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Criminal Justice and Evidentiary Thresholds in Canada: The Last Ten Years

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THE LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA promotes research and scholarship in diverse areas.

REFEREE AND PEER REVIEW PROCESS

All of the articles in the *Manitoba Law Journal Robson Crim Edition* are externally refereed by independent academic experts after being rigorously peer reviewed by Manitoba faculty editors, as well as reviewed by student staff. Usually 3 external peer reviewers assess each piece on a double-blind basis.

INFORMATION FOR CONTRIBUTORS

The editors invite the submission of unsolicited articles, comments, and reviews. The submission cannot have been previously published. All multiple submissions should be clearly marked as such and an electronic copy in Microsoft Word should accompany the submission. All citations must conform to the *Canadian Guide to Uniform Legal Citation*, 9th Edition. Contributors should, prior to submission, ensure the correctness of all citations and quotations. Authors warrant that their submissions contain no material that is false, defamatory, or otherwise unlawful, or that is inconsistent with scholarly ethics. Initial acceptance of articles by the Editorial Board is always subject to advice from up to three (or more) external reviewers.

The Editorial Board reserves the right to make such changes in manuscripts as are necessary to ensure correctness of grammar, spelling, punctuation, clarification of ambiguities, and conformity to the *Manitoba Law Journal* style guide. Authors whose articles are accepted agree that, at the discretion of the editor, they may be published not only in print form but posted on a website maintained by the journal or published in electronic versions maintained by services such as Quicklaw, Westlaw, LexisNexis, and HeinOnline. Authors will receive a complimentary copy of the *Manitoba Law Journal* in which their work appears.

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2020 Volume 43(3), Special Issue

Criminal Justice and Evidentiary Thresholds in Canada: The Last Ten Years

CONTENTS

Continuing the Conversation: Exploring Current Themes in Criminal Justice and the Law

DAVID IRELAND AND
RICHARD JOCHELSON

It is our great pleasure to bring you the latest volumes of the Criminal Law Special Edition of the Manitoba Law Journal. Academics, students, and the practicing bench and bar continue to access this publication and contribute to it their knowledge and experience in the criminal law. Publishing a triple volume is a testament to the quality of submissions received. We present 27 articles from 34 authors, highlighting the work of some of Canada's leading criminal law, criminal justice and criminological academics.

The Manitoba Law Journal remains one of the most important legal scholarship platforms in Canada with a rich history of hosting criminal law analyses.[1] With the help of our contributors, the Manitoba Law Journal was recently ranked second out of 31 entries in the Law, Government and Politics category of the Social Sciences and Humanities Research Council (SSHRC). We continue to be committed to open access scholarship and our readership grows with each Criminal Law Special Edition released.

Our content is accessible on robsoncrim.com, themanitobalawjournal.com, Academia.edu, CanLII Connects, Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. We have expanded to Amazon ebook platforms as well for those that want to consider print on demand options or who enjoy that format. Since our first edition in 2017, our Special Edition has ranked as high as the top 0.1% on Academia.edu and we have had approximately 6,000 downloads and close to 10,000 total views. Since 2016, our own website, robsoncrim.com, has

1 David Ireland, "Bargaining for expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38:1 Man LJ 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37:2 Man LJ 365.

accumulated tens of thousands more engagements with the Special Edition, attracting hits from all over the world. Our readership engages with articles on subjects as diverse as the Tragically Hip and wrongful convictions,[2] bestiality law,[3] and the British Columbia courts sentencing response to fentanyl trafficking.[4]

Since launching in 2016, the Robsoncrim research cluster at the Faculty of Law, University of Manitoba, has continued to develop a unique interdisciplinary platform for the advancement of research and teaching in the criminal law. Robsoncrim.com has now hosted over 500 Blawgs,[5] with contributions from across the country and beyond. Our cluster has over 30,000 tweet impressions a month and our website has delivered approximately 12,000 reads in the past 12 months. We are as delighted as we are humbled to continue delivering quality academic content that embraces and unites academic discussion around the criminal law. Our team of collaborators extends from coast to coast and is comprised of top academics in their respective criminal justice fields.

The peer review process for the Special Edition in Criminal Law remains rigorously double blind, using up to five reviewers per submission. As has become our tradition, we would like to preview for our readers the contents of this year's special edition. The edition is divided into three volumes. The first volume represents the work of our SSHRC funded conference: *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* which took place in October of 2019 and attracted scholars from all over Canada and beyond. The second and third volumes are organized into a number of thematic sections.

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2 Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40:3 Man LJ 1.

3 James Gacek & Richard Jochelson, "Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40:3 Man LJ 337.

4 Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149.

5 Amar Khoday, "Against the Clock: Criminal Law & the Legal Value of Time" (17 June 2019), online (blog): *Robson Crim* <tinyurl.com/y3npys9g> [perma.cc/KKN6-6N8C]; L Campbell, "A Reasonable Expectation of Privacy and the *Criminal Code*: Two Cases, Two Different Definitions" (30 July 2019), online (blog): *Robson Crim* <robsoncrim.com/single-post/2019/07/30/A-Reasonable-Expectation-of-Privacy-and-the-Criminal-Code-Two-Cases-Two-Different-Definitions> [perma.cc/DG4U-E2FE]; T Sicotte, "The Supreme Court Needs to Clean up the Sex Offender Registry" (18 July 2019), online (blog): *Robson Crim* <tinyurl.com/y6p5cg27> [perma.cc/VPN9-KFQG].

I. VOLUME 43(3)

This volume contains papers presented at the *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* conference, hosted at the Faculty of Law, University of Manitoba. The conference focussed on the evolution of the law of evidence and the sometimes radical transformations it has seen over the last ten years since the seminal decision of *R v Grant* in 2009, which reoriented the test for exclusion of evidence at trial. The conference explored questions of the conception of knowledge in modern criminal legal proceedings and the changes in the nature of knowing and constructing criminal responsibility over the last ten years as the information age continues to develop the law of evidence. Unparalleled connectivity, state surveillance capabilities, Canada's commitment to truth and reconciliation with Indigenous communities, and anxieties pertaining to large scale security calamities (like terror events), have altered the landscape in which crime is investigated, and in which evidence is subsequently discovered, and admitted. The conference discussed and unpacked these issues and developed a tremendous body of scholarship which we are proud to present in this volume.

Kent Roach leads the conference volume with his piece "Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition." This article examines the mechanisms of exclusion of evidence in four western democracies, finding similar origins for each mechanism: the protection of the individual. Professor Roach argues that this original rights protection rationale should be reclaimed in the form of *prima facie* rules of exclusion once used in Canada's fair trial test and in New Zealand and Ireland. Roach contends that the exclusionary rules should be subject to a more transparent and disciplined process where the state can justify proportionate limits on the exclusionary remedy based on the lack of the seriousness of the violation, the existence of adequate but less drastic alternative remedies, and, more controversially, the importance of the evidence to the ability to adjudicate the case on the merits.

Michael Nesbitt and Ian M. Wylie present a fascinating empirical study of expert opinion evidence in Canadian terrorism cases. The authors unpack the prevalence of expert testimony in these cases and offer a number of reasons why expert evidence will continue to play a crucial role in terrorism prosecutions in Canada. Following this, University of Alberta Law

Professor Lisa A. Silver dives into the complex world of social media evidence in "The Unclear Picture of Social Media Evidence." This article interrogates the uncomfortable relationship between our sometimes-archaic rules of evidence and the growth of social media evidence being presented in Canadian courts. Professor Silver takes a deep look at the construction of evidentiary categories and the preference for social media evidence to be viewed in the courtroom as documentary evidence. She then discusses the application of the relevant provisions of the *Canada Evidence Act* and offers a practical solution by discussing the enhanced admissibility approach used for expert evidence.

Professor David Milward's article, "Cree Law and the Duty to Assist in the Present Day" is an exploration of Indigenous legal orders through the lens of 'pastamowin' or the facet of Cree law dealing with laws against harming others. Milward juxtaposes this Indigenous legal principle with the absence of a general duty to help others in Canadian common law. He then uses this model as a platform to discuss Indigenous communities reviving past laws and developing current legal systems that embrace concepts of true self-governance. This impactful piece asks deep questions relating to reconciliation, the Calls to Action of the *Truth and Reconciliation Commission*, and the future of Indigenous self-governance.

"Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the Canadian Charter of Rights and Freedoms" by Ruby Dhand and Kerri Joffe discusses civil mental health laws and the involuntary detention of persons with disabilities. The authors apply a section 7 and section 15 *Charter* analysis to involuntary detention and involuntary treatment provisions in select Canadian jurisdictions. By unpacking the *Convention on the Rights of Persons with Disabilities* (CRPD), the authors draw upon Article 12 of the CRPD and argue that one way in which Canadian mental health laws violate the *Charter* is by prohibiting involuntarily detained persons from accessing supports for decision-making. The theme of mental health and the law is continued by Dr. Hygiea Casiano and Dr. Sabrina Demetrioff in their article "Forensic Mental Health Assessments: Optimizing Input to the Courts." Here, the authors argue that feedback from legal personnel in mental health assessments for fitness to stand trial and criminal responsibility can potentially lead to improved provision of care and due process for a marginalized population. They conclude by proposing further study into these issues.

James Gacek and Rosemary Ricciardelli unpack how changing drug management policies in Canadian federal prisons create new ways of thinking about responses (policy or otherwise) to drug use and the essence of intoxication in "Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons." The authors shed light on the complexities underpinning interpretations of intoxicants that are present yet 'managed' in prison spaces.

In "Mr. Big and the New Common Law Confessions Rule: Five Years in Review", Adelina Iftene and Vanessa L. Kinnear take a look at the judicial progeny of the seminal case of *R v Hart*. The authors review the last five years of judicial application of the new *Hart* framework and argue that the flexibility and discretion built into the *Hart* framework have resulted in an inconsistent application of the two-prong test. As the controversial police practice of Mr. Big stings continues in Canada, this article projects further light onto the propriety of this technique.

Alicia Dueck-Read deals with judicial constructions of responsibility in the area of non-consensual distribution of intimate images (NCDII). This article provides a discourse analysis of judicial decision-making on *Criminal Code* section 162.1 cases. Dueck-Read unpacks whether judges adjudicating cases under section 162.1 draw upon privacy frameworks and/or the rape myths common to sexual assault trials. Continuing this theme of harm in the digital age, Lauren Menzies and Taryn Hepburn explore the underlying logics and implementation of section 172.1 of the *Criminal Code* ("Luring a Child") and critique the current practice of governing child luring through proactive investigations by police. The authors argue proactive child luring investigations have been used to police marginalized sexualities and sex work communities and have inflicted substantial harms upon those who are wrongly caught up in investigations. They then question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases.

This conference volume concludes with an in-depth exploration of victim impact statements in the context of Canadian corporate sentencings. The recent SNC-Lavalin scandal and its political fallout have drawn public attention to an existing culture of impunity enjoyed by corporate criminal wrongdoers, despite the 2004 changes to the *Criminal Code of Canada* that were intended to make corporate prosecutions easier. Erin Sheley convincingly argues that the conceptual problems with corporate criminal liability may lie in the criminal justice system's general misapprehension of

the nature of corporate crime; especially of the distinct nature of the harm experienced by white collar victims. She also considers the challenges to a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement in Canada and offers a comparative analysis of how corporate criminal sentencings occur in Canada and the United States.

II. VOLUME 43(4)

Volume 43(4) is divided into three sections. The first section is entitled *International Contributions* and highlights the work of two leading international scholars. The second thematic section is entitled *Current Issues in Criminal Law* and delves into issues as diverse as the use of victim impact statements and the Mr. Big investigatory process. The third and final section is a stand-alone *Year in Review* in which we present a paper summarizing the most recent Supreme Court of Canada and Manitoba Court of Appeal cases.

Leading off the *International Contributions* section is Hadar Aviram's work: "Making Sense of the Experiences of Bar Applicants with Criminal Records." This article offers insight into the bar admission process in the United States, seen through the lens of real-life experiences of the Bar takers themselves. The article provides a legal analysis of the California Bar's determination of moral character, relying on the Bar rules. The author then moves into an empirical examination of the Bar's policy through the eyes of ten California Bar applicants with criminal records, two ethics lawyers, and a Bar official. Aviram then makes recommendations for law schools and the Bar.

Following this piece is "Corporate Criminal Liability 2.0: Expansion Beyond Human Responsibility" by Eli Lederman who asks the question: is corporate criminal liability expanding beyond that of human responsibility? Lederman examines the expansion of criminal liability on non-human legal entities in the U.S. and U.K., reflecting on the possible directions in which corporate liability may be heading.

Elizabeth Janzen leads off our *Current Issues in Criminal Law* section with "The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the Victim Bill of Rights." This paper examines the Canadian regime governing the participation of victims in sentencing through the use of victim impact statements, with a focus on

the regime following the 2015 amendments implemented through the *Victims Bill of Rights Act*. The author argues that an approach to victim impact statements that focuses on their expressive and communicative uses best aligns with both Canadian sentencing principles and respect for victims.

Darcy L. MacPherson then presents a case comment on *9147-0732 Quebec Inc c Directeur Des Poursuites Criminelles et Penales* in which he argues the assumption that *Criminal Code* standards will and should apply to provincial offences is highly questionable. MacPherson, a notable expert in this area of the law, presents a cogent analysis of the complex jurisdictional issues brought forward by this case.

No current issues section would be complete without a look at "Criminal Law During (and After) COVID-19." Terry Skolnik delves into this most timely of issues by exploring the current and potential impacts of the pandemic on three specific areas of the criminal law: scope of crimes, bail, and punishment. Skolnik's analysis shows us why judges, policy makers, and justice system actors should seize on this unique opportunity in history to generate lasting positive changes to the criminal justice system. Following this timely piece comes an equally important analysis of the *Charter* and the defamatory libel provisions of the *Criminal Code*. In "If You Do Not Have Anything Nice to Say: Charter Issues with the Offence of Defamatory Libel (Section 301)", Dylan J. Williams outlines the existing debate and the *Charter* issues raised by section 301 by tracing relevant lower court decisions, each of which has ultimately struck this offence down. Williams argues that section 301 is unconstitutional because it infringes the freedom of expression found in section 2(b) of the *Charter* and is likely to fail at both the minimum impairment and proportionality stages of the *Oakes* test.

The *Current Issues in Criminal Law* section is concluded by Christopher Lutes "Hart Failure: Assessing the Mr. Big Confessions Framework Five Years Later." This piece compliments Adelina Iftene and Vanessa Kinnear's work in volume 43(3). While Iftene and Kinnear found that *Hart* had no substantial impact on the amount of confessions admitted in Mr. Big prosecutions post-*Hart*, Lutes reports that the admission rate of Mr. Big confessions have actually increased since the framework was implemented. Lutes argues this increase is indicative of police relying on Mr. Big type techniques because of increased protections for accused persons while in police custody.

Finally, we present our "Robson Crim Year in Review" by LL.M. student Brayden McDonald and J.D. student (now articling student) Kathleen Kerr-Donohue. This paper summarizes the leading criminal law cases from the Supreme Court of Canada and Manitoba Court of Appeal in 2019. The cases are presented with relevant statistics and divided by themes for ease of reference. The authors also add commentary on discernable themes in this recent case law. All in all, this article is an invaluable resource for students, professors, and the practicing bench and bar.

III. VOLUME 43(5)

Our third volume of 2020 is also divided into three sections: *Corrections, Judicial Release, and Related Issues*; *Critical Approaches in Criminal Justice*; and *Placing Theory into Criminal Law Practice*. The first section contains two articles: Sarah Runyon's "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties" and Alana Hannaford's "Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions." Runyon's article interrogates the prevalence of administration of justice charges in the context of Indigenous offenders. She argues that continually charging Indigenous offenders with breaching court orders, so called system generated charges, can create and perpetuate a social hierarchy from which the state justifies continued discrimination and oppression of the Indigenous population. Runyon goes on to revisit the seminal cases of *Gladue* and *Ipeelee* in the context of community-based dispositions. The author argues that rather than ameliorating the crisis of over-incarceration, the imposition of a community-based disposition, which relies on an administrative court order as its enforcement mechanism, serves to exacerbate the social problem endured by Indigenous peoples in Canada. Hannaford's article on abstention clauses builds upon Sarah Runyon's piece. Hannaford describes the unfair operation of administration of justice charges on non-violent offenders suffering from addictions. The author argues that abstention conditions on bail orders effectively force people suffering from addictions to keep their use private, which increases the risk of overdose and decreases the likelihood that they will seek treatment independently out of fear of harsh legal consequences. In combination,

these articles highlight many of the issues concerning police overcharging and the inequitable operation of system generated charges.

Florence Ashley presents a feminist perspective on the voluntary intoxication defence to lead off our *Critical Approaches in Criminal Justice* section of this volume. Ashley looks to the Ontario Court of Appeal decision in *R v Sullivan*, a decision frequently decried as antifeminist, and presents a feminist view of the defence that is far more nuanced than has been previously suggested. The article concludes that a feminist analysis of the voluntary intoxication defence requires more nuanced policy discussions than those that have thus far prevailed in the public sphere.

Following this, Lauren Sapic has written "The Criminalization of Non-Assimilation and Property Rights in the Canadian Prairies." The killing of Colten Boushie in Saskatchewan and the eventual acquittal of Gerald Stanley has left an indelible mark on the relationship between Indigenous and non-Indigenous Canadians. Sapic uses this tragic case as a backdrop to a fascinating analysis of how policies in Canadian property law have privileged white settlers' property rights as a result of the subjugation of Indigenous human rights. Sapic proposes an overhaul of the Canadian property law system, with a focus on negating the abuse of Indigenous men and the abuse of the property law system itself. This important work situates property law in a settler dominant model that speaks of the ongoing and sustained inequities that exist between white settlers and the Indigenous peoples of Canada.

The third article in this section offers a critical perspective on Supreme Court *Charter* cases and the further disenfranchisement and marginalization of racialized communities in Canada. In "The Supreme Court of Canada's Justification of Charter Breaches and its Effect on Black and Indigenous Communities", Elsa Kaka employs Critical Race Theory to undertake an analysis of how Supreme Court of Canada decisions pertaining to *Charter* breaches have allowed for an expansion of police powers that exacerbate the maltreatment of racialized communities by our criminal justice system. This timely article speaks to the importance of the Black Lives Matter movement and the *Truth a Reconciliation Commissions*' Calls to Action in achieving real change to ensure that the *Charter* rights of all Canadians are respected.

Katy Stack's article "Moms in Prison: The Impact of Maternal Incarceration on Women and Children" closes out the *Critical Approaches in Criminal Justice* section of this volume. Stack examines the impact of incarceration on mothers and children through a case study format. The

author compares maternal incarceration in the U.S. and Canada, examining the impacts on both mothers and children when mothers are imprisoned.

