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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 8.1 of the *Intra Vires Undergraduate Law Journal*! This issue features five academic undergraduate pieces all of which focus on insightful and pressing legal issues, ranging from white female solipsism in Canadian legal language to the constitutionality of Toronto's new parking enforcement scheme. 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. 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 8.1, Angelina Zahajko identifies and exposes the presence of white female solipsism within the Canadian constitution in her article, "Gender Equality for Who? Disentangling the white, Christian solipsism in our legal language through *Bill 21*." In the next article, "'Assured Prosecutorial Success': A Constitutional and Normative Inquiry into the Toronto APS," Anthonie Fan investigates and challenges the constitutionality of Toronto's new parking enforcement scheme (Administrative Penalty System). Following Anthonie's piece, we have Clover Chen on the Tsleil-Waututh Nation's environmental assessment and how opposing Western and Indigenous worldviews call for more balance in powers and responsibilities in their paper, "The Role of Indigenous-Led Environmental Assessment in Environmental Justice and Rejecting the State." Lily Farinaccio then proves and condemns the impact of rape myths in sexual assault allegations while identifying racial and economic prejudices in "'She asked for it!': Analyzing the Role Rape Myths Play at the Various Stages of a Sexual Assault Allegation." Lastly, to close the issue, we present you with Nathan Ching's paper, "More Than Two Extremes - An Examination of the Anti-impunity issues regarding the coexistence of Criminal Accountability and Truth, Peace and Forgiveness," addressing the debate on anti-impunity as it pertains to criminal justice and truth, peace, and forgiveness (TPF).

Without further adieu, here is issue 8.1! We hope you enjoy it.

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

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.

Sommer Pesikan is a third year student at the University of Toronto, double majoring in Ethics, Society, & Law, and Political Science, and minoring in French. Outside of Intra Vires, Sommer works at an insurance company. In her free time, she likes discovering new libraries, watching movies, and spending time with family and friends. Sommer hopes the journal can serve as a platform for all students to express their views on legal-related matters.

EDITORS

Anasofia Florez is a first-year in CSE, WGS, and SDS. She is an intersectional activist and avid enjoyer of all forms of art. She hopes to serve in a judicial office. Until then, you'll find her listening to music with her noise-cancelling headphones.

Anthonie Fan is a third-year student at Trinity College, double majoring in Public Policy and Ethics, Society, and Law. He is interested in the intersections of law, philosophy, and moral reasoning.

Ayesha Firoz is a second-year student double-majoring in Criminology and Sociolegal Studies and Sociology. She is an aspiring lawyer who is passionate about social justice, community involvement, and law.

Eleanor Park is a second-year student at Trinity College, pursuing a double major in English and Religion. Outside of Intra Vires, she competes on the Canadian Moot Team and writes for The Varsity as Associate Comment Editor. In her free time, you can find her biking through Toronto or going to TIFF at random times of the day!

Grace Bogdani is a Rotman Commerce student, specializing in Management with minors in Economics and English. In her spare time, she enjoys reading, running, and exploring the intersections between business and law.

James Jiang is a third-year student pursuing a Political Science specialist. Apart from Intra Vires, he is also an editor for other undergraduate journals and works as a court reporter for the Ontario Court of Justice. Upon graduation, he hopes to attend law school and one day become a Crown prosecutor.

Mellisa Ing is in her third year majoring in Criminology and double minoring in Philosophy and Bioethics. She is excited to be part of the Intra Vires team this year!

Rachel Brouwer is a third-year student majoring in Political Science and minoring in History and African Studies. Besides being an editor for Intra Vires, she is a Junior Research Fellow at the Canadian Law Review and is interested in pursuing international law.

AUTHORS

Angelina Zahajko (she/her) is a third-year undergraduate student studying urban studies and ethics, society, and law. Her research interests lie at the intersection of housing justice, the ethics of development and the real estate state, and the politics of homelessness – all of which are explored with a critical, decolonized, anti-capitalist, and intersectional lens. She is currently pursuing these passions as the Research Chair at Kensington Market Community Land Trust and as a Project Coordinator at 8 80 Cities, a community-focused, eco-conscious urban planning non-profit.

Anthonie Fan is a third-year student at Trinity College, double majoring in Public Policy and Ethics, Society, and Law. He is interested in the intersections of law, philosophy, and moral reasoning.

Clover Chen (they/them) is studying a specialist in Peace, Conflict, and Justice, and a minor in Indigenous studies with a focus on the intersection between sustainability and Indigenous self-determination. They are an advocate for justice, equity, diversity, inclusion, and belonging on campus and in their broader communities. As well, Clover is an artist exploring self-expression through digital art, dance, music, and poetry.

Lily Farinaccio is a third-year student at the University of Toronto, double-majoring in Ethics, Society and Law, & Critical Studies in Equity and Solidarity. Originally from Ottawa, Ontario, she is passionate about feminism and social justice, and hopes to pursue a career in law. When Lily is not studying, you can catch her playing basketball, reading poetry, baking, and jogging around Queen's Park.

Nathan Ching is a final-year student of criminology, public policy, and political science. Hoping to go to law school and make a difference in the criminal justice system, he is extremely passionate about social welfare, international law, and the jurisprudence of law-making. Outside of academia, he is an award-winning student leader, hired photographer, and a man who enjoys the simple pleasures of cooking and casual debates.

Gender Equality for Who? Disentangling the white, Christian solipsism in our legal language through *Bill 21*

By: Angelina Zahajko

Introduction

In September of 2022, Mahsa Amini was murdered by the Iranian morality police for wearing her hijab "improperly"; since then, Iranian women's chants of "Women, life, freedom!" have shaken the world, sparking transnational solidarity in favour of the Muslim woman's right to choose to cover (Jabbari, 2022). In November of 2022, the fight for Muslim women's autonomy was brought into the Canadian context after a group of Muslim women and human rights organizations appealed to the Québec Court of Appeals in hopes of abolishing the discriminatory *Bill 21: An Act representing the laïcité of the State*—a Québécois laïcité law that prevents the wearing of religious symbols in public sector positions (Rukavina, 2022b). In tandem, these events have also reinvigorated the Western, white feminist discourse around the hijab as a symbol of patriarchal oppression as opposed to a chosen expression of faith (Simard, 2022; Sirois, 2022). With both parties assuming the language of "gender equality," a tension unfolds within the Canadian legal language of whose vision of equality is being pursued within *Charter* challenges and who is harmed in the process.

Drawing from the legislation and rhetoric surrounding *Bill 21*, I argue that the language of gender equality and freedom within our Constitution assumes a white solipsism that directly infringes upon Muslim women's autonomy to cover and express their faith. In positioning the hijab as a symbol of inherent patriarchal violence, gender equality laws like *Bill 21* serve only to silence those that it alleges to liberate. In this paper, I will first provide a historical and legal background on laïcité in Québec and demonstrate how *Bill 21* disproportionately discriminates and otherizes Muslim hijabi women. I will then provide a case analysis of *Hak v. Attorney General of Québec*, the court challenge to *Bill 21*, to understand how the law fails to protect Muslim women and how legal discourses on gender equality are distorted under the lens of white liberal feminism. In light of this case study, I will draw from the disciplines of white feminism, Muslim feminism, and transnational feminism to prove the existence of white female solipsism within the legal language of secularism, freedom of religion, and gender equality. Finally, I will conclude with an analysis of how this impacts Muslim women's lives and what future considerations we must make to repair this systemic discrimination.

The Road to Bill 21: Catholic Hegemony to Laïcité

Laïcité—that is, the separation of religions writ large and the State—has become synonymous with the Québécois identity and, paradoxically, we can credit this characteristic to the province's long history of Catholic hegemony. Until 1960, the Catholic Church monopolized the organization of Québécois society: while the rest of Canada was modernizing and secularizing following the World Wars, the Catholic Church managed Québec's education system, hospitals, and social welfare, as there were no governmental ministries for these sectors at the time (Baum, 2000). This history follows the tradition of regions such as Ireland and Poland, which were conquered by the empire and, therefore, turned to the Catholic Church to maintain a distinct cultural identity and way of life from those who conquered them (Baum, 2000). However, come 1960, the people of Québec desired to be less economically dependent on the English-speaking regions of the country and to "modernize" socially (Baum, 2000). In the West, a Manicheastic dichotomy has been constructed between the "modern" secular society and the "archaic" non-secular society, a dichotomy that has stigmatized those who express their faiths as subject to oppression, dangerous, and out-of-touch and holds substantial gendered implications (Scheibelhofer, 2012). Thus, on June 22, 1960, a Liberal government usurped the conservative Union Nationale and created ministries that largely eradicated the political role of the Catholic Church—an event that is remembered today as a socialist "Quiet Revolution" (Baum, 2000, 151).

Now, following the Quiet Revolution and two failed secession attempts, the Québec nationalist project du jour is "interculturalism" (Laxer, 2019, 4). According to Laxer (2019), interculturalism pushes back against the federal multiculturalism policy; rather than emphasizing tolerance and a celebration of diversity, Québécois interculturalism emphasizes a "common public identity centred on the French language" that minorities and migrants immigrating to

the "nation" must assimilate into (4). Under this framework, laïcité stems from the fear of reverting back into a non-secular society, a fear that was heightened once religious minorities who publicly practiced their faith began to immigrate in large numbers to the province (Laxer, 2019, 5). Therefore, a bill enshrining laïcité has been on the provincial ballot since it was first tabled in the Québec *Charter* of Values in 2013 to allegedly bolster religious neutrality and interculturalism (Laxer, 2019).

This history of discriminatory, ethno-nationalist rhetoric culminated in the enactment of *Bill 21*, which was tabled by Legault's Coalition Avenir Québec administration on March 28, 2019 and adopted by the National Assembly on June 16, 2019. Under *Bill 21* (2019), all public service workers are forbidden to do their job while wearing religious symbols, including hijabs, kippahs, turbans, crosses, and more. This includes French education and childcare workers, healthcare workers, workers within the legal system (e.g., lawyers, judges, police officers, etc.), and public transit operators (*Bill 21*, 2019). Furthermore, those who seek public services can be denied services if they are wearing the aforementioned religious symbols (*Bill 21*, 2019). While the bill states that the law does not apply to those holding positions at the time of enactment, it will be put in effect for those seeking a new job or looking to advance (*Bill 21*, 2019). Finally, while it is built on the principles of "religious neutrality, freedom of conscience, and freedom of religion", *Bill 21* (2019) also alleges to have a gender equality function, arguing in its preamble that it displays "the Québec nation [attaching] importance to the equality of men and women" (5).

Under the guise of liberal buzzwords such as equality, secularism, and neutrality, *Bill 21* is a manifestation of ethno-nationalist rhetoric that has served only to (1) otherize those who fail to fit the WASP/C[1] mould, (2) sow Islamophobia and anti-Semitism into the fabric of the province, and (3) restrict the autonomy and socioeconomic mobility, particularly of hijabi Muslim women. Regarding the first two claims, from reduced economic opportunities to a recent, but extensive history of violence and mass shootings, studies have shown that Islamophobia has notably increased in Québec since the introduction of laïcité (Rusakvina, 2022a). Finally, while it is not explicitly stated, this law is clearly predicated upon the Western, white, liberal feminist view that the hijab is a manifestation of "Islamic gendered oppression that women are subjugated to," not a chosen expression of faith. In other words, by attempting to use the law to expand gender equality and liberate Muslim women, they have silenced and dominated them, infringing upon their right to choose to cover.

