroots organizations have started to take a completely different approach to address sexual violence. GenerationFIVE is an Oakland-based organization using transformative justice strategies to address sexual violence, specifically child sexual abuse (44). The organization emphasizes the importance of community responsibility and accountability in instances of sexual abuse. GenerationFIVE uses mediation and conferences to respond to specific cases (44). Additionally, GenerationFIVE teaches the community at large about sexual trauma and how to respond to allegations of sexual abuse (44). This approach has shown success in addressing some of the root causes of child sexual abuse—denial, minimization, and victim-blaming—and has changed community responses to allegations to better support survivors (44). Another successful example is Communities Against Rape and Abuse (CARA) based in Seattle. CARA refrains from adhering to specific processes or tactics and instead relies on the wishes of survivors as well as the context of the situation and the community (43). These two organizations are but a few that have successfully used transformative justice strategies to combat sexual and gender-based violence. Their methods focus on rehabilitation and prevention, addressing both the victim and the offender, as well as community accountability.

VI. Conclusion

Current carceral practices to combat sexual and gender-based violence not only are unsuccessful but re-perpetrate harm to both offenders and their victims. Hyper-misogyny and high rates of sexual assault infest prisons and the violent responses of police and judges further traumatize survivors when they come forward. Carceral strategies do not address the sexual violence perpetrated onto sex workers. In certain contexts, such as child pornography and child sex abuse, the codification and enforcement of laws does not provide constructive rehabilitation or justice. The ostracization of and violence against sex offenders in the current carceral system create inhumane conditions that provide no benefits to society other than a result of a failed legal system. Furthermore, carceral feminism reinforces cis-hetero-patriarchal norms. To successfully honor the needs of survivors and achieve justice, we must consider a progressive system that has a proven record in holding the community and perpetrator accountable instead of mass incarceration, which is used to shut down survivors and incarcerate the offenders as a shortcut solution. Finally, society must address and prevent gender-based violence and address the root causes of systemic violence against women. Rooted in colonialism and white supremacy, mass incarceration as a punitive system has cost society too much to be the one-size-fits all solution for gender-based violence.

The prison system is destructive and demonstrates the sloppiness and brutality of the current legal and corrections system in the U.S., and it must be abolished.

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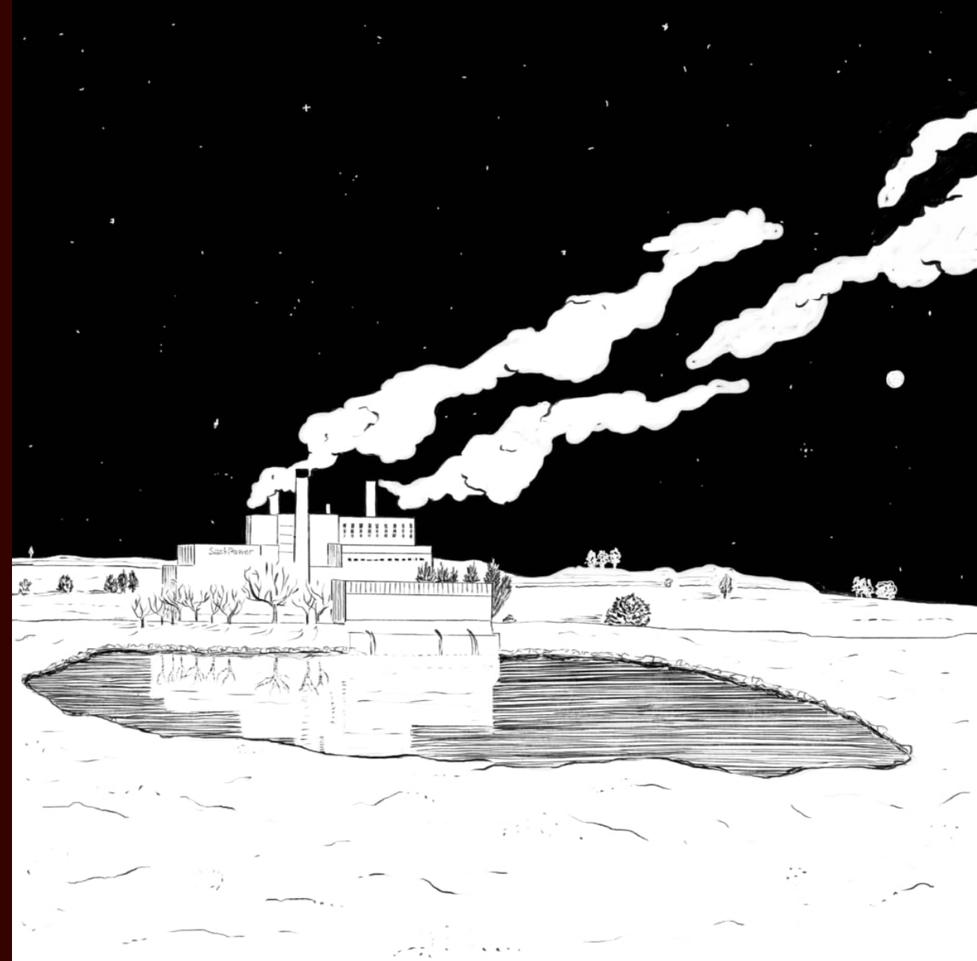

Evicting the Undesireable: The Disposal, Devaluation, and Dehumanization of Indigenous Bodies in Starlight Tours

By: Sumayyah Shah

Introduction

On the night of January 28th, 2000, Saskatoon Police Services (SPS) picked up Darrell Night from a rowdy party, drove him to the city outskirts, and forced him outside into -22°C weather dressed in only a t-shirt and jeans: "Get the [f] out of here, you [f-ing] Indian" (Brown 2003). The following day, Rodney Naistus was discovered dead in the same area Night had been abandoned; five days later, Lawrence Wegner's body was found in a nearby field (Hubbard 2004). All three Indigenous men were abandoned by SPS officers; Night was the only survivor.

Since 1976, Canadian police have brutalized countless Indigenous bodies in a practice coined the "starlight tours," namely arresting Indigenous people for disorderliness and deserting them in and around cities at night and in subzero temperatures, with many succumbing to a freezing death (Razack 2014). Despite inquiries into starlight tours across the country, police reports have hyperfocused on narratives that justify the violence, devaluing the victims based on their inherent delinquency. The isolation and desertion of Indigenous people reflect ongoing patterns of colonialism that aim to delegitimize Indigeneity, reinforcing colonialist assumptions of Indigenous bodies as contaminants in the clean white Canadian landscape.

In this essay, I argue that police violence against Indigenous people during starlight tours is produced and condoned through colonialism's purification of the deviant Indigenous body from the white settler city. I begin by framing Canadian policing as premised on eradicating bodies that threaten colonialism and starlight tours as one method for achieving the police's objective of waste disposal. I then highlight how the devaluation of Indigenous women is exacerbated by the intersections between race, gender, and the normalization of sexual violence. Finally, I explore how colonialist assumptions of Indigenous people as incompatible with modernity legitimize starlight tours through the naturalization of Indigenous deaths.

Police and the Removal of 'Waste' from White Settlements

The perception of Indigeneity as a threat to social order legitimizes the law's expulsion and dehumanization of Indigenous people in encounters with the police. The capacity for police to brutalize Indigenous bodies relies on the construction of their presence as contaminating and therefore unworthy of empathy. Sherene Razack (2014) utilizes a theory of waste disposal to articulate that the geographic and social isolation of Indigenous people is rooted in perceptions of them as "disordered or [...] out of place" (58). According to colonial logic, excess populations refer to groups who jeopardize the ability of governance to maintain control, consequently forcing them out of spaces of belonging and into "spaces of death," where the law and humanity do not exist (Razack 2014:57-58). By simply existing, Indigenous people threaten the legitimacy of settler colonialism; as a result, they are labeled as waste and forced outside of the social order, where they are absolved of access to fundamental human values and rights.

Canadian policing is reliant on theories of waste disposal to justify colonial violence and Indigenous peoples' physical and social banishment. The first Canadian police force, the North-West Mounted Police (NWMP), was founded in 1873 in response to Indigenous resistance to settlement in Western Canada, with their primary purpose being to conduct a campaign of waste disposal where Indigenous tribes were isolated on reserves, leaving their land available for settlement (Brown & Brown 1973). Throughout the 19th and 20th centuries, the NWMP—later renamed the Royal Canadian Mounted Police (RCMP)—was responsible for upholding settler colonialism by overseeing the construction of railroads on Indigenous land, enforcing compulsory residential schooling for Indigenous children, and normalizing over-policing as necessary for civilizing the belligerent Indigenous community (Brown & Brown 1973). The foundations of Canadian policing are rooted in the construction of Indigeneity as disruptive and in need of disposal, manifesting in both legal and physical violence.

Through colonialism's reinforcement of Indigenous people as wasteful, police normalize starlight tours as a necessary tool for social regulation. The deaths in the 2000s, including that of Rodney Naistus and Lawrence Wegner, incurred a series of inquiries into starlight tours in Saskatchewan, such as the Wright Inquiry (2003), an investigation into the 1990 freezing death of a 17-year-old teenager named Neil

Stonechild (Razack 2014). The inquest revealed that starlight tours were a common practice deployed to treat nuisances who had reputations for disturbing the police (Razack 2014:63). Officers admitted to regularly using starlight tours to avoid the administrative work required during formal detainment, with one officer stating he hoped it would "[teach] his nuisance a lesson" (Razack 2014:63). Waste disposal materializes in starlight tours as the dumping of the disordered Indigenous body to maintain order within civilized society.