The *Placing Theory into Criminal Law Practice* section contains two articles, "The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8" by Michelle Biddulph and "Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada" by Sarah Ferencz. Biddulph delves into the Supreme Court of Canada cases of *Marakah* and *Mills*, both of which deal with section 8 *Charter* protections. The author discusses how *Marakah* has created a 'privacy paradox' in that the rights protections are at once extremely broad and also illusory. The result in *Mills* is then cited as an example of this paradox. This in-depth discussion of section 8 jurisprudence is both academically insightful and also of practical use to lawyers. Finally, Sarah Ferencz's article deals with the incorporation of social, or non-commercial, drug trafficking within the Canadian legal context. The author recognizes the overly broad ambit of Canada's drug laws that focus on the inherent predatory nature of trafficking, for profit or otherwise. By unpacking the concept of social supply within this context, Ferencz proposes three avenues for law reform focussing on education and language.

IV. LOOKING FORWARD

Our goal remains to provide a leading national and international forum for scholars of criminal law, criminology and criminal justice to engage in dialogue. Too often, these disciplines are siloed and apprehensive to engage in cross-disciplinary exchanges. We believe that high quality publications in these disciplines, and indeed, other cognate disciplines, ought to exist in dialogue. We view this as crucial to enhancing justice knowledge: theory and practice, policy and planning, and even, in resistance to injustice. We strive to break down the barriers that keep these works in disciplinary pigeon holes. This is, of course, an ambitious path to continue upon, but the three volumes we have released this year represent further incremental steps toward our goals.

The work of the Robson Crim research cluster at the University of Manitoba continues to advance criminal law and justice scholarship in Canada. In doing so, and we are fortunate to work with a tremendously talented group of scholars, students, and jurists from across the country. It

is this continued collaboration and free exchange of ideas that drives the publication of this Special Edition in Criminal Law and the rest of our work at Robson Crim. We thank our interdisciplinary collaborator team (https://www.robsoncrim.com/collaborators), our editorial team, our student editors, and all of the MLJ staff, without whom these volumes would not exist. We hope you enjoy these volumes and we look forward to our next publication in 2021.

CALL FOR PAPERS: Closes February 1, 2021
Manitoba Law Journal - Robson Crim's Fourth Special Issue on Criminal Law

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We seek submissions related to two major areas: **1) general themes in criminal law; and 2) evidentiary developments in criminal law** (see details below). This is our sixth specialized criminal law volume, though Manitoba Law Journal is one of Canada's oldest law journals. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. We are in press for volumes 43(3), 43(4), and 43(5) of the Manitoba Law Journal and have published papers from leading academics in criminal law, criminology, law and psychology and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

We invite papers that relate to **issues of criminal law and cognate disciplines** as well as papers that reflect on the following sub-themes:

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections and court settings
- Regulation of policing and state surveillance

- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances
- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

We also invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities);
- New developments in digital evidence and crimes;
- Evidentiary changes in the criminal law;
- Evidence in matters of national security;
- Thresholds of evidence for police or state conduct;
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations;
- Evidence in the context of mental health or substance abuse in or related to the justice system;
- Use of evidence in prison law and administrative bodies of the prison systems;
- Understandings of harms or evidence in corporate criminality;
- Historical excavations and juxtapositions related to evidence or knowing in criminal law;
- Cultural understandings of evidence and harm; and
- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system.

Last but not least, we invite general submissions dealing with topics in criminal law, criminology, criminal justice, urban studies, legal studies and social justice that relate to criminal regulation.

SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2021. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and if at all possible conform with the Canadian Guide to Uniform Legal Citation, 9th ed (Toronto: Thomson Carswell, 2018) - the "McGill Guide". Submissions must be in word or word compatible formats and contain a 250 word or less abstract and a list of 10-15 keywords.

Submissions are due February 1, 2021 and should be sent to info@robsoncrim.com. For queries please contact Professors Richard Jochelson or David Ireland, at this email address.

THE JOURNAL

Aims and Scope

The Manitoba Law Journal (MLJ) is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. The MLJ is carried on LexisNexis Quicklaw Advance, Westlaw Next and Heinonline and included in the annual rankings of law journals by the leading service, the Washington and Lee University annual survey. The MLJ operates with the support of the SSHRC aid to scholarly journal grants program.

Peer Review

We generally use a double-blind peer review process to ensure that the quality of our publications meets the requisite academic standards. Articles are anonymized and then, after editorial review, reviewed by anonymous experts. Occasionally the identity of the author is intrinsic to evaluating the article (e.g., an invited distinguished lecture or interview)

and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

This is an open access journal, which means that all content is freely available without charge to the user.

Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition

KENT ROACH *

ABSTRACT

An examination of exclusion of evidence obtained in violation of rights in four democracies reveals striking convergence. Courts in Canada, Ireland, New Zealand, and the United States originally conceived of exclusion as a remedy designed to protect the rights of accused persons and to restore them to the position that they would have occupied but for the violation. This approach makes sense of individual standing and causation requirements. All four jurisdictions have, however, moved towards new tests that place more emphasis on balancing competing social interests. This article argues that the original rights protection rationale should be reclaimed in the form of prima facie rules of exclusion once used in Canada's fair trial test and in New Zealand and Ireland. At the same time, such rules should be subject to a more transparent and disciplined process where the state can justify proportionate limits on the exclusionary remedy based on the lack of the seriousness of the violation, the existence of adequate but less drastic alternative remedies, and, more controversially, the importance of the evidence to the ability to adjudicate the case on the merits. In determining the seriousness of the violation, courts should evaluate whether the state has made reasonable efforts to prevent the repetition of similar rights violation. This would allow courts to enter into a dialogue with the state about whether the state has employed effective remedies that would not be available to courts such as better police training, discipline, and legislative reform.

Keywords: Exclusion Improperly Obtained Evidence; Canada; Section 24(2); Ireland; New Zealand; United States; Compensation; Deterrence; Proportionality; Alternative Remedies; Non-Repetition of Violation

I. INTRODUCTION

Exclusion of improperly obtained evidence is by far the most litigated constitutional remedy. The Supreme Court's decision in *R v Grant*[1] has already been cited in over 4,700 cases since it was decided in 2009. Although exclusion only is available when incriminating evidence is found and subsequently used in a prosecution, it represents the most important form of judicial review of conduct in the criminal process. This raises the question of whether we are making the best use of the exclusionary remedy.

I will examine American, Canadian, Irish, and New Zealand jurisprudence on the exclusion of evidence obtained in violation of rights. In the first part of this article, I will suggest that courts in all four jurisdictions originally conceived exclusion as a remedy designed to compensate and vindicate the rights of the accused. Such an approach makes sense of the requirements that the accused's own rights be violated and that there be a causal relation between a violation and the evidence sought to be excluded. The early jurisprudence in the four countries reveals the deep structure of the exclusionary remedy and what should be its predominant purpose: repairing and vindicating the accused's rights.

The next part will examine how courts in all four jurisdictions have moved towards balancing of competing interests approaches. In the United States, the corrective or compensatory rationale for the exclusion of evidence was abandoned as courts started to apply the exclusionary rule to the states.[2] It has now been replaced by the idea that exclusion should only

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* Prichard-Wilson Chair in Law and Public Policy, University of Toronto. I thank Richard Jochelson and David Ireland for inviting me to give the keynote address on which this article is based. I also thank three anonymous reviewers for helpful and challenging comments on an earlier draft. This paper is dedicated to the memory of my late father-in-law, Cecil Cox, who was a great teacher and believer in learning and a proud alumnus of the University of Manitoba.

1 2009 SCC 32 [*Grant*].

2 *Wolf v Colorado*, 338 US 25 (1949) [*Wolf*]; *Rochin v California*, 342 US 165 (1952) [*Rochin*].

occur when necessary to deter police misconduct.[3] Doubts about the exclusionary rule's deterrent effect on individual officers have inspired many restrictions on the American exclusionary rule.[4] The early compensatory rationale for the exclusion of evidence, which produced prima facie rules of exclusion, was rejected in the 2002 New Zealand case of *R v Shaheed*,[5] the 2009 Canadian case of *Grant*[6] that abolished the fair trial test, and most recently the 2015 Irish case of *DPP v JC*.[7]

The fact that all four jurisdictions enforcing a bill of rights have moved toward a balancing test should not be dismissed. Most rights, let alone remedies, are not absolute.[8] In the third and final part of this article, I will propose that balancing tests should be replaced by a prima facie rule of exclusion based on the need for rights protection and compensation for the harms caused by the violation. At the same time, however, the state should be able to justify proportionate limits on the exclusionary remedy. The state should be able to do this by demonstrating that the violation was not serious and not likely to be repeated. The latter consideration goes beyond the frequent focus on the subjective fault of the officers involved in the violation. It borrows from international human rights law and recognizes that the state can use a broad range of educational, disciplinary and law reform remedial measures that would not be open to even the most active of courts.

I will also argue that exceptions to a prima facie rule of exclusion can, in some cases, also be justified with reference to the importance of the evidence sought to be excluded as it relates to society's interests in an adjudication of the merits. At the same time, I will suggest that the seriousness of the offence charged should not be considered because its consideration would be at odds with the presumption of innocence.

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3 *Elkins v United States*, 364 US 206 (1960); *Mapp v Ohio*, 367 US 643 (1961) [*Mapp*].

4 *Herring v United States*, 555 US 135 (2009) [*Herring*].

5 [2002] 2 NZLR 377 (CA) [*Shaheed*].

6 *Supra* note 1.

7 [2015] IESC 31 [*JC*].

8 When remedies are perceived as more robust or automatic, they will lead to "remedial deterrence" a process in which the right contracts to avoid the remedy. *R v Rahey*, [1987] 1 SCR 588 at 637–42, 39 DLR (4th) 481, LaForest J (McIntyre J concurring in dissent); Daryl J Levinson, "Rights Essentialism and Remedial Equalibration" (1999) 99:4 Colum L Rev 857.

A. Methodology

The methodology used in this article is informed by comparative law and legal process/dialogic theories based on institutional interaction and relative institutional competence.

Comparative law allows researchers to focus on the big picture forests that are too often lost in the trees. I have selected Canada, Ireland, New Zealand, and the United States because they are all democracies that use exclusion to enforce bills of rights. Exclusion in Canada is governed by the text of section 24(2) of the Charter and in Ireland by a general remedial provision.[9] Exclusion has been developed in the United States and New Zealand in the absence of any specific remedial provisions in their bill of rights. Despite these differences, there are striking similarities in how the exclusionary remedy has evolved in all four jurisdictions.[10] This is perhaps not surprising given that I have employed a "most similar cases"[11] methodology, focusing on democracies with common law backgrounds and bills of rights.

The legal process and dialogic approach used in this article is concerned with the roles of courts, legislatures, and the executive and their frequent interactions. New legal process thinking stresses the dynamic and, at times, dysfunctional roles of courts, the executive, and legislatures.[12] In the United States, this has generated growing disenchantment with the episodic nature of court-dominated constitutional regulation of the criminal process.[13] In Canada, there are similar concerns that the complex and uncertain nature of constitutional restraints placed on the police are being increasingly used as a reason not to exclude evidence obtained in violation of rights.[14] Informed by new legal process thinking, this article accepts rights violations

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9 On the limitations of textual approaches to remedies see Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson, 2013 as updated) at 3.100–3.800 [Roach, "Constitutional Remedies"].

10 For the importance of studying remedies as a form of comparative law see Robert Leckey, "Remedial Practice Beyond Constitutional Text" (2016) 64 Am J Comp L 1.

11 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) at 244.

12 Kent Roach, "What's New and Old About the Legal Process?" (1997) 47 UTLJ 363.

13 Craig M Bradley, *The Failure of the Criminal Procedure Revolution* (Philadelphia: University of Pennsylvania Press, 1993); William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011).

14 *R v Cole*, 2012 SCC 53 [*Cole*]; *R v Aucoin*, 2012 SCC 66; *R v Vu*, 2013 SCC 60 [*Vu*]; *R v Omar*, 2019 SCC 32 [*Omar*].

as a sign, to some degree, of dysfunction in policing. It seeks to address this dysfunction by placing greater emphasis on whether the state, including police services, have taken reasonable measures to prevent violations.[15]

The essence of the legal process approach is being aware of the strengths and weakness of each institution. Thus, this article urges courts to reflect on what they do best: providing effective remedies for litigants who have established rights violations and in using proportionality reasoning to balance competing interests. Conversely, police services and the state in general have a variety of budgeting, training, and disciplinary powers that are not available to the courts and can be used to prevent future violations.

This article is also part of a larger project on remedies for violations of human rights that proposes a two-track approach to remedies in which courts play a dominant role in providing remedies that are designed to compensate individual litigants who have established that their rights have been violated. At the same time, courts should pursue a second systemic track that engages with the state to achieve non-repetition of similar violations in the future.[16]

Like dialogic theories of judicial review, my proposed two-track approach to remedies is not simply concerned with judicial decisions at one single point in time. It is also concerned with remedial cycles that are often produced by the frequent failure of remedies to prevent future violations.

The reforms to the exclusionary rule proposed in this article are intended to allow courts better to fulfill their remedial roles, especially with respect to the compensation and vindication of rights violations in the criminal process. At the same time, it recognizes that non-judicial institutions — in this case the police and their governance and oversight bodies[17] — have a greater ability to enact a wide range of reforms to prevent similar rights violations in the future. As such, they should be encouraged by the courts to undertake such systemic reforms.

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15 Veenu Goswami, "Breaking the Purposive Barrier: Embracing Non-Repetition as a Guiding Principle for Subsection 24(2) of the *Charter*" (2018) 51 UBC L Rev 289.

16 Kent Roach, "Dialogic Remedies" (2019) 17:3 Intl J Constitutional L 860 [Roach, "Dialogic Remedies"]; Kent Roach, "The Disappointing Remedy?: Damages as Remedy for Violations of Human Rights" (2019) 69 (1 supp) UTLJ 33 [Roach, "Disappointing Remedy?"].

17 Kent Roach, "Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police" (2014) 61 Crim LQ 29.

II. THE COMPENSATORY ORIGINS OF EXCLUSION OF EVIDENCE

Taking an approach to comparative law that seeks to reveal patterns in the law, this section will argue that it is significant that courts in four different democracies originally conceived of the exclusion of improperly obtained evidence as a remedy designed to compensate and vindicate the accused's rights. These early cases all have echoes of "right to a remedy" reasoning long celebrated in Anglo-American constitutionalism by writers such as Blackstone and Dicey.[18]

Subsequent moves away from this original understanding of the exclusionary remedy present a temptation to dismiss right to a remedy reasoning as archaic and too individualistic.[19] Nevertheless, I will argue that this temptation should be resisted. Courts still have an important role in providing successful litigants with meaningful remedies in order to uphold the rule of law and to vindicate bills of rights.[20] That said, the second part of this article will recognize a common trend in all four jurisdictions towards balancing of competing interests because of concerns that a right to a remedy approach may impose excessive social costs in individual cases. In turn, the third part of this article will propose a manner to improve the balancing process that draws on proportionality reasoning commonly used in human rights litigation. It will also examine ways that courts can provide incentives on states to implement a broad range of measures to prevent future rights violations in the criminal process.

A. The United States

The American exclusionary rule was first applied to violations of search and seizure rights by federal officials in the late 19th and early 20th century. In 1914, Justice Day reasoned that the exclusion of incriminating letters obtained from a warrantless search of a person's home was required if the

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18 Roach, "Dialogic Remedies", *supra* note 16 at 862–63.

19 This may be a particular danger in Canada given the wording of section 24(2) of the Charter was designed to reject the idea of "automatic" exclusion following rights violations.

20 The UK SC, in its recent decision, holding the proroguing of Parliament to be unlawful, paid attention to such remedial details in declaring the offending Order in Council to be the equivalent of a "blank piece of paper". *Miller v The Prime Minister*, [2019] UKSC 41 at para 69. See generally Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015).

right against unreasonable search and seizure was to have any meaning.[21] This reasoning followed from the traditional emphasis placed on a right to a remedy celebrated by Blackstone and Dicey as recognized (but not honoured) in *Marbury v Madison*.[22] Even more recently, the Court in *Miranda v Arizona*[23] deduced its exclusionary rule from the nature of the 5th Amendment right against self-incrimination.

In the early 20th century, the United States Supreme Court emphasized that rights were harmed as much by "stealthy encroachment or 'gradual deprecation'... by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."[24] This represented a focus on the effects of violations on the accused and a corresponding lack of concern about the fault of the police.

The American courts moved away from this demanding rights protection rationale for exclusion as they begun to apply the Bill of Rights and the exclusionary remedy to the states which prosecute most crime. Until the late 1980s, the rights protection rationale was defended by judges, such as Justices Brennan and Marshall, and by academic commentators.[25] Today, however, the rights protection rationale for exclusion seems to have been lost and abandoned by American courts and commentators. This may be related to larger patterns of cynicism about rule of law expectations that those whose rights have been violated should receive a remedy from the courts.[26]

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21 *Weeks v United States,* 232 US 383 (1914) at 393 "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." See also William A Schroder, "Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device" (1983) 51:5 Geo Wash L Rev 633.

22 *Marbury v Madison*, 5 US 137 (1803) [*Marbury*].

23 *Miranda v Arizona*, 384 US 436 (1966) [*Miranda*].

24 *Gouled v United States*, 255 US 298 at 304 (1921).

25 *United States v Leon*, 468 US 897 (1984) [*Leon*]; Yale Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?" (1983) 16:3 Creighton L Rev 565.

26 For a complete rejection of right to a remedy reasoning in the context of civil lawsuits see *Ziglar v Abbasi*, 137 S Ct 1843 (2017). Influenced by legal realism, some American commentators dismiss as naïve the idea that all rights violations should receive a remedy suggesting that this would any lead to a contraction of rights. See Daryl J Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99:4 Colum L Rev 857; John C Jeffries Jr., *"The Right-Remedy Gap in Constitutional Law"* (1999) 109 Yale LJ 87.

B. Canada

Given that section 24(2) of the Charter was designed as an alternative to the absolute American exclusionary rule,[27] it might have been expected that Canadian courts would avoid rights protection and compensatory rationales for the exclusion of improperly obtained evidence.[28] Nevertheless from 1987 to 2009, the Supreme Court developed and applied a test that prioritized the exclusion of evidence in order to protect the accused's right to a fair trial.[29] In 1987, the Court reasoned that evidence should generally be excluded if its admission would deprive the accused of a fair trial. The focus of this rights protection approach was not on all rights violations as in the United States, Ireland, or New Zealand, but on evidence that was conscripted from the accused such as confessions and breath samples.

As in the United States, the Canadian rights protection approach was supported by decisions that held that the accused did not have standing to request exclusion of evidence on the basis of violations of the rights of third parties.[30] The Court initially did not follow American law in requiring strict and direct causal connections between the violation and the discovery of the evidence.[31] Nevertheless, the fair trial test, like American jurisprudence in general, was concerned about the strength of the causal connection between the violation and the discovery of evidence. This causation approach made sense if the purpose of the exclusionary remedy was to place accused in no worse, but also no better, position than if their rights had not

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27 Section 24(2) of the Charter provides that where an individual seeks a remedy for a Charter violation and "a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

28 David M Paciocco, "The Judicial Repeal of S. 24(2) and the Development of the Canadian Exclusionary Rule" (1990) 32:3 Crim LQ 326 [Paciocco, "Judicial Repeal"].

29 *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508 [*Collins*]; *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193 [*Stillman*]. Note that the author represented the Canadian Civil Liberties Association in its intervention in this case.