Two things become apparent here: (1) the success of Québécois laïcité laws relies on the gendered oppression and state control of Muslim women, exemplifying how white feminist beliefs are entrenched within the constitutional legal language of equality and freedom, and (2) *Bill 21* infringes upon one's freedom of religion guaranteed in s.2 of *The Canadian Charter of Rights and Freedom* (hereafter known as *The Charter*). The Québec government is not ignorant of this, for, upon enacting the Bill, they invoked s.33 of *The Charter* (colloquially referred to as "the notwithstanding clause") to avoid legal challenges on this basis. Despite this, a group of plaintiffs and human rights groups sought to challenge the legislation in 2021 with partial success—a case which will be explored below.

Case Analysis: *Hak v. Attorney General of Québec* (2021)

The Québec Superior Court saw the case of *Hak v. Attorney General of Québec* (2021) on April 20, 2021. The plaintiffs were comprised of mostly Muslim women[2] who were either at risk of losing their jobs based on their religious expression or deprived of opportunities in their field on the same grounds. They brought the Attorney General of Québec to court with the intention of establishing the unconstitutionality of *Bill 21* through methods not protected by the notwithstanding clause, abolishing the legislation, and receiving adequate damages (*Hak v. Attorney General of Québec*, 2021). The trial also included 14 interveners:

1 WASP is a common acronym that stands for white, Anglo-saxon, Protestants, to which I have added a 'C' to include Catholics. While Protestants and Catholics have had a long, contested history, I believe that they can be grouped together here, as they are both faiths that emphasize individual, private practice and are, therefore, less vulnerable to the effects of *Bill 21*.

2 Plaintiffs who did not fit into this description include a Catholic woman and a Jewish man, both education workers.

those in favour of the plaintiffs included the National Council of Canadian Muslims, the Corporation of the Canadian Civil Liberties Association, and the Canadian Human Rights Commission, and those in favour of the defendants included the Québec Secularism Movement, feminist organization PDF Québec, and Atheist Freethinkers (*Hak v. Attorney General of Québec*, 2021). The plaintiffs argued that even with the use of the notwithstanding clause, *Bill 21* should be abolished, for it (1) violates the "constitutional architecture" of Canada based on the "unwritten constitutional principles of democracy and the protection of minorities," (2) violates "rule of law" by its vague application that serves to target specific minority groups, and (3) is *ultra vires* because it is grounded in criminal law, a federal jurisdiction (Safeer, 2019). While the Court sympathized with the plaintiffs' circumstances, it argued that the plaintiffs failed to (1) demonstrate that the Act would cause irreparable harm and/or an "overall imbalance of inconvenience," (2) provide affidavits that the court felt were non-speculative, and (3) disprove that the law was drafted in good faith to maximize societal utility. That said, the Court did strike down the Act's application to National Assembly members and English School Board members: the former restriction violated the s.3 *Charter* right to run for office, while the latter restriction—and interculturalism more broadly—violated the s.23 *Charter* right to receive education in a minority language (Safeer, 2019).

The decision was met with outrage on both ends of the debate, but one thing remained at the centre of the debate: gender equality. Those in favour of the plaintiffs argued that the Act oppresses Muslim women and limits their autonomy, whereas defenders of the Act argued that any ethical permissibility of Muslim headgear is also permitting their oppression and limiting their autonomy (Ruvaksina, 2022b; Simard, 2022). The case was appealed to the Québec Court of Appeals with no success and is on track to reach the Supreme Court of Canada in 2023 (Ruvaksina, 2022b). As this legal battle continues, two questions emerge: how does constitutional language such as gender equality, freedom, and secularism become distorted by white feminism and what is the impact on Muslim women?

Analyzing White Solipsism within Gendered Legal Discourse

Finley (1989) argues that because laws were created by white, cisgender, heterosexual, and upper-class men, legal language cannot possibly protect against the harms that women face, for their experiences have been excluded from its creation (887). This legal injustice was one of the founding principles of the liberal feminist movement—a type of feminism that looks to law and power to provide equal opportunities for women, believing that they have been deprived of these opportunities through the establishment of socialized gender roles (Comack, 1999). In response to the work of liberal feminists, the courts expanded the Constitution to include laws that protected "gender equality" and the "rights of women"; however, this language still proves to be semantically problematic.

Coined by Adrienne Rich, white solipsism describes the phenomenon where "women" are essentialized within legal language to only represent the experiences of white, cisgender, heterosexual, and middle/upper-class individuals (qtd. in Harris, 1990, 349). This is especially exemplified by the "global sisterhood" brand of transnational feminism; Grewal (1999) critiques that an essentializing "women's-rights-as-human-rights" approach to transnational feminism fails because it works off an American subjectivity that does not speak for the priorities and values of women from all social, cultural, and religious backgrounds (337). Thus, gender equality laws serve to uphold the rights and fight for the values foregrounded by white liberal feminism. Women who do not fit within that mould must conform to that of the dominant group or they will be subjugated and excluded by the laws that allege to protect them.

Similarly, Western secularism is often justified under this liberal legal language of gender equality, as seen in the aforementioned case. According to Brown (2012), Québécois laïcité is only successful in achieving religious neutrality if you identify with that white, Christian solipsism, for the Western model of secularism can only work to affirm the rights of those who practice Christianity. Christianity, and subsequently Catholicism, focuses on one's individual relationship with God. Therefore, it is often practiced privately and individually (Brown, 2012). Laïcité is a reflection of Québec's Catholic history, as it pushes all signs of religion out of the public sphere and into the private—a place where Christian faiths can still be explored and expressed successfully. The same cannot be said for Islam or Judaism because these faiths are expressed and practiced publicly through the adornment of religious headpieces and community prayers. In other words, non-negotiable and non-Christian public expressions of faith not only violate Québécois laïcité laws but are viewed as "religious zealotry" (Brown, 2012, 6), thereby otherizing Muslim women—among others—who express their faith through the donning of a hijab. Thus, laws like *Bill 21* are inherently Islamophobic and anti-Semitic, as the legal language of religious neutrality and secularism does not account for non-Christian expressions of faith.

By applying an intersectional approach to *Bill 21*, we see that Muslim women especially are oppressed by two mutually-reinforcing structures of domination entrenched within our laws: the white solipsism within gender equality and the othering accomplished through Western secularism. This systemic discrimination is only further exacerbated in a post-9/11 landscape, where Muslim men have been painted as archaic and violent, an enemy to the "progressive, secular West" (Schiebelhofer, 2012; Thobani, 2008).

White liberal feminists justify this blatant Islamophobia within our laws on the grounds that religions like Islam, and more specifically the hijab, are inherently patriarchal. In the liberal, Western feminist discourse, women were often confined to the home and forced into domestic labour by patriarchal figures in their life. Consequently, liberal feminism is often conflated with a middle-class brand of "career feminism" or "girlboss feminism" that fights for equal opportunities for women outside of the private life and within the public discourse of power (Comack, 2000; Brown, 2012). In the eyes of a white liberal feminist, a Muslim woman wearing a hijab in public is a threat to that mission, for they are bringing the private sphere (religion) into the public, thereby reminding these women of that domestic patriarchal subjugation (Brown, 2012).

For example, white liberal "feminist" scholars like Chesler have remarked that they dream of freeing those in Islamic religions, arguing that they

are "[trapped] women in domestic and sexual slavery against their will with no chance of escape" (qtd. in Thobani, 2008, 172). For the women's rights group Pour les Droits de Femmes Québec (PDF Québec), who intervened on behalf of the State in *Bill 21* and *Hak v. Attorney General of Quebec*, this prejudice is particularly severe. They argued that the hijab and other religious symbols are a symbol of subjugation, for every religion is about patriarchal control; therefore, to permit even the choice of wearing a hijab would be to permit the subjugation of women (Simard, 2022; Sirois, 2022). Similarly, when faced with the ongoing Revolution in Iran, they doubled down on this argument, writing that:

> "Iranian women, your fight is ours! We know that the veil, which the Islamic regime in Iran forces you to wear to withdraw from society and make you second-class citizens, is not just a piece of cloth, as claimed by women and men from Québec and Canada (not counting those from elsewhere in the world) who call themselves feminists!!
>
> …This is why it is so important that signs of the oppression of women are not broadcast in our schools and promoted in our institutions. It is about the freedom of conscience of our children, and especially that of little girls" (Sirois, 2022).

Thobani (2008) argues that this superiority complex/saviour complex entrenched within liberal feminism is directly linked to whiteness, for white feminists use their privilege to mobilize within spaces of power and use tools like the law to assert neo-colonial dominance over women who are not like them, all under the universalizing guise of gender equality. Chesler and PDF Québec staunchly argue against the hijab, but this greatly differs from the ideas put forth by Muslim feminists who perceive Islam as a feminist religion—especially compared to Christianity (Ali et al., 2008). For example, Ali et al. (2008) interviewed a breadth of Muslim women to see how their faith intersected with their feminist identities. One participant argued,

> "The essence of my faith, Islam, which is that 'Paradise lies beneath the feet of the mother' and 'you should worship your Lord and reverence the womb that bore you.' I mean that is one sentence! I mean one statement and it's together in the same statement where we are asked to worship God and reverence the womb that bore us. Putting those things on an equal footing, this is as important as this."

This greatly contrasts the responses of Christian women, who admitted that Christianity was inherently patriarchal and clearly defined gender roles within the public and private spheres (Ali et al., 2008). This proves that gender equality and similar secular laws contain a white, Christian solipsism because only those who conform to those identities will benefit from laws like laïcité. White liberal feminists are often credited with the advances in gender equality laws[3] and their Islamophobic and ignorant viewpoints on the hijab permeate this legislation. By essentializing women into a homogeneous category that is informed by white feminist experiences and values, laws that seek to advance gender equality actually serve to exacerbate and reinforce the intersectional structures of domination that oppress Muslim women, as seen in a post-*Bill 21* Québec.

Conclusion

This paper proves that there is an inherent white, liberal, secular feminist logic at the centre of rights-based "gender equality," especially within the context of Québécois laïcité. Under these biases enshrined within our Constitution, the language of secularism and gender equality serve as a legal and rhetorical tool that oppress Muslim women by condemning and ostracizing their faith to fulfill the rights and desires of the white, Christian solipsism—the only demographic that matter in the eyes of the law. As the Supreme Court hearing for *Hak v. Attorney General of Québec* looms, let us hope the court hears the people's cries to adopt an intersectional lens and abolishes *Bill 21* once and for all, so that the law can finally begin to safeguard the people it promises to protect.

[3] This is not to say that there is not an expansive history of cisgender and trans women of colour who paved the way for these advancements in gender equality in North America. However, the white, liberal feminist movement is often credited disproportionately for these advances because their whiteness privileges them with a louder platform.

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"Assured Prosecutorial Success": A Constitutional and Normative Inquiry into the Toronto APS

By: Anthonie Fan

Introduction

In 2015, the City of Toronto withdrew approximately 880,000 parking tickets contested at the Provincial Offences Court due to the extended timeframe expected for the proceedings.[1] The decision caused the City an estimated $20 million in revenue loss.[2] As a result, the City enacted a new parking enforcement scheme known as the Administrative Penalty System (APS), where the City issues "parking violation notices" for parking infractions instead of provincial offense tickets.[3] Recipients of parking violation notices can contest their fines online or in person at select locations chosen by the City Council.[4] The new system introduces screening officers and hearing officers to replace the Provincial Offences Court in resolving disputes.[5]

The streamlined process has also decriminalized parking infractions, with violators no longer convicted under the *Provincial Offences Act* ("the *POA*").[6] Despite the decriminalization, parking in contravention of by-laws remains illegal and leads to penalties similar in amount to fines under the *POA*.[7] Individuals facing penalties, however, are no longer granted the presumption of innocence and the procedural safeguards guaranteed under the *POA* proceeding.[8] More notably, under the APS, the decision of the hearing officer—a member of the executive rather than the judicial branch—would be final.[9] These features suggest that the changes under the APS scheme are actually to the legal advantage of the City, rather than the recipients of penalties.