In the process of the disposal, the spaces of death that Indigenous people live in become tangible, with the police's callous disregard for Indigenous life reflective of their status as waste. In the 2000s Saskatoon freezing deaths, each man was discovered poorly dressed, Naistus being shirtless and Wegner without shoes. Both men were deserted in weather that dipped below -20°C in varying states of mental and physical incapacitation (Razack 2014). The capacity for law enforcement to abandon the men in such conditions and not expect death or serious harm is nearly incomprehensible, yet exposes the total apathy of police towards lives that are marked as inferior. Police brutality is validated as a necessary tool for regulating social stability and preserving colonial governance, while the indifference towards the destruction of Indigenous lives reflects the success of colonialism in constructing Indigeneity as a source of waste and the annihilation of the Indigenous body as a standard process for maintaining social order.

The Disposability of Unworthy Victims

The disposability of Indigenous people reduces the capacity for law enforcement to view Indigenous women and girls as legitimate victims of violence, with their susceptibility to police brutality being aggravated by the simultaneous devaluation of their racialized and gendered bodies. The expendability of Indigenous women is upheld by both their vulnerability to violence through waste disposal and the transformation of their bodies into waste through the violence itself. Razack (2016) contends that Indigenous women are perceived as "sexually/violently accessible," with the construction of Indigenous populations as "primitive and barbaric" intersecting with patriarchal desires to occupy and claim ownership over the female body (293).

While both Indigenous men and women are vulnerable to eviction, violence against Indigenous women is distinguished by the body's objectification and delegitimization in the aftermath of the assault (Razack 2016). Sexualized violence constitutes a form of gendered disposability where the body is transformed into waste through social norms that identify any impure female body as a body devoid of value. The normalization of victim-blaming in violence against women obscures any form of accountability that the perpetrator is expected to take, with police officers partaking in the violence either as physical instigators of the act or through legal indifference (Razack 2016). By identifying the Indigenous female victim as deviant, the violence is legitimized by claiming that control over the body is warranted, a claim aggravated by the intersection between racialized and gendered spheres of waste disposal.

In 2015, journalistic investigations into the disappearance of an Algonquin woman in Val D'Or, Quebec, led to the exposure of over 30 cases of starlight tours committed by Sûreté du Québec (SQ), Quebec's provincial police force, against Indigenous women in the community (Rich 2021). Subsequent investigations documented dozens of stories from women, many of whom were sex workers, who reported being picked up by police cruisers while intoxicated and dropped off on the side of the highway in dangerously cold weather. Some women stated that they were coerced into or paid for sexual services while others recounted being sexually assaulted for refusing to abide by the officers' orders (Rich 2021). However, despite widespread reports of police misconduct, SQ claimed that starlight tours were a standard process for *la purge géographique* ("detoxifying by geography") (Rich 2021:13). SQ officers weaponized sexualized violence as proof of the women's banality, highlighting their intoxication and sexual promiscuity as evidence that the women were guilty of their own assault (Palmater 2016). The women of Val D'Or were targeted as a population deemed toxic to the public arena, while the violation of their bodies during the starlight tours legitimized the violence and the debasement of their bodies justified the need for their eviction.

The image of the barbaric and sexually deviant

Indigenous woman both naturalizes and verifies violence as the appropriate response for gendered deviance. In the Val D'Or starlight tours and other instances of sexualized police violence against Indigenous women and sex workers, the culprit is not the aggressor but is rather the woman's high-risk lifestyle, which is highlighted in cases of violence against sex workers and women who were inebriated at the time of the assault (Palmater 2016). Behaviours that violate standards of femininity, such as drug use, alcohol consumption, and paid sexual services, are perceived as women inviting violence into their lives, with their subsequent brutalization treated as an unfortunate, yet justifiable, outcome of their delinquency. The transformation of Indigenous women's bodies into waste is rooted in colonialism's conception of women as illegitimate and impure, with the degradation of women being the logical outcome of their inferior existence.

"Modernity" and the Naturalization of Indigenous Deaths

The naturalization of Indigenous inferiority legitimizes their deaths as inevitable due to Indigeneity's temporal, biological, and cultural incompatibility with Canadian modernity. The enduring fiction that Indigenous people are a prehistoric remnant of the past with no relevance in the modern area legitimizes the expulsion of Indigeneity as the next step in evolution. Kara Granzow (2020) frames modernity as the West's construction of temporal superiority, with Western modernity idealized as a superior civilization that all other developing societies are expected to aspire for. The process of settler colonialism delegitimizes the capacity for Indigenous peoples to govern themselves according to the logic that they are unfit for existence amongst civilized people (Granzow 2020). High rates of poverty, addiction, and homelessness within the Indigenous community — each a product of colonial violence and intergenerational trauma — prove the spatial and temporal limits of Indigenous existence (Razack 2012). In starlight tours, the brutalization of the body by the natural elements confirms that the Indigenous body is unable to acclimate, and their eviction from the white settler city is treated as inevitable.

The pathological weakness of Indigenous people strips the police of responsibility during instances of police violence because the impending demise of Indigeneity makes it impossible for any other human being to be the cause of their death. For Indigenous people, addiction and alcoholism hold significant power as two of the most tangible legacies of colonialism and as illnesses that reinforce the image of the "drunken Indian," with substance abuse treated as proof of Indigenous people's inability to govern themselves (Razack 2013). During the inquest into the freezing death of 30-year-old Lawrence Wegner, SPS relied on Wegner's history of addiction and mental illness to argue that his body was predisposed to failure and that it was his biological weaknesses, not the police, who killed him. SPS weaponized his history of depression, drug use, and erratic behaviour in group homes and past interactions with police to claim that Wegner had wandered to the city's outskirts in a psychotic state and froze to death due to self-induced incapacitation (Razack 2014). Yet throughout the inquest, witnesses testified that the level of marijuana in Wegner's system would not have placed him in a psychotic state. Police who examined the body also found that Wegner's socks were clean, making it nearly impossible for him to have walked to the area by himself (Razack 2014). Despite evidence that SPS drove Wegner to where his body was discovered, the inquest maintained that Wegner was the author of his own demise. By targeting incapacitated individuals for starlight tours, the police protect themselves from responsibility and shift the blame to the pathological frailty of Indigenous people, whose eviction from modern society is the naturalized outcome of their innate weakness.

Through the temporal delineation of Indigeneity as incompatible with modernity, police violence succeeds in enacting colonialism's delegitimization

and eviction of Indigenous culture from Canadian society. During the Wright Inquiry, the presiding judge's recommendations heavily focused on perceived cultural differences between police and the Indigenous community, insinuating that their deviance was a hallmark of their culture (Lugosi 2011). The inquiry reinforced the deficiency of Indigeneity by excusing the police's behaviour as caused by a gap between Indigenous culture (the archaic) and police mandates (the modern), undermining the role that colonialist attitudes play in the destruction of Indigenous bodies (Lugosi 2011). Ultimately, Indigenous deaths are treated as an unfortunate yet necessary sacrifice in the modern landscape, "purging [society] of its undesirable elements" and allowing police to escape the costs of caring for a burdensome population unfit for modern life (Razack 2013). In the process, colonial violence is reproduced as white settlers are accepted as the natural successors to Indigeneity, whose legitimacy is eradicated as a product of police brutality.

Conclusion

In the 2003 documentary *Two Worlds Colliding*, Darrell Night visits the field that SPS officers abandoned him in—the night they decided his disorderly body was unworthy of warmth: "Those cops tried to take my life... and I value my life. Nobody deserves that" (Hubbard 2003 00:47). Standing in the same space that claimed the lives of Stonechild, Naistus, and Wegner, Night's testimony attests to the devaluation and dehumanization that police violence induces on bodies judged as out of place within the colonial landscape.

This essay discusses how Canadian police practices are rooted in colonial attempts to isolate and eradicate the Indigenous body from the white settler nation, focusing on the use of starlight tours as a weapon utilized to naturalize the inferiority of Indigenous people. Through an exploration of the imperialist history of Canadian policing and the social apathy towards the deaths of Indigenous people, this essay aims to highlight how the devaluation of Indigenous lives allows the police to legitimize forms of police brutality as a necessary tactic for regulating and evicting bodies that are deemed undeserving of belonging. The normalization of and indifference towards the death of Indigenous people in starlight tours reflect how policing dehumanizes populations who are judged as threats to the social order and deemed in need of disposal. Inquests into starlight tours and the justification of violence expose how police label and evict Indigenous bodies as inferior and unworthy of empathy.

Deconstructing the racial frameworks that legitimize Indigenous disposability requires police to confront the inexcusable terror and loss they have induced. Nevertheless, by acknowledging the systemic apathy and dehumanization of Indigeneity, police may have the capacity to begin meaningful consultations and reconciliation with the Indigenous community. While there are no number of reparations that will ever account for the loss of those who died in starlight tours, there is a small amount of justice in the recognition that those lives—regardless of inebriation, disorderliness, or delinquency—were valuable and deserving of empathy, care, and warmth.