30 *R v Edwards*, [1996] 1 SCR 128, 132 DLR (4th) 31. This decision, however, resulted in a strong dissent by Justice LaForest who correctly warned that the court's individualistic approach could result in the court ignoring serious violations.

31 *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673 [*Strachan*]. But even this threshold requirement seemed to be tightened again in *R v Goldhart*, [1996] 2 SCR 463, 136 DLR (4th) 502 over a strong dissent by Justice LaForest who again stressed the danger of ignoring serious violations.

been violated. As Chief Justice Lamer, the chief architect of the fair trial test, explained: "discoverability is premised on the notion of corrective justice. The purpose is to ensure that the accused is placed in no worse, but also no better, position that if he or she had been forced to participate in the state's case."[32] The Court eventually recognized that pre-existing real evidence could be excluded under the fair trial test if the police could not have discovered such evidence without unconstitutionally conscripting the accused to assist in building the state's case.[33] This followed the logic of causation reasoning. At the same time, however, it increased the social costs of the fair trial rule and played a role in its judicial abolition in 2009.[34]

C. Ireland

In *People v O'Brien*,[35] Justice Walsh of the Irish Supreme Court endorsed a rights protection and vindication rationale for the exclusion of unconstitutionally obtained evidence. He reasoned that "[t]he vindication and the protection of Constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield to any competing interest."[36] The Irish Supreme Court subsequently defined a corrective justice rationale for the exclusion of evidence as a remedy: courts have "a positive duty... to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded."[37]

In the 1990 decision of *The People v Kenny*,[38] the Irish Supreme Court related exclusion of evidence to a general provision in Article 40(3) of its Constitution providing that "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." This differed from the specific text of section 24(2) of the Charter or the absence of a remedial provision in the American or New

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32 Rt Hon Antonio Lamer, "Protecting the Administration of Justice from Disrepute" (1998) 42:2 Saint Louis ULJ 345 at 358. See also Kent Roach, "The Evolving Fair Trial Test Under Section 24(2) of the Charter" (1996) 1 Can Crim L Rev 69; Kent Roach, "Constitutionalizing Disrepute: Exclusion of Evidence after Therens" (1986) 44:2 UT Fac L Rev 209; Roach, "Constitutional Remedies", *supra* note 9 at 10-1 to 10-81 for similar views.

33 *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7.

34 *Grant*, *supra* note 1.

35 *People v O'Brien*, [1965] IR 142.

36 *Ibid* at 170.

37 *The State v Governor of Mountjoy Prison*, [1985] ILRM 465 at 484.

38 *The People v Kenny*, [1990] 2 IR 110.

Zealand Bill of Rights. Nevertheless, as under the early American rule and the Canadian fair trial rule, the Irish court stressed its duty to protect rights with remedies. It created a prima facie exclusionary rule on the basis that:

> [T]he correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidently, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its discretion.[39]

Alas, a jurisprudence of "extraordinary excusing circumstances" was not developed in the subsequent caselaw.[40] In short, the Irish approach, like the Canadian approach under the fair trial test, was heavily weighted towards rights protection and corrective justice. The Irish approach, however, was broader than the Canadian approach and closer to the American rule because it included search and seizure violations that obtained pre-existing real evidence without the accused's participation in the scope of its prima facie rule of exclusion. In *Kenny*, the Court excluded real evidence obtained under an invalid warrant and pursuant to a long-standing Gardai policy,[41] albeit with two judges dissenting on the basis that the violation was not sufficiently serious to merit exclusion.

Consistent with American and Canadian law, the Irish courts restricted the application of its prima facie exclusionary rule by causation reasoning. Thus, it would not exclude evidence that the police would have inevitably obtained without a constitutional violation[42] or where there was no direct causal connection between a constitutional violation and the obtaining of evidence.[43] This made little sense if the purpose of the exclusionary remedy was to regulate the police; it did, however, make sense if the purpose was to attempt to return accused to the position they would have occupied had their rights not been violated. The Irish Court, like the American and Canadian courts, would not give third parties whose rights were not violated standing to argue that evidence should be excluded, even if the violation

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39 *Ibid* at 134.

40 Yvonne Marie Daly, "Overruling the Protectionist Exclusionary Rule: DPP v JC" (2015) 19:4 Intl J Evidence & Proof 270 at 274.

41 Declan McGrath, "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" (2004) 26 Dublin ULJ 108 at 114.

42 *People v O'Donnell*, [1995] 3 IR 551.

43 *Walsh v O'Buachalla*, [1991] 1 IR 56.

was serious.[44] Again, this was consistent with the individualistic rights protection approach also seen in the American jurisprudence and under the Canadian fair trial test.

D. New Zealand

In the decade following the enactment of its 1990 statutory Bill of Rights, the New Zealand courts employed a prima facie rule of exclusion that was similar to the Irish *Kenny* rule. In *R v Butcher*,[45] President Cooke ruled that once a violation was established, evidence should be excluded subject to the state discharging "the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation." *Butcher* established a prima facie rule of exclusion largely on the basis of right to a remedy reasoning that President Cooke would later famously apply to damage claims under the Bill of Rights.[46] This result was reached despite the absence of a general remedial provision in the New Zealand Bill of Rights similar to that in the Irish constitution.

In a subsequent case, President Cooke warned that while courts should not ignore evidence of a deliberate violation, that exclusionary decisions should not:

> [D]epend on a kind of mens rea on the part of the officer. Otherwise ignorance of the law would become an excuse and the less an officer understood about a person's rights the less the law would protect those rights. It is primarily from the point of view of the actual effect of what is done that a Bill of Rights Act issue has to be approached. The right is the starting point.[47]

This reflected a focus on rights similar to the early American and Irish cases and the Canadian fair trial test. All four tests allowed evidence obtained in violation of rights to be excluded regardless of the seriousness of the violation or the fault of the individual officer.

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44 Robert Bloom & Erin Dewey, "When Rights Become Empty Promises: Promoting an Exclusionary Rule that Vindicates Personal Rights" (2011) 46 Irish Jurist 38 at 68.

45 *R v Butcher*, [1992] 2 NZLR 257 at 266 (CA). The Court excluded both confessions and hidden real evidence that could not have obtained without a confession taken in violation of the right to counsel. At the same time, it did not exclude weapons that would have been discovered without a right to counsel violation on the basis that "the prosecution should not be put in a better position than it would have been if no illegality had happened or in a worst position simply because of some earlier police error or misconduct." *R v H*, [1994] NZLR 143 at 150 (CA)

46 *Simpson v AG* (*Baigent's Case*), [1994] 3 NZLR 667.

47 *R v Goodwin*, [1993] 2 NZLR 153 at 172 [*Goodwin*].

President Cooke was not alone in adopting this rights protection approach. Hardie Boys J. stressed: "[t]he Court's duty to uphold the rights affirmed by the Act requires it to make an appropriate response where there has been a breach... To those who see that as a rogues' charter, one can only say that it is the price of freedom; that had the police observed the law the evidence would not have been obtained anyway."[48] Richardson J. similarly indicated that the primary thrust of the Bill of Rights was "on the positive assurance of rights rather than on the deterrence of official misconduct."[49] In his view, "this rights-centred approach necessarily requires that primacy be given to the vindication of human rights and that the prima facie answer or presumption where evidence has been obtained in breach of a right is that the evidence should be excluded."[50]

The Court of Appeal applied causation analysis in *Butcher* to hold that while some evidence should be excluded because it would never have been discovered without a violation, other evidence — notably parts of a gun — would have been inevitably discovered and should not be excluded. It required the accused to establish a "real and substantial connection"[51] between the rights violation and the obtaining of the evidence sought to be excluded. It rejected the idea accepted in Canada that a temporal or contextual connection might be sufficient in determining the threshold matter of whether the evidence was obtained in a manner that violated the Charter.[52]

Consistent with the corrective and compensatory nature of the prima facie rule, the New Zealand Court of Appeal held that third parties did not have standing to seek a remedy for a search and seizure violation.[53] The

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48 *R v Te Kira*, [1993] 3 NZLR 257 at 276 [*Te Kira*].

49 *Goodwin*, *supra* note 47 at 193.

50 *Ibid* at 194.

51 *Te Kira*, *supra* note 48; *R v Wharuemu*, [2001] 1 NZLR 655 at 657 (CA). For arguments that the various causation tests imposed by New Zealand judges are influenced by their approach to whether the evidence should be excluded in the particular case see Richard Mahoney, "Exclusion of Evidence" in Paul Rishworth et al, eds, *The New Zealand Bill of Rights*, (Melbourne: Oxford University Press, 2003) 770 at 799–810.

52 As discussed above, the Canadian courts applied a stricter causation analysis when deciding to exclude evidence under its fair trial test. This causation test was distinct from the more flexible test used in *Strachan*, *supra* note 31 to determine whether evidence was obtained in a manner that violated the Charter. The stricter fair trial causation test was similar to the causation analysis applied by the New Zealand as well as the American and Irish courts.

53 *R v Wilson*, [1994] 3 NZLR 257 (CA).

Court of Appeal concluded that the Bill of Rights would "be trivialized by this attempt to claim for himself a remedy which belongs to another."[54] Individual standing requirements and the requirement of a causal connection between the violation and the discovery of the evidence were common features in all four countries. They reveal the deep individualistic and corrective justice origins of the exclusionary remedy.

E. The Strength of the Rights Protection Rationale

It is striking that four different apex courts all gravitated towards a rights compensation rationale for the exclusion of improperly obtained evidence. To be sure, there are some differences with the Canadian approach being something of an outlier by only taking a rights protection with respect to conscriptive evidence under the fair trial test. The Irish and New Zealand approaches both used a prima facie rule of exclusion that allowed for courts to justify departures from the general rule. Only the American rule cheerfully accepted that it was automatic and sought to justify such a rule on right to a remedy reasoning that is also found (albeit not honoured) in *Marbury v Madison*.[55]

The compensatory rationale for the exclusion of evidence is the strongest rationale for the exclusion of evidence.[56] It is rooted in the idea of corrective justice, which justifies remedies as an attempt to undo and prevent harms of rights violations. It makes sense of the fact that third parties who have not suffered rights violations do not generally have

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54 *R v Bruhns*, [1994] 11 CRNZ 656 at 657 (CA).

55 *Marbury*, *supra* note 22 at 163.

56 Steven Penney while accepting that the corrective justice rationale for exclusion is powerful and better than judicial integrity or condonation rationales has argued that it is too strong in the sense that it will result in a "remedy that is grossly disproportionate to the wrong" compared to remedies especially damages that would be given to those not accused of crime for the same rights violations. Stephen Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2)" (2004) 49:1 McGill LJ 105 at 112. Professor Penney's observation is correct but may be related to the tendency to undervalue Charter damages. It also ignores that the accused seeking an exclusionary remedy faces special jeopardy of imprisonment because of the rights violations without which no incriminating evidence would be available. On the under-valuing of Charter damages in cases where the accused is not charged see *Ward v Vancouver*, 2010 SCC 27 [*Ward*]; Roach, "Disappointing Remedy?", *supra* note 16. In part 3, I will argue that a prima facie exclusionary rule based on corrective grounds could be restrained and prevented from having disproportionate effects by the state justifying proportionate exceptions.

standing to seek the exclusion of evidence. It also makes sense of the causation reasoning found in all four jurisdictions but in Canada, mainly under the fair trial test. Causation analysis focuses on whether the evidence sought to be excluded could have been obtained from an independent source or would have inevitably been discovered. Such an analysis is an attempt to fulfill the corrective purpose of placing accused in the same position that they would have occupied but for the rights violation. To be sure, this rights protection approach is individualistic, but it provides the strongest rationale for the drastic remedy of the exclusion of evidence.[57]

Some commentators have argued that the fact that the strong exclusionary remedy would not be necessary if evidence was not discovered undermines the viability of the rights protection approach.[58] These arguments, however, discount the commitment in corrective justice to repair the particular harms caused by the violation, even if those harms require stronger remedies than those that may be required for factually innocent persons who experience similar violations but not similar harms. It also discounts the reality that access to justice limitations mean that it is often only those who have been charged with offences that will have an incentive or legal aid to seek remedies. That said, it is beyond dispute that the rights protection rationale is demanding. As will be seen in the next section, all four countries have decisively moved away from their original rationales for exclusion in favour of new rationales that facilitate balancing of competing interests.

III. COMMON MOVES TO BALANCING OF INTERESTS AND THE NEED FOR THE DISCIPLINE OF PROPORTIONALITY REASONING

Although all four jurisdictions embraced rights protection as the original rationale for exclusion of evidence, they have moved, albeit in different ways, towards tests that allowed for the more overt balancing of competing interests.

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57 Roach, "Constitutional Remedies", *supra* note 9; Dimitrios Giannoulopoulos, "Improperly Obtained Evidence in Anglo-American and Continental Law" (London, UK: Bloomsbury, 2019) at 200–50.

58 Penney, *supra* note 56; David M Paciocco, "Section 24(2): Lottery or Law- The Appreciable Limits of Purposive Reasoning" (2011) 58:1 Crim LQ 15 [Paciocco, "Lottery or Law"].

A. The United States

The United States was able to retain the compensatory and corrective focus of its exclusionary rule so long as it was only applied to the federal government. As the Bill of Rights began to apply to the states which prosecuted much more crime, it was perhaps inevitable that the courts would move towards tests that lent themselves more easily to the balancing of conflicting interests.

The US Supreme Court initially refused to extend the exclusionary remedy to constitutional violations by state officials, stressing that states could develop a variety of remedies for such violations including their own exclusionary rule, damages, and prosecutions of the official who violated the rights.[59] Justice Potter Stewart, however, reasoned that prosecutions and damage awards against individual officers were difficult to obtain, in part because of a reluctance to punish state officials for doing their jobs, albeit in a way that violated rights.[60] The Court started gradually to apply the exclusionary rule to the states. For example, it excluded evidence obtained by particularly serious violations that shocked the conscience, such as forced stomach pumping.[61] At the same time, the subjective and unpredictable nature of such balancing and judicial integrity tests were a problem, especially given the high volume of the American criminal justice system.

In 1961, the United States Supreme Court held that the exclusionary rule would apply to search and seizure violations by state officials. It reasoned that the extension of the exclusionary rules "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[62] The true and new rationale for exclusion became clearer when the Court ruled that the exclusionary rule should not be applied retroactively because it would not serve its "prime purpose" of being "the only effective deterrent to lawless police action."[63] The Court used this rationale in subsequent cases to justify many limits on the

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59 *Wolf*, *supra* note 2.

60 Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases" (1983) 83 Colum L Rev 1365.

61 *Rochin*, *supra* note 2 at 173–74.

62 *Mapp*, *supra* note 3 at 660.

63 *Linkletter v Walker*, 381 US 618 (1965) at 635. See also *United States v Calandra*, 414 US 338 (1974) at 348 [*Calandra*].

exclusionary rule, including with respect to evidence obtained through reasonable reliance on a defective warrant or by reliance on a law subsequently found to be unconstitutional.[64]

As the United States Supreme Court became more concerned with the social costs of the exclusionary rule, it developed more and more exceptions to it. There are a range of good faith exceptions when the police rely on a warrant, a statute, a precedent, or even internal police information.[65] In *Herring v United States*, the Court refused to apply the rule to what is characterized as an isolated act of police negligence. Chief Justice Roberts stressed "the exclusionary rule is not an individual right" and only applies when: "the benefits of deterrence… outweigh the costs… To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[66] *Herring* came close to subjecting the 4th Amendment exclusionary rule to a cost-benefits analysis. That said, it recognized a concern with "recurring or systemic negligence" that was not always present in Canadian, Irish, and New Zealand exclusionary rules.

The *Miranda* exclusionary rule also evolved from a right connected, to the 5th Amendment, to a deterrent rule subject to public safety exceptions[67] and cost benefit calculations.[68] Justice Scalia argued that the deterrence provided by police discipline, training, and complaints were "incomparably greater" than the exclusion of evidence.[69] Justice Alito for the Court refused to exclude a gun unreasonably seized from a car and stressed that the exclusionary rule "almost always requires courts to ignore reliable, trustworthy evidence… its bottom line effect, in many cases, is to suppress truth and set the criminal loose in the community without punishment."[70] Although the American exclusionary rule is not dead, there are increasing

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64 *Calandra, supra* note 63; *Leon*, *supra* note 25; *Herring*, *supra* note 4; *Illinois v Krull*, 480 US 340 (1987) [*Krull*]; *Davis v United States*, 564 US 229 (2011) [*Davis*].

65 *Leon*, *supra* note 25; *Krull*, *supra* note 64; *Arizona v Evans,* 514 US 1 (1995); *Davis*, *supra* note 64.

66 *Herring*, *supra* note 4 at 700, 702.

67 *New York v Quarles*, 467 US 649 (1984).

68 *Dickerson v United* States, 530 US 428 (2000).

69 *Hudson v Michigan,* 547 US 586 (2006).

70 *Davis*, *supra* note 64.

concerns that the Court will not exclude evidence in the absence of some form of fault on the part of the police.[71]

The American Court has also continued to limit the application of the exclusionary rule in ways that do not fit well with the rule's new deterrence rationale. It will not apply the rule if evidence could have been obtained properly from an independent source[72] or would have been inevitably discovered,[73] or if there was an attenuated causal connection[74] between the violation and the obtaining of the evidence. The causation analysis is used to limit the social costs of exclusion, but the American exclusionary rule, unlike the Canadian one, fails to recognize that police misconduct in violating a suspect's rights may actually be worse if the police could have obtained the evidence without violating the accused's rights.[75] Similarly, the requirement of individual standing has been maintained[76] even though it can require courts to ignore evidence obtained through serious violations.[77] These causation and standing requirements made sense when the purpose of exclusion was to repair the effects of the violation that the accused suffered: they do not make sense now that exclusion is meant to deter police misconduct and rights violations.

B. Canada

In 2009, the Supreme Court of Canada in *Grant*[78] overruled its prior prima facie exclusionary rule that generally prohibited the admission of conscriptive evidence on the basis that it could render trials unfair. The

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71 Craig M Bradley, "Is the Exclusionary Remedy Dead?" (2012) 102:1 J Crim L & Criminology 1.

72 *Murray v United States*, 487 US 533 (1988).

73 *Nix v Williams*, 467 US 431 (1984).

74 *Utah v Strieff*, 136 S Ct 2056 (2016).

75 This is recognized by the Supreme Court in Canada in the course of determining the seriousness of the violation. For example, "where a police officer could have acted constitutionally but did not, this might indicate that the officer adopted a casual attitude toward- or, still worse, deliberately flouted the accused's rights." See *Cole*, *supra* note 14 at para 89.

76 *Rakas v Illinois*, 439 US 128 (1978). On these exceptions to the various American exclusionary rules see James J Tomkovicz, *Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order* (New York: Oxford University Press, 2011).

77 Donald L Doernberg, "'The Right of the People': Reconciling Collective and Individual Interests under the Fourth Amendment" (1983) 58 NYUL Rev 240.

78 *Supra* note 1.