This paper advances the position that, although the APS scheme is constitutional under current Canadian jurisprudence, it is an undesirable form of public policy because liberal political philosophy does not support a substantive distinction between the State's jurisdiction over individual liberty and property. This paper will start by investigating the constitutionality of the procedural aspects of the APS through the lens of s. 11 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Employing *Wigglesworth*, *Martineau*, and *Guindon*, this paper will show that s. 11 safeguards do not extend to the APS, and the procedural aspects of the APS are, therefore, constitutional. Then, the paper will compare the situation faced by the recipient of a parking fine under the APS and the traditional *POA* scheme to show that individuals are now put in a significantly worse position to contest parking violations than before. Lastly, the paper will rebut the economic arguments proposed to support the APS by explaining why the economic analysis adopted by supporters of the APS is flawed and how the classical liberal interpretation of State rights refutes the implications of the economic analysis.

The APS in the Context of Canadian Administrative Monetary Penalties (AMPs)

The Wigglesworth/Martineau Test: Defining the Scope of s. 11

Section 11 of the *Charter* provides:

> Any person charged with an offense has the right
> …
> (b) to be tried within a reasonable time;
> …
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;[10]

Although the *Charter* provides robust protection for persons invoking these rights, only persons "charged with an offense" are entitled to them. In *R v. Wigglesworth*, the Supreme Court developed a two-branched test for the invocation of s. 11 rights: (1) the

[1] CBC News, "Nearly 88,000 tickets were awaiting trial for more than a year", *CBC* (6 September 2015).
[2] *Ibid*.
[3] Muriel Draaisma, "City launches new system for motorists to dispute parking tickets that doesn't involve court", CBC (28 August 2017).
[4] *Ibid*.
[5] *Ibid*.
[6] *City of Toronto Act*, O Reg 611/06, s 4 [APS Regulation].
[7] City of Toronto, by-law No 799-2017, *Administrative Penalty System By-law*, Schedule A [APS By-law].
[8] *Ibid*, §§ 2.2N(2), 2.3J(2), 5.5A(2).
[9] *Ibid*, § 2.3P.
[10] *Canadian Charter of Rights and Freedoms*, s 11, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

matter "by its very nature [...] is a criminal proceeding" or (2) a "conviction in respect of the offense may lead to a true penal consequence."[11] The first prong of the test is easy to understand: Any proceeding that takes the form of a criminal proceeding triggers s. 11 scrutiny. The second prong of the test—the "true penal consequence" test—is elaborated as an "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large."[12] A matter attracts s. 11 analysis if *either* branch of the test is satisfied.

Guindon v. Canada: AMPs through the lens of Wigglesworth/Martineau

In *Guindon v. Canada*, Ms. *Guindon* was assessed penalties adding up to $546,747 under s. 163.2 of the *Income Tax Act* ("the *ITA*") for tax fraud.[13] She claimed that s. 163.2 of the *ITA* created an offense triggering protections afforded by s. 11 of the *Charter*.[14] The Supreme Court applied the *Wigglesworth/Martineau* test to the *ITA* to analyze the purpose of the *ITA* and the regulatory process it outlines before concluding that s. 163.2 imposes an administrative proceeding as opposed to a criminal one.[15] The Court then examined whether s. 163.2 brings "true penal consequence." In the process, the Court elaborated on its previous iteration of "a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large."[16] In assessing the nature of a fine, one should look at "whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty."[17] The Court further clarified the term "magnitude" as whether "the amount at issue is out of proportion to the amount required to achieve regulatory purposes" instead of an absolute amount.[18] In so doing, the Court rejected the notion that the *Wigglesworth/Martineau* test imposes an upper limit on administrative penalties for s. 11 purposes.[19]

The key takeaway from *Guindon* is that AMPs are the administrative counterpart of fines in Canada. In addition to potential implications for the accused's s. 11 rights, the administrative nature of AMPs also allows them to be finalized by an administrative body. Furthermore, the criminal rules of evidence and burden of proof need not apply to the prosecuting party in AMP proceedings. These implications significantly damage an accused person's procedural safeguards in a bid to smoothen the regulatory process.

APS as a form of AMP

The Toronto APS is established by the *Administrative Penalty System By-law* and *Ontario Regulation 611/06*. In examining the applicability of s. 11 of the *Charter* to the APS, this paper will apply *Guindon* to the specificities of the *By-law* and the *Regulation* to assess how courts might deal with challenges against the APS.

The "Criminal in Nature" Test

The Legislative Scheme of the APS

To determine the purpose of the *By-law*, one should look at its legislative scheme and its enabling legislation.[20] Section 6 of the *Regulation* provides:

> The amount of an administrative penalty established by the City shall,
> (a) not be punitive in nature;[21]

This requirement is reproduced verbatim in the preambles of the *By-law*.[22] The plain meaning of these words suggests that the *By-law* is intended to be a regulatory instrument, rather than a penal one. As such,

[11] *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235, at para 21 [*Wigglesworth*].
[12] *Ibid*, at para 46 [emphasis added]. See also *Martineau v* MNR, 2004 SCC 81, at para 57.
[13] *Guindon v Canada*, 2015 SCC 41, at para 2 [*Guindon*].
[14] *Ibid*, at para 41.
[15] *Ibid*, at paras 61-62, 67-71.
[16] *Wigglesworth*, *supra* note 11, at para 46.
[17] *Guindon*, *supra* note 13, at para 76 [emphasis added].
[18] *Ibid*, at para 77 [emphasis added].
[19] *Ibid*, at paras 78-79.
[20] *Guindon*, *supra* note 13, at para 53.
[21] *APS Regulation, supra* note 6, s 6.
[22] *APS By-law, supra* note 7.

the proceeding prescribed in the *By-law* for parking enforcement is a *prima facie* administrative proceeding.

Furthermore, s. 3 of the *Regulation* indicates that the power conferred onto the City is a regulatory one granted under the *City of Toronto Act*.[23] Under the Canadian constitutional scheme, municipalities do not have any specific power unless granted by their respective provinces.[24] Since the *Act* did not empower the City to create and administer s. 92(15) offenses, the *By-law* cannot be construed to create a proceeding that is criminal in nature.[25]

The Process within the APS

In *Guindon*, the Court relied on textual traces of terms like "conviction" and "accused" to determine the nature of a statutory process.[26] The *By-law* was carefully crafted to avoid terms "traditionally associated with the criminal process"[27] by employing terms like "contravention"[28] instead of "conviction" and "review"[29] instead of "appeal." Furthermore, since the imposition of a penalty under the APS takes place outside a criminal court, the process involved in the APS proceeding is unlikely to be criminal in nature.[30]

Conclusion

Considering the City's inability to create criminal statutes, the Province's explicit legislative intent to make the APS administrative, and the process enacted in the *By-law*, the APS is not criminal in nature for the purpose of s. 11.

The True Penal Consequence Test

To analyze the magnitude of the fines imposed by the APS, this paper will imitate the Court's treatment of *Guindon*.[31] This paper will start by reviewing the enabling *Regulation*.

Section 3(2) of the *Regulation* reads:

> The purpose of the system of administrative penalties established by the City shall be to assist the City in regulating the flow of traffic and use of land, including highways, by promoting compliance with its by-laws respecting the parking, standing, or stopping of motor vehicles.[32]

Section 6 of the *Regulation* provides:

> The amount of an administrative penalty established by the City shall,
> …
> (b) not exceed the amount reasonably required to promote compliance with a designated by-law;[33]

Both ss. 3(2) and 6(b) are reflected by the preambles to the *By-law*.[34] As such, the legislative intent of the *By-law* should be understood as to encourage compliance with traffic regulations rather than to denounce and punish those breaking by-laws. Although this purpose requires penalties to have some level of general deterrence effect, *Guindon* teaches that such effect alone is not enough to categorize a penalty as penal.[35]

Moreover, Schedule A to the *By-law* stipulates a series of fixed amount penalties for parking infractions,[36] analogous to s. 163.2(4) of the *ITA* in *Guindon*.[37] As the Justices Rothstein and Cromwell observed,

[23] *City of Toronto Act*, S.O. 2006, c. 11, Sched. A, ss 6-8, 81.
[24] *Constitution Act*, 1867 (UK), 20 & 21 Geo. V, c 26, ss 91-92.
[25] *SSupra* note CTA, s 6.
[26] *Guindon*, *supra* note 13, at para 63.
[27] *Ibid*, at para 63.
[28] *APS By-law*, *supra* note 7, § 610-2.1.
[29] *Ibid*, § 621-2.2.
[30] *Guindon*, *supra* note 13, at para 64.
[31] *Ibid*, at paras 82-88.
[32] *APS Regulation, supra* note 6, s 3(2) [emphasis added].
[33] *Ibid*, s 6.
[34] *APS By-law, supra* note 7.
[35] *Guindon*, *supra* note 13, at para 83.
[36] *Ibid*, Schedule A.
[37] *Guindon*, *supra* note 13, at para 84.

"[t]he amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty."[38] Consequently, the fixed amounts stipulated in Schedule A renders the *By-law* a primarily administrative instrument.

Finally, the *By-law* explicitly allows for financial hardship to be used as an excusal from administrative penalties.[39] This design proves salient in mitigating the relative magnitude of the penalties since whether the amount "is very high for an individual" factors into the Court's assessment of a fine's consequence.[40]

Based on the legislative purpose and exemptions incorporated into the *By-law*, the APS does not present a true penal consequence for those receiving a fine under it.

Conclusion

Since the APS proves to fail both the "Criminal in Nature" and "True Penal Consequence" tests, s. 11 rights do not extend to people fined under the *By-law*.

The APS in Comparison with Part II of the *POA*

The APS discussed in this paper applies only to the City of Toronto. Many municipalities and towns in Ontario still retain the traditional parking enforcement system under Part II of the *POA*.[41] In this part of the paper, the APS will be compared side-by-side with the *POA* scheme to illustrate the disadvantages an APS complainant faces.

Standard of Proof

Section 2.1A of Chapter 610 of the *Toronto Municipal Code* reads:

> An enforcement officer who has reason to believe that a vehicle has been left parked, standing, or stopped in contravention of a designated by-law provision may issue a penalty.[42]

In *Maheu v. IMS Health Canada*, the Federal Court held that to have "reason to believe" is the same standard as to have "reasonable grounds to believe."[43] In other words, § 610-2.1A requires only a "*bona fide* belief in a serious possibility based on credible evidence."[44] This standard is one of the lowest ones in the Canadian legal system: lower than the "balance of probabilities," which is the standard used in civil cases.[45]

In *POA* proceedings, however, the highest standard of proof—beyond a reasonable doubt—is employed.[46] The Ontario Court of Justice characterizes "beyond a reasonable doubt" as involving "a significant level of proof far beyond the 'balance of probabilities.'"[47] This means that the Crown would have to discharge a much higher burden of proof to secure a parking conviction under the *POA* as opposed to the City in order to exercise an issue for an administrative penalty.

Burden of Proof and Presumption of Innocence

Section 2.2N of Chapter 610 of the *Toronto Municipal Code* reads:

> On a review of the administrative penalty, a screening officer may:
> …
> (2) cancel the administrative penalty, including administrative fees, if the recipient establishes on the balance of probabilities that the vehicle was not parked, standing, or stopped contrary to the designated by-law provision as described in the penalty notice;[48]

[38] *Ibid* at para 84.
[39] *APS By-law, supra* note 7, § 610-2.4.
[40] *Guindon*, *supra* note 13, at para 85.
[41] *Provincial Offences Act*, R.S.O. 1990, c. P.33 [*POA*].
[42] *APS By-law*, *supra* note 7, § 610-2.1A [emphasis added].
[43] *Maheu v IMS Health Canada*, 2003 FCT 1, at para 54.
[44] *Ibid*, at para 54 [emphasis removed]. See also *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, 195 DLR (4th) 422, at para 60.
[45] *Ibid*, at para 54.
[46] Ontario Court of Justice, *Guide for Defendants in Provincial Offences Cases*, (2014), at 4.
[47] *Ibid*, at 4 [emphasis added].
[48] *APS By-law*, *supra* note 7, § 610-2.2N [emphasis added].