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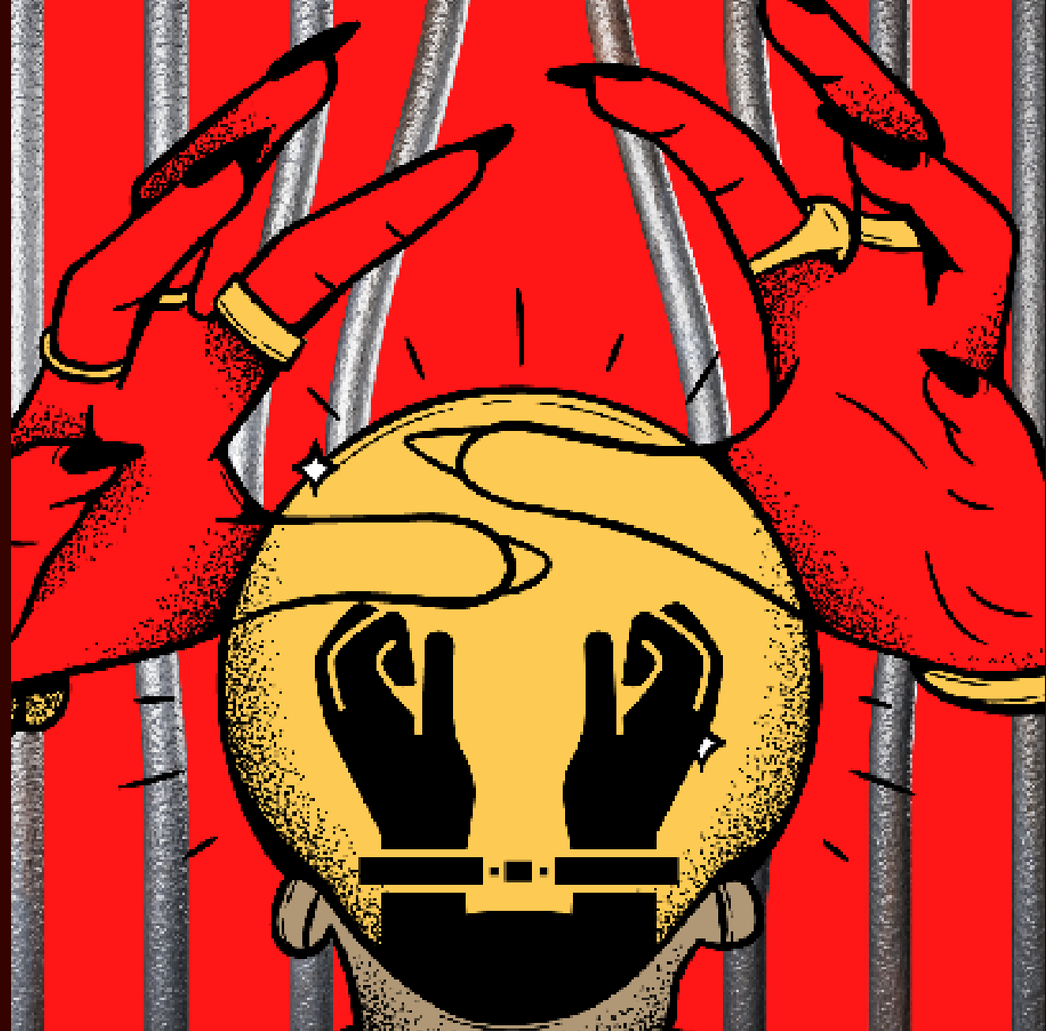

When Marvel's Project Insight Becomes a Reality; Positivism Versus Critical Race Theory on AI Driven Predictive Policing Algorithms

By: Rory M. Banfalvi

"This is project insight…We're gonna neutralize a lot of threats before they even happen" (Russo & Russo, 2014, 16:30-17:07). While the plot of Marvel's Captain America: The Winter Soldier may seem limited to the realm of science fiction, its concepts of preventive policing are eerily mirrored in current predictive policing practices used in America. In this film, an advanced AI program identifies and targets future criminal threats and marks them for execution (Russo & Russo, 2014). While more severe and en-masse than many predictive policing programs today, law enforcement is increasingly turning to AI to facilitate investigations and prevention of crime.

Legal positivism[1], as a classical approach to the nature of law, hypothesizes law as a system of rules enforced in order to maintain social order (Hart, 1959/2017). Critical Race Theory[2] is built on a critique of positivism and similar jurisprudential theories that fail to recognize the substantive realities of law for vulnerable groups and views law as a tool of the elites to advance their interests (Culver & Guidice, 2017, pp. 209-214). From a positivist perspective, predictive policing would eliminate many issues plaguing current legal systems. In contrast, Critical Race Theory demonstrates the inherent bias in AI algorithms that perpetuate existing systemic inequalities. Supported by the points of conflict between these two approaches, I will argue that the implementation of AI-driven predictive policing programs reinforces existing inequalities rather than eradicating them as AI purports to. Subsequently, I will identify how predictive policing moves the sphere of morality further and unjustly into the sphere of law, an approach that is contrary to legal positivist thought.

AI-driven predictive policing involves "the application of analytical techniques to data for the generation of statistical predictions about events so that something can be done about them in advance" (McDaniel & Pease, 2021, p. 7). Simply, police input data regarding criminal behaviour, hot spots, and demographic data into an algorithm that predicts one's risk of criminality (McDaniel & Pease, 2021, p. 9). According to these individual risk assessment predictions, police make decisions concerning degrees of surveillance, intervention, and police presence that individuals and locations merit (McDaniel & Pease, 2021, p. 7).

With the specifics and functions of predictive policing algorithms out of the way, we can turn to their analysis from jurisprudential perspectives. Legal positivists promote three central tenets that anchor their theory of the nature of law; (1) law is a system of rules, (2) judicial decisions are not solely an "automatic" process, rather a process that relies on existing social aims and, (3) the law is objective and impartial. In reviewing predictive policing algorithms, these values remain prominent.

AI algorithms are built from a base model of rules that guide the AI in its evaluation and analysis of input data to produce desired outcomes (McDaniel & Pease, 2021, p. 9). Even more than the legal system, these rules clearly outline how to determine an individual's guilt, the only difference being that the law is reactive and uses these rules to identify guilt following the commission of proscribed conduct. In contrast, predictive policing AI determines "guilt" in the form of risk, prior to any crime being committed.

In terms of judicial discretion, AI algorithms function in a similar yet more sophisticated fashion than legal adjudicators. When provided with a system of rules and relevant case information, judges are expected to make decisions about guilt (in bench trials) and apply the law with a high degree of accuracy, free of personal bias (Hart, 1959/2017, p. 104). When the case is not concrete but is penumbral, judges must reach into social aims in order to come to the most accurate conclusion (Hart, 1959/2017, p. 95). Algorithms for predictive policing act as judge, jury, and executioner — they are fed relevant statistics and data and use a system of rules in the form of code to come to their decision and prescribe the appropriate law enforcement response. When the patterns become complicated or penumbral, AI is capable of deep machine learning. As these algorithms accumulate larger datasets, they learn from the patterns they identify and selectively edit their base model and code to better reflect society and its crime patterns (McDaniel & Pease, 2021, p. 17). Predictive policing AI algorithms use a process that is "objective, scientific and reproducible" (McDaniel & Pease, 2021, p. 7), based solely on data, yet remain reactive and flexible to changes in society to ensure against their obsolescence.

One of positivism's primary and most notorious beliefs is the separability thesis — that there is no

connection between law and morality. This belief, in large part, is supported by the positivist commitment to objectivity that proscribes the use of morality in legislating or judicial decisions (Hart, 1959/2017, p. 104). However, it also explains that despite some laws coinciding with morality — laws prohibiting homicide, for one — the law has no natural reliance on morality (Hart, 1959/2017, p. 102). Predictive policing AI, perceived as a product of science, not humanity, eliminates the human error and bias present even in the most unbiased of police in determining who is considered high risk, adhering to strict principles of objectivity and impartiality as described above.

When AI-driven predictive policing programs are examined in these dimensions, it is evident that positivists would accept their implementation and even promote it as a means of proactive crime prevention. However, by adding a critical race lens to this issue, the flaws and inherent biases become clear. Two main principles of Critical Race Theory are that positivist analyses of the nature of law fail to recognize its substantive realities in their blind commitment to objectivity and that the law is a tool weaponized by the elites (Culver & Guidice, 2017, pp. 209-214). While AI predictive policing may seem an admirable pursuit, there is a harmful bias latent in the input data.

Essentialized in four words — "bias in, bias out" (Mayson, 2019, as cited in Samant, Horowitz, Beiers, & Xu, 2021, p. 4). These algorithms can only function objectively if the provided data is not infused with bias, and in the case of American policing programs, that is far from the case. In the U.S., racialized minorities have always been overpoliced and over incarcerated, a product of the country's deeply entrenched institutional and systemic racism (Nellis, 2021). The significance of this historical discrimination is that any data entered is tainted by these systemic inequalities (Samant, Horowitz, Beiers, & Xu, 2021, p. 4). Data is a historical account — it represents what has occurred in the past, and the past is scarred by racism. The American Civil Liberties Union summarizes this flaw expertly in a review of the use of predictive policing algorithms in child neglect cases: "Any tool built from a jurisdiction's historical data runs the risk of perpetuating and exacerbating, rather than ameliorating, the biases that are embedded in that data." (Samant et al., 2021, p. 4)

Given the U.S.'s historical and continuing predilection to over-policing racialized individuals and neighbourhoods, the data will ultimately show increased criminality among racialized individuals. This creates an inescapable positive feedback loop[3] (Samant et al., 2021, p. 4). Using an example to ground this critique, if a majority of the crime data entered shows that perpetrators are primarily Black and live in majority-Black neighbourhoods, the algorithm will reproduce the fact that Black people and Black neighbourhoods are crime hot zones and 'hot people' who merit a higher individual risk score. Therefore, they will be subject to increased surveillance, police presence, and intervention. When the police identify hot spots, they dispatch more police to these regions, and police presence precipitates increased crime in an area simply because there are more officers present to observe and intervene.

Crime data also does not provide a complete picture of crime. "Suspicious" behaviour is more likely to be interrupted by police if the individual is racialized (Quan-Haase & Tepperman, 2021, p. 213). Police are also more likely to arrest and charge a racialized individual for the same crime that a white individual would only receive a warning or a slap on the wrist for. This discrepancy in crime rates across racial groups produces a false conclusion of higher criminality among racialized individuals (Finnsdottir & Tepperman, 2021, p. 82). These are the substantive realities of AI-driven predictive policing that positivism fails to recognize.