Court concluded that the fair trial test was contrary to the text of section 24(2) because it had created "an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence."[79] All of the judgments in the case allowed more balancing of the need for exclusion with competing social interests. They all would have admitted unconstitutionally obtained drugs and a gun in the particular case.[80]

The Court in *Grant* made much of the text of section 24(2) and, in particular, the idea that it directs the court's attention to the future effects of admitting evidence. Although supported by the wording of section 24(2), prospective tests of disrepute, like judicial integrity and balancing tests, are somewhat artificial. The accused establishes the facts about past violations, not future reactions. A focus on the future effects of admission tends to maximize judicial discretion over the exclusionary remedy and ignore the efforts made to establish adjudicative facts about the past, such as the causal connection between the violation and the obtaining of the impugned evidence.

The Court in *Grant* indicated that it was prepared to continue to exclude statements obtained through a violation of the right to counsel.[81] This suggests that the compensatory/vindicatory rationale for exclusion implicit in the fair trial test may still have some bite. To this end, the Court stressed the importance of the right against self-incrimination in justifying a presumption that statements taken in violation of the Charter will be excluded.[82] At the same time, it rejected the idea implicit in *Stillman*[83] that real evidence could be obtained in violation of the right against self-incrimination.

The Court affirmed the importance of causation analysis in revealing how much harm a particular violation did to Charter protected interests. It stated that:

> [D]iscoverability retains a useful role... in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength

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79 *Ibid* at para 64.

80 In a separate judgment, Justice Deschamps would have given even more weight than the majority to the seriousness of the offence charged and the reliability and importance of the evidence.

81 Grant, *supra* note 1 at para 105.

82 *Ibid* at para 95.

83 *Supra* note 29.

> of the causal connection between the Charter infringing self-incrimination and the resultant evidence.[84]

At the same time, the Court recognized that a determination that the police could have obtained the evidence without violating Charter rights tends to make violations more serious.[85] In this way, the Canadian Court has correctly noted that causation reasoning can point in different directions depending on the purpose of the exclusionary remedy.

The final group of factors relating to society's interests in an adjudication on the merits emerged from *Grant*, unchanged from the earlier test. The Court could have been candid and perhaps won public support for its ruling if it had stressed that it was reluctant to exclude guns, but it was extremely ambiguous on the issue. It recognized that while weapons offences "raise major public safety concerns and that the gun is the main evidence in this case", the seriousness of the offence charged also suggested that it is "all the more important" that the accused's rights be respected.[86] In the end, the Court found the third test not to be of "much assistance".[87] This is hardly surprising given that courts have characterized almost all offences as serious and have suggested that the seriousness of the offence both bolsters the need to exclude evidence and the social harm of exclusion. The Court has, in subsequent cases, indicated that the third part of the test should not trump the first two parts of the test. Its recent decision in *R v Le* may bring more clarity to the relevance of the third group of factors by suggesting that the third test should generally operate as a tie breaker in cases where a strong case for exclusion does not emerge under the first two tests.[88] That said, *Le* was a 3:2 decision. The dissent gave much greater weight to the seriousness of the offence and the importance of the evidence than the majority. The present Supreme Court seems very split on the future direction of section 24(2).

Some empirical studies suggest that the seriousness of the violation has emerged as the most important factor in the *Grant* test, but the courts also continue to exclude evidence quite frequently.[89] Statements and breath

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84 *Grant*, *supra* note 1 at para 122.

85 *R v Cote*, 2011 SCC 46 [*Cote*]; *Cole*, *supra* note 14.

86 *Grant*, *supra* note 1 at para 139.

87 *Ibid*.

88 *R v Le*, 2019 SCC 34 at paras 141–42 [*Le*].

89 Richard Jochelson, Debao Huang & Melanie Murchison, "Empiricizing Exclusionary Remedies- A Cross Canada Study of Exclusion of Evidence under s.24(2), Five Years after Grant" (2016) 63:1/2 Crim LQ 206; Benjamin Johnson, Richard Jochelson &

samples were more readily excluded than guns, and evidence was more likely to be excluded if there were multiple breaches.[90] This suggests that the trend towards balancing of interests may have been more rhetorical than real. Trial judges, in particular, may continue to be drawn towards a felt need to provide accuseds whose rights have been violated with remedies, with appellate courts often affirming their decisions.

The seriousness of the violation test is at the heart of the current section 24(2) test. It is fact specific and hence, difficult to predict. For example, in *Grant*, the Court determined that the violations of the rights to counsel and against arbitrary detention of a young Black man in Toronto were not serious, despite the fact that he was subject to a proactive and coercive stop by one uniformed and two undercover police officers. The Court stressed that there was no evidence of profiling or discriminatory practices, and that "the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled."[91] Hence, the error made by the police was "an understandable one"[92] and committed in good faith. Reasonable people may, however, differ about the seriousness of the breaches in *Grant*. The same is true about the companion case of *R v Harrison*[93] where a police hunch about a rental car that had travelled a great distance in a short time turned out to be correct and led to the discovery of 35 kg of cocaine. Nevertheless, in that case, and unlike in *Grant*, the Court excluded the evidence that was critical to the prosecution's case.

The post-*Grant* jurisprudence is less predictable than those under the *Collins/Stillman* test, which almost always resulted in conscriptive evidence that would affect the fairness of the trial being excluded and balanced the seriousness of the violation against the adverse effects of excluding evidence in other cases. For example, the Court, in a 4:3 decision, has admitted information taken from an unreasonably seized cell phone because the police "had good reason to believe, as they did, that what they were doing was perfectly legal."[94] At the same time, the Court excluded child pornography because of misleading information in an application for a warrant even though the police "did not wilfully or even negligently breach

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Victoria Weir, "Exclusion of Evidence under Section 24(2) of the Charter Post Grant 2014-2017: A Comprehensive Analysis of 600 Cases" (2019) 67:3 Crim LQ 56.

90 Jochelson et al, *supra* note 89 at 219–21, 229; Johnson et al, *supra* note 89 at 91.

91 *Grant*, *supra* note 1 at para 133.

92 *Ibid*.

93 2009 SCC 34 [*Harrison*].

94 *R v Fearon*, 2014 SCC 77. See also *Vu, supra* note 14.

the Charter."[95] Four years later, however, the Court admitted evidence of child pornography because the police had reasonably concluded that they did not need a warrant to obtain subscriber information.[96] During 2018, the Court accepted evidence obtained after three separate *Charter* violations in one case[97] and then excluded evidence in another case because "there were serious Charter breaches throughout the investigative process."[98] In 2019, the Court split 3:2 over the weight that should be given to the discoverability analysis and the third test gauging the adverse effects of excluding evidence in a case where the Court, unlike in *Grant*, excluded unconstitutionally obtained drugs and guns.[99] As in the United States, the current section 24(2) jurisprudence is emerging as a complex and unpredictable mess and one that invites cynical suspicions that it is result-driven.

The Canadian Court, like the United States Supreme Court, has been attracted to creating good faith exceptions to its exclusionary rule, albeit in slightly less categorical ways. Good faith reliance on statutes and warrants subsequently held to be unconstitutional has been recognized in both jurisdictions. The Canadian courts have taken the additional step of allowing individual police officers to rely on policing policies, even when those policies are constitutionally defective.[100] The attention to policing policies is significant. It will be suggested in the third part of this article that policing policies and training should be examined by the court in determining whether reasonable steps have been taken to minimize rights violations in the future.

C. Ireland

In its 2015 decision in *DPP v JC*,[101] the Irish Supreme Court overruled its previous exclusionary rule in favour of one that favoured a more explicit balancing of competing interests. This followed public criticism of the *Kenny* rule, including proposals for legislative imposition of a balancing test or even a constitutional amendment.[102] As in the United States and Canada,

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95 *R v Morelli*, 2010 SCC 8 at para 99.
96 *R v Spencer*, 2014 SCC 43.
97 *R v Culotta*, 2018 SCC 57.
98 *R v Reeves*, 2018 SCC 56 at paras 65, 102, 138–39.
99 *Le*, *supra* note 88.
100 *R v Caslake*, [1998] 1 SCR 51, 155 DLR (4th) 19.
101 *Supra* note 7.
102 Bloom & Dewey, *supra* note 44 at 64–65.

the Irish Court has moved towards a balancing test because of concerns about the crime control costs of previous exclusionary rules, albeit without citing specific evidence about these costs or even specific cases where new balancing tests would have clearly produced a different result.

The Irish Supreme Court in *JC* stressed the need to balance social interests in the admission of reliable and probative evidence against the "the high constitutional value"[103] of respecting and vindicating constitutional rights. The Court elaborated three different rules, all of which are different than the American, Canadian, or New Zealand rules because they still place the burden on the prosecution to justify inclusion once a violation and its connection to the evidence has been established by the accused. It will be suggested in the third part of this paper that assigning burdens on the state is a helpful way to structure exclusionary jurisprudence and it is a particularly good fit with increased use of proportionality reasoning to structure the balancing process. Prima facie rules, like general limitation clauses, can provide the state with incentives to establish facts within its purview, such as facts about police conduct, policies, training, and discipline.

Under the first Irish rule, if there was a "deliberate and conscious violation" of the Constitution, there is a presumption that the evidence should be excluded. The Court, however, changed prior understandings of what was a conscious and deliberate violation to require "knowledge of the unconstitutionality of the taking of the relevant evidence."[104] This "state of mind" requirement relates not only to "the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned."[105] In the case of a deliberate violation, there is a strong presumption that evidence should be excluded.

Even if a violation is not conscious and deliberate, there is still a presumption under the second Irish rule that evidence should be excluded unless "the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives

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103 *JC*, *supra* note 7 at 4.11, 4.16.
104 *Ibid* at 5.8
105 *Ibid* at 7.2.

from subsequent legal developments."[106] Inadvertence does not include recklessness or gross negligence.[107] This approach is consistent with American and Canadian jurisprudence that frequently (but not always) expresses concerns about grossly negligent violations. As one commentator has noted, the new rule is quite strict. It may admit the acceptance of unconstitutionally obtained evidence only if "a garda… has no idea that the warrant he holds may be invalid."[108] In other words, the new Irish rule will exclude evidence if the police know, are reckless, or are grossly negligent with respect to the constitutionality of their actions.[109]

A third rule provides that evidence that could not be discovered or obtained without a constitutional violation should be excluded regardless of whether the violation was deliberate or inadvertent.[110] In a subsequent case, the Irish Supreme Court has admitted statements taken after a right to counsel violation ruling that "it is not possible to identify any deliberate or conscious violation to which a causative link can be attached."[111] As in the United States, causation analyses continue to play a role, even though the new rule places less of an emphasis on rights protection and corrective justice.

Justice Hardiman in dissent would have maintained the old prima facie rule of exclusion in *Kenny* as necessary to vindicate constitutional rights. He argued that exclusion was "the most obvious, the most practical and indeed the only possible form of restitution in integrum available in such circumstances."[112] This was an appeal to traditional right to a remedy reasoning discussed in the first part of this article. Two other judges also dissented. They noted that the majority could not point to a specific case that would be decided differently under the previous, and somewhat broader, prima facie rule of exclusion in *Kenny*. As in Canada, the Irish move to balancing of interests may be more rhetorical than real.

D. New Zealand

In 2002, the New Zealand Court of Appeal abandoned its prima facie rule of exclusion and moved towards a balancing of interests test in *R v*

106 *Ibid* 5.20.
107 *Ibid* 5.14.
108 Daly, *supra* note 40 at 278.
109 *Ibid.*
110 *JC*, *supra* note 7 at 7.2.
111 *DPP v Doyle*, [2017] IESC 1 at 51.
112 *JC*, *supra* note 7 at 224.

Shaheed.[113] The case involved rape charges and a 14-year-old victim. The Court was concerned that the prima facie rule "does not give the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished."[114] It expressed special concerns about some Canadian developments that suggested that even real pre-existing evidence such as guns and drugs could be excluded under the Canadian fair trial test.[115]

Justice Blanchard explained in *Shaheed* that judges must decide whether exclusion "is proportionate" to the breach.[116] He elaborated: "[e]xclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's rights or where the police conduct in relation to that breach has been grossly careless."[117] The reliability of the evidence and its importance to the prosecution were also relevant.[118] Unlike under compensatory based tests, but following the Canadian serious violation test, the ability of the police to obtain the evidence without a violation was seen as a factor supporting exclusion.[119] The result was a contextual, complicated, and multi-factor test.

Given the new balancing test, the Court of Appeal was perhaps understandably divided in applying the new rule to hold that while DNA evidence in *Shaheed* should be excluded, photo identification of the accused in the case was not sufficiently connected with the original right to counsel violation.[120] Similar to the American courts, the Court of Appeal maintained the requirement of a causal connection. They used the lack of causal connection between the violation and the photo identification as an indirect and non-transparent means to factor in social interests in the admission of important evidence.

The Court in *Shaheed* rejected Cooke P's earlier warnings that courts should not focus on "the mens rea" of the individual police officer for fear of encouraging systemic ignorance of the law by the police. It thus stressed that police "action not known to be a breach of rights does not merit the

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113 *Supra* note 5.

114 *Ibid* at para 137.

115 *Ibid* at para 90, citing *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7.

116 *Ibid* at para 156.

117 *Ibid* at para 148.

118 *Ibid* at para 152.

119 *Ibid* at para 150.

120 Scott L Optican & Peter J Sankoff, "The New Exclusionary Rule: A Preliminary Assessment of R v Shaheed" (2003) NZLR 1 at 17.

same degree of condemnation as one which is known to be so, particularly if the police error arose from a genuine misunderstanding of a difficult legal complication."[121]

Shaheed also singled out confessions taken in deliberate breach of a suspect's rights as an easy case for exclusion.[122] The Canadian rule similarly maintained this *Miranda* type focus on using exclusion of statements as a means to enforce the right to counsel. The preferred position of the right to counsel raises questions about why some rights should be counted more than others in the exclusion calculus. It may be explained by a sense that exclusion of evidence is the best way to compensate the accused for a confession obtained in an unfair manner. Courts may be more reluctant to apply such reasoning in cases involving real evidence, where the exclusion of evidence such as drugs and guns will virtually guarantee the collapse of the state's case against the accused.

Chief Justice Elias issued a strong dissent in *Shaheed.* She would have maintained the prima facie exclusionary rule but restrained it through a requirement of a direct causal connection between the violation and the evidence sought to be excluded. Indeed, she found a direct causal connection to be missing with respect to both the DNA evidence and the photo identification. Richard Mahoney noted, it was "surely ironic" that the one judge who would have preserved the prima facie rule would not have excluded any evidence in *Shaheed.*[123] That said, the requirement of a causal connection between a violation and the evidence sought to be excluded does limit the ambit of a rights-based exclusionary rule, though it should play less of a role with respect to a regulatory-based exclusionary rule.

In any event, knowledgeable commentators concluded that the results in *Shaheed* were the same as those that would have occurred under the previous prima facie rule and initial empirical studies found continued high rates of exclusion.[124] This is consistent with the continued high rates of exclusion found under the *Grant* test. One hypothesis is that trial judges

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121 *Shaheed*, *supra* note 5 at para 148.

122 *Ibid* at para 151.

123 Mahoney, *supra* note 51 at 773. John Ip has defended the narrower approach to causation taken by Chief Justice Elias and other dissenters in *Shaheed* because the majority used a broader "but for" test that is "too onerous for law enforcement" and could have "far reaching and disproportionate consequences." John Ip, "The End of the Prima Facie Exclusionary Rule" (2012) 9:3 Auckland UL Rev 1016 at 1025.

124 Mahoney, *supra* note 51. See also Simon Consedine, "R v Shaheed: The First Twenty Months" (2004) Canterbury L Rev 77 (86% exclusion rate under *Shaheed*).

continue, in many cases, to provide remedies to accused who establish that incriminating evidence was obtained through a violation of their rights. Appeal courts are understandably reluctant to intervene. The move by apex courts to a balancing of interests test may be superficial and rhetorical.

The *Shaheed* test has been subsequently codified in New Zealand in something of an unpredictable "laundry list"[125] of factors that maximizes judicial discretion in determining when evidence should be excluded.[126] Although *Shaheed* made some potentially helpful statements that proportionality was an important factor in administering the test, the New Zealand courts have not developed a jurisprudence that systemically employs proportionality reasoning.[127] Under *Shaheed*, there is a judicial desire to balance competing interests but a failure to develop clear and predictable tests to do so.

E. Summary

The moves in all four jurisdictions towards approaches that allow balancing of interests have not been entirely successful. As Richard Mahoney has observed "the balancing approach opens the door to an

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125 The *Evidence Act 2006* (NZ), 2006/69, s 30 [*Evidence Act 2006*] requires that a judge determine whether the exclusion of evidence was proportionate to the impropriety. In considering that matter, the Court may, under subsection 30(3), among other matters, have regard to the following:"(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it: b) the nature of the impropriety, in particular, whether it was deliberate, reckless or done in bad faith: (c) the nature and quality of the improperly obtained evidence:(d) the seriousness of the offence with which the defendant is charged:(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant: g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others; (h) whether there was any urgency in obtaining the improperly obtained evidence."

126 Optican & Sankoff, *supra* note 120 at 19.

127 In *R v Hamed,* [2011] NZSC 101, the Supreme Court issued five separate opinions (themselves divided on whether evidence should be excluded), affirming a more open ended and contextual approach based on balancing and assigning weight to multiple factors. Subsequent discussions of the rule in New Zealand have revolved more around the relevance of factors such as seriousness of the charge and the importance of the evidence sought to be excluded rather than an application of proportionality reasoning alluded to, but not fully developed, in *Shaheed.* For criticisms see Scott Optican, "Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006" (2012) 2012:4 NZLR 605.

undesirable lack of certainty in future cases."[128] Moreover, the idea that judges have a strong discretion not to award a remedy tends to undermine the very idea of rights.[129]

Although *Grant* is probably the most structured of the four balancing tests, it has been criticized by David Paciocco as a "legal lottery",[130] even though he was the most influential critic of the Supreme Court's prior, more absolute, fair trial test that was abolished by *Grant*.[131] In the United States, some argue that the Court got the balance wrong by over-emphasizing the costs of the exclusionary rule and under-estimating its benefits.[132] The new balancing tests remain unpredictable.

At the same time, the convergence in these four democracies towards balancing of interests cannot be dismissed. Just as the common compensatory origins of the exclusionary remedy in all four jurisdictions reveal truths that might be lost if one focused only on the jurisprudence of one jurisdiction, the new trends towards interest balancing suggest that the state's interests in adjudication on the merits and convictions of the guilty are not likely to be ignored in any reformulated test. This is true regardless of the text, or lack of text, governing the remedial provision.

In the next section, I will argue that prima facie rules of exclusion based on a compensatory rationale should be restored in all four jurisdictions. At the same time, a more principled way is needed to determine legitimate exceptions from such rules. I will argue that this should be done through the use of proportionality reasoning that assigns burdens on the state to establish that violations are not serious, and that reasonable efforts have been made to prevent future violations.

IV. The Need for a Prima Facie Rule of Exclusion and Proportionality Reasoning that Includes the State's Effort to Prevent Violations

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128 Mahoney, *supra* note 51 at 773. See also Kay L Levine, Jenia I Turner & Ronald F Wright "Evidence Laundering in a Post-*Herring* World" (2016) 106:4 J Crim L & Criminology 627 at 665ff.