During reviews under the APS, the recipient of the penalty bears the burden of proof, as the infraction is presumed to have been committed "as described in the penalty notice."[49] To put it in another way, not only does a person have to prove their own innocence, but they also have to discharge a higher burden of proof than the enforcement officer issuing the penalty.

Since proceedings under the *POA* are criminal in nature, s. 11 of the *Charter* is engaged.[50] As a result, the accused is presumed to be innocent until convicted, and the Crown bears the entire burden of proof.[51]

Procedural Matters and Rules of Evidence

Under the APS, a person seeking to vacate or reduce an administrative penalty needs first to file an application for review by a screening officer.[52] During the review by the screening officer, written materials constitute the primary form of submission.[53] It is not required for the officer to summon either the by-law enforcement officer or the recipient of the penalty notice.[54] During the hearing process, the *By-law* requires the hearing officer to give the City an opportunity to be heard; a ticket cannot be canceled on the basis that the City's representatives did not show up.[55] In addition, the rules of evidence for the hearing are significantly relaxed.[56] For example, "opinion and hearsay which would be inadmissible in a court of law" can be admitted into evidence.[57] Moreover, statements submitted by the City are presumed to contain the truth, further burdening persons challenging the penalty notice.[58] Finally, the *By-law* does not provide a clear guideline on the maximum processing time allowed within the APS.[59] This means that, although the system is designed to streamline the processing of parking disputes, there is no consequence for the City not achieving its purported goals.

In proceedings under the *POA*, rules of evidence applying to criminal trials apply, including rules against hearsay and speculations.[60] Furthermore, it is a common occurrence at the Provincial Offences Court that charges against accused persons be quashed in the event that the responsible officer fails to show up.[61] Finally, the right to a speedy trial guaranteed by s. 11 of the *Charter* applies to cases under the *POA*.[62] In *R v. Jordan*, the Supreme Court set an 18-month deadline for criminal charges before the provincial court.[63] In Ottawa, a justice of the peace applied the *Jordan* decision to throw out 14 parking tickets in 2017.[64] However, since Torontonians are no longer contesting parking violations at the Provincial Offences Court, the 18-month ceiling provided by *Jordan* no longer applies.

Post-Hearing Remedies

Ordinary Appeals under the APS and the *POA*

Section 2.3P of Chapter 610 of the *Toronto Municipal Code* reads, "Any decision by a hearing officer is final."[65] This language mirrors s. 8(5) of its enabling *Regulation*.[66] As a result, Torontonians dissatisfied with a hearing officer's decision have no recourse to appeal that decision to a court of law.

In proceedings under the *POA*, an accused person in a parking violation trial can appeal the matter

[49] *Ibid*, § 610-2.2N(2). § 610-2.3J(2) provides the same in the case of a review by a hearing officer.
[50] *Guindon*, *supra* note 13, at para 64.
[51] *Charter*, *supra* 10, s 11(d).
[52] *APS By-law*, *supra* note 7, §§ 610-2.2A, 610-2.3A.
[53] *Ibid*, § 610-2.2K.
[54] *Ibid*, § 610-2.2K.
[55] *Ibid*, § 610-2.3G.
[56] *Ibid*, §§ 610-2.3M, N.
[57] *Report Into Administrative Monetary Penalties for Parking Infractions*, by Stanley David Berger (Law Commission of Ontario, 2010), at 23 [*LCO Report*].
[58] *APS By-law, supra* note 7, § 610-2.3N.
[59] *Ibid*.
[60] *LCO Report, supra* note 57.
[61] *Ibid*, at 13.
[62] *Charter*, *supra* 10, s 11(*b*).
[63] *R v Jordan,* 2016 SCC 27, at para 46.
[64] Ashley Burke, "'It's a little surprising:' Parking tickets tossed in Ottawa due to court delays", *CBC* (1 August 2017).
[65] *APS By-law, supra* note 7, § 610-2.3P.
[66] *APS Regulation*, *supra* note 6, s 8(5) reads.

to the Ontario Court of Justice as a matter of right.[67] Although the appeal is by review, the *POA* empowers the presiding provincial judge to revisit evidence if needed.[68]

Judicial Review under the APS

Although a statutory appeal is not available under the APS, recipients of a penalty notice might still be able to request a judicial review at the Divisional Court. In *Vavilov*, the Supreme Court set forth a framework to determine the standard of review. The prevailing presumption is for the court to adopt a standard of reasonableness.[69] There are six exceptions to the rule. The first two come from the legislature's intent: legislated standard of review[70] and statutory appeal mechanisms.[71] Three come from the principle of the rule of law: constitutional questions[72] (including questions of constitutional conventions[73]), general questions of law of "central importance to the legal system as a whole,"[74] and jurisdictional boundaries between administrative bodies.[75] The final class of exception is when administrative and judicial bodies share concurrent jurisdiction over a matter.[76]

In the context of the APS, both the *By-law* and the *Regulation* preclude statutory appeals and fail to provide a legislated standard of review. In most APS cases, constitutional questions and centrally important questions of law are not concerned. Since the *By-law* only authorizes the Administrative Penalty Tribunal to process parking disputes, there is no question regarding the jurisdictional boundaries of administrative bodies. Finally, because the *Regulation* precludes the application of the *POA*,[77] the Provincial Offences Court has no concurrent jurisdiction over parking infractions in the City of Toronto.

Therefore, should the Divisional Court conduct a judicial review against a decision made under the APS, the reasonableness standard will be employed. *Vavilov* teaches that the reasonableness standard requires a reviewing court to pay "respectful attention" and seek to "understand the reasoning process followed by the decision maker to arrive at its conclusion."[78] It is thus expected for the Divisional Court to show a high degree of deference to the Administrative Penalty Tribunal. Furthermore, "as a general rule, [courts are to] refrain from deciding the issue themselves."[79] As such, the central issue of a parking dispute—whether a fine should have been assessed—is not under judicial scrutiny.

Comparing the Recourses

Although citizens dissatisfied with the outcome of the initial hearing can seek review from the provincial court under both the APS and the *POA* schemes, there are significant differences in the level of accessibility and rigor either recourse provides. First, an appeal from the Provincial Offences Court to the Ontario Court of Justice is a matter of right, whereas an applicant for judicial review must seek leave from the Divisional Court. Secondly, the appellate standard of review applies to appeals under the *POA*. This means that a standard of correctness is applied to questions of law.[80] The *POA* further empowers judges to reopen the investigation of certain facts on appeals from parking convictions.[81] A judge deciding a judicial review arising from the Administrative Penalty Tribunal, on the other hand, is required to show much more deference to the hearing officer. Considering the low burden of

[67] *POA*, *supra* note 41, s 135(1).
[68] *Ibid*, s 136(3).
[69] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 16 [*Vavilov*].
[70] *Ibid*, at para 35.
[71] *Ibid*, at para 37.
[72] *Ibid*, at para 55.
[73] *Ibid*, at para 56.
[74] *Ibid*, at para 58.
[75] *Ibid*, at para 63.
[76] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, at paras 37-39.
[77] *POA*, *supra* note 41, s 4.
[78] *Vavilov*, *supra* note 69, at para 84.
[79] *Ibid*, at para 83.
[80] *Ibid*.
[81] *POA*, *supra* note 41, s 136(3).

proof assigned to the City, the lax rules of evidence, and the presumption in favor of the City involved in the APS, it is hard to conceive a successful case of judicial review. Thus, the recipient of a penalty notice is, left effectively without recourse with an unfavorable ruling from the hearing officer.

Conclusion

Taking the APS out of the context of criminal law has far-reaching implications. The lack of s. 11 safeguards, the evidentiary framework contained in the APS, and the preclusion of judicial appeals all contribute to a great detriment against anyone receiving a penalty notice.

Normative Concerns with the APS

Economic Analysis of Law

In the U.S. case *Van Harken v. Chicago*, Judge Posner adopted a cost-benefit analysis of law enforcement officers' attendance at traffic court hearings.[82] Judge Posner's conclusion is that requiring law enforcement officers to show up at hearings encourages people to dispute parking tickets, making the cost of parking enforcement higher for the City.[83] He, therefore, affirms the constitutionality of making law enforcement officers' attendance optional.

Judge Posner erred in his analysis by assuming that the City *deserves* all amounts claimed on all parking tickets.[84] The calculations Judge Posner illustrated take for granted that the City *ought to* ticket every car parked against by-laws, and the fines *ought to* end up in the City's pocket. These assumptions, however, fail to consider the State's own economic agency when the State itself also responds to economic incentives. For example, when Toronto canceled 880,000 parking tickets in 2015, the City justified the decision by explaining that pursuing the tickets would cost $3 million more than the outstanding amount on the tickets.[85] When accounting for officers' failure to show up to court, the then Director of Finance and Administration for Toronto Police Services said, "We don't want them to attend court while they're on duty because then they wouldn't be issuing tickets."[86] These reactions show that the City is a rational economic actor responding to incentives put before itself.

As such, a rational City would conduct a cost-benefit analysis in terms of which parking tickets to pursue and which to forgo. In the grander scheme of public order, the City can turn to focus its policing resources on more dire needs in the community rather than questioning why citizens are not paying every single ticket outright. Just as it is reasonable for each citizen to ask whether each parking ticket is worth fighting, the City should ask whether each parking ticket is worth issuing and collecting. By focusing the economic analysis solely on the citizenry, Judge Posner and the Law Commission are exempting the State from the constraints of scarcity that every agent faces in a capitalistic society.

Principles of Liberalism

In addition to the flaws in the economic analysis conducted on the APS, the fact that such methodology is considered in the first place represents a worrying trend of dispensing individual rights as a matter of economic expediency. The Law Reform Commission of Saskatchewan argues that "close scrutiny and appeal rights may not be necessary or appropriate if the penalty is small."[87] An analogous line of reasoning was used by the Law Commission of Ontario.[88] Similarly, at the very core of his analysis in *Van Harken*, Judge Posner claims that "[t]he traditional system, mindlessly assimilating a parking ticket to an indictment for murder, was archaic and ineffective."[89] This rationale, however, overlooks the qualitative principles embedded in the English liberal tradition Canada inherited from Britain.

Assimilating a parking ticket to a murder

[82] *Van Harken v City of Chicago,* 103 F.3d 1346 (U.S.C.A. Seventh Circuit) at 1351-1354 [*Van Harken*].
[83] *Ibid*, at 1354.
[84] *Ibid*, at 1351-1352.
[85] *supra* note 1.
[86] Kelly Grant, "Trimming the fat from Toronto's police budget", *The Globe and Mail* (10 April 2010) [emphasis added].
[87] Saskatchewan Law Reform Commission, *Consultation Paper on Administrative Penalties*, (2009), at 22.
[88] *LCO Report*, *supra* note 57, at 30-31.
[89] *Ibid*, at 1351 [emphasis added].

charge is a design dictated by the liberal interpretation of the relationship between the individual and the State. In the English liberal tradition, Thomas Hobbes and J.S. Mill are the leading figures in defining the parameters of a liberal society. Thomas Hobbes contends that, in the state of nature, there was no concept of property or ownership, and every person keeps what they can forcibly obtain and defend.[90] The State, according to Hobbes, was created to determine the relationships of property.[91] When the Commonwealth was formed by individuals forfeiting their liberties, both economic and political liberties were transferred to the Sovereign.[92] The Sovereign, thus, exercises considerable power in both spheres over individuals, relying on its force.[93] According to J.S. Mill, any government intervention in an individual's liberty and property must arise from the protection of another person.[94] All interventions justified under the Millian standard appear to be *prima facie* true penal consequences under the *Wigglesworth* framework since the deprivation of property is penal under any circumstance based on the Millian framework.[95] As such, the justification that economic penalties require fewer safeguards than imprisonment fails under the liberal philosophical framework governing modern society.