With this reality in mind, the exploitative use of predictive policing algorithms becomes clear. Beyond law as a tool of elites, the integration of seemingly objective AI programs coded to identify criminality also doubles as a tool for the dominant class to weaponize and oppress vulnerable groups through mass incarceration. Increased surveillance and intervention, because of faulty predictions, will not only increase the incidence of crime, but will also increase police brutality and clashes between police and citizens.

There are two dimensions to the consequences of the bias of AI for the intersection of morality and law. First and foremost, the use of predictive policing algorithms, even if unbiased, unjustly injects morality into the law. In determining who is high risk or exhibits traits predicting criminality, these AI algorithms essentially decide who is guilty or innocent before the crime has been committed. In the American legal system, everyone is considered innocent until proven guilty, and the outputs of these algorithms violate that precedent by acting extrajudicially[4] to determine guilt.

Beyond simply the violation of precedent, in deciding who is guilty, these algorithms are making moral recommendations of who they deem is good or bad and, even more dangerously, whose right to the presumption of innocence should be valued. In creating these categories of good and bad, AI drafts a moral code that law enforcement uses to make policing decisions — a biased and prejudicial moral code that discriminates against people of colour.

In terms of law, these critiques of AI algorithms point out necessary areas of reform within the larger legal system. While the law purports to treat all individuals equally irrespective of race, gender, class, religion, and ability, it carries inherent biases that result in differences in treatment that have existed since its formation. Despite what a positivist will say about mechanical applications of the law that eliminate human bias, the law itself was written by and meant to protect the privileged and dominant class and continues to do so today. The integration of AI algorithms into law enforcement and judicial systems allows us to clearly see the bias that remains present in the law. Ultimately, the contrast between positivism and Critical Race Theory identifies essential areas of the law that must be broken down and rebuilt more equitably. This contrast also shows the flaw in the law's reactive nature. It must proactively intervene in the use of AI-driven predictive policing in order to legislate against its exploitative uses and provide legitimate and ethical oversight of the algorithms to ensure they do not continue to replicate existing inequalities.

At first glance, AI predictive policing algorithms appear to be a positivist's dream; a system of rules, impartially making decisions free of human emotion, bias or morality. However, in applying a critical race lens, the inherent biases of algorithms that rely on historical data are evident. This reliance on historical crime statistics reproduces systemic inequalities faced by marginalized groups and creates a positive feedback loop of high crime, increased police intervention and thus increased crime reporting. The consequence of AI-driven predictive policing, irrelevant of bias, is the identification of high risk individuals as being preemptively bad or guilty, thus unjustly moving the sphere of morality further into the sphere of law. In addition, it is evident that this moral invasion of the law occurs disproportionately in the application of the law for marginalized groups. We must now ask, is the law capable of achieving a more ethical and equitable application of predictive policing algorithms or will Marvel's Project Insight soon become a reality?

Notes

[1] See H.L.A. Hart's "Positivism and the Separation of Law and Morals" and "The Law as a Union of Primary and Secondary Rules" in The Concept of Law for a more comprehensive understanding of legal positivism.

[2] Critical legal theory and subsequently Critical Race Theory emerged as an opposition to colonial, racist, and patriarchal iterations of the nature of law. They aim to bring awareness to how the law acts on people in the margins (Culver & Guidice, 2017, pp. 209-210). They have brought a previously unseen level of consciousness to jurisprudence.

[3] While this paper does not discuss predictive policing and over-policing among marginalized communities in-depth, other than the Black community, it should be noted that similar if not greater effects and feedback loops can be observed for other vulnerable groups such as Indigenous communities in Canada and those with mental illnesses.

[4] The use of "extrajudicially" here is meant to indicate a decision outside of the court process not outside the sphere of law.

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Peremptory Challenges: A Necessity for the Legitimacy of the Judicial Process within a Psychological Model

By: Shruti Nistandra

Epistemology forms a significant and contentious part of judicial fact finding, especially when it comes to jury selection. The purpose of a jury is to grant the accused "a fair and public hearing by an independent and impartial tribunal" (*Canadian Charter of Rights and Freedoms*, 1982). Yet, impartiality and fairness are difficult to define. There are two main epistemological traditions that conceptualize impartiality. One is the modernist or enlightenment tradition, which accords with the traditional legal model of the mind. This model argues that a juror can consciously be impartial and base their deliberation and reasoning on the facts presented during a trial (Watson, 2021). The other is the psychological model, which argues that the external world is perceived and understood through the inner workings of the mind; these inner workings are informed by one's identity, socialization, and experiences (Cammack, 1995, 416-417). Thus, one's thoughts, decisions, and deliberations are always unconsciously influenced by these inner workings (Watson, 2021). The problem of impartiality, as formulated by these competing models, is especially salient in the debate about peremptory challenges, which allow attorneys to dismiss jurors without stating a cause or explanation. From the traditional legal view, peremptory challenges allow attorneys' prejudices to violate the principle of impartiality (*R. v. Chouhan*, 2021); whereas, from the psychological perspective, peremptory challenges enhance the legitimacy of the judicial process by recognizing and dismissing intrinsic biases, which could disadvantage the accused (*R. v. Chouhan*, 2021). This paper argues that as a society slowly moving towards the psychological model, Canada was wrong to abolish peremptory challenges. A purely psychological model leads to a complete loss of impartiality and brings identity politics into the law, which reduces the legitimacy of the judicial system (Richards, 2003, 448). Thus, although unnecessary in the traditional legal model, peremptory challenges are necessary to "balance the biases" in a psychological model. The discriminatory effects of peremptory challenges in an increasingly psychologized system can be mitigated through new techniques, such as adding an "objective observer" like the Washington Supreme Court's General Rule 37 rule or by introducing methods such as category masking and prejudgement ratings to reduce attorney bias.

The landmark Supreme Court of Canada case, *R. v. Chouhan*, which found that it was constitutional to abolish peremptory challenges in Canada, showcases both sides of this debate. Interestingly, the Justices were unanimous in recognizing the need for impartiality and the importance of avoiding discrimination, yet they were deeply divided over the role of peremptory challenges in achieving this. Their perspectives largely differed based on the models of the mind that each espoused. The *Canadian Charter of Rights and Freedoms* (1982), proscribes in s.11(d) and (f) that everyone has a right to a hearing in front of a "fair and impartial tribunal" who is representative and "indifferently chosen." The *Charter*, however, clarifies that "representativeness focuses on the process used to compile the jury roll and not its ultimate composition." This formulation indicates that the Constitution is based on the traditional legal model as impartiality is presumed and representativeness entails no specific jury composition. In contrast, post-modern discourse posits impartiality and representativeness as competing principles, with representativeness signalling a recognition of specific differences and unconscious biases, and impartiality standing for the opposite. This dichotomy is visible in the different opinions offered in *Chouhan*. Chief Justice Wagner, along with Justices Moldaver and Brown, took the traditional legal position as they argued that the representativeness of a jury comes from the randomness of the selection process (*R. v. Chouhan*, 2021). A jury, thus, is not required to uphold diversity or be responsive to the subjective identity of any of the parties involved (*R. v. Chouhan*, 2021). As such, they found that peremptory challenges "undermined randomness" and paved the way for a favourable, and not merely an impartial, jury (*R. v. Chouhan*, 2021). Justices Karakatsanis, Martin, and Kasirer, although ruling the same way, took a more psychological approach, reasoning that courts must uphold impartiality "through a contextualized approach that looks to... structural and unconscious biases" (*R. v. Chouhan*, 2021). Justice Abella, although agreeing on the unconstitutionality of peremptory challenges, argued that the purpose of representation is promoting diversity within the jury (*R. v. Chouhan*, 2021). Justice Côtè was the only one who fully dissented, arguing for the preservation of peremptory challenges through taking a distinctly psychological

approach. She argued that "peremptory challenges permit accused to strike at hidden, subtle, and unconscious biases that are undoubtedly present at the jury array" (*R. v. Chouhan*, 2021). Thus, the arguments for and against peremptory challenges are strictly delineated by the models of the mind. In the post-modern psychological model, where the goal is the recognition of identity, as well as unconscious and subjective biases, the peremptory challenge is necessary to maintain impartiality and legitimacy. Yet, from the traditional model of the mind where decisions are knowable and conscious, peremptory challenges are a dangerous introduction of prejudice and bias.

In a purely post-modern model, peremptory challenges are necessary to ensure the fairness and legitimacy of the justice system. There are two main reasons for this. The first is that this model is not automatically conducive to diverse juries; in many cases, the psychological rationale has the opposite effect. For example, according to the psychological model, the landmark American anti-discrimination decisions of *Batson v. Kentucky* and *J.E.B. v. Alabama*, which disallowed the use of peremptory challenges on the basis of race and gender respectively, are flawed because they affirm that race and gender are not significant aspects of one's identity, which can meaningfully impact the inner workings of the mind (Flowers, 1995, 515-516). As such, the psychological model would permit attorneys to discriminate on the basis of race and gender because that is a recognition of the unconscious and salient impact that these facets of identity have on one's decisions. Yet, as showcased in *J.E.B.*, peremptory challenges based on gender led to the construction of an all-female jury, which the accused believed to have violated his equal protection rights (512). This leads to the second part of the argument, which is that the psychological model often focuses the debate on the rights of the community to be fairly represented on the jury, rather than to safeguard the rights of the accused (Richards, 2003, 451), which was the initial reason for the formulation of the jury process (Watson, 2021). As such, in Peter J. Richards' paper "The Discreet Charm of the Mixed Jury," he criticizes this as "subjective impartiality," where ensuring fairness consists of including a representative cross-section of the community, who have "local knowledge" (Richards, 2003, 447). Richards highlights that the courts in California have even gone so far as to deny the impartiality of the jury altogether, and instead achieve fairness through a "balance of biases" (547). In such a model, no limits to the peremptory challenges should be justified because allowing both the defence and the prosecution to input their biases in an adversarial manner is the only way to reach a legitimate balance between the rights of the accused, the rights of the victim, and the community's right to representation.