129 Peter Birks, "Rights, Wrongs and Remedies" (2000) 20:1 Oxford J Leg Stud 1; Kent Roach, "Principled Remedial Discretion under the Charter" (2004) 25 SCLR (2d) 101.

130 David Paciocco, "Lottery or Law", *supra* note 58.

131 David Paciocco, "Judicial Repeal", *supra* note 28.

132 Arnold H Loewy, "The Exclusionary Rule as a Remedy" (2014) 46:2 Tex Tech L Rev 369.

The moves towards balancing of competing interests give trial judges considerable discretion in deciding just how much weight to give to the state's interests on the facts of a particular case. What is required is a more familiar, transparent, and predictable way to balance competing interests before deciding whether to exclude evidence.

In my view, an optimal exclusionary rule would embrace a prima facie rule of exclusion for all evidence obtained as a result of a violation of rights. In order to trigger this rule, the accused would have to establish a violation of a right and a causal connection between the violation and the evidence. Exclusion is not required as a compensatory remedy if the evidence clearly would have been obtained without a violation. That said, there may be some cases where courts could exclude evidence or even stay proceedings if faced with very serious violations, even in the absence of a causal connection between the violation and the evidence.

A prima facie rule of exclusion is a strong rule, but it is not an absolute rule. The prima facie rules that have been used in Canada (under the now abolished fair trial test), New Zealand, and Ireland were not sustainable because courts failed to develop a principled and predictable jurisprudence of exceptions from them. I will argue that a key to developing such a jurisprudence is to employ proportionality reasoning that is used in other parts of human rights jurisprudence. In particular, states should have the burden of establishing that a violation is not serious; that the state has taken reasonable steps to prevent future violations or that some less drastic remedy than exclusion will be effective, both in compensating the accused for the rights violation and in preventing future violations.[133]

A. A Prima Facie Rule of Exclusion

New Zealand, Canada (under the fair trial test), and Ireland all have experience with a prima facie rule of exclusion. Although the American rule is often described as automatic, both when used to protect rights or to deter police misconduct, the growing number of exceptions to it now renders it, at most, a prima facie rule of exclusion. Prima facie rules of exclusion that place the burden on the state to justify departures are still used in Ireland after *JC*.

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[133] This approach is designed to implement the two-track approach to individual and systemic remedies discussed in Roach, "Dialogic Remedies", *supra* note 16 and Kent Roach, *Remedies for Violations of Human Rights* (Cambridge: Cambridge University Press, forthcoming 2021).

A prima facie rule of exclusion would have the advantage of indicating that courts will not routinely accept that the ends of crime control or prosecution justify the means of obtaining evidence by violating human rights. A reluctance to embrace ends justifying means reasoning may help explain why the Canadian third part test of considering the adverse effects of excluding evidence has not emerged as decisive in Canada[134] and why similar tests are not used in the United States, Ireland, or New Zealand. A prima facie rule of exclusion demonstrates in concrete terms that the court takes rights violations and its remedial function seriously. At the same time, it avoids the idea of an automatic exclusionary rule which sits uneasily with the wide-spread recognition that neither rights nor remedies are absolute.

Prima facie rules can also improve the predictability of exclusionary decision-making. They make clear the consequences of initial findings of a rights violation and a causal connection with the discovery of evidence. They then allow the state to use its superior resources and knowledge with respect to matters that affect the seriousness of the violation and the steps taken to prevent future violations. Although placing such burdens on the state has no textual basis in any of the four jurisdictions, the Supreme Court of Canada has imposed a burden on the state without any textual basis to establish that countervailing factors and less drastic alternative remedies justify not awarding damages under section 24(1) of the Charter.[135] The prima facie rule also appropriately places the burden on the state to adduce evidence, both with respect to adjudicative facts relating to the specific violation and legislative or policy facts about the state's response to the violation that is relevant in determining the seriousness of the violation and the likelihood that it will be repeated in the future.

B. The Need for a Structured Proportionality Reasoning to Discipline the Balancing of Interests

If it is accepted that competing social interests should be considered and balanced with the accused's claims for exclusion of evidence as a remedy, then what is the optimal mechanism to achieve such balancing? A better alternative to either categorical good faith limits, open-ended

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134 Some judges in dissent (such as Justice Moldaver in *Le*, *supra* note 88 and Justice Deschamps in *Grant*, *supra* note 1) have, however, placed a decisive emphasis on this third factor.

135 *Ward*, *supra* note 56 at para 33. The author represented the British Columbia Civil Liberties Association in this case.

balancing, or the use of causation analyses as an indirect means to recognize state interests would be for courts to employ proportionality reasoning while placing a clear burden on the state to justify no exclusion or the use of a less drastic, alternative remedy as a proportionate response to the violation and the state's legitimate interests.

There is some precedent for using a proportionality analysis to discipline and guide the exercise of remedial discretion. Section 30(4) of New Zealand's Evidence Act 2006,[136] picks up on the reference to proportionality in *Shaheed*. It provides: "the judge must exclude any improperly obtained evidence if the judge determines...that its exclusion is proportionate to the impropriety."[137] As mentioned above, the Supreme Court of Canada has developed a "mini section 1" proportionality analysis under the remedial provisions in section 24(1) of the *Charter* that allows the government to specify an open-ended list of countervailing factors to the award of damages. Consistent with section 1 of the Charter, the government bears the burden to demonstrate that countervailing factors justify awarding alternative remedies to damages, no remedy at all, or a reduced quantum of damages.[138] Finally, courts are familiar with proportionality reasoning that is used in the limitation clauses in the Canadian and New Zealand Bills of Rights and American due process and equal protection analyses.[139]

Proportionality is a good fit with a prima facie rule of exclusion because both place the onus on the state to justify limits on the exclusionary remedy.[140] Placing an onus on the state to justify exceptions is consistent with both a prima facie rule of exclusion and general rules of proportionality which expect the government to deduce evidence and to persuade the court that limits are justified.[141] The state should generally be in the best position to explain 1) why the violation is not serious; 2) the effects of exclusion on the ability to adjudicate the merits; 3) what, if any, steps it has taken to

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136 *Evidence Act 2006*, *supra* note 125.

137 *Ibid*, s 30(4).

138 *Ward*, *supra* note 56.

139 Vicki C Jackson, "Constitutional Law in the Age of Proportionality" (2015) 124:8 Yale LJ 3094.

140 It could be argued that such an onus is inconsistent with the reference in section 24(2) of the *Charter* to establishing that the evidence would bring the administration of justice into disrepute, but similar language in section 24(1) did not prevent the Court in *Ward*, *supra* note 56 from establishing a similar onus.

141 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) at 447–54.

prevent the recurrence of similar rights violations in the future; and 4) to suggest alternative remedies such as sentence reductions.

The basic contours of proportionality reasoning are well known. The state must demonstrate a legitimate objective for the limit, rational connection, least restrictive means, and overall balance in terms of achieving both its objective and respecting the right. The cases where governments can, under a full proportionality test, justify no remedy may be quite rare. Following proportionality analyses, such a result would have to be necessary to support a compelling social objective, and the overall balance of the gains to social interests must outweigh the harms of no remedy. The state's interests in controlling crime and having a successful prosecution would be an important objective, but the whole point of a proportionality test is to determine whether allowing a limit is truly necessary to achieving such an important social objective. The more drastic the effects of the limit on the accused, the more the state has to be able to justify the particular limit and not providing some effective remedy for the accused.

An important but under-examined issue in proportionality analyses is whether all objectives should be considered to be legitimate. The Supreme Court of Canada has, at times, suggested that objectives that are the antithesis or negation of the underlying right[142] or simply a political or symbolic explanation of why the state wants to limit a right[143] are not important enough to justify reasonable limits on rights under section 1. It is striking that all four courts that have moved to balancing tests for exclusion were unable to cite concrete evidence that exclusion under previous compensatory rationales were harming social interests. Proportionality is a device that both protects and allows reasonable limits on rights[144] or, in this case, remedies. This raises the threshold question of whether some of the state's objectives in limiting the exclusion of evidence

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142 *Attorney General of Quebec v Quebec Protestant School Boards et al*, [1984] 2 SCR 66, 10 DLR (4th) 321; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202.

143 *Sauvé v Canada*, 2002 SCC 68. The author represented Aboriginal Legal Services in this case. For arguments that courts should not accept rhetorical or symbolic objectives such as abstract notions about the rule of law or controlling crime as a legitimate objective in proportionality analysis see Kent Roach "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffret Sigalet, Gregoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy and Institutions* (Cambridge: Cambridge University Press, 2019) 267 at 300–02.

144 *R v Oakes,* [1986] 1 SCR 103, 26 DLR (4th) 200.

are legitimate and important enough to limit the remedy or whether they are inconsistent with the ideas of rights and remedies.

C. Is the Seriousness of the Offence a Legitimate Objective to Limit Exclusion?

The seriousness of the offence charged should not be considered a legitimate objective to limit the exclusion remedy. First, considering the seriousness of the offence assumes that the accused is guilty, contrary to the presumption of innocence. Second, considering the seriousness of the offence charged supports the normatively dubious proposition that the ends of combatting serious crime justifies a lack of remedy for a rights violation. Considering the offence charged as an objective for limiting a remedy contravenes other parts of the constitution. As such, it is similar to a "law whose only purpose is to discriminate."[145] A final reason is that, as the Supreme Court recognized in *Grant* and other cases, the seriousness of the offence cuts both ways because it suggests that while society may have a greater interest in the prosecution of the case, the accused also has a greater interest in their rights being respected. Given this toss up, the Court in *Grant*[146] concluded that it did not find the seriousness of the offence "to be of much assistance." It also does not feature in the American, New Zealand or Irish jurisprudence. Not much would be lost by not considering the seriousness of the offence charged.

D. Is the Importance of the Evidence a Legitimate Objective to Limit Exclusion?

An objective that might justify a limit on the exclusionary remedy is the importance of the evidence to the prosecution. The continued willingness of courts in Canada, New Zealand and the United States to exclude statements taken in violation of rights likely represents an implicit view that the state should have other evidence available to prosecute the accused. In contrast, the exclusion of guns, drugs or other illegal substances discovered through a rights violation will generally cause the state's prosecution to collapse. These tend to be the proverbial cases where the "criminal [goes] free because the constable has blundered."[147] These are the type of cases that

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145 Barak, *supra* note 141 at 251.

146 *Supra* note 1 at para 139.

147 *People v Defore*, 150 NE 585 (NY 1926) at 588–89.

appear to have motivated all four courts to abandon rights protection in favour of balancing of interests.

There is less of a presumption of innocence problem in considering the importance of the evidence that was actually discovered in the accused's possession. If there is a doubt about whether the drugs or guns actually belonged to the accused, these can still be resolved in the accused's favour on the appropriate reasonable doubt standard. If the importance of the evidence is considered a valid objective to limit the exclusionary rule, it will still be necessary for the court to apply the remaining elements of proportionality reasoning and in particular whether there is any other effective way other than exclusion to satisfy the state's objective while respecting the accused's rights. The question of alternative remedies will be examined below. Even if there was a viable alternative remedy such as a sentence reduction, courts should still consider the overall balance and ask whether the alternative of a less drastic remedy, or no remedy at all, achieves a fair balance in relation to the state's interests and the violation of rights.

Courts seem to be comfortable in considering the importance of the evidence under section 24(2) of the *Charter*. A recent examination of 678 cases decided under *Grant* found 106 cases where judges mentioned reliable evidence crucial to the Crown's case as a relevant factor. In such cases, the Courts did not seem to be overwhelmed by the importance of the evidence because they still excluded evidence in 61% of the cases. When courts concluded that evidence was not essential or crucial to the prosecution's case, however, they excluded the evidence at higher rates between 78 and 82%.[148] In other words, courts understandably do consider the importance of the evidence to the prosecution's case when deciding exclusion cases.

In pragmatic terms, consideration of the importance of the evidence may be the price that must be paid for recapturing the emphasis on rights protection that would be provided with a prima facie rule of exclusion. That said, the importance of the evidence would simply be a legitimate objective to limit the exclusionary remedy: it would not be a trump card. Courts should still apply the remaining elements of proportionality analysis in concluding whether the state has justified not ordering exclusion of evidence.

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[148] Johnson, Jochelson & Weir, *supra* note 89 at 89–90.

E. Lack of Seriousness of the Violation as a Legitimate Objective to Limit Exclusion

Another factor that should be considered a legitimate objective to limit the exclusionary remedy is the ability of the state to demonstrate that a violation was not serious. All four jurisdictions examined in this article have recognized the relevance of considering the seriousness of the violation. To the extent that the Canadian fair trial test, Chief Justice Elias's dissent in *Shaheed* and Justice Hardiman's dissent in *JC* would not consider the seriousness of the violation, they are positions at the extreme end of the exclusionary spectrum.

The state could seek to limit the exclusionary remedy on the basis that the violation was not serious and that it would be disproportionate to exclude the evidence. This should involve a comparison between the proportionality of the violation and exclusion as required by section 30(4) of New Zealand's *Evidence Act, 2006*. It should also involve a more searching examination of whether exclusion is necessary to respond to and deter the violation. This may require the court to examine the violation with less reliance on causation analyses. As the Supreme Court of Canada has recognized, conclusions that the state could have obtained the evidence without violating rights may suggest that the violation is more serious[149] even if the same conclusion minimizes the harm caused to the accused. A causal connection would be necessary to trigger the prima facie rule of exclusion, but causation analyses may play a different role in determining whether the state has justified departing from the prima facie rule.

Is deterrence of rights violations a legitimate concern when deciding whether to exclude evidence? The United States is the only jurisdiction which, since 1960, justifies exclusion of evidence exclusively in deterrence terms. The deterrence rationale for the exclusion of evidence fails to make sense of personal standing requirements that require that the accused's own rights be violated before the remedy is sought. If taken to its logical conclusion, it would abandon all standing and causation requirements, and

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149 *Cote*, *supra* note 85; *Cole*, *supra* note 14; *Le*, *supra* note 88. Chief Justice McLachlin has similarly recognized in the context of *Charter* damages in *Ward*, *supra* note 56 at para 30 that the causation analysis, while related to compensation, plays less of a role with respect to the vindicatory and deterrent purposes of the remedy. See Roach, "Constitutional Remedies", *supra* note 9 at 10.1390–10.1440.

I am aware of no jurisdiction that has done so.[150] Thus, deterrence is best seen as a supplementary rationale or, what the Supreme Court of Canada has called, "a happy consequence" [151]of the exclusion of evidence.

At the same time, I agree with Professor Penney that courts should be concerned with "optimal deterrence value"[152] of their exclusionary decisions. The exclusionary rule only applies to a small subset of cases — those in which the police obtain evidence through constitutional violations and in which the state pursues a prosecution of the accused. This is a small subset of all interactions between individuals and the police, but the large number of cases decided in all four jurisdictions suggests that it is not a trivial subset. Indeed, exclusionary decisions may represent the courts' most frequent engagements with the administration of criminal justice.

Canadian courts have recognized that deterrence is a legitimate purpose for *Charter* damages.[153] It is difficult to see why it should be an illegitimate consideration under section 24(2). If deterrence is accepted as a legitimate supplementary purpose of exclusion, the question that then arises is how best to achieve what Penney describes as the "optimal deterrence value" — a concept that itself fits well with proportionality in its common search for a happy medium between too little and too much deterrence.

Deterrence can work either as a form of specific deterrence of individual officers or as a general deterrence of the state. As Peter Schuck has argued in the context of constitutional torts, specific deterrence can be difficult to achieve and may result in over-deterrence. On the one hand, individual officers may face no consequences if evidence is excluded. If, however, they did suffer consequences such as demotions or damages, there would be problems of over-deterrence as police officers might be reluctant to embark on proactive investigations in contexts where rights could be violated. For these reasons, Schuck suggests that courts should focus on general deterrence that imposes direct remedies on the state as opposed to individual officers. Such state focused general deterrence allows the state to

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150 The Canadian approach has eased causation requirements in interpreting whether evidence is obtained in a manner that violates Charter rights, but still requires personal standing. The broader Canadian approach to causation could be useful in identifying cases where there is a serious violation that should be deterred but not necessarily a direct causal connection between the serious violation or pattern of violations and the evidence sought to be excluded.

151 *Grant*, *supra* note 1 at 73.

152 Penney, *supra* note 56.

153 *Ward*, *supra* note 56.

select what, if any, steps it will take to respond to the remedies that the court imposes on the state.[154] This form of general deterrence makes sense in the exclusionary context where it is the state and society as a whole that suffers the costs of exclusion as opposed to the individual officers involved in the violation.

F. Assessing the Seriousness of the Violation: The Focus on Specific Deterrence of Individual Officers

In all four countries examined, courts tend to evaluate the conduct of the officers who violate rights as opposed to the conduct of the police organization and the state. In other words, present exclusionary doctrine is more amenable to the task of specifically deterring individual officers as opposed to general deterrence of the state, including providing optimal incentives to the state to take a variety of steps to minimize the violation of rights during criminal investigations. Courts should be more concerned about the general deterrence of the state. In the next section, I will argue that this end can be achieved by placing a burden on the state under a prima facie rule of exclusion to establish not simply that individual officers were not at fault for violating rights, but that the state as an entity has taken reasonable steps to prevent the rights violation, both in the case before the court and going forward from that case.

It is understandable why courts have tended to focus on the fault of individual officers. It is those officers who typically testify in an evidentiary *voir dire* that determines the adjudicative facts of a specific violation. The courts have recognized deliberate violations committed with knowledge that the officer is breaching the constitution as particularly blameworthy. Such an individualistic mens rea approach to the seriousness of the violation is not necessarily wrong. Specific deterrence is important and there is no evidence of over-deterrence of individual officers in the exclusionary context.[155] Nevertheless Robin Cooke's warnings of the dangers of focusing on the "mens rea"[156] of individual police officers and ignoring the larger

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154 Peter H Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983). On the role of insurance companies in encouraging training and oversight to lessen damage cost awards in the United States see John Rappaport, "How Private Insurers Regulate Public Police" (2017) 130:6 Harv L Rev 1539.

155 The burden on the state to justify limits on exclusion would, however, allow them to produce such evidence if there was an over-deterrence problem that was negatively affecting the ability of the police to investigate certain crimes.

156 *Goodwin*, *supra* note 47 at 172. See also Levine, Turner & Wright, *supra* note 128.

institutional and organizational determinants of many rights violations remain compelling.

The Supreme Court of Canada has been equivocal about the degree of fault necessary to classify a violation as serious. In some cases, the Court has concluded that a violation is not serious if it was the result of police "carelessness"[157] whereas in other cases, including in *Grant*,[158] it has warned that "ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith."[159] The Court's "scale of culpability"[160] has, like the various forms of criminal fault, become complex, fine-grained, and difficult to predict. The Court has frequently excused officers because of the uncertainty in sections 8 and 9 *Charter* jurisprudence that the Court has itself created. The three-judge majority in *Le* made things more complex by stating that "an absence of bad faith does not necessarily equate to a positive finding of good faith."[161] All these fine distinctions may be justified for the purposes of assessing individual fault. Nevertheless, they fail to send clear or consistent signals to the police or the broader administration of justice as organizations. The Canadian approach to the seriousness of the violation has been found to be unclear,[162] even though it is determinative of most cases decided under the *Grant* test.