Through the lens of liberal philosophy, one can easily spot the fundamental flaw in the claim that "[parking] violators were taking advantage of the lack of court resources by … having their matters dismissed not on the merits."[96] The underlying assumption of this claim is that the individual should justify *not* paying the State, rather the State bearing the burden to justify its *intrusion* into property.

Moreover, Judge Posner's analysis that "the average saving to the innocent respondent … would be only … a trivial amount"[97] departs from the common-law philosophical tradition in penalties. In the 1760s, Sir William Blackstone observed that "[i]t is better that ten guilty persons escape than that one innocent suffer."[98] This formulation is later established as the Blackstone ratio: one of the bedrocks of the common-law legal tradition. By characterizing the economic damages imposed on an innocent respondent as "trivial," Judge Posner's analysis effectively regressed centuries of English legal philosophy, dating back to before the time the United States developed its own jurisprudence independent of England.

Finally, the principle of natural justice requires that no one be the judge of their own case. In the APS, however, the City plays not only the judge, the jury, and the executioner but also the legislator and the administrator. The City is responsible for maintaining the by-laws providing for the financial penalty and prohibited acts. The City is also responsible for hiring officers to enforce the by-laws. In addition, the City sets up the procedural and evidentiary standards for the hearings and appoints hearing officers without checks and balances involved in judicial appointments. Finally, the City collects the money it orders citizens to pay through the APS. The City stands to benefit from a system that tilts in its favor, and it designed just that system.

Shortcomings of the Charter

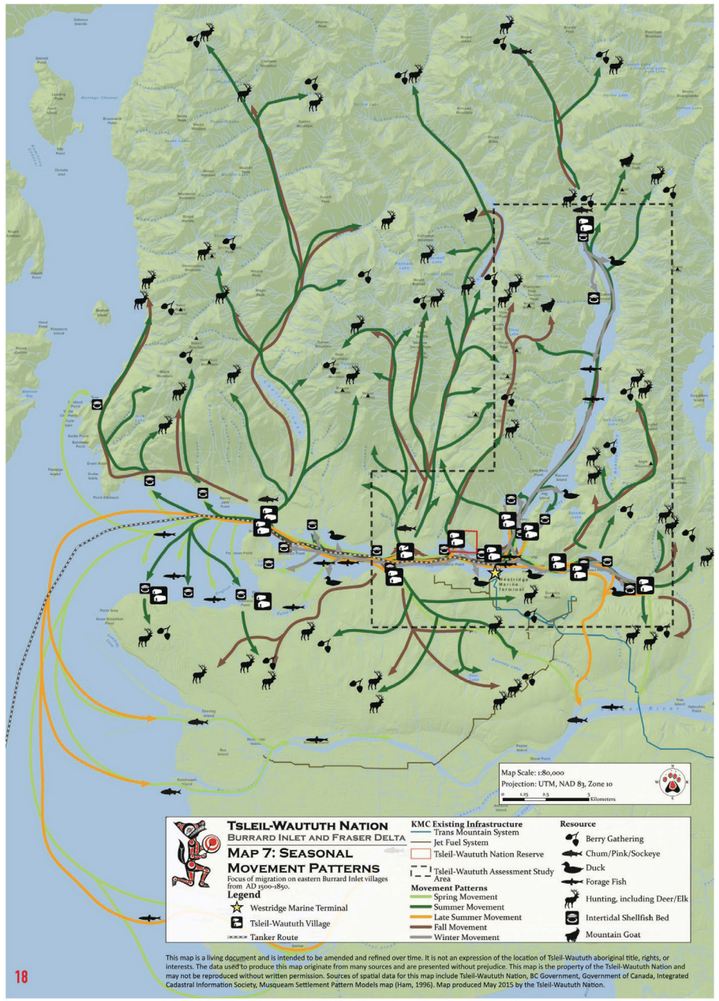
Despite the strong normative arguments against the acceptability of the APS in a liberal society, Canada's current constitutional order is unable to stop it. *Wigglesworth* and *Martineau* created a dichotomy between administrative and criminal offenses: a distinction that makes little sense based on liberal philosophy. However, the fact that s. 11 allows for—if not invites—such distinction reflects flaws in the design of the *Charter* by including the qualifier "charged with an offense."[99] In contrast, s. 2 of the *Canadian Bill of Rights* provides for a general "right to a fair hearing in accordance with the principles of fundamental justice,"[100] a much more robust legal right than that provided in s. 11(*d*).

Another shortfall of the *Charter* illustrated through a comparative analysis is its neglect of property rights. In *Van Harken*, the challengers cited the Due Process Clause in the Illinois Constitution, which provides that no one "shall be deprived of life, liberty, or property without due process of law."[101] This expression is analogous to s. 1 of the Bill of Rights which protects the right to "[the] enjoyment of property and the right not to be deprived thereof except by due process of law."[102] The mention of property, however, was omitted from s. 7 of the *Charter*, which guarantees the right to "life, liberty, and security of the person."[103] Although the *Bill of Rights* is still law in Canada, its judicial application has been limited, and its ambit does not cover municipal by-laws like the APS. The omission of property rights from the *Charter* deprives Torontonians of a potential s. 7 challenge to the APS, which would have been possible regardless of whether a parking violation under the APS is an "offense."[104]

Conclusion

Although the City characterizes the APS as a bid to improve customer experience in the parking infraction system, the system actually puts citizens at a significant disadvantage compared to the traditional system under the *POA*. The low standard of proof on the City, the reversed onus on the individual, the relaxed rules of evidence favoring law enforcement, and the deprivation of judicial appeals are all alarming features of a system that effectively issues fines to Torontonians. Despite the tension between the APS and the normative ideals of a liberal society, there is little impediment to the validity of the APS under Canadian jurisprudence as a form of AMP. A series of Supreme Court decisions—*Wigglesworth*, *Martineau*, and *Guindon*—deny the application of s. 11 and relevant procedural safeguards to recipients of AMPs. The lack of property rights in s. 7 of the *Charter* further restricts judicial challenges available against AMPs. Through an analysis of the liberal legal tradition embedded in the common law, this paper shows the inadequacies of the *Charter* and its protection of Canadians facing AMPs.

[90] Thomas Hobbes, "Leviathan" in Michael L Morgan, ed, *Classics of moral and political theory*, 5th ed (Indianapolis: Hackett Pub. Co, 2011), at 625.
[91] *Ibid*, at 625.
[92] *Ibid*, at 636-636.
[93] *Ibid*, at 637.
[94] John Stuart Mill, "On liberty" in Mary Warnock, ed, *Utilitarianism: and, On liberty: including Mill's Essay on Bentham' and selections from the writings of Jeremy Bentham and John Austin*, 2nd ed (Malden, MA: Blackwell Pub, 2003).
[95] *Wigglesworth*, *supra* note 11 at para 24.
[96] *LCO Report*, *supra* note 57 at 4.
[97] *Van Harken*, *supra* 82 at 1352 [emphasis added].
[98] Sir Blackstone, *Commentaries on the Laws of England in Four Books* (J. B. Lippincott, 1753).
[99] *Charter*, *supra* note 10, s 11.
[100] *Canadian Bill of Rights*, SC 1960, c 44, s 2(*e*) [*BOR*].
[101] *Illinois Constitution*, 1970, art II, § 1, art I, § 2 [emphasis added].
[102] *BOR, supra* note 100, s 1(a) [emphasis added].
[103] *Charter*, *supra* note 10, s 7.
[104] *Wigglesworth*, *supra* note 11, at para 25.



The Role of Indigenous-Led Environmental Assessment in Environmental Justice and Rejecting the State

By: Clover Chen

Indigenous nations and the Canadian State have legal protocols to conduct assessments of the environmental consequences of extractive industry projects. Indeed, the Trans Mountain Expansion (TMEX) proposal to expand the existing Trans Mountain pipeline and tanker system induced impact assessments by both the Canadian National Energy Board (NEB) and the Tsleil-Waututh Nation (TWN). TWN's approach to environmental assessment is founded in a worldview that contrasts with the Canadian State's approach. I will argue that the TWN assessment is an important precedent for Indigenous nations exercising rights related to environmental justice, sustainable self-determination, and legal plurality. In this paper, I will first define environmental impact assessments and summarize the case conflict of the Trans Mountain proposal. I will next identify and explain the implications of the different worldviews present in this case. Finally, I will discuss how the TWN assessment plays a crucial role in exercising rights for TWN and other Indigenous nations.

1. Environmental Assessment

An impact assessment (IA), or environmental assessment (EA), are interchangeable terms that describe the process of assessing the risk of a proposed project's potential environmental impact on the local natural environment and communities (Arsenault et al., 2019, 120). EAs prescribe a recommendation to proceed with the project or not based on whether the project's potential environmental harm exceeds a predefined threshold (Stewart & Harding, 2021, 6). In 1972, Canada mandated environmental assessments and has since acknowledged the importance of Indigenous participation in these processes (Arsenault et al., 2019, 121). Specifically, Section 35 of the 1982 *Constitution Act of Canada* provides the legal foundation for the obligation to consult with and accommodate Indigenous nations when planning any activities that may impact Indigenous lands (*Canadian Charter of Rights and Freedoms*, s 35, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11).

2. Case Conflict: Trans Mountain Expansion Project

Tsleil-Waututh Nation is a distinct Coast Salish Nation ("*Assessment*," 2015, 10). TWN peoples have lived and occupied their unceded territory for time immemorial, including the Burrard Inlet and surrounding waters (Arsenault et al., 2019, 10). In 2009, TWN adopted a Stewardship Policy that is "an expression of Tsleil-Waututh jurisdiction and law" and mandates a review of any proposed development in TWN territory (Arsenault et al., 2019, 6). Completing this review helps TWN make an informed choice about consenting or withholding support for proposed projects (Arsenault et al., 2019, 6). In December 2013, Trans Mountain submitted its TMEX proposal to the NEB for a risk assessment ("*Assessment*," 2015, 3). Trans Mountain, a subsidiary under Kinder Morgan Canada, proposed the expansion because the additional infrastructure would provide added storage, two new pipelines, and an expanded dock complex to move nearly triple the volume and frequency of crude oil through pipelines and tanker exports ("*Assessment*," 2015, 43). The added infrastructure would increase economic profits and expand Canadian oil exports to new international markets (Stewart & Harding, 2021, 9). The proposed tanker traffic would move through the Burrard Inlet, and the last 28 kilometers of the proposed pipeline expansion would fall within TWN territory (Clogg et al., 2016, 12). Thus, the elements contained in this TMEX proposal are subject to TWN's Stewardship Policy (Clogg et al., 2016, 12).

In May 2015, TWN published its *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal* [*Assessment*]. The document was the first of its kind, including TWN's traditional knowledge and two decades of TWN's work to restore the Burrard Inlet (Stewart & Harding, 2021, 16). The TWN assessment concluded that the potential environmental harm was too great and withheld support from the TMEX proposal ("*Assessment*," 2015, 86). At the time, the NEB was the federal agency responsible for regulating pipelines, and so carried out the IA for the Canadian State, operating under the 2012 *Canadian Environmental Assessment Act* (Stewart & Harding, 2021, 8). In May 2016, the NEB's IA report concluded that the TMEX project was "not likely to cause significant adverse environmental effects" and approved the project construction, directly opposing the TWN's *Assessment* (NEB 2016, xii). In May 2018, the Cana-

dian Federal government bought the TMEX project from Kinder Morgan, resuming the construction that was halted from court challenges and political opposition (Thurton, 2022). However, TWN resisted and in August 2018, TWN legally challenged the TMEX in *Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh v. Canada*], prompting the NEB to conduct a second IA (Stewart & Harding, 2021, 9). In February 2019, the NEB published its *Reconsideration Report*, nearly identical to their first IA but with the added consideration of the impacts of increased shipping traffic (Stewart & Harding, 2021, 9). While the NEB's new conclusion stated that the project was indeed likely to cause significant environmental damage, it once again approved the project because of the TMEX project's economic benefits and environmental mitigation measures (Stewart & Harding, 2021, 9).