In a purely post-modern model, peremptory challenges are necessary to ensure the fairness and legitimacy of the justice system.

Yet, a glaring problem with this model is that it seeks to encompass an ever-broadening measure of identities, which makes the law inconsistent and difficult to define (449). Additionally, it determines bias based upon the current socially and politically relevant identity categories (447). Identity is not seen as a fixed concept but something which is ever changing and ever-expanding (457). As the notion of identity expands to include many different dimensions, the judicial system will be tasked with deliberating which dimensions of identity are most salient, and this is often defined along the boundaries of identity politics (448). This is highly problematic, as it makes the law subject to the ebb and flow of the social and political tide. The justice system, based on such malleable boundaries, will lose consistency over time (449). The alternative to the peremptory challenge, as the Supreme Court suggested in *Chouhan*, is an expanded challenge for cause. The challenge for cause ultimately rests in the judge's hands. As the peremptory challenge is criticized for importing the accused's, the victim's, and their attorneys' bias into the deliberation process, challenge for cause without peremptory challenges would shift the burden to the judges to determine questions of identity (Holland, 2020, 181-182), whose own subjective and unconscious biases would be seen as informing this. In the case of peremptory challenges, bias can be seen as being "balanced" as all parties are contributing to it; however, the bias of the state, alone, would delegitimize the process (Richards, 2003, 447).

Crucially, the psychological model falls short due to its overemphasis on unconscious biases, which cannot be overcome and thus must be accommodated. Yet, there is contrary evidence to suggest that some level of objectivity undoubtedly exists. This can be seen in the early infanticide trials, where juries of privileged upper-class men would put their own identity aside to understand the abuse and exploitation which surrounded the young, often impoverished women's particular actions, and thus would exonerate them (Watson, 2021). Furthermore, a study by Cheryl Thomas, discussed by Annabelle Lever in her paper, "Democracy, Epistemology, and the Problem of All-White Juries" highlights some benefits of diverse juries from a traditional legal perspective. She highlighted that a mixed jury is intrinsically better because it allows the introduction of different perspectives (Lever, 2017, 542). For example, Lever cited examples of how white jurors acknowledged existing discrimination yet were uncomfortable discussing issues of race, even where it might be highly relevant, and how a mixed jury might not only encourage such conversations, but make them easier and more likely to happen, which would be more conducive to impartiality (542). This gets at the heart of the traditional legal model that the purpose of the jury is not to represent all the biases of society, but to have a fair cross section of people who are capable of consciously setting their biases aside when deliberating. In such a system, peremptory challenges should be abolished. As such, the majority opinion of Justices Wagner, Brown, and Moldaver in *Chouhan* was correct in strongly affirming that in the traditional legal model, peremptory challenges are unconstitutional. Yet, at the same time, Justice Côtè was also correct in her argument, that when viewed through a psychological lens, it is necessary to uphold peremptory challenges.

Many solutions have been proposed in order to reach the correct balance between managing attorneys' unconscious biases in the peremptory process, as highlighted by the psychological model, and maintaining juror impartiality as required by the traditional legal model. The Supreme Court has suggested an expansion of the challenge for cause, yet research has shown that lawyers can still very easily exclude a juror based on stereotype and prejudice by merely offering different reasons (Norton & Sommers, 2017, 474-475). Another possible solution can be the integration of psychological methods in order to limit attorneys' discriminatory practices. These can consist of category masking, where the lawyer does not have face-to-face contact with the juror during voir dire (Sommers & Norton, 2008, 535), or prejudgement ratings, where lawyers share their preferred juror characteristics before voir dire (536). Another option is something like the General Rule 37 rule that the Washington Supreme Court has recently adopted. According to this rule, the judge would have to consider whether an "objective observer" would believe that race could have played a factor in the peremptory challenge, as is prohibited by *Batson* in the U.S. (Holland, 2020, 206). The objective observer of the rule is specified as someone who is aware that "implicit, institutional, and unconscious biases exist" (210). As such, the test is designed for a psychological model. Furthermore, the proposal for the test highlights the alternative explanations that are often used by attorneys to offer neutral justifications for their stereotypically motivated decisions so that such justifications can be recognized and prevented (206).

The psychological model falls short due to its overemphasis on unconscious biases, which cannot be overcome and thus must be accommodated.

As Chief Justice Wagner and Justices Brown, and Moldaver highlighted in *Chouhan*, greater public attention towards discrimination, especially on a racial basis, is becoming prominent within the judicial system. As such, there is a rising tendency towards the psychological model, which can cause problems stemming from a complete abolition of impartiality, and the impact of identity politics. Peremptory challenges are one remedy to preserve the legitimacy of the judicial system. Yet, this need not mean an acceptance of biased juries. Going forward, new ways such as the General Rule 37 rule with its "objective observer" test, are being developed to maintain legitimacy within the heightening psychologization of the jury selection process.

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Not Really About Religious Freedom: A Libertarian Rejection of Accommodationism

By: Anthonie Fan

In *The New Religious Intolerance*, Martha Nussbaum argues for accommodationism, the doctrine of exempting people from laws burdening their conscience. This theory requires the state to move away from formal neutrality and show deference to individuals in religious matters. I, however, disagree with this tenet of accommodationism. Religious freedom should be rejected as grounds for exemption from secular laws punishing people only for harm to others. For example, Québec's Ethics and Religious Culture (ERC) curriculum mandates a neutral and objective presentation of multiple religious and ethical theories. Catholic parents have challenged the program's constitutionality, claiming it hinders their ability to pass Catholicism onto their children. Both Nussbaum and I would dismiss their challenge. ERC does not amount to an intolerable infringement upon religious liberties because society has a compelling interest in educating children inclusively.

Nussbaum begins her argument for accommodationism with two fundamental assertions. Firstly, that all humans bear equal dignity (Nussbaum 61). Secondly, governments must respect, protect, and not violate this equal dignity (62). Then, Nussbaum proceeds to her third premise: an assault on conscience is an assault on dignity (65). She believes that the quest for life's meaning is essential to our being; therefore, the faculty used to navigate this quest – namely "conscience" – is vital to our dignity (65). Nussbaum's fourth premise further defines assaults on conscience. She contends that our conscience "can be seriously impeded by worldly conditions" (65). There are two types of violations: prohibition of outward expression of one's conscience and forced affirmation of a belief one does not hold (65-66). The former is analogous to imprisoning one's conscientious beliefs in inward validations (65). Without practice, conscience is forced into inactivity, hence impinged upon (65). The reasoning behind the latter is apparent: one cannot, with an intact conscience, affirm what they do not believe in (66). Since both forms may result from externalities, conscience is vulnerable to social and political conditions (67). However, it is crucial to note an assaulted conscience is still entitled to equal protection without being removed or less worthy of respect (66). To protect conscience and dignity from damages, governments must "[tailor] worldly conditions" to safeguard citizens' rights to free belief, expression, and practice of conscience (67). Combining these freedoms with the equality premise, Nussbaum concludes that "liberty should be both *ample* and *equal*" (68, emphasis added).

There are two main theories regarding the protection of the freedom of conscience. John Locke believes formally non-persecutory laws are sufficient to protect religious liberties (Nussbaum 71). When laws conflict with conscience, Locke suggests one to "follow their conscience" and "pay the legal penalty" (qtd. in Nussbaum 72). In contrast, Nussbaum contends that individuals receive exemptions from laws burdening their conscience; otherwise, they do not enjoy religious freedoms (74). Because democracy is inherently majoritarian, laws embody the majority's idea of convenience (73-74). Formally non-discriminatory laws might, in practice, penalize minorities for their beliefs (74). For example, a formally non-persecutory law mandating the removal of hats in court would put Quakers in the position where they must either give up their conscience or be punished for contempt (75). Therefore, we must exempt minorities from laws burdening their conscience (74).

Nussbaum, however, is not arguing for unlimited freedom of conscience. She sets out two important boundaries of religious liberty: public order and safety (75). In U.S. jurisprudence, this limitation is known as a "compelling state interest" (78). In other words, when society has good reasons to burden conscience, it can rightfully do so. Moreover, Nussbaum's accommodationism extends to secular and ethical beliefs, excluded by Locke from religious freedom (76). Moreover, Nussbaum's liberty of conscience is individual: When considering accommodation applications, we should only consider applicants' personal understanding of sacred duties (79).

Nussbaum believes accommodationism promotes social inclusion as the doctrine ensures "*[n] either minorities nor majorities*, entering [public] spaces, may insulate themselves from contact with those who are different" (138, emphasis added). The majority must not legislate in a way that drives minorities out of the public sphere. Likewise, minorities must not form insular communities, effectively seceding from the diverse and inclusive society.

I believe Nussbaum would uphold ERC's

constitutionality. She would agree with the Supreme Court that "realities that differ from those in their immediate family environment is a fact of life in society" (*S.L.*[1] para. 40). Thus, insulating children from this reality "amounts to a rejection of the multicultural reality" (*S.L.* para. 40). Neither the majority nor the minorities may be allowed to do so in an inclusive society (Nussbaum 138). Besides, Québec has a compelling state interest in the program. Québec's Education Minister states that Québec, as "an open, pluralistic society," expects "[a]ll schools [to] teach students to respect different allegiance" (qtd. in *S.L.* para. 13). Nussbaum would agree with him, for society may "insist on teaching children about the diverse groups" in it (127).