Courts have used language in exclusion cases that mimics the various graduations of criminal fault. This ignores that officers act within large bureaucracies that are responsible for properly training and disciplining them. Employers provide much more direct incentives for officer behaviour than the occasional decision by courts whether to admit or exclude evidence. The American courts have, on occasion, expressed concerns about systemic fault, but the New Zealand, Irish, and Canadian courts have tended to assess police fault by focusing on the actions of individual officers, not police organizations.

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157 *R v Wise*, [1992] 1 SCR 527, [1992] SCJ No 16.

158 *Supra* note 1 at para 75.

159 *Ibid*.

160 *R v Paterson*, 2017 SCC 15 at para 37 [*Paterson*].

161 *Supra* note 88 at para 147.

162 Patrick McGuinty, "Section 24(2) of the Charter: Exploring the Role of Police Conduct in the *Grant* Analysis" (2018) 41 Man LJ 273 at 289.

G. Assessing the Seriousness of the Violation: The Need to Consider the General Deterrence of the State

Although courts hear evidence from individual officers and should not shy away from judging their conduct as highly paid professionals, they should not ignore the institutional determinants of such conduct. Section 24(2) directs courts to be concerned with protecting the entire administration of justice from disrepute, as opposed to judging the conduct of individual actors within the administration of justice.

One area that reflects badly on the entire administration, and especially some police services, are repeated violations of constitutional restraints on strip searches. A 2019 report by Ontario's Office of the Independent Police Review Director called *Breaking the Golden Rule*, detailed how 22,000 strip searches were performed each year in Ontario. These strip searches were frequently in violation of the Supreme Court of Canada's 2001 decision in *R v Golden*,[163] requiring reasonable and probable grounds in relation to weapons or evidence to justify such intrusive searches. The report found 89 reported judicial decisions in Ontario involving strip searches in violation of the right against unreasonable search and seizure up to the end of 2018.[164] 40 of these cases involved one police service, the Toronto Police Service. Ten of the cases involved judges making adverse comments on the training that the police received.[165] This demonstrates that judges are capable of hearing evidence about some of the organizational determinants of human rights violations.[166] In only one case, however, did the trial judge take the step to ask that the decision be conveyed to the Chief of Police in order to ensure that proper training be implemented.[167] Such communications between the court and the police organization should be more routine when courts discover serious and recurring violations. We devote many public resources, as we should, to various forms of oversight to the police, but often with little obvious input into police policies, training, or discipline.

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163 2001 SCC 83. The author represented Aboriginal Legal Services in this case.

164 Office of the Independent Police Review Director (OIPRD), *Breaking the Golden Rule* (Toronto: OOIPRD, 2018) at 35.

165 *Ibid* at 36.

166 *Ibid* at 42. The judicial response to these violations in terms of individual responses was quite robust: 35 cases resulted in evidence being excluded and 24 cases resulted in the even more drastic remedy of a stay of proceedings. Nine cases resulted in a sentence reduction and in 14 cases, no remedy was awarded.

167 *R v Wilson*, 2006 ONCJ 434 at paras 59–62.

The *Breaking the Golden Rule* report noted the inadequacy of statistics from some police services and called for consistent statistics to be kept, including race-based statistics. This was responsive to concerns expressed by the Supreme Court in 2001 that strip searches were used disproportionately on African Canadian and Indigenous suspects. The available statistics revealed shocking disparities, with the Toronto Police Service strip searching about 40% of those they arrested compared to neighboring police services that strip searched less than 1% of those they arrested.[168] This report suggests that judges should be more attentive to the conduct of the police as an organization in terms of training and discipline when evaluating whether a violation was serious.

The state is in the best position to establish legislative facts that relate to its efforts (or lack thereof) to prevent violations. For this reason, the lack of seriousness of a violation is a matter that is best proved by the state under a prima facie rule of exclusion. The lack of seriousness should relate both to demonstrating that there is no need for specific deterrence of the officers involved in the violation, but also no need for general deterrence of the state or police organization because it has made reasonable efforts to have prevented the violation in the specific case and to prevent repetitive violations in the future such as those that occurred with strip searches.

H. The Need to Consider State Efforts to Ensure Non-Repetition of the Violation

Veenu Goswami has proposed that Canadian courts, under section 24(2), should embrace the remedial purpose of non-repetition of rights violations widely recognized in international human rights law. I agree but would give non-repetition concerns somewhat more of a supplementary role. In my view, evidence would be subject to a prima facie rule of exclusion for compensatory reasons. The state could, however, justify proportionate exceptions to exclusion by showing that the violation was not serious. This would provide the state with an opportunity to demonstrate that exclusion is not necessary, either specifically to deter the officers involved in the violation or generally to provide the state with incentives to make reasonable efforts to prevent similar violations in the future. Non-repetition should focus on the organizational, as opposed to the individual, determinants of

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168 OIPRD, *supra* note 164 at 62.

rights violations.[169] As such, it would serve as a useful corrective to the present tendency of courts to focus on the fault of the individual officer.

The state should have an opportunity to present to the court any disciplinary or remedial measures that it has taken, either in the specific case or more generally.[170] Courts should respect the greater expertise and range of remedies available to the police and those that govern them. Encouraging the police to make clear to the court what steps they have taken in response to a violation could "promote greater transparency in policing. Judicial decisions will more frequently feature discussions of police practices, training and internal discipline."[171] At the same time, courts would only judge the reasonableness of the state response as one factor to consider in evaluating the seriousness of the violation and whether the state has justified a departure from the prima facie rule of exclusion.[172] Courts would not be asked to run or even supervise the police. Their decisions would, however, provide an incentive to the police to be more transparent about their processes. This might also facilitate the type of civil society review and activism that Charles Epp has found are often necessary to make rights more effective.[173]

Fortunately, there is already some precedent in section 24(2) jurisprudence for a broader approach that goes beyond examining the seriousness of the violation exclusively at the time of the violation. In *R v Harrison*,[174] the Court gave considerable weight to police conduct after the violation in terms of misleading the court. Similarly, the *dicta* in *Grant*, about focusing on the current effects of admitting evidence, also supports the idea that courts deciding exclusionary applications should be concerned about the state's ongoing efforts to prevent repetitive violations.

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169 Goswami, *supra* note 15 at 333.

170 *Ibid* at 319.

171 *Ibid* at 342.

172 Goswami recognizes this possibility when he states "effective non-repetition evidence that attenuates the seriousness of a breach will sometimes 'tip' the balance of a case towards admission. Similar evidence considered at the final 'balancing stage' of a close case will have the same effect." *Ibid* at 321, n 154.

173 Charles R Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009).

174 *Supra* note 93.

I. Proportionality and Alternative Remedies

An important and indeed, often critical, stage in proportionality reasoning is asking whether a legitimate state objective can be achieved while violating the right less. Transferred to the remedial context, this question would ask whether a less drastic remedy other than exclusion would serve the purposes of compensating the accused and deterring future violations. It is important that this stage of proportionality not be reduced to a mechanical search for any less drastic remedy. A less drastic remedy should only be used if it fulfills its remedial purposes, both in terms of compensation and deterrence, as well as a more drastic remedy.

The idea of preferring less drastic but equally as effective alternative remedies is an entrenched staple of remedial jurisprudence. For example, stays of proceedings, injunctions, and damages will only be ordered when there are concerns that the less drastic remedy of a declaration would not be effective. There was some interest in the United States in using damages as a less drastic alternative to exclusion.[175] The alternative of damages has, however, not played an important role, in large part because of qualified immunities that frequently require proof of fault, especially in the US to obtain damages; the lack of jurisdiction of criminal courts in most Anglo-American common law systems to award damages and access to justice problems that many accused would have in conducting separate civil litigation that is necessary to obtain damages. At the same time, it should be noted that some civilian and international courts can award damages. In addition, the burden of assessing and awarding damages in criminal cases would seem to be no more excessive than of awarding restitution to crime victims.

A more realistic alternative to exclusion for criminal courts in the four countries examined to consider would be sentence reductions for the accused. The courts in all four jurisdictions, however, generally do not consider sentence reductions or other alternative remedies. In Canada, this position has some textual support in the reference to the mandatory "shall be excluded" in section 24(2) of the *Charter*, as well as early Supreme Court decisions that clearly stated that courts should not consider the availability

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[175] Chief Justice Burger defended damages as a more proportionate remedy to exclusion in *Bivens v Six Unnamed Agents*, 403 US 383 (1971) but also conceded the need for legislative reform including the creation of a special tribunal to ensure that the alternative of damages was not illusory.

of alternative remedies under section 24(2).[176] The Supreme Court has, however, recently placed the issue of alternative remedies back on the table, albeit in the briefest of reasons in *R v Omar*,[177] but without adverting to textual and jurisprudential barriers note above.[178] It has also considered alternative remedies to exclusion of evidence in the rare cases where exclusion is available under section 24(1) of the *Charter*, as well as with respect to stays of proceedings.[179]

The New Zealand courts are not restrained by wording such as that provided under section 24(2), but they have been reluctant to consider alternative remedies to exclusion. In *Shaheed*, Blanchard J. doubted whether a declaration or a police complaint proceeding "possibly leading to a disciplinary proceeding against the transgressing police officer, could provide a form of redress which truly vindicated the right."[180] Such attempts at specific deterrence of the officer or general deterrence of the state would not serve the compensatory purpose of the exclusionary remedy. He added that an award of damages or sentence reduction "might look strange" and "[u]nless the crimes were especially serious or involved an ongoing risk to public safety, such an outcome would be regarded by a dispassionate observer as bringing the administration of justice into disrepute."[181] New Zealand's subsequent codification of its exclusionary rule, however, suggests that alternative remedies are a legitimate consideration.[182] Moreover, attentiveness to less drastic but adequate remedies is a constant in remedial jurisprudence. Finally, the result of refusing to consider alternative remedies may be to deny the accused any remedy at all.[183]

A revival of the prima facie rule of exclusion would place the burden on the state to ask for and justify a less drastic alternative remedy. This could

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176 *Collins*, *supra* note 29 at 268; *R v Genest*, [1989] 1 SCR 59 at 82–83, 91 NR 161; *R v Mullins*, 2019 ONSC 2408 at paras 55–56.

177 *Supra* note 14 at para 1. But for a recent Court of Appeal decision using a sentence reduction as a remedy in a case where the Court concluded that the exclusion of evidence was not justified under section 24(2), see *Kennett v R*, 2019 NBCA 52 at para 4.

178 *Ibid*. See also *Paterson*, *supra* note 160 at para 98, Moldaver J, dissenting.

179 *R v Bjelland*, 2009 SCC 38; *R v Regan*, 2002 SCC 12.

180 *Shaheed*, *supra* note 5 at 153.

181 *Ibid* at 154–55. For approval of these comments and predictions that New Zealand courts will not examine alternative remedies see Mahoney, *supra* note 51 at 787.

182 *Evidence Act 2006*, *supra* note 136, s 30(3)(f).

183 Levinson, *supra* note 8; Sonja B Starr, "Rethinking 'Effective Remedies': Remedial Deterrence in International Courts" (2008) 83 NYUL Rev 693 at 766.

help ensure that a sentence reduction would not bring the administration of justice into disrepute and that the state would accept responsibility for the reduction. If sentence reductions are used as a remedy, courts should take care, as suggested by the European Court of Human Rights, to apply an individualized approach that justifies the sentence reduction in relation to the purposes of the remedy,[184] as opposed to the vaguer and more holistic approach that the Supreme Court of Canada has approved in *R v Nasogaluak*.[185] A sentence reduction should be proposed by the state and found by the court to be proportionate, both to remedial purposes and to the crime and the offender.

At the end of the day, the use of alternative remedies such as sentence reductions might, in appropriate cases, be a way to reconcile the state's interests in an adjudication on the merits with the accused's interest in a meaningful remedy. Costs or damages might have to be used to provide an accused with a remedy if the accused is acquitted.[186] The danger that such alternatives would be used when exclusion remains the appropriate remedy could be combatted by requiring the judge to pay attention to whether the less drastic remedy serves the remedial purposes as well as exclusion and also to the overall balance between recognizing the accused's and state's interest. The absence of any meaningful remedy for the accused or the possibility that the accused may have to spend money to collect limited damages should bear considerable weight, especially in applying the overall balance stage of proportionality reasoning and determining whether the state has justified an alternative to exclusion.

J. Summary

A prima facie rule of exclusion provides a strong statement about the importance of rights and the need for the state to justify as proportionate any limits placed on rights and remedies. Such rules are still used in Ireland and have been used in Canada and New Zealand. Not much would be lost

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184 *Ananyev and Others v Russia Applications*, 42525/07 and 60800/08 European Court of Human Rights, First Section Judgment, 10 Jan 2012 at 224–25. That court reflecting its jurisdiction and the ability of many European criminal courts to award damages seems to prefer to award damages than to reduce sentences as a remedy.

185 2010 SCC 6 at paras 55–56.

186 For an application of the two-track approach to damage remedies with a suggestion that aggravated damages could be awarded if the state did not take reasonable efforts to prevent similar violations in the future see Roach, "Disappointing Remedy?", *supra* note 16.

in the United States if its so-called automatic exclusionary rule, which is now subject to many exceptions, was re-formulated as a prima facie rule of exclusion.

The state should be able to avoid a prima facie rule of exclusion by demonstrating that exclusion would be disproportionate to the violation and that it has justified some lesser or perhaps even no remedy as a proportionate response to the violation. In making such assessments, courts should consider whether the state has established that the violation is not serious. In doing so, courts should be concerned both with the fault and specific deterrence of the individual officers involved in the violation and with whether the state and police organization is taking reasonable steps to prevent similar violations in the future. It has also been suggested that the importance of the evidence to the prosecution's case can be a legitimate factor in considering whether exclusion is a proportionate remedy. At the same time, courts should not consider the seriousness of the offence charged because to do so is inconsistent with the presumption of innocence.

V. CONCLUSION

Comparative analyses of exclusion of evidence can reveal broad trends and truths that may easily be lost in the many trees of each country's jurisprudence. In Canada, Ireland, New Zealand, and the United States, courts all originally justified the exclusion of evidence on the basis that it was designed to protect the accused's rights. In Canada, this compensatory rationale was limited to violations which produced evidence conscripted from the accused whereas in the three other countries, it was conceived more broadly and could apply to real evidence discovered through an unreasonable search and seizure. It is striking that all four countries initially embraced an individualistic and corrective understanding of exclusion. This common approach made sense of personal standing and causation requirements[187] and reflected right to a remedy reasoning that has long been recognized in the common law.[188]

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187 The idea that evidence should not be excluded if the police would have inevitably discovered it by constitutional means makes sense if the focus is on placing accused in the same position that they would have occupied but for the violation. At the same time, it makes less sense to the extent that courts are concerned with regulating state conduct and preventing similar violations in the future.

188 *Marbury*, *supra* note 22.

The compensatory rationale for exclusion of evidence has proven too demanding in all four countries. This should not be too surprising given the severe effects that the exclusion of evidence — such as drugs and guns — can have on the ability to adjudicate on the merits. Unfortunately, the courts have resorted to vague tests based on balancing interests, costs and benefits, judicial integrity, and multiple and open-ended lists of relevant considerations that result in decisions that are difficult to predict and often unsatisfying.

The New Zealand jurisprudence is promising in appealing to the idea of proportionality, but disappointing as it emerges as the most unstructured and unpredictable of the four balancing tests. The American jurisprudence is candid in its discussion of costs and benefits but tends to limit exclusion bluntly by creating a growing list of good faith exceptions and using causation-based reasoning as an indirect means to recognize state interests. The Canadian jurisprudence post-*Grant* also uses good faith exceptions. It assesses the seriousness of the violation through a spectrum of complex, uncertain, and shifting subjective and objective fault standards. The Canadian courts have failed to develop a principled approach to factoring in state interests, especially with respect to the importance of the evidence sought to be excluded or the seriousness of the offence. This produces something of a remedial "lottery"[189] where remedial discretion can be used in unpredictable ways and, in some cases, to nullify the meaning of rights. The new Irish approach is the most promising in its retention of prima facie rules of exclusion and its attempts to classify what type of good faith or lack of fault will justify an exception to its prima facie rule.

This article has suggested that the compensatory rationale for exclusion of evidence is the strongest and soundest rationale for courts to justify the remedy of the exclusion of evidence and that it justifies a prima facie rule of exclusion. In Canada, such an approach would restore and broaden the prima facie case for exclusion under the fair trial test abolished in *Grant*. In New Zealand, it would restore the prima facie rule of exclusion as it existed before *Shaheed*. At the same time, the use of a prima facie rule of exclusion would not require much, if any, change from current practice in Ireland and the United States. The compensatory rationale of exclusion would also make sense of the existing requirements in most jurisdictions of personal standing and some causal connection between the violation and the obtaining of evidence.

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189 Paciocco, "Lottery or Law", *supra* note 58.

Although compensation is the best rationale for the drastic remedy of exclusion, courts should continue to consider the seriousness of the violation, but with greater emphasis on whether the state has taken reasonable steps to prevent similar violations in the future. This would allow courts to leverage the state's superior ability to apply the broadest array of training, disciplinary, and legislative reforms to prevent similar violations. This could hopefully avoid epidemics of police illegality that have been documented in Canada with respect to strip searches.

In close cases, courts should not hesitate to exclude evidence or even stay proceedings if they are satisfied that the state has not taken reasonable efforts to prevent violations. Such an approach would not require courts to run police departments. It would, however, require them to be attentive to the efforts that states have or have not taken to prevent rights violations. Current approaches to the exclusion of improperly obtained evidence in Canada, Ireland, New Zealand, and the United States are a missed opportunity for courts to do what they do best — provide remedies to compensate and vindicate rights — while also dialogically engaging with the state to use its wide of range of powers to prevent similar violations in the future.

A prima facie rule of exclusion would require the state to justify any remedy short of exclusion. The balancing of interests can be made more predictable and transparent by the use of familiar proportionality principles. Under these principles, the state could seek to limit the exclusionary remedy on the basis that the evidence is critical to an adjudication on the merits but not on the basis of the seriousness of the offence. The latter objective is illegitimate because of its inconsistency with the presumption of innocence. In most cases, however, the state would seek to justify departures from the prima facie rule on the basis that exclusion is not necessary because the violation was not serious. This should require the state to demonstrate that there is no need for specific deterrence of those officials involved in the violation and that the state is taking reasonable measures to prevent similar violations in the future.

At least where the text of the rule does not exclude it, the consideration of less drastic but effective remedies should factor into the proportionality analysis. The state would have to propose and justify a sentence reduction as a less drastic alternative remedy that was appropriate for the accused and not inconsistent with the need to deter and prevent serious violations. Placing the onus on the state to propose alternative remedies would also

help ensure that sentence reductions were in the public interest and could still be defended as producing a sentence proportionate to the offence and the offender. The state could provide for other less drastic alternatives such as damages. The focus should not be on a mechanical search for any less drastic remedy, but for one that will as adequately fulfill the remedial purposes of compensation and prevention of similar violations in the future.