3. The Influence of Worldviews on Environmental Assessment

Before I begin my analysis of the contrasting worldviews in the environmental assessments and the case conflict more broadly, I want to acknowledge my positionality as a non-Indigenous settler living in Tkaronto. In the context of Indigenous environmental assessment and the TMEX case conflict, my personal experiences limit my knowledge and understanding of how extractive industries can impact ways of life for Indigenous peoples, specifically those from TWN. I have not been to the region affected and have not cultivated relationships with the people or the land there. Thus, I must rely on, and am grateful to learn from, Indigenous scholars and TWN's documented legal and cosmological principles for the following analysis.

A worldview is a particular position that informs how people make sense of their world and their meaning and place in it (Gray, 2011, 58). An environmental worldview is an extension of these fundamental beliefs and shapes the relationship between people and the natural world (Leichenko and O'Brien, 2019, 61). Environmental worldviews are founded on belief systems that are represented in legal orders and their legislative frameworks (Leichenko and O'Brien, 2019, 67). In *Tsleil-Waututh v. Canada*, TWN presents an Indigenous environmental worldview that conflicts with the Western environmental worldview. The Western worldview is characteristic of extractive industry corporations, such as Kinder Morgan, and its supporters, such as the Canadian government. It is clear, based on the TMEX proposal and Canada's approach to IA, that the Western environmental worldview understands the environment through a capitalistic perspective. In this worldview, natural resources are something to be extracted for profit, despite the potential for environmental damage (Leichenko and O'Brien, 2019, 68). Even though conducting an EA is required by Canadian law, its ultimate goal is to identify and mitigate risks in order to proceed with extractive development (Bernauer, 2020, 491).

Although there are many distinct Indigenous nations, they share a common environmental worldview that values reciprocal relationships and the protection of the natural world ("*Assessment*," 2015, 53). In the specific case of TWN and their *Assessment*, Coast Salish stories, teachings, and ancestral laws are the foundation for a worldview that extends into TWN legal principles and protocols (52). The *Assessment* engages with three TWN legal principles. First, the sacred obligation of TWN to "protect, defend, and steward" the land (53). Second, the obligation to maintain and restore cultural, spiritual, and economic conditions for TWN to thrive (54). Third, there are consequences for individuals and the broader nation for failing to be "highly responsible" toward the land (55). It is thus clear that the conflict between TWN and extractive industries in the TMEX case study comes from the fundamental differences in environmental worldviews, and by extension, their resulting impact assessments. While the NEB's IA aims to mitigate risk, and compromise between corporate interests and environmental harms, TWN's approach aims to stop the proposed project if it is in violation of outlined harm thresholds. The distinct IAs conducted by TWN and Canada's NEB are founded on different legal principles and policies, relative aims, and founding values.

Core differences between the two environmental worldviews do not exist in a vacuum. Instead, the legal, economic, and social structures of capitalism and colonialism reinforce Western worldviews and minimize Indigenous worldviews (Kuokkanen, 2011). These factors create a power imbalance between TWN and the extractive industries allied with the Canadian

government. In practice, colonial and capitalist social relationships develop through Western EA practices in Canada (Bernauer, 2020, 490). Scholars critique the EA process for focusing on risk mitigation rather than empowering the affected Indigenous nations with a veto to deny projects with unacceptable environmental risk (Bernauer, 2020, 499). In that sense, the process of EA in Canada is intimately connected to and biased toward extractive industries (490). Resource extraction projects increasingly use impact and benefit agreements that formalize relationships between Indigenous communities and corporations, and award certain benefits to Indigenous communities (Dylan et al., 2013, 62). While impact and benefit agreements in EA fulfill the duty to consult and accommodate Indigenous communities, they are still very limited. The EA process is embedded within unequal power relations, and legitimizes capitalist extraction by compromising environmental well-being for economic benefits (Bernauer, 2020, 491). However, TWN's "sacred legal obligations," ancestral teachings, and wealth of land-based knowledge from generations of knowledge transmission reinforce the Indigenous environmental worldview and delegitimizes the Western extractivist worldview ("*Assessment*," 2015, 3). The TWN's *Assessment* allows for a holistic assessment of the project, including biophysical impacts, such as oil spill risk and management, but also the cultural, spiritual, and economic impacts of the project (Clogg et al., 2016, 13). In that sense, the scope of TWN's IA goes beyond the scope of a Western IA model, or more specifically, that of the Canadian State.

The TWN's *Assessment* as a collection of this body of knowledge also has broader significance in environmental justice, sustainable self-determination, and legal plurality. Environmental justice is a social movement to address the inequitable distribution of environmental burdens and benefits due to systemic structures such as racism and colonialism (Pulido, 2017, 2). The TWN's *Assessment* conclusion and process maintains environmental justice by advocating for the people and land the TMEX will disproportionately impact. The *Assessment* also allows the TWN community to speak for themselves rather than have the Canadian government speak and draw conclusions for them. Sustainable self-determination is an Indigenous movement that seeks to enact rights through a combination of individual and community-based responsibility, rather than seeking recognition and rights from the state (Corntassel & Bryce, 2012, 160). The sustainability aspect of the movement comes from its goals to transmit knowledge and cultural practices to future generations and aims to honour longstanding reciprocal relationships with the natural world (156). The TWN's *Assessment* is a body of knowledge that is founded on and includes traditional knowledge and land-based teachings from TWN. The process of conducting the *Assessment* and the withholding of consent is an exercise of the sacred obligation and jurisdiction of the TWN, as expressed through the Stewardship Policy ("*Assessment*," 2015, 6). In other words, the TWN's *Assessment* enacts responsibility-based rights independent from the sovereignty of the Canadian State. The TWN's *Assessment* is thus also an example of how a plurality of legal orders can co-exist and equally inform development decisions in a partnership between Canada and Indigenous nations. Yet the current power imbalance in EA processes undermines this potential legal plurality and partnership. In the TMEX case, the NEB subsumed the TWN Assessment under the NEB evidence (Baptiste, 2022). By doing so, they did not recognize TWN's governance authority over the matter and did not adequately weigh it into their own decision (Baptiste, 2022). While the TWN's *Assessment* is groundbreaking in itself as a process and exercise of sovereignty, the Canadian government still must be held responsible for its failure to put its laws and policies that recognize Indigenous sovereign rights into meaningful practice.

4. Conclusion

In summary, the case of the TMEX proposal showcases two contrasting environmental worldviews. Indigenous and Western worldviews and approaches to EA clash because of fundamental differences but also systemic power structures that reinforce colonial and capitalist legacies. Although the TWN's *Assessment* is a beacon of hope for environmental justice, sustainable Indigenous self-determination, and the possibility of legal plurality, it is still necessary for the Canadian government to make more intentional progress upholding Indigenous sovereign rights in environmental assessment.

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“She asked for it!”: Analyzing the Role Rape Myths Play at the Various Stages of a Sexual Assault Allegation

By: Lily Farinaccio

Sexual assault is the most underreported crime in Canada (Canadian Women’s Foundation). According to the Department of Justice, only five percent of sexual assaults that occur are reported to the police (Department of Justice Canada). Of those reported, only 42% result in a charge (Doolittle). Of those charged, only 6.5% ended in a conviction. In total, fewer than one percent of sexual assaults end in criminal sanctions (Vancouver Rape Relief and Women’s Shelter). Further, sexual assault is a gendered crime: women are victimized at a significantly higher rate than men (Department of Justice Canada). It is clear our criminal justice system is failing women.

Upon first encountering these numbers, I was curious as to what factors contributed to the gross discrepancy between sexual assaults that occur and those that end in punishment. After my preliminary reading, I found that rape myths had significant impact. Rape myths are “false beliefs people hold about sexual assault which shift blame from the perpetrator to the survivor” (CARE). A number of rape myths persist in society. One includes the conception that only “certain” types of women are sexually assaulted, such as those dressed in a provocative manner. Another common rape myth is the perception that the victim “asked for it” by being inebriated or seductive (CARE). Ultimately, rape myths affirm that female victims are responsible for the sexual aggression of male perpetrators.

In this paper, I look at both qualitative and quantitative data to explore the ways in which rape myths play a role at the various stages of sexual assault allegations. I argue that these myths contribute to victims’ reluctance to seek help from the authorities, to police officers’ decision to lay a charge, and to the juries’ tendency to believe the perpetrators as opposed to the victims. Moreover, I contend that the knowledge of the presence of such myths at the proceeding stages of the criminal process affects the considerations of victims and police officers. I use the notion of internality to refer to the ways in which such conceptions exert direct influence on the specific actors at the relevant stage—either victims, police officers, or jurors. Further, I use the notion of externality to describe how the adoption of rape myths more broadly, by individuals at the following stages of the sexual assault process, also influences the relevant actor’s decision to continue with an allegation or charge. This paper proceeds in four parts. First, I analyze the ways in which rape myths inhibit victims’ inclination to disclose a sexual assault. Then, I explore how rape myths affect law enforcement’s tendency to disbelieve victims. Further, I examine the presence of rape myth ideologies in juries’ attitudes and the ways in which this lessens the number of sexual assault convictions. Finally, I point to education as a possible solution to combat these widespread, misogynistic myths.

Rape myths do not apply universally; they have differential impacts on women from different cultural, ethnic, and socioeconomic backgrounds. Therefore, my analysis of each stage will take an intersectional lens. Intersectionality can be understood as an analytical mechanism used to recognize the multiple axes of oppression that affect one’s unique positionality such as race, class, gender, or sexuality, and the ways in which these structures of oppression are interdependent (Crenshaw). I will focus on racialized women and those from lower socioeconomic backgrounds to critique the essentialist notion that the experiences of women in the criminal justice system are identical regardless of their identity.

Internalization and External Observance: The Victim

Both internally and externally, rape myths operate to inhibit victims’ tendency to report sexual assaults. First, they are prevalent in victims’ attitudes. A study conducted by Sable et al., asked a group of college students to rank barriers to reporting sexual assault by level of importance. Feelings of shame, guilt, and embarrassment were ranked first by participants (Sable 157). The findings signal an internalization of rape myths. These misogynistic misconceptions project the notion that victims are responsible for the behaviour of their assailant. They are so widespread that victims themselves adhere to these beliefs. Ultimately, this causes them to question their role in the assault. They experience feelings of guilt and shame and do not report the violation to authorities.

In addition to victims’ internalization of rape myths, their awareness of the adoption of such myths by external agents, including law enforcement, inhibits their disclosure. In “*Real Rapes” and “Real Victims”:*

The Shared Reliance on Common Cultural Definitions of Rape, Stewart et al. explored the adoption of these misogynistic misconceptions among victims, the authorities, and the courts. While conducting interviews, they uncovered that women were conscious of "extra-legal factors" in relation to rape, that would influence the police, prosecutors, and judges in determining if their claim was "valid" (Stewart 164). "Extralegal factors" included whether they sustained physical injuries, possessed certain sexual experience, or behaved in a particular way before the assault (Stewart 164). These factors are premised upon the logic of rape myths. Legal actors look for "real proof" and draw upon the sexual character of women. In doing so, they appeal to rape myths as a means of discrediting women's claims. Victims are aware of such actions, and thus do not seek help from the very institutions in place to "promote justice."