Admittedly, by requiring students to learn about different religions, Québec limits religious freedom. However, "the freedom of religion asserted by the [parents] is their own, … not that of the children" (*S.L.* para. 29). Nussbaum would suggest that public space should be administered to expand children's choices, and ERC protects the children's freedom to have beliefs other than their parents' beliefs (127, 129). While parents may teach Catholicism at home, public schools are not in the private sphere (124, 127).

Furthermore, unlike the Amish parents in *Wisconsin v. Yoder,* S.L. seeks a complete exemption from ERC (Nussbaum 127; *S.L.* para. 4). Québec would fail to achieve its educational duties with the application granted (*S.L.* para. 40). This distinguishes *S.L.* from *Loyola*[2], where the Court allowed an equivalent, denominational approach to implementing ERC (*Loyola* para. 80). Nussbaum would agree with the Court that strict adherence to a non-denominational approach impairs freedom more than required by Québec's goals, effectively penalizing Loyola for being a Catholic school (*Loyola* para. 56; Nussbaum 74).

I agree with Nussbaum's hypothetical conclusions in both *S.L.* and *Loyola* but on different grounds. I agree that freedoms should be both *equal* and *ample* (Nussbaum 68). However, Nussbaum proposes an overbroad scope of conscience and an unequal protection of freedoms. Mill's harm principle, accompanied by a modified Lockean standard, sufficiently protects free conscience. There should be no accommodations on conscientious grounds.

J.S. Mill offers a theory of legal limitations to freedom known as the harm principle. He believes that the only justification of state interference in citizens' lives is if one's action causes harm to others (94). The theory suggests the right to educate children belongs to their parents (172). However, since inadequate education harms children, the state may impose a particular education scheme to prepare children for the future if parents fail (172-173).

Peter Singer provides a more specific framework regarding religious freedom: compliance with conscience as an individual responsibility. He agrees with Nussbaum that personal practice of religion should never be violated (Singer 1). However, Singer believes that, to follow their faith, a faithful believer should give up amenities not religiously required (2). Singer further rejects that all cases involving religion must invoke religious freedom; he agrees with Locke that secularly motivated laws do not trigger scrutiny under religious freedom (2).

I would interpret *ample* freedoms as various types of freedoms rather than a broad reading of conscience proposed by Nussbaum. Based on her premise that exploration of life's meaning relies upon the faculty of conscience (65), virtually everything purposefully done relates to conscience. If all actions enjoyed the high level of deference she proposes, "each conscience [would be] a law unto itself" (Scalia qtd. in Nussbaum 82). A broad reading of conscience is not required in most cases, where other freedoms protect dignity. For example, Mill's argument for state education can apply to ERC (172-173): "[T]he state has to justify the imposition of a particular course on every child, without exceptions" (Groleau qtd. in Makin 2).

Further, I find beliefs *inherently unequal* under Nussbaum's accommodationism. She claims freedom of conscience covers non-religious beliefs (74), but this is not the case in practice. Differentiating accommodations in conscription and drug laws, Nussbaum shows a clear preference for religious beliefs over secular ones (89). She believes that ethical pacifists should be exempted from military service, but secular exemption from drug laws would be "courting anarchy" (89). However, she fails to account for why secular beliefs are less close to dignity than religious ones. For example, if a strict ethical vegetarian like Peter Singer (2) and a Buddhist barely following Dharma both end up in prison, Nussbaum's theory would only

grant vegetarian catering to the latter (84). If religious and secular beliefs were genuinely *equal*, everyone would receive exemptions from any law of their choice. In this case, accommodations "could not coexist with meaningful enforcement" (89).

If religious and secular beliefs were genuinely *equal,* everyone would receive exemptions from any law of their choice.

Admittedly, John Locke denies atheists and agnostics the right to freedom of religion (Nussbaum 74). Under his theory, laws banning the teaching of Catholicism would be void, whereas those prohibiting the dissemination of atheism would be valid. However, fixing this inequality does not trigger concerns about anarchy. The non-persecution principle can easily extend to free thinkers. To achieve *equal* freedoms, we should apply this extension to the Lockean principle.

My theory would render similar results as Nussbaum's theory in some cases and distinct ones in others. Since ERC deals with inclusivity, Nussbaum would dismiss S.L.'s request for exemption. However, suppose the government wants to impose a math curriculum. Parents come before the court asking for an exemption, claiming their religion mandates a unique counting system incompatible with modern mathematics. An accommodationist would not choose to force modern science on their children. However, the Millian framework of education would save the children from being ill-equipped to get a job.

Another pair of cases to differentiate the two theories is motorcycle helmet laws and the kirpan ban. Nussbaum's approach would allow Sikhs exemptions in both. I would conclude that motorcycle helmet laws are void; anyone may choose to wear or not to wear anything on a motorcycle. Not wearing a helmet is self-harm, allowed under the harm principle. In the kirpan case, I would side with the ban. Although a "ceremonial dagger" for Sikhs, kirpans may be used for assaults by non-Sikhs (CBC News). The law sees all articles potentially used to assault as perils, regardless of bearers' intent.[3] Therefore, a kirpan exemption for Sikhs is unequal, for someone believing in an imperative to carry weapons on non-religious grounds would not be exempted; a total unbanning of weapons in courthouses and parliaments is unimaginable.

In conclusion, I believe that it is rightful for Québec to implement ERC as Québécois children have a significant interest in being raised in a pluralistic, inclusive way. The same analysis should apply to all state education components, as parents have the right to designate educational programs for their children. Additionally, I reject Nussbaum's argument for accommodationism as it imposes overbroad and unequal protection of the liberty of conscience and reparations to either shortcoming cause perils of anarchy. I propose Mill's principle of harm, accompanied by Locke's non-persecution standard, as an alternative solution to balancing personal freedom and societal values.

Notes

[1] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 (CanLII), [2012] 1 SCR 235.

[2] *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613.

[3] Although potentially counterintuitive, this is the law in most common-law jurisdictions. See s. 2 of the *Canadian Criminal Code* ("weapon"). See also s. 2 of the *Hong Kong Public Order Ordinance* ("offensive weapon"), §5.06(2) of the *Model Penal Code* ("weapon").

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Justice Denied: Applying a Critical Race Lens to Explain s. 718.2(e) and *Gladue*'s Failure

By: Variam Manak

Introduction

According to the most recent data on the demographic make-up of Canada's prisons, Indigenous people make up 30% of the federal prison population, despite being 5% of the country's overall population (Zinger 20). This significant disproportionality has been the subject of various parliamentary debates, official inquiries, and academic literature, as scholars and politicians attempt to understand this pressing social issue and formulate lasting solutions. In 1996, with the supposed aim of remedying this issue of overrepresentation, the Canadian Parliament enacted s. 718.2(e) of the Criminal Code, which instructed judges to look for alternatives to imprisonment when crafting sentences "with particular attention to the circumstances of Aboriginal offenders" (Rudin 2). In 1999, this law was interpreted and defined in the landmark decision in *R. v. Gladue*, wherein the Supreme Court of Canada recognized the systemic discrimination underlying the issue of Indigenous overincarceration. Despite their laudable aims, the federal government's enactment of s. 718.2(e) and the Supreme Court's decision in *Gladue* had an insignificant impact on this pressing social matter. Overall, this research paper will use Critical Race Theory to explore and understand this law and Supreme Court decision, while also explaining its inability to remedy Indigenous overincarceration.

Through an application of a Critical Race lens and an engagement with scholarly research, this paper will demonstrate that despite s. 718.2(e) and *Gladue*'s transformative potential, they were unable to solve the Indigenous overincarceration crisis. This is because of a lack of resources provided to the Canadian court system, a lack of direction given to lower courts on the application of *Gladue*, and new laws that have rendered s. 718.2(e) and *Gladue* ineffective. Furthermore, this paper will argue that apathy and blatant disregard towards this law and Supreme Court decision illustrates how s. 718.2(e) and *Gladue* were not meant to resolve the issue of Indigenous overincarceration. Rather, they were intended to close the contradiction that Indigenous overincarceration presented for a seemingly fair and multicultural Canadian society. Additionally, by focusing on the sentencing stage, which is a relatively minor aspect of Indigenous overincarceration, s. 718.2(e) and *Gladue* highlight how the law can act as a homeostatic device that ensures swift racial progress does not occur.

Historical Overview and Official Responses

In 1995, the Royal Commission on Aboriginal People (RCAP) authorized a study on Indigenous peoples' experiences with Canada's criminal justice system. The study confirmed what criminological circles and Indigenous communities had known for decades: the criminal justice system was imprisoning Indigenous people at alarmingly disproportionate rates. At the time of the study, Indigenous people made up 10% of the federal prison population despite being 2% of Canada's general population (RCAP 29). As the RCAP made apparent, overrepresentation was particularly striking in the prairie provinces. For example, Indigenous people were 10% of Saskatchewan's general population, yet made up 72% of their provincial prisoners (Rudin 13-14).

In 1996, with the goal of ameliorating this pressing social issue, Parliament enacted Bill C-41, which contained amendments to the sentencing guidelines within the Criminal Code. One of the new provisions, s. 718.2(e), held that upon conviction, "all available sanctions other than imprisonment… should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders" (Rudin 2). It is important to note that these amendments were not specifically directed towards improving the outcomes of Indigenous offenders. Rather, Bill C-41 was a part of the federal government's broader effort to reduce the incarceration rate in Canada, which ranked as one of the highest among all Western democracies (Daubney 37-38). Essentially, the focus on Indigenous offenders was a secondary aim of this newly enacted law.