Proportionality analyses could provide some transparent guidelines to the vague and uncertain references that all four courts make to the need to balance interests when deciding whether to exclude evidence obtained in violation of rights. A proportionality-based approach would hopefully allow courts to recapture the power of the compensatory rationale for the exclusion of evidence while also embracing concerns about preventing future violations that can often best be implemented by the state as opposed to the court.

An Empirical and Qualitative Study of Expert Opinion Evidence in Canadian Terrorism Cases: November 2001 to December 2019

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AND IAN M. WYLIE[**]

I. INTRODUCTION

Between late 2001, when the *Criminal Code's* terrorism offences[1] were first introduced, and December 2019, Canada charged 56 individuals for terrorism offences, 44 of whom have been prosecuted to completion (whether that be a finding of guilt, innocence, or a stay of proceedings).[2] To date, expert opinion evidence has been called in at least

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1 See *Criminal Code*, RSC 1985, c C-46, ss 83.01(1)–83.33(2) [*Criminal Code*].

2 See Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) 67:1/2 Crim LQ 96. Separate terrorism charges against two individuals have been laid since this study was published: a Kingston Youth is facing terrorism charges and, on 6 December 2019, the

50% (22 out of 44) of the cases where individuals were charged with terrorism offences, and more than one expert has often been called in those trials. More strikingly, if one excludes trials that ended in stays of proceedings as well as guilty pleas — where the only opportunity for an expert reasonably to appear is at sentencing — then experts have appeared in cases against 15 of 18 individuals (83%).[3] These experts have been called by Crown prosecutors, the defence, and the courts alike; they have provided evidence on a variety of social science, technical, and psycho-social topics. They have also offered perspectives on an accused's mental health or prospects for rehabilitation, the meaning of religious texts, translations of words from a foreign language into English or French, technical explanations on the collection of online evidence, or how bombs (Improvised Explosive Devices) are made. In short, expert witnesses have been, should be, and will continue to be incredibly important to the successful completion — and fair (or unfair) rendering — of justice in terrorism trials in Canada.

In theory, there are at least three good reasons why expert evidence should play, and will continue to play, a particularly crucial role in terrorism prosecutions in Canada. First, terrorism offences in Canada are uniquely,

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RCMP's Integrated National Security Enforcement Team (INSET) arrested Ikar Mao for participation in a terrorist group (*Criminal Code*, *supra* note 1, s 83.18) and leaving Canada to participate in activity of terrorist group (*Criminal Code*, *supra* note 1, s 83.181). See Philip Ling et al, "RCMP Charge Kingston, Ont., Youth with Terror-Related Offence After Security Probe", *CBC News* (25 January 2019), online: <www.cbc.ca/news/politics/rcmp-arrests-security-kingston-1.4992518> [perma.cc/7UKL-FCFF]; Royal Canadian Mounted Police, *RCMP Integrated National Security Enforcement Team Lays Terrorism Charges in Ontario* (News Release) (Milton, ON: RCMP, 6 December 2019), online: <www.rcmp-grc.gc.ca/en/news/2019/rcmp-integrated-national-security-enforcement-team-lays> [perma.cc/LR4P-CQZ5] [RCMP, *Terrorism Charges in Ontario*]. This total includes Chiheb Esseghaier and Raed Jaser, whose convictions were recently overturned before the Ontario Court of Appeal: *R v Esseghaier*, 2019 ONCA 672 [*Esseghaier* ONCA]. As of writing, the Crown was seeking leave to appeal this decision: Jim Brownskill, "Crown seeks Supreme Court of Canada Hearing in Via Rail Terror Case", *CBC News* (19 November 2019), online: <www.cbc.ca/news/politics/supreme-court-railway-terror-1.5364513> [perma.cc/XFY8-ST4B].

3 Four of the acquittals to date have included the use of expert evidence: Sabrine Djermane, El Mahdi Jamali, Othman Hamdan, Ayanle Hassan Ali. 11 of the convicted individuals to date have seen experts at their trials: Abdelhaleem, Misbahuddin Ahmed, Steven Chand, Rehab Dughmosh, Chiheb Esseghaier, Mohamed Hersi, Raed Jaser, Momin Khawaja, Said Namouh, a Quebec Youth and Nishanthan Yogakrishnan. For citations and more information on the accused whose trials featured expert evidence, see Appendix A below.

definitionally complicated and thus, they are uniquely constructed to require expert input.[4] Two "elusive phrases",[5] those being "terrorist activity" and "terrorist group", form the predicates for all terrorism offences in Canada. As such, to prove any terrorism offence, the Crown must first prove either that the accused's activity was in furtherance of a "terrorist activity" (e.g. facilitating a terrorist activity under section 83.19 of the *Criminal Code*) or that the individual contributed to a "terrorist group" (e.g. participating in the activities of a terrorist group under section 83.18).[6] "Terrorist activity", which itself forms the backbone of the definition of "terrorist group", then incorporates what has been called a "motive clause"[7] (the activity must be committed or planned "for a political, religious or ideological purpose, objective or cause"), a "purpose clause" (it must be committed "with the intention of intimidating the public...as regards its security, or to compel a person, government or organization...to do or refrain from doing any act"),[8] as well as a "consequence clause" ("causing death or serious bodily harm", endangering a life, etc.).[9]

Thus, in contrast to the vast majority of *Criminal Code* offences where the Crown must prove only the wrongful act (*actus reus*) and attendant mental element (*mens rea*) of the offence, in terrorism trials we see the Crown usually having to prove that preparatory activities[10] were driven by a religious or ideological motive,[11] that the individual or group had a goal or

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4 As the Ontario Court of Appeal stated in Canada's first terrorism case, *R v Khawaja*, 2010 ONCA 862 at para 231 [*Khawaja* ONCA]: "To be sure, terrorism is a crime unto itself. It has no equal". For a review of the unique complexity of the structure of the offences themselves, see Michael Nesbitt & Dana Hagg, "An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offences" (2020) 57:3 Alta L Rev 595.

5 Michael Nesbitt, Robert Oxoby & Meagan Potier, "Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases" (2019) 52:2 UBC L Rev 553.

6 *Criminal Code*, *supra* note 1, ss 83.01(1), 83.18(1)–(4), 83.19(1)–(2).

7 The "motive", "purpose", and "consequence" clauses have been named, broken down, and explained in Nesbitt & Hagg, *supra* note 4 at 609–18.

8 *Criminal Code*, *supra* note 1, ss 83.01(1)(b)(i)(A)–(B).

9 *Ibid*, s 83.01(1)(b)(ii).

10 In Canada, the vast majority of cases to date have been for preparatory or inchoate conduct. This result is consistent with the original intention of Parliament to get at—primarily though not exclusively—preparatory conduct. See Nesbitt, *supra* note 2 at 124–25.

11 All trials to date have concerned a religious motive; the sole exception was a guilty plea in the case of *R v Thambaithurai,* 2010 BCSC 1949 [*Thambaithurai*]. This concerned the

purpose in mind (e.g. intimidating the public), and that the planned activity would result in pre-defined and specific consequences. Proving these additional elements brings religion, ideology, and the future goals of a group — maybe even a foreign, organized group — to the fore, which in turn requires that the Crown, the defence, and the court understand sufficiently these groups of individuals and the two predicates for terrorism offences — something for which social scientists that study terrorist groups, religion, radicalization to violence, or other such fields can assist.

This brings us to the second reason why terrorism offences are likely to require expert evidence, and that is because the type of information required to prove motive, purposes, and intended consequences usually requires understanding the goals of the individuals. This, in turn, requires an understanding of what they were building (e.g., the fertilizer may not have been for gardening in those quantities), how terrorist financing works, or how data used to prove "motive" and "purpose" is scraped from social media accounts or computers. In practice, prosecuting the offences means leading evidence on words, thoughts, beliefs, social (group) interactions, and preparatory conduct; understanding technology has become, and will likely increasingly become, central to the admissibility of evidence and understanding its implications in terrorism trials. These technological issues are only compounded when the offence takes place, in whole or in part, overseas, which can happen either in the simple case where an accused is communicating or plotting with individuals overseas (a common occurrence in Canadian cases, first seen in Canada's first terrorism trial *R v Khawaja*[12]) or where part or all of the offence takes place overseas (for example, where a so-called "foreign fighter" is tried for so-called terrorist travel under sections 83.181 or 83.191 of the *Criminal Code*).

Third, and finally, many academic studies have suggested that there is not a meaningful correlation between international terrorism and mental health needs, or at least that the factors contributing to terrorist ideation are deeply complex and multifaceted.[13] And yet, in Canada, academic

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financing of the Sri Lankan LTTE group. The LTTE was a listed terrorist entity (para 2) and thus, its terrorist agenda would not have to be proven at court, subject to a constitutional challenge of the listing regime. In any event, due to the guilty plea, its status as a terrorist entity went unchallenged.

12 *R v Khawaja*, 238 CCC (3d) 114, 2008 CanLII 92005 (ONSC) [*Khawaja* ONSC].

13 Paul Gill & Emily Corner, "Is There a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?" (2017) 10:1 CTC Sentinel 1; Paul Gill & Emily Corner, "There and Back Again: The Study of Mental Disorder and Terrorist

research has begun to draw links between terrorism prosecutions and the use of mental health experts at trial.[14] Perhaps not surprisingly then, even before beginning the study, the authors anecdotally noted a high number of cases where the mental health of the accused was front and centre in terrorism trials, whether that be in regards to an accused's competence to stand trial in the first place or with regard to how the individual should be treated upon sentencing. Indeed, after completing this study, we found that 13 of the 29 experts that this study has identified work in the field of mental health and were called to speak to the capacity, broadly speaking, of the accused; perhaps not surprisingly, virtually all of these experts have been called by the defence either prior to trial (capacity) or at sentencing.

Yet, despite the theoretical importance — and anecdotal prevalence — of expert evidence appearing in terrorism trials, it is not a topic that has yet been studied in the Canadian context.[15] Simply put, there are no comprehensive empirical or qualitative studies on expert evidence in Canadian terrorism trials — a situation that, on the quantitative side at least, largely mirrors the Canadian experience with expert evidence more broadly.[16]

Involvement" (2017) 72:3 American Psychologist 231; Emily Corner & Paul Gill, "The Nascent Empirical Literature on Psychopathology and Terrorism" (2018) 17:2 World Psychiatry 147; Emily Corner & Paul Gill, "Psychological Distress, Terrorist Involvement and Disengagement from Terrorism: A Sequence Analysis Approach" (2019) J Quantitative Criminology, DOI: <10.1007/s10940-019-09420-1>.

14 See Reem Zaia, "Mental Health Experts in Terrorism Cases: Reclaiming the Status of Rehabilitation as a Sentencing Principle" (2017) 64 Crim LQ 548 [Zaia, "Mental Health Experts in Terrorism Cases"]; Wagdy Loza, Hy Bloom & Mini Mamak, "The Psychiatrist's Contribution to Understanding and Preventing Acts of Terrorism" in Hy Bloom & Richard D Schneider, eds, *Law and Mental Disorder: A Comprehensive and Practical Approach* (Toronto: Irwin Law, 2013) 623 at 623–56. See also Reem Zaia, "Forensic Psychiatry and the Extremist: A Review of the Recent Violence Risk Assessment Tools for Offenders Convicted of Terrorism Offences" (2018) TSAS Working Paper No 18-04 [Zaia, "Forensic Psychiatry and the Extremist"].

15 This is actually true across the Western world. The author is currently working with colleagues in both the United Kingdom and Australia to get a sense for how those jurisdictions have used expert evidence.

16 For an excellent, recent counter-example where scholars take on empirical questions related to expert evidence in Canada and, particularly, the risks associated with expert evidence and expert biases, see Jason M Chin, Michael Lutsky & Itiel E. Dror, "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42:4 Man LJ 21. For similarly documented psycho-social experts during sentencing of terrorists in Canada, see Zaia, "Forensic Psychiatry and the Extremist", *supra* note 14; Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14. The above articles, we

This is all to say that there is very good reason to study expert evidence and its uses in Canadian terrorism trials. This paper thus takes up the challenge. It offers the first empirical breakdown of all terrorism trials in Canada that have made use of expert evidence, with a particular view to the types of expert evidence used, which party (prosecution, defence, or in one case, the judiciary) is using it, how that party is using it, and whether or when expert testimony is ultimately relied upon by the judges.[17] It considers the judicial treatment of experts and attempts to identify where they have been particularly useful or influential to judicial decisions, where the court and/or lawyers might make better use of experts, whether gender is playing a role in the identification or treatment of experts, and so on. This paper then ends with an application of the data to lessons-learned for the defence, prosecution, and courts, as well as what it tells us about the future use of expert opinion evidence in Canadian terrorism trials. This paper will be useful for Crown and defence attorneys and judges alike in helping them to identify when experts have been used to great effect, when they have tended not to be as helpful, when future cases might begin to look to experts to help resolve issues, when Crown and defence should consider calling more (or less) expert evidence (defence should consider relying more heavily on experts during the trial proper rather than just at sentencing), whether equality of arms between the defence and prosecution's ability to identify

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hope, represent a recent reengagement in studying expert evidence from both an empirical and theoretical perspective. By way of contrast, the US appears to be somewhat different with regard to empirical studies of expert evidence at trial. See e.g. Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, "An Empirical Examination of the Use of Expert Witnesses in the Courts: Part II: A Three City Study" (1994) 34:2 Jurimetrics 193; Stephanie Domitrovich, Mara L. Merlino and James T. Richardson, "State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons" (2010) 50:3 Jurimetrics 371; see generally Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company, 1966). Finally, one outstanding Canadian scholar should be noted for her excellent contributions to understanding expert evidence in Canada from a variety of theoretical and methodological perspectives, that being Dr. Emma Cunliffe. See e.g. Emma Cunliffe, ed, *The Ethics of Expert Evidence*, 1 ed (London: Routledge, 2016); Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts & Michael Stockdale, eds, *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Cheltenham: Edward Elgar, 2018) 310 at 310–32; Emma Cunliffe & Gary Edmond, "Gaitkeeping in Canada: Mis-steps in Assessing the Reliability of Expert Testimony" (2014) 92 Can Bar Rev 327.

17 See Annex A at the end of this paper for a full list of experts called in various terrorism prosecutions in Canada between September 2001 and September 2019.

and make use of experts is a problem, and finally, where the court might be particularly attuned to risks (e.g. of wrongful conviction) often attendant with the use of (or failure to use) expert evidence properly.

To accomplish these goals, this paper will first offer a discussion of the methodology used to collect the data relied upon in this study. Then, Part II of this paper will offer a very brief review of expert opinion evidence in Canadian criminal law, what it is, and, most importantly, with an expanded explanation of the three reasons above, why we hypothesize that it should in theory be so particularly significant in the context of terrorism prosecutions in Canada—and why this might also mean that we should be very wary of expert evidence in terrorism trials. Part III will then look at the actual use of experts in terrorism trials to date, focusing on the trends in Canadian terrorism prosecutions, including who called the experts (Crown/defence/judge), the gender of the expert, what stage of the proceeding (trial, pre-trial, sentencing), how judges have treated the experts (adopted their testimony, found it credible but ultimately unpersuasive, or finding it unpersuasive), and so on. (Appendix A lists the terrorism prosecutions featuring experts and documents their roles, the stage they appeared at, and how judges treated their evidence. Appendix B provides the experts' basic biographical details.) Finally, Part IV of this paper elaborates on the implications of the numerical findings in Part III, including what these numbers tell us in terms of implications for defence and the Crown in particular, where experts have been used, and what this might tell social scientists and other potential experts about what the legal system needs in terms of academic expertise.

A. A Note on Methodology

Over the course of approximately three years, the authors employed a multi-faceted research methodology to identify when expert evidence has been called in terrorism trials in Canada. In order to obtain an accurate empirical picture, we implemented the following methodology. First, we went through every judgement and decision associated with a terrorism trial in Canada to identify whether experts were referred to (often directly in sentencing decisions, for example), alluded to, or whether there was any evidence presented that would have likely required the use of an expert witness or affidavit. In so doing, we noted all of the named experts, their appearances, and other associated information (gender, topic, etc.). Second, we then went to associated trial and appeal transcripts, as well as exhibits

lists, to see whether it appeared that an expert had been called and, if so, to what did they testify. However, the sheer costs associated with accessing trial transcripts did not permit a comprehensive review of the transcripts of every judgement and interlocutory decision, for example; our focus, therefore, was on following-up on instances in judgements or decisions where evidence was referred or alluded to that might have required an expert. We also focused a good deal on exhibit lists, that is, the lists of documents submitted to court in terrorism trials that would, or should, include any expert evidence reports. Third, we identified the prosecutors and defence lawyers associated with terrorism trials and where possible, asked for their assistance in determining whether and when they had called experts during those trials, whether they had transcripts of those proceedings that they would be willing to share, and so on. Once again, we followed up with trial transcripts where information came to light. Of course, some of those trials took place almost a decade before this research project began, meaning that we cannot be certain that those lawyers and legal assistants had a photographic recollection of all instances where experts were called or, more likely, perhaps should or could have been called but were not. Nevertheless, we cross-referenced our findings from the three sources — judgements and decisions, trial transcripts and exhibit lists, and discussions with lawyers — with news coverage of trials and our own recollections to put together what we hope is an accurate picture of the use of expert evidence in Canadian terrorism trials over an almost-20-year period. In the end, without going through every transcript (hundreds of thousands of pages or more) of every moment of terrorism hearings, we cannot be sure that the study is comprehensive, though we have attempted to minimize, through the above methodological steps, the chances that an expert appearance has been missed. In any event, the ultimate goal of this paper is to provide a starting point for a more informed discussion on the use of expert evidence in terrorism trials and perhaps trials more broadly in Canada. We thus believe that, at minimum, this paper provides a significantly better understanding of terrorism trials in Canada and the role that expert evidence plays in shaping the law, the facts, and ultimately the judicial findings; we hope that this, in turn, leads to some useful working conclusions and observations in this paper. Just as importantly, we hope that others will take up those questions and refine the work through future empirical studies using this dataset (see Appendices A and B), or using some of the information and

analysis provided, to dig deeper on case studies or qualitative analyses on some of the experts and issues raised herein.

II. A Brief Look at Expert Opinion Evidence in Canadian Courts and why it Might Seem Particularly Useful in Terrorism Cases

The basics surrounding the admission of expert opinion evidence, its importance, and its attendant risks in criminal trials are well-covered terrain. We do not purport to offer a comprehensive review of the subject in general, but rather merely introduce it in order to put into context why it is important in terrorism cases and how we can, subsequently, understand some of the empirical findings found in Part III of this paper.