Further, the impact of rape myths, both internal and external, exert differential impacts on racialized women and women of a lower socioeconomic status. As mentioned above, victims internalize these myths, causing them to question their own culpability in the assault. Black women are sexualized differently than White women, and thus experience this contemplation to a different degree. Sexual stereotypes of the Black women portray them as "promiscuous, deceitful, and irresponsible" (Coble 17). Black women socialized into these gendered categories of sexual promiscuity often deem themselves responsible for rape (Coble 17). Based on these misconceptions, they question if they "asked for it," or behaved in such a way that enabled the abuse.

Moreover, as previously mentioned, victims' knowledge of rape myths in the proceeding stages of sexual assault allegations contributes to their reluctance to seek support from the authorities. Again, this interaction is different for women of colour and women of lower socioeconomic status. Stewart et al. found that though victims recognized they had in fact been raped, they understood that the police's "perceptions of their culture, race or neighbourhood would influence the definition of their case and subsequently did not report their rape" (Stewart 169). Here, one can note the ways in which rape myths exert differential impacts among women of various positionalities. Women from these social locations recognize their case is likely to be dismissed simply because of false assumptions about their identity. Ultimately, this contributes to their reluctance to seek help from law enforcement.

To summarize, rape myths indeed inhibit victims' ability to report a sexual assault. Internally, women accept these misogynistic ideologies, preventing their disclosure. Women's knowledge of the presence of rape myths in the criminal justice system adds to this, further limiting their likelihood of reporting. These factors are exacerbated for racialized women and women of a lower socioeconomic status.

Victim Blaming and Jury Contemplation: The Police

In Canada, it is extremely common for police officers to discredit allegations of sexual assault and rape. More than 5,000 allegations of sexual assault are deemed "unfounded" by police every year (Doolittle). Marking a case as "unfounded" signals that a crime did not occur. It is law enforcement blatantly declaring they did not believe the victim. According to Robyn Doolittle, an investigative reporter for *The Globe and Mail*, "When complaints of sexual assault are dismissed with such frequency, it is a sign of deeper flaws in the investigative process…[including] the persistence of rape myths among law-enforcement officials" (Doolittle). Studies have shown that when women are disbelieved by the police, they experience adverse mental health effects beyond the impact of the sexual assault including a loss of self-worth and low self-esteem (McQueen 6). For the sake of the victims, it is essential we understand the ways in which rape myths are adopted and implemented by the authorities.

The presence of rape myths internally—within the beliefs of law enforcement—and externally—within the beliefs of the jury—affect police officers' decision-making when contemplating a charge. Stewart et al. found the police officers interviewed often invoked rape myths when explaining their disbelief in a victim's allegation. One overarching category of police's grounds for discrediting the victim was their "risky behaviour." This included "getting in a car with a man she met at a bar, kissing at a bar, and having too much to drink, or inviting a man into the house to have a drink" (Stewart 167). Additionally, Stewart et al.

note they often heard police exclaim, "What did she expect?" (Stewart 167). By shifting the responsibility of rape to the survivor, these assumptions flow directly from the misogynistic ideologies that constitute rape myths. It is evident that police officers deem these myths to be true, causing them to disbelieve victims' allegations.

The adherence to rape myths in the judiciary further contributes to police officers' likelihood of discrediting an allegation. Law enforcement's characterization of a "good case" demonstrates the interplay between the authorities and the courts. Stewart et al. additionally uncovered that when determining what constitutes a "good case," police officers consider how a judge or jury might react to the woman's lifestyle and to her moral character (Stewart 170). Similar to the ways in which the victim understands that police officers adopt rape myth ideologies, police officers understand that juries hold such beliefs as well. A victim with good "moral character" is one who will not cause the jury to shift blame upon her—one who is not seductive, is not drunk at the time of the assault, and does not engage in sexual acts with a variety of men. The juries' adherence to rape myths informs who law enforcement is willing to believe, and ultimately who they charge.

Furthermore, police officers' adherence to and application of rape myths differs in relation to both race and class. Women from certain ethnic backgrounds are less likely to be believed by police. A study conducted by Suzanne Coble at Arizona State University discovered that victim blame is amplified when victims are Black or Latinx women. Coble articulates, "—Black and Latinx victims' clothing, drinking, and foreplay are considered more provocative or risky than the clothing and behaviour of White victims" (Coble 113). So far, I have repeatedly emphasized the common rape myth that the victim asked for the assault. Here, one can note the ways in which this myth is magnified in relation to a victim's race. Because Black and Latinx women's behaviour is deemed more provocative, law enforcement is more likely to conclude they "asked for it" than if a white woman acted in the same way. Additionally, women of a lower socioeconomic status are more likely to be disbelieved. In the same study conducted by Stewart et al., one woman interviewed claimed that after she had been raped, she sought help from law enforcement who responded by explaining "her boyfriend was in a gang, what did she expect?" (Stewart 169). Once again, law enforcement shifts the blame to the victim by assuming they acted in a way that invited the rape. In this instance, however, there is an additional layer insofar as the police in part blamed the woman's socioeconomic status. Therefore, rape myths are applied differently when the victim is of a certain race or class.

It is evident that both police officers' adherence to these misogynistic myths and their knowledge of the court's acceptance of such ideologies influences their propensity to disbelieve victims, resulting in only a small number of perpetrators being charged. Additionally, police officers appeal to these myths in different capacities when the victim is a racialized woman or a woman of a low socioeconomic status.

Internal Biases: The Jury

Rape myths persist in the final stage of sexual assault allegations: the court. Specifically, they are prevalent in jurors' attitudes. Multiple studies affirm that jurors adopt and hold these beliefs. Dinos et al. conducted a systematic review of nine studies of jurors' perspectives. In eight of the studies, it was found that jurors do indeed accept rape myth ideology (Dinos 46). These simple statistics demonstrate overwhelming affirmation that misogynistic conceptions of rape make jurors' biased in their decision-making.

The application of such biases is portrayed in Judy Shepherd's *Reflections on a Rape Trial: The Role of Rape Myths and Jury Selection in the Outcome of a Trial.* Shepherd conducts an in-depth case study of a rape trial. By assuming the role of a juror, she is able to observe the pervasiveness of these myths in jurors' attitudes. The rape at hand occurred in Alaska in 1998 at the home of a 66-year-old Indigenous woman. The perpetrator was a 55-year-old Indigenous man whom she knew. The victim had consumed alcohol with friends at a function that night. The accused was also present at the function. Later, he broke into her home and raped her (Shepherd). During jury deliberations, Shepherd noted rape myth ideology in comments made by jurors. One individual invoked the myth that women lie about rape for their own benefit: "She claimed rape so her husband wouldn't get mad"

(Shepherd 84). The conception the victim "asked for it" by being inebriated was also present. For instance, one juror referenced the fact that "she was drunk" as reason to disbelieve her testimony (Shepherd 84). Jurors' adoption of rape myths is incredibly significant as they are left with the task of determining a guilty verdict. The jury holds the power to decide whether a rapist goes free or faces the consequences of their actions.

Further, racialized women experience the effects of these misogynistic assumptions differently than White women, as jurors appeal to distinct racialized rape myths in court proceedings. Expanding upon the case study described above, the jury possessed racist beliefs that shifted blame from the rapist to the victim. Individuals appealed to racialized constructions of Indigenous people as grounds for disbelieving the victim. One juror noted, "Want to know my personal experiences with Natives and sex? They all cover up for one another" (Shepherd 84). Another juror stated, "I lived in a village; I know how they party" (Shepherd 84). These are all explicitly racist conceptions. They discredit the victim's claim by first exclaiming that Indigenous people lie for one another in relation to sex. Moreover, the recurring conception that one "asked for it" appears again, but with a racial meaning. The second juror stereotypes all Indigenous people as excessive partiers: because the Indigenous woman participates in "risky" behaviour, such as drinking, she is lying. From this, it is evident that women of colour experience the implications of these myths differently than White women in the context of the court.

Thus, rape myths are apparent in jurors' attitudes, and contribute to only a small number of perpetrators being convicted. These myths are further complicated when the victim is a person of colour.

Where do we go from here?: Rape Myth Education

As I have demonstrated throughout this paper, rape myths contribute significantly to the discrepancies in the number of sexual assaults reported, those charged, and those convicted. With a topic such as this, that is of sufficient importance, we ought to offer possible solutions. To respond to the problem rape myths pose, I suggest rape myth education as an answer. Rape myths are not innate beliefs; they are learned, gender-oppressive conceptions. Rape myth education constitutes a suitable solution, as it seeks to dismantle these myths by falsifying them. Rape myth education could be implemented in specific contexts, such as law enforcement, or more broadly in non-professional spaces. In the context of my paper, I focus on the latter. Through my exploration of these myths, I have emphasized that they are widespread; they are not confined solely to juries' or to law enforcement's attitudes but remain persistent in the broad landscape of society. Therefore, when considering education as a solution, we need to prioritize educating everyone, even those who are not directly involved in the criminal justice system.

In *Feminist Rape Education: Does it Work?*, Fonow et al. sought to determine the impact of rape-education intervention strategies on college students' attitudes. They tested the effectiveness of a live rape-education workshop, and a video workshop. In their preliminary testing, the women were less likely to accept rape myths than men. After the educational interventions, Fonow et al. found that students who had undergone these interventions had lower rape-myth acceptance scores than those who had not (Fonow 118). Another study, looking at a non-student sample, found similar results. Researchers tested the success of a ten-minute informal video on a randomized group of participants. This video successfully lessened the groups' adherence to rape myths (Reddy 1312). The success of the interventions in both studies confirm that rape myth education offers a compelling solution to combat the prevalence of these misconceptions. The second study in particular found a change in participants' attitudes after a ten-minute educational video was shown. I find this to be extremely significant. If there is considerable change in rape myth acceptance after only short intervention, the amount of change that could be offered by an in-depth intervention would be crucial. Additionally, a ten-minute educational video is easily accessible. Implementing videos such as these in classrooms, workplaces, etc. are simple steps that should be taken to help combat these misogynistic ideologies.

Furthermore, Fonow et al. found that both men and women's scores decreased equally; however, women continued to reject rape myths more than men.

Men's lower score is pertinent. They articulate, "Because women always operate within a power-imbalanced system that favours men, men's attitudes cannot be viewed as simply different from women's: they are more prevailing, naming, controlling, and determining" (Fonow 118). I agree. Particular attention must be paid to men's adherence to rape myths. The criminal justice system constitutes a "power-imbalanced system." For instance, in 2018, there was a total of 53, 589 male police officers, compared to just 14, 943 female officers (Jeudy). Special attention must be paid to rape education that targets men's attitudes. In a patriarchal society, these viewpoints dominate mainstream discourse and are given more power. Thus, I suggest that in implementing rape education we must consider this gendered difference, thinking about ways to target the misogynistic views of men in particular.

Conclusion

Through exploration of the attitudes of victims, law enforcement officers, and juries, I have displayed the ways rape myths substantially contribute to the discrepancies between the number of sexual assaults that occur, those reported, those charged, and those that end in a conviction. Further, I have emphasized the interrelated nature of these stages, by describing the ways in which victims' knowledge of police officers' reliance on rape myths inhibits their reporting, and how police officers' awareness of juries' reliance on these myths causes them to disbelieve victims' allegations. Throughout my analysis, I have discussed the experiences of both women of colour and women of a lower socioeconomic status to highlight that the experience of women in the criminal justice system is not universal: these rape myths are exacerbated by race and class. Finally, I stressed education as a method of correcting these learned, misogynistic misconceptions. Moving forward, we must seriously implement solutions. Too many women are silenced, disbelieved, and discredited because of these widespread myths. After being victim to a crime as violating as a sexual assault, women have nowhere to turn to—no proper means to seek justice. How can we as a society allow this to persist?