In 1999, the Supreme Court of Canada interpreted and defined s. 718.2(e) in their decision in *Gladue*. Per Cory and Iacobacci J.J., paying "particular attention to the circumstances of Aboriginal offenders" entailed that sentencing judges ought to consider and take "notice of the broad systemic and background factors affecting aboriginal people" (Supreme Court of Canada. 670) . The systemic and background factors the court was referring to, which are commonly known as "Gladue factors", include the following:

- Personal, familial, or community histories of poverty or substance abuse
- Experiences of racism or discrimination
- Family status and history
- Experiences of abandonment or with residential schools
- A history of abuse, whether it be sexual, physical, emotional, or spiritual
- Diminished employment or educational opportunities
- A history in foster care or adoption
- Dislocation from their communities (Maurutto and Hannah-Moffat 456).

The Supreme Court maintained that when crafting a fair and proportionate sentence for any Indigenous offender, sentencing judges ought to consider relevant Gladue factors alongside appropriate restorative justice approaches that prioritize the needs of the victim, the offender, and their community. The hope was that through such an analysis, sentencing judges could reduce the Indigenous incarceration rate and thereby realize the supposed goals of s. 718.2(e) (Rudin 43). Additionally, the Supreme Court made it clear that this section was not an automatic sentencing discount for Indigenous offenders, and that the traditional sentencing principles of denunciation, incapacitation, and deterrence were still relevant (Rudin 43).

A Brief Overview of Critical Race Theory

Broadly, Critical Race Theory scholars are interested in studying and understanding the relationships between race, racism, and power in society (Delgado and Stefancic 3). Critical Race Theory (CRT) contends that racism is an ordinary feature of society and is commonly experienced by racial minority groups. Racial progress, according to CRT, does not occur out of altruism from the dominant racial group but out of an "interest convergence", wherein the dominant group grants rights strictly out of self-interest (9). Furthermore, CRT asserts that race is not a fixed category that is rooted in biological realities but a social construct forged through social thought and relations. As such, different racial groups can be constructed in different ways, depending on the desires or interests of the dominant racial group (9-10).

One of the main branches of CRT is structural determinism. This strand of CRT argues that the existing legal system is unable to redress the harms suffered by marginalized groups partly due to the law's inability to reform and its unwillingness to ensure swift racial progress (30-38).

An Application of Critical Race Theory to Explain s.718.2(e), *Gladue* and Their Failure

Initially, s. 718.2(e) and *Gladue* appear to have the potential to remedy the issue of Indigenous overrepresentation by abandoning the colorblindness and racial/ethnic neutrality that characterizes much of Canadian law. As proponents of CRT would contend, colorblindness prevents people from "taking account of difference in order to help people in need" (Delgado and Stefancic 27). In the context of law and legal decision-making, a colorblind approach would prohibit judges and lawmakers from taking account of race and ethnicity, even if it enabled them to ameliorate historical harms (27). Only through aggressive colour-consciousness can the law resolve the misery suffered by marginalized minority groups (27). By explicitly referencing the "circumstances of Aboriginal offenders", s. 718.2(e) is renouncing a racially/ethnically neutral approach. The Supreme Court's decision in *Gladue* is similarly abandoning colorblindness by taking notice of the racism and systemic discrimination that has caused Indigenous persons to be imprisoned at such high rates. As Iacobucci J. stated, "s. 718.2(e) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people" (Supreme Court of Canada 702) Essentially, by mentioning Indigenous groups and identifying the longstanding harms they have suffered, s. 718.2(e) and *Gladue* are adopting a racially, ethnically, and culturally conscious stance which, according to CRT, would make them well-equipped to tackle the issue of Indigenous overrepresentation.

Research from the Legal Services Society of BC appears to confirm the view that *Gladue* has the potential to limit the incarceration of Indigenous offenders. In their study, researchers compared the case outcomes of 42 Indigenous offenders who underwent a Gladue analysis with 42 Indigenous offenders who did not (12). They found that 23 of the offenders who had

had a Gladue analysis conducted received a prison sentence compared to 32 of those who did not (Legal Services Society of BC 22). Additionally, offenders who received a Gladue analysis had an average prison sentence of 18 days and non-Gladue offenders were sentenced to an average of 45 days in custody (Legal Services Society of BC 25). As the findings from this study suggests, if applied correctly, *Gladue* and s. 718.2(e) can help Indigenous offenders avoid imprisonment and thereby help remedy the Indigenous overincarceration crisis.

Despite its transformative potential, empirical data from across Canada reveals that s. 718.2(e) and *Gladue* did not rectify the issue of Indigenous overrepresentation in this country's prisons and jails. In fact, the overincarceration of Indigenous people in Canada has gotten significantly worse since *Gladue*. According to Dr. Ivan Zinger, the current Correctional Investigator of Canada, the proportion of Indigenous inmates in federal corrections nearly doubled in the two decades following the Supreme Court's landmark decision (Zinger 20). As of 2020, Indigenous people make up 30% of all individuals in Canada's federal prisons (20). As these numbers make clear, s. 718.2(e) and *Gladue* had no impact on the overincarceration crisis.

Moreover, several factors contributed to s. 718.2(e) and *Gladue*'s overall ineffectiveness. Firstly, as Rudin notes, relatively few resources were put towards the implementation of this law (48). Essentially, judges' effective application of s. 718.2(e) to the sentencing of Indigenous offenders requires information regarding their relevant Gladue factors, typically through what is known as a Gladue report. However, in several jurisdictions, court officials were given insufficient time and resources to collect such information (Rudin 48). For instance, officials in Manitoba were often given only 8 to 10 hours to collect information on relevant Gladue factors, even though such a process usually takes weeks to complete (Rudin 48). Consequently, very few Gladue reports were coming before judges. For instance, from 1999 to 2005, only 25 Gladue reports were completed by Manitoban courts (Rudin 48). Additionally, as former judge Bill Sundhu explains, provincial Legal Aid services often lacked sufficient funding for the writing of Gladue reports, which meant that Indigenous offenders' applications for these reports are routinely rejected (Edwards). Ultimately, this lack of funding has resulted in a very limited application of s. 718.2(e) and *Gladue*.

An additional reason why this law and Supreme Court decision were unable to resolve Indigenous overincarceration is due to a lack of guidance on how these laws were to be applied, which resulted in confusion and misunderstanding among judges across the country. Essentially, as Rudin notes, while the Supreme Court clearly stated the types of personal and systemic factors that judges were to consider in their sentencing of Indigenous offenders, they offered very little guidance on how this information was to come before the criminal courts (Rudin 48). Additionally, judges were often confused on the types of offences *Gladue* applied to, as many mistakenly believed that Gladue analyses were not required for violent offences

or for offences that bared no clear connection to an Indigenous accused's social circumstances (Rudin 375).

In addition to a lack of funding and judicial guidance, s. 718.2(e) and Gladue were unable to ameliorate the Indigenous overrepresentation crisis because they were rendered invalid by the implementation of mandatory minimum sentences. In 2012, Parliament enacted Bill C-10, which created mandatory minimum sentences of imprisonment for several drug- and weapon-related offences, inhibited the use of conditional sentences, and increased the maximum term of imprisonment for several offences (Rudin 379). This effectively undermined the goals of s. 718.2(e) and subverted the impact of the decision in Gladue, as judges were barred from engaging in Gladue analyses for Indigenous offenders convicted of crimes that carried mandatory minimum sentences of imprisonment (Newell 221). Bill C-10 had a significant impact on the Indigenous incarceration rate, as Indigenous people made up 28% of all offenders sent to prison via a mandatory minimum sentence from 2012 to 2017 (Department of Justice 2).

Canada's criminal justice system and governments demonstrated apathy and blatant disregard for the application of s. 718.2(e) and the decision in Gladue. This prompts several questions. Why pass the law in the first place? Why make formal commitments towards the amelioration of the Indigenous overincarceration crisis while providing minimal resources and guidance to ensure that these commitments would be followed? Additionally, why render s. 718.2(e) and *Gladue* useless? Critical Race Theory's concept of "contradiction-closing cases" provides an answer. According to this notion, when the gap between the legal system's ideals and practices becomes too significant, it will produce a contradiction-closing case to make it appear fair and just (Delgado and Stefancic 38). Canada portrays itself as a multicultural society that is open to and tolerant of all racial/ethnic groups (Perry 6). The legal system appears to epitomize these virtues by guaranteeing the fair and equal treatment of all persons, regardless of their racial, ethnic, or cultural background. However, the disproportionate imprisonment of Indigenous populations casts doubts onto the extent to which the criminal justice system embodies these ideals. Essentially, how can the justice system be fair when certain groups are more likely to be imprisoned than others? A critical race lens would suggest that to resolve this apparent contradiction, the Canadian Parliament enacted s. 718.2(e) and the Supreme Court produced their decision in *Gladue*, as they both give the impression that the criminal justice system is working towards the fair and equitable treatment of Indigenous people, despite empirical evidence that suggests the opposite.

As Rudin notes, when the Supreme Court decided in *Askov* that unreasonable delays in criminal trials would result in charges being dropped, the criminal justice system was given ample resources by the federal government to hire new judges and build new courthouses in order to swiftly adapt to this change in the law (Rudin 704). In the case of *Stinchcombe*, when the Supreme Court mandated more expansive disclosure rules, criminal justice actors promptly changed their practices to fall in line with this law (704). This shows that when willing, the criminal justice system can swiftly change its practices to give effect to the laws before them. Therefore, the system's inaction regarding s.718.2(e) and *Gladue* reflects an unwillingness to change. Essentially, if the legal system truly wanted to realize the goals of s.718.2(e) and *Gladue*, they would have exemplified similar levels of urgency and dedicated the resources necessary to ensure the law's effective implementation. As an application of a Critical Race lens would reveal, this inaction was no mistake, as s. 718.2(e) and *Gladue* were merely intended to resolve the apparent contradiction between the legal system's formal commitments to fairness and the substantive reality of unequal treatment against Indigenous offenders.