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More Than Two Extremes:

An Examination of the Anti-impunity issues regarding the coexistence of Criminal Accountability and Truth, Peace and Forgiveness

By: Nathan Ching

"No peace without justice"; peace cannot be sustained without the facilitation of justice. Within the field of international criminal law, the debate on anti-impunity has always centred around the dichotomous relationship between criminal justice and truth, peace and forgiveness (TPF). To some critics, these two supposedly "polarised" ends are often unable to meet, due to the varied focuses between justice and TPF principles. Some argue that truth, peace and forgiveness is necessary to facilitate a transition to, and consolidation of, an overtaking democratic order—and to that extent, retributive punishment on an abusive regime would make such transition impossible (AZAPO v President of the Republic of South Africa, 1996). On the other hand, some have argued that by focusing on the truth rather than punishment, international criminals are excused for their mass atrocities, thus defeating the inherent purpose of an international court, which is to prevent such atrocities from happening again (Krzan, 2017, 1-2). These debates have come to all-time high attention during the rise of the global anti-impunity agenda. The term "anti-impunity" refers to the fight against immunity from prosecution of individuals and recognises criminal individual responsibility in international law.

This trend could be seen, for example, from Amnesty International's (AI) shift in its policy stance on impunity; even AI, an organization historically in favour of impunity, has turned its focus towards criminal justice through anti-impunity reports (Engle, 2015, 1077). This could also be seen through the creation of the International Criminal Court (ICC) based on the 1998 Rome Statute, a move originally deemed unimaginable and impractical by critics before the 1990s (Engle, 2015, 1075-1076). The argument against impunity is that international criminals should be held individually accountable because international crimes are "committed by men, not by abstract entities, and only by punishing individuals…can the provisions of international law be enforced" (Kirsch, 2006, 3).

In that sense, this essay asks an issue raised by the debate between TPF principles and the goal of impunity: Are Truth, Peace and Forgiveness principles in conflict with criminal accountability? The answer is no, in that Truth, Peace and Forgiveness principles facilitate criminal accountability, and thus should not be in conflict with the aforementioned principles. First, I will examine the reasons why TPF principles are preferred by certain critics over punitive criminal justice. Second, I will discuss how criminal accountability can provide justice for victims that, in turn, promote the admission of truth, peace and forgiveness. Finally, this essay draws full circle by coming back to the notion that there is "no peace without justice," in that justice is necessary to facilitate truth, peace and forgiveness.

Though arguably, impunity has given victims of war and international crimes a practical chance of knowing the truth about the atrocities committed against them and the ability to reconcile from knowing the truth, the guaranteed immunity for perpetrators defeats the purpose of entering these truths as evidence.

The historical discussion on truth and reconciliation can be best seen in the establishment of the Truth and Reconciliation Commission in South Africa (Promotion of National Unity and Reconciliation Act, 1995). The objective is to promote unity and reconciliation as opposed to retribution and further conflict, leading to a negotiated transition to democracy in South Africa (*Promotion*, 1995). By placing unity and reconciliation above retribution, the committee is provided with discretion and "wide powers" to grant "amnesty in respect of any act, omission or offence" as long as the perpetrators agree to disclose the full facts of the case (*Promotion*, 1995). Ultimately, amnesty plays the role of a bargaining chip in international negotiations with war criminals; the prosecution gains first-hand account of the crimes committed, and in return, will exempt these criminals from punishments. In that sense, because victims are focused on emotional closure through truth more so than punishing the perpetrator, it is fair that the desire to prosecute individual responsibility would become somewhat irrelevant. However, I find this sentiment problematic. Not only does this excuse the atrocities committed, but also it presumes that victims would assume closure from simply knowing the truth. As argued by Stanley (2001), the usefulness of acknowledged truth is neutralized by wider social and criminal justice concerns. Not only did amnesty benefit the abusers, but it also ignores the reality that social conditions must be changed in the present to repair the mass and negative consequences created by these criminals (536-541). Moreover, reparations are a necessary component to reconciliation and peace - while the truth is essential

for victims to reconcile, victims may find it difficult to view international law as effective in maintaining peace and forgiveness without reparations (Evans, 2012, 42-43).

Another argument raised in favour of amnesty was outlined by the Truth and Reconciliation Commission for Sierra Leone, in that "those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict" (Krzan, 2017, 82). To barter for peace, investigative bodies are willing to offer amnesty for high-ranking officials, who are the leading perpetrators of mass international crimes, in exchange for a ceasefire, and thus peace. This is once again a problematic view, as it places an overly optimistic trust in "bartered peace." As mentioned at the beginning of this paper, peace will not be sustained without justice. Though it may be necessary for temporary peace to achieve negotiations and prosecution, I find it overly optimistic to place too much trust in the peace bartered by amnesty. In that sense, it might be important to ask: is bartered peace worth providing criminals with the guarantee that their crimes will go unpunished?

The assumptions made by those in favour of TFP principles is that TFP leads to meaningful reconciliation of victims and sustainable peace, but as proven above, this is not necessarily the case. If anything, enforcing criminal accountability could ensure a more sustainable peace because it affirms a population's faith in the criminal justice system. An example of this would be through the Rwandan Genocide case, in which high-ranking officials involved in the mass killing of the Tutsi population, known as génocidaires, were prosecuted by the International Criminal Tribunal for Rwanda (ICTR). It was argued that Rwanda is a society beyond repair for the foreseeable future and that any supposed post-conflict talks and reconciliation would not have been satisfactory for surviving Rwandans at the moment (Akhavan, 2001, 23). This is not to say 'revenge' should be encouraged, but that if the punishment was to be used to provide victims with closure, it should be from a fair and impartial decision as to what the abusers deserve. Moreover, it was said that the detention and trial of these génocidaires in Rwandese courts were an alternative to mass expulsions or widespread executions or private revenge killings that could've happened if ICTR hadn't stepped in (Akhavan, 2001, 23). While pro-TPF critics have argued that truth, peace and forgiveness facilitate ceasefire better, criminal accountability was arguably more effective in the Rwandan case. The decapitation of the génociraire leadership thwarted any political rehabilitation of genocidal extremism, thus effectively putting a permanent end to the war (Akhavan, 2001, 23). This measure served a preventive purpose for international criminal justice in post-conflict contexts, providing long-lasting peace. As an extension, the success of the ICTR to stop private killings and the return of the géocidaire sends the message to survivors that the justice system has worked, and in due process, the suffering has stopped. Furthermore, the ICTR's approach to criminal accountability properly allows for truth and forgiveness to prevail as well. Though truth-telling is somewhat therapeutic for victims since they feel a great deal of relief and satisfaction when they testify against their perpetrators (Shaw, 2005, 7), this level of testifying cannot be nationally fair—not every single victim could testify at trial due to the scale and time it would take to do so. On the other hand, seeing a criminal apprehended could be just as satisfying, if not more, than testifying.

A counter-argument that could be offered against criminal accountability would be that the telling of truth could be more useful than revenge-based justice. However, this again isn't always the case. In the case of the Truth and Reconciliation Committee of Sierra Leone, social forgetting, or the process of a society attempting to forget about the atrocities committed against them, was more preferred. Many child ex-combatants have expressed that they wished to forget the war and get on with their lives, which was a popular practice among those scarred by war to achieve social recovery (Shaw, 2005, 9). Ultimately, it is up to what the population might prefer—if most survivors of the violence prefer retributive justice, then a truth commission is unlikely to be an adequate response (Shaw, 2005, 11). Even worse, and as exemplified in the Sierra Leone case, a truth commission would only survive to rip open emotional wounds, becoming more destructive than it is helpful (Shaw, 2005, 11). Where truth-hearings fail, retributive justice may help victims more so for closure.

So far, this essay has argued for how criminal

accountability is more of a satisfactory road to peace than truth-telling. However, criminal accountability is not only a satisfactory means of achieving peace and reconciliation but a necessity. For a jurisprudential response to this idea, I turn to the Nuremberg principles, in which values of international law were first introduced at the Nuremberg Trial of the Nazi regime. In the famous opening statement by Justice Jackson in 1945, it was established that the goal of international law was to "meet the greatest menace of our times: aggressive war." It was also reasoned that any forgiveness towards these criminals would only encourage evildoers, and thus sanctioning their evil deeds. Of course, this view is somewhat outdated, as progressive and transitional justice has become a rising trend in the international sphere. However, the value in understanding the basics of how international law was created is in what the Rome Statute, the statute that created the ICC, attempted to do. The goal that the ICC inherited from the Nuremberg trials was that all of humanity should be guarded by an international legal shield that even an evil Head of State could be criminally responsible if they choose to be aggressive (Ferencz, 1998, 225-226). Furthermore, the ICC was expected to punish those responsible for crimes against humanity and to promote justice so that peace endures (Ferencz, 1998, 227). Even as the ICC was created, the main purpose has always been to prosecute to achieve peace. In other words, if peace was to be achieved, the United Nations must uphold the "symbol of our highest hopes for this unity of peace and justice" that the ICC represents (Ferencz, 1998, 227). From these two examples of international law origins, both the Nuremberg principles and ICC were created to provide peace through criminal accountability. In that sense, it is not an option to exclude criminal accountability from international law.

A counter-argument against impunity comes in the form that the decontextualisation of criminal law can harm the original intention of the anti-impunity trend. Criminal accountability is too focused on asserting blame than it is in reconciling victims, too much so that there is a lack of concern for the cause of a conflict or its ideological content (Engle, 2015, 1121). Moreover, because the current system of the ICC is somewhat adversarially focused on accusing each other of atrocities worthy of international attention, it ignores the more pressing need to intervene and deal with citizen concerns, such as removing the abusive regime or repairing cultural damages to the nation (Engle, 2015, 1121). To further this point, the TPF principles create a more nuanced approach to understanding the context of the crimes committed against victims. Because contextualising and acknowledging a problematic past would be necessary for TPF principles to work, TPF principles are more effective than criminal accountability in resolving international conflicts. However, one can also argue that the success of the ICC in enforcing criminal accountability has shown that criminal accountability can also displace abusive regimes (as argued above in the Rwandan case). As such, this counter-argument may have its merits, in that the TPF has its merits in being able to better understand the context of the crimes committed, but it does not necessarily mean that criminal accountability does not have its merits either.

The debate surrounding TPF versus criminal accountability has become increasingly more reductive. The assumption made by critics is that only one can be adapted, or that one is better than the other. However, the delineated expression on the possible coexistence of both values shows that the relationship between criminal accountability and truth, peace and forgiveness is more than a dichotomous one. I have argued substantially why critiques against individual criminal responsibility have been ineffective, and that criminal accountability is necessary for the facilitation of the TPF principles.

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pg. 12: Thousands of people gathered in downtown Montreal on Sunday to protest Quebec's proposed Bill 21, photographed by Graham Hughes/Canadian Press. Digital Image. *CBC News*. Accessed May 5th, 2023. https://www.cbc.ca/news/canada/montreal/bill-21-protests-montreal-1.5088265.

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pg. 20: Tips and Tricks on How to Best Handle a Parking Ticket. Digitial Image. *ParkMobile.* Accessed May 5th, 2023. https://parkmobile.io/wp-content/uploads/2020/10/tips-and-tricks-on-how-to-best-handle-a-parking-ticket-3.jpg

pg. 30: Map 7 - Patterns of Seasonal Movement. Map produced May 2015 by the Tsleil-Waututh Nation, *Tsleil-Waututh Nation's Trans Mountain Assessment Report.* Accessed May 5th, 2023.

pg. 44: A protest to mark Juneteenth at the Martin Luther King Jr. Memorial on June 19th, 2020, in Washington D.C. Digital Image. *POLITICO*. Accessed May 5th, 2023. https://www.politico.com/news/magazine/2020/08/16/does-america-need-a-truth-and-reconciliation-commission-395332.

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