S. 718.2(e) Acts as a Homeostatic Device

According to the structural determinist branch of CRT, laws aimed at remedying the issues faced by racial/ethnic minority groups typically act as homeostatic devices. This means that they are structured in a manner that prevents racial progress from occurring swiftly (Delgado and Stefancic 38). A careful review of the structure of s. 718.2(e) and the nature of the issue of Indigenous overincarceration offers support for this assertion. Essentially, by only focusing on sentencing, the federal government addressed a single aspect of a multi-faceted issue. In doing so, they

ensured that s. 718.2(e) would not have the broad effect necessary to immediately tackle Indigenous overincarceration.

s. 718.2(e) and *Gladue* were merely intended to resolve the apparent contradiction between the legal system's formal commitments to fairness and the substantive reality of unequal treatment against Indigenous offenders.

As scholarly research illustrates, the sentencing of Indigenous offenders is one of the key factors that contribute to Indigenous peoples' overrepresentation in Canada's prisons and jails. A national study on Canada's criminal courts conducted reveals that from 2005-2016, Indigenous offenders were 30% more likely to be sentenced to custody and 13% less likely to be sentenced to probation than their white counterparts (Saghbini, Bressan, and Paquin-Marseille 22-24). In this regard, it makes logical sense for the federal government to target the sentencing stage as a means to reduce Indigenous overincarceration.

What is puzzling, however, is their disregard for the other areas aspects of the criminal justice system that contribute to Indigenous overrepresentation in prisons. Essentially, in order to receive a sentence of imprisonment, an Indigenous person must first be convicted of their charges. Data on Canadian criminal courts reveal systemic discrimination occurs during the trial phase, as Indigenous people are 14% more likely to be found guilty than white accused, 55% less likely to have their charges withdrawn or dismissed, and 33% less likely to be acquitted (Saghbini et al. 18-20). Additionally, Indigenous people make up 21% of all persons held in pre-trial detention who were denied bail (Gallop 171). This is due to provincial bail systems' overreliance on sureties for pre-trial release, which many Indigenous accused are not able to provide due to the rampant poverty in their communities (Deshman and Myers 76). Although the bail system and discrimination at the trial phase are significant drivers of Indigenous overincarceration, s. 718.2(e) and *Gladue* ignored them completely.

Consequently, this law and Supreme Court decision ensured that swift and substantial progress on the issue of Indigenous overincarceration would not occur. By focusing all their attention on the sentencing stage, Parliament allowed the systemic discrimination against Indigenous accused at the trial phase and their disproportionate denial of bail to continue unchecked. This effectively ensured that their overrepresentation in prisons would not be resolved. As such, the law was structured to focus on a specific aspect of a complex issue which, in theory, would prevent significant progress from being made. Overall, this example supports CRT's assertion that laws aimed at addressing the issues faced by racial/ethnic minority groups ultimately act as homeostatic devices.

The History of the Canadian Criminal Law and Justice System: Why s. 718.2(e) and *Gladue*'s Ineffectiveness is not Surprising

As Critical Race Theory contends, racism is an ordinary aspect of society that is deeply entrenched within its institutions (Delgado and Stefancic 8). In relation to Canada, the settler-colonial domination of Indigenous people, which is rooted in racism, is anw ordinary aspect and purpose of this country's criminal law and criminal justice system. As Heidi Stark's historical analysis illustrates, Canada used their criminal law to enable colonial expansion in the 19th century (Stark 1). Essentially, Indigenous resistance to Canadian colonization was framed as criminal by the federal governments of the time and was thus used to justify the imposition of their laws onto Indigenous peoples and lands. Indigenous groups were brought under the jurisdiction of Canada's criminal law, which enabled them to reduce Indigenous political autonomy, domesticate Indigenous groups within their settler state, and expand their legal boundaries (Stark 1). Criminal justice actors were also implicated in this process, as the Northwest Mounted Police, currently known as the Royal Canadian Mounted Police, were relied upon to instill colonial law and enable Canadian settlers' westward expansion (Stark 4). The NWMP restricted Indigenous mobility and heavily supervised, controlled, and scrutinized Indigenous leaders in order to "bring Indians and Métis within the reach of Canadian law" (Stark 4).

Furthermore, the Canadian criminal justice

system's role as a tool of settler oppression continues to this day, as the prison system has emerged as the newest means by which this country exercises its domination of Indigenous communities. As Vicki Chartrand notes, following the conclusion of World War 2, Canada's reserve and residential school systems were slowly replaced by the penitentiary as the premier means of controlling Indigenous populations (Chartrand 68 & 75). In other words, the prison emerged as a "new expression of colonialism" that this country used to dominate its "problem population" (Chartrand 76). In this regard, the overincarceration of Indigenous persons is not a "legacy" of colonialism, but rather, is "linked to a continuing colonial project in Canada" (68).

As these examples illustrate, in line with a central premise of CRT, settler-colonial dominance of Indigenous populations is an ordinary feature of Canada's criminal law and justice system. As such, one cannot expect the criminal law and legal system to produce remedies to the issues plaguing Indigenous communities, especially when these institutions are the ones to blame. A tool of colonial oppression will almost never be able to treat Indigenous persons in an equitable or emancipatory manner. Ultimately, the criminal law and criminal justice system were never designed to benefit Indigenous populations. Therefore, it should not come as a surprise that s. 718.2(e) of the Criminal Code and its interpretation by the Supreme Court fail to ameliorate Indigenous overincarceration.

Looking Beyond Canadian Law For Solutions

Given s. 718.2(e) and Gladue's failure to remedy Indigenous overincarceration and the criminal law and justice system's status as a site of domination for Indigenous populations, governments and policymakers may need to look beyond the law for solutions to this pressing social problem. However, due to its cultural commitment to the rule of law, Critical Race Theory may not be helpful in this endeavour. This is because CRT tends to view changes in legislation and thinking about law as the only way to eradicate injustice and inequality in society (Trevino, Harris, and Wallace 8). Essentially, CRT is sometimes unable to adopt a conception of justice that is "independent of culture wholly permeated by law's rule" (Trevino, Harris, and Wallace 8). As a result, issues of social justice that negatively affect racial/ethnic minority groups, which may exist independent of the law, tend to be undermined or ignored (Trevino, Harris, and Wallace 8).

However, the materialist branch of CRT may aid in the formulation of lasting solutions for Indigenous communities. According to materialists, racism is the means by which dominant groups in society allocate resources, status, and privileges. Racial hierarches largely shape the economic realities of different racial groups, as those viewed as inferior are typically barred from tangible or material benefits (Delgado and Stefancic 21). This line of thought is useful in understanding and characterizing the economic realities of Canada's First Nations. Settler-colonialism, which involves racial categorization/hierarchies, has produced extreme poverty and socioeconomic deprivation among Indigenous populations (RCAP 42). This has given rise to criminogenic conditions within Indigenous communities, which has increased their contact with the criminal justice system and thus contributes to their ongoing overincarceration (McDonald 75). Efforts from governments and policymakers to remedy Indigenous overincarceration could include initiatives that seek to improve the socioeconomic conditions of Indigenous communities, such that their contact with the criminal justice system is significantly reduced.

Conclusion

As Critical Race Theory would contend, *Gladue* and s. 718.2(e)'s rejection of a racially/ethnically neutral approach suggested that it could have remedied the longstanding issue of Indigenous overincarceration. However, it was limited in its effect due to a lack of resources from federal and provincial governments, a lack of clear direction for lower courts, and the implementation of mandatory minimum sentences. Such apathy and disregard point towards the conclusion that s. 718.2(e) and *Gladue* were never intended to fully resolve the Indigenous overrepresentation crisis. As Daubney observed, during the Supreme Court's deliberation in *Gladue*, the intervening Attorney General's factum made no suggestion that s. 718.2(e) "would make a huge difference in the rate of Aboriginal incarceration, let alone be a panacea for the problem" (41). Instead, as a Critical Race lens makes clear, s. 718.2(e) and Gladue were simply intended to give the appearance that the criminal justice system was working towards the fair and equitable treatment of Indigenous persons. A swift and substantial solution was not the aim of Parliament, which is evidenced by the fact that they ignored many of the causal factors of the Indigenous overrepresentation crisis. An absence of a solution from the criminal law and criminal justice systems is not astonishing, given these institutions historical and ongoing roles as tools of settler-dominance.

The overincarceration of Indigenous persons has been on the federal government's agenda since the RCAP's 1995 report. The fact that this problem has remained unsolved for the last two and a half decades is not due to a lack of knowledge or lack of resources, but rather, an absence of political will. Canada's national mythology contains grand statements about openness, acceptance, and multiculturalism. However, as Indigenous people's experiences with Canada's colonial legal systems reveal, this could not be further from the truth. If Canada truly wants to close the contradiction, they must do more than produce laws and Supreme Court decisions. They must produce results, which means an immediate reduction in the proportion of Indigenous people in this country's prisons and jails.

Overall, a critical race lens was useful in the exploration of s. 718.2(e) and Gladue because it helped characterize their potential and make sense of their failures. In theory, laws that abandon colorblindness and racial/ethnic neutrality can produce remedies for the issues faced by marginalized racial/ethnic minority groups. However, as evidenced by Gladue and s. 718.2(e), without substantial action to back up these commitments, such laws become no more than a means to deceive marginalized populations into thinking that progress is being made. Without comprehensive efforts to address all facets of a social concern, laws and court decisions will not engender significant change.

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