Expert opinion evidence in Canada operates as an exception to the general rule of evidence that does not permit witnesses to provide opinions,[18] that is, witnesses offer facts — what they saw, heard, know, etc. — and not their opinions about those facts. But sometimes the court will need help understanding the facts of the case. Experts then have a role to play in helping the court to understand the complex subject-matter in which the witness is an expert. The very first requirement of the so-called *Mohan* factors that set the test for the court's reception of expert opinion evidence is thus that the expert opinion (help, really) be necessary. This means that the court must find that an understanding of the subject-matter is "outside the experience and knowledge of the judge or jury…By contrast, if normal experience enables triers of fact to cope, expert evidence should not be received."[19]

It follows that the expert's duty is to the court, not to the party that called them, and they are to help the court in understanding the subject-matter of their expertise in a fair and balanced manner.[20] *White Burgess Langille Inman v Abbott and Haliburton Co*[21] remains the leading case on the

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18 *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 14–15 [*White Burgess*].

19 David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 213.

20 Ontario, Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*, by Hon Stephen T. Goudge, vol 3 (Report) (Toronto, ON: Ontario Ministry of the Attorney General, 30 September 2008) at 503 [Goudge, *Report*].

21 *Supra* note 18.

use and admission of expert evidence at trial.[22] In that case, the Supreme Court of Canada made it clear that, as a starting point, experts "have a special duty to the court to provide fair, objective and non-partisan assistance."[23]

Experts may then play a number of roles in court processes: they may help with the evaluation of an accused's mental state, with understanding a particular technology or scientific method, or even parliamentary procedure.[24] The expert may be called, for example, by the Crown to explain the known ideology of an international terrorist group, by the defence in support of a "Not Criminally Responsible" (NCR) application, or by a judge to help the court understand evidence or a subject-area being proffered by the parties.

Our hypothesis is that expert evidence such as this must play a crucial role in the proper resolution of many terrorism cases, simply by nature of the offences, what must be proved, and the relevant issues that they raise. But, because the expertise is crucial to understanding the foundations of the case and, in many cases, the experts will be providing testimony directly as to elements of terrorism offences — for example, whether the possession of certain "religious" texts tends to demonstrate a terrorist ideology — we might also say that the risks associated with expert evidence are correspondingly high. Our hypothesis rests on three primary assertions as to why expert evidence should be particularly salient and deserves particular scrutiny in terrorism cases. These three assertions are discussed below. Part III of this paper will then attempt to test the extent to which the hypotheses are playing out in practice and what the theory might tell us about the practice to date.

First, as stated in the introduction to this paper, terrorism offences are structured within Canada's *Criminal Code*, importing as they do various elements that would seem ripe for expert opinion evidence. In particular, Canadian terrorism offences are complicated in that there is no criminal offence of terrorist activity. Rather, terrorism offences are set-up to require that one of two predicates be proven: either the offence must be perpetrated on behalf of a terrorist group (e.g. participating in the activity of a terrorist group under section 83.18 of the *Criminal Code*); or one must contribute to

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22 See e.g. *R v Mohan*, [1994] 2 SCR 9, 114 DLR 4th 419 [*Mohan*]; *R v Sekhon*, 2014 SCC 15 [*Sekhon*]; *R v Bingley*, 2017 SCC 12 [*Bingley*].

23 *White Burgess*, *supra* note 18 at para 2.

24 Paciocco & Stuesser, *supra* note 19 at 213, citing *Goddard v Day*, 2000 ABQB 799.

a "terrorist activity" (e.g. facilitation of a terrorist activity under section 83.19).[25] But, the definition of "terrorist group" brings us back to "terrorist activity".

There are two ways to prove a terrorist group (which is, in turn, defined as a terrorist "entity" in the words of the *Criminal Code*)[26] : either by resort to a list of terrorist groups;[27] or the Crown must prove beyond a reasonable doubt that "an entity has one of its purposes or activities facilitating or carrying out any terrorist activity."[28] Virtually all of the trials that we examined (as contrasted with guilty pleas) have proceeded on the basis of proving in court that a group constitutes a terrorist entity (so, not using the list)[29] and, in any event, the Ontario Superior Court has made it clear that in most cases, the listing process does not allow the Crown to avoid the definition of "terrorist activity".[30] As a result, in practice, the vast majority of the time the Crown will have to prove contribution to a "terrorist activity". This is where the complexity arises, at least relative to other crimes.

As noted in the introduction to this paper, Canada's *Criminal Code* imports an ideological component into the definition of terrorist activity: the impugned act or omission must be committed "in whole or in part for a political, religious or ideological purpose, objective or cause." The *Criminal Code* also imports a motive requirement, that being that the activity is intended to "intimidate…the public." Finally, there is a "consequence" component to the definition of terrorist activity: that the act is intended to cause death, endanger life, "cause a serious risk to the health or safety of the public…" and so on.[31] Moreover, the primary intention behind the terrorism offences was to capture preemptive (inchoate or preparatory[32])

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25 *Criminal Code*, *supra* note 1, ss 83.18–83.19. The terrorism offence is defined in s 2 of the *Criminal Code* and it incorporates the following offence sections: ss 83.02–83.04, 83.18–83.23.

26 The *Criminal Code*, *supra* note 1, s 2 defines terrorist group as an entity in subsection 83.01(1). Subsection 83.01(1) then defines "entity" as "a person, group, trust, partnership or fund or an unincorporated association or organization." For more on the listing process and definition of terrorist entity, see Nesbitt & Hagg, *supra* note 4.

27 For more on the Canadian listing process and the manner in which it has been used in the past, see Craig Forcese & Kent Roach, "Yesterday's Law: Terrorist Group Listing In Canada" (2018) 30:2 Terrorism & Political Violence 259.

28 *Criminal Code*, *supra* note 1, s 83.01(1).

29 Forcese & Roach, *supra* note 27.

30 *R v Hersi*, 2014 ONSC 1217. For a discussion, see Nesbitt & Hagg, *supra* note 4 at 617.

31 Nesbitt & Hagg, *supra* note 4 609-610.

32 Nesbitt, *supra* note 2 at 123.

situations in the planning stages, such that the terrorist plots never come to fruition.[33] Combining the motive, ideological, causal, and inchoate elements, the result is that the prosecution is not just proving that someone committed an assault, for example, but that they were planning to commit a future action, that the planning was driven by a religious, ideological, or political motive, that the goal was to intimidate the public in the perpetration of the action, and that they intended a particular result, that being a serious risk to health, infrastructure, or individuals.

One might say that the Crown regularly leads evidence as to motive, to help demonstrate a reason for committing a crime. For example, when proving first degree murder, a motive can help to show how a history of conflict between individuals or a drug debt left unpaid might explain why a killing was not just an accident, but planned and deliberate—critical elements of first-degree murder.[34] So how, then, are terrorism offences really that different? Most saliently, acting on a religious or ideological motive is a more complicated, nuanced human behavior, involving more complicated reasoning than acting violently because of an impulse or hatred against a single, identifiable party (a spouse, for example). Indeed, defining ideology at all has been notoriously slippery in the social sciences,[35] let alone defining a particular ideology, associating it with a particular person, and then further proving beyond a reasonable doubt that the person's particular ideology was driving their (terrorist) actions. That all becomes more complicated again when the accused's plan remains in the preparatory phase, that is, where the Crown must prove that a particular ideology is driving a set of preparatory actions, the results of which have not come to pass.

Often motive becomes evident in hindsight; it becomes obvious when we see the consequences, for example, when we say you killed someone because you stood to inherit from the will. But foresight is a different matter; it is conceptually more indeterminate (indeterminate in the literal sense: the action may not actually come to pass) to say that you have a particular ideology, and, on that basis, you are surely planning to undertake

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33 *Ibid* at 123–24.

34 *Criminal Code*, *supra* note 1, s 231(2).

35 See e.g. Donald Holbrook & John Horgan, "Terrorism and Ideology: Cracking the Nut" (2019) 13:6 Perspectives on Terrorism 2; Lilliana Mason, "Ideologues without Issues: The Polarizing Consequences of Ideological Identities" (2018) 82:S1 Public Opinion Q 866; Jeffrey M. Bale, *The Darkest Sides of Politics, 1: Postwar Fascism, Covert Operations, and Terrorism* (New York: Routledge, 2018) at 1–45.

future actions. Put another way, when the consequences are not yet evident, one risks entering a sort of circular logic: the argument goes that one would have committed the act because of their ideology, and one can see their ideology clearly based on what they were planning to do in the future; the ideology becomes evident through purported future actions and the likelihood of the future actions is reinforced through the ideology.

The Crown must counter or avoid such real or perceived circularity with independent corroboration for the ideology, such that its proof does not just depend on an inchoate plan and the assertion of a future goal (for example, through tendering as evidence the writings or readings of an individual and with whom the individual was interacting). Such corroboration links the assertion about a particular ideology to the planning that is happening and, if done correctly, it can prove that an individual is motivated by a religious or ideological purpose to carry out a future action with a defined goal (motive and cause) in mind. But, that corroborative evidence only functions as evidential support if it is properly and contextually understood. To understand religion or complex group ideologies and how they manifest and can motivate individuals, or how reading something or watching something or engaging with a particular group can exhibit ideological or religious belief, one must understand the meaning of complicated and often obscure texts, videos, speeches, foreign groups, or religions in which a judge may not be well-versed. In other words, to connect a book and a video to an individual ideology requires someone to make that connection, an expert in many cases. Similarly, connecting an individual to a terrorist group requires proving that some group has, as part of its ideology, the goal of facilitating terrorist activity.

All of this requires a complicated, nuanced marshalling of a lot of background evidence on ideology, religion, motives, and future plans; as such, it also requires a nuanced understanding of what that evidence means to a particular individual. Is a religious text simply something that people that belong to the religion read, or does it have special significance? What does it mean when an individual underscores particular speeches and phrases and not others in a religious text? Does a black flag signal support for "jihadism" or might black cloth used as a flag simply be a sign of a devout Muslim? This was the question that the judge in *R v Ansari* was asked to rule upon (without expert evidence).[36] These are also the foundational questions

[36] This exact question came up in the case of *R v Ansari*. See Anver M. Emon & Aaqib Mahmood, "Canada v. *Asad Ansari*: Avatars, Inexpertise, and Racial Bias in Canadian

that must be addressed in order to distinguish terrorism from other crimes because it is the ideological and religious components (motive clause) and the intention to intimidate the public, not just enrich the self or harm an individual (the purpose clause), that distinguish terrorism offences from other crimes. In the end, it is clear that this sort of contextually interpreted evidence forms the bulk of what must be proffered by the Crown to prove terrorism. It is crucial to the defence and the case because understanding it properly is necessary to understand individual motivations and goals and thus, guilt or innocence. This is precisely why expert opinion evidence should matter a great deal in terrorism prosecutions. Specifically, these experts can ensure that judges properly understand the evidence that underpins the motive and purpose clauses and thus, the terrorism offences themselves. For this reason, we should see a number of experts called by both the Crown and the defence at trial to speak to the foundational elements of the definition of "terrorist activity" and "terrorist group" and thus, to terrorism offences.

This brings us nicely to the second reason why we hypothesize experts should have an important role to play in terrorism trials in Canada. That is, an expert can speak not just to the elements of terrorism as an offence, to whether a particular ideology is driving the actions of an individual, or whether an association of people is indeed best defined as a "terrorist group", but also to the collection of such evidence that will, in practice, be used to prove intention, motivation, ideological, or religious purpose. That is, in practice, it is likely that police will look to computers — emails, social media accounts, viewing history, videos made — to instantiate a religious or ideological purpose. What the person has said about themselves will matter and a record of this may exist online. Moreover, all or part of the offences might take place overseas, perhaps in collaboration with an overseas group (say, ISIS in Syria). This means that either the accused will have to communicate from Canada with individuals overseas[37] or from where the

Anti-Terrorism Litigation" forthcoming in Michael Nesbitt, Kent Roach & David Hofmann, eds, *The Toronto 18 Terrorism Trials* (Calgary: University of Calgary Press) citing "Asad Ansari, Testimony in Chief by Mr. J. Norris", *R v A Ansari and S Chand,* Ontario Superior Court, 327–29.

37 This sort of evidence has been extremely prevalent in the so-called foreign fighters cases that Canada has prosecuted to date — most of whom have been prosecuted for actions in Canada in preparation to fight overseas. See for example *Khawaja* ONSC, *supra* note 12 at para 12, where Khawaja's terrorist group — and indeed plot — was mostly in England, though his actions were in Canada.

evidence will be collected to a warzone overseas and thus, there will surely be a good deal of electronic evidence (e.g., YouTube videos, geolocation, or wiretaps). Of course, if the goal of the accused is purportedly to cause death, endanger life, or cause a serious risk to health or safety (the "consequence clause" in the definition of terrorist activity), then the offences themselves will often involve, and have often involved,[38] Improvised Explosive Devices, bomb making ingredients, etc., all of which requires expertise. For example, one might have to explain why purchasing a large amount of fertilizer might not signify a turn to farming for a city dweller, when coupled with other chemical purchases.

Combining assertions one and two above, the result is an extraordinarily complex litigation that requires the court to make sense of what the mere ownership of particular religious texts and social media posts might mean in terms of a plotter's ideology, whether the individual is associated with a foreign group and if that group has as its purpose the intimidation of the public on ideological grounds, whether fertilizer might have been purchased with the goal of bombing a public place, and so on. This is added to the preemptive nature of most terrorism charges (that we must rely on evidence about what will happen, and why it will happen in the future) and that we are talking about complicated factual matrices — the type of which should often require "special knowledge" and experience going beyond that of the trier of fact.[39] In short, courts should be relying on experts to a far greater degree in terrorism trials than other trials, by virtue of their multi-tiered definitional incorporation of ideology, motive, and the consequence clause.

Third, though social science evidence continues to suggest that there is not an unusual connection between mental health needs and terrorism, a number of the more infamous cases in Canada have had to deal with mental health or capacity as a major factor in the trial or sentencing. In the notorious Via Rail plot, Esseghaier's competence to stand trial and possible schizophrenia took centre stage at sentencing.[40] In the case against Ayanle Hassan Ali, the prosecution agreed before trial that he was NCR by virtue

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38 Terrorism cases involving bomb plots include *Khawaja* ONSC, *supra* note 12 at para 5; *R v Jamali*, 2017 QCCS 6078 [*Jamali*]; *R v Nuttall*, 2016 BCSC 1404 [*Nuttall Entrapment Application*] and the Toronto 18 (*R v Amara*, 2010 ONSC 441 [*Amara*]).

39 See *R v Béland*, [1987] 2 SCR 398 at 415; 43 DLR (4th) 641.

40 *R v Jaser*, 2015 ONSC 4729 at paras 1–3 [*Esseghaier* (First Sentencing Hearing)].

of mental illness for all of the crimes save the terrorism offence.[41] And, in the case against Rehab Dughmosh, her competency to subscribe to a terrorist ideology also took centre stage.[42] Moreover, we know from previous studies that rehabilitation — and expert opinion regarding an accused's capacity for rehabilitation in particular — has proved to be a controversial topic at terrorism sentencing hearings.[43] As such, medical and psycho-social expert evidence appears to be of particular importance in terrorism trials.

If indeed we are correct that expert evidence is, or at least should be, crucial to proving some of the fundamental aspects and formal elements of terrorism offences, then the study of expert evidence in terrorism trials is self-evidently valuable. Looking at how, when, and why experts have been used effectively (or less-than-effectively in the past), can provide lessons for the future. This paper's look at the use of expert evidence is also intended to lay the foundation for future, in-depth studies on the use of expert evidence by providing links to the cases where evidence was used, the types of expert evidence sought, and the systemic issues that may or may not be arising that require a further look.

But, the seeds of this study were planted as much by an anxious concern about the use of expert evidence in terrorism trials as they were by an ambition that it be used effectively by litigants. Paciocco J. of the Ontario Court of Appeal, writing with Professor Lee Stuesser, has succinctly offered the following to explain how experts, while called to help, can cause problems for the legal system and, in particular, the criminal justice system:

> If the evidence requires special training or experience to observe or understand, triers of fact are vulnerable to accepting unreliable testimony; that evidence will be difficult to evaluate because it takes special knowledge or experience to understand; and experts are apt to be impressive and daunting and to use technical language and be resistant to effective cross-examination by lay lawyers.[44]

In the words of the Supreme Court of Canada in *R v Mohan*: "There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not

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41 *R v Ali*, 2018 ONSC 2838 at para 10 [*Ali*].

42 *R v Dughmosh*, 2019 ONSC 1036 at para 24 [*Dughmosh*].

43 See Nesbitt, Oxoby & Potier, *supra* note 5 at pages 597–603. See also Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14 at 555–59, 562–66; Robert Diab, "R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing" (2014) 39:2 Queen's LJ 587.

44 Paciocco & Stuesser, *supra* note 19 at 206.

easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves."[45] These are not groundless concerns; they have been laid bare repeatedly in Canadian[46] case law[47] and, most saliently (and sadly), with the use of expert evidence in the wrongful conviction of Guy Paul Morin,[48] as well as the notorious testimony of (former) coroner, Dr. Charles Smith.[49] For as much help as expert opinion evidence can be, it can also be extremely dangerous, particularly where, as here, that expert evidence will certainly have to speak to foundational elements of the offence — to whether the individual possess the mental capacity or the requisite ideology to be found guilty of terrorism. Put succinctly, the more we are completely reliant on expert evidence, the more we should be cautious of wrongful convictions.

It is for these reasons that we undertook this study and introduce, below, an empirical analysis and initial evaluation of some of the trends on the use of expert opinion evidence in Canadian terrorism trials. But it bears repeating that we offer this as an introduction to the theoretical importance and concerns and as an initial foray into what we have seen at trial thus far. It is our intent that others will use the below dataset to build on it; that others will take some of the initial insights and offer more thorough qualitative analysis and case studies of some of the issues that we can, at this time, only point vaguely towards. The theoretical importance of the work and the attendant risks truly do militate in favour of a host of further inquiries into the fairness and effectiveness of expert evidence in terrorism trials (and, undoubtedly, beyond), and we hope that those with the requisite

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45 *Mohan*, *supra* note 22 at 21.

46 *White Burgess*, *supra* note 18 starts, in the very first sentence, by saying: "[e]xpert opinion evidence can be a key element in the search for truth, but it may also pose special dangers." See also *Sekhon*, *supra* note 22 at para 46; *Bingley*, supra note 22 at paras 30–32.

47 See e.g. *R v DD*, [2000] 2 SCR 275 at para 52, 191 DLR (4th) 60.

48 For an important review of the case of Guy Paul Morin and the role that expert evidence played, see Ontario, Ministry of the Attorney General, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin: Executive Summary* (Ontario: Ministry of the Attorney General, 31 March 1998), online: <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html> [perma.cc/339A-XHR2].

49 The actions of Dr. Charles Smith and the effect that they had on a number of trials, and convictions, were meticulously detailed in what has become known as the "Goudge Report." See Goudge, *Report*, *supra* note 20.

expertise will continue to take seriously the risks and opportunities provided by experts in terrorism trials.

III. EMPIRICAL LOOK AT USE OF EXPERTS IN CANADIAN TERRORISM TRIALS: 2001–2019

Experts have been called in 22 of the 44 completed terrorism prosecutions as of December, 2019.[50] As of writing, 16 trials have been held (including four joint trials), with experts appearing in ten of these trials.[51] This means that 63% of trials featured at least one expert, while 50% of completed prosecutions featured an expert at some stage. However, 15 of the 18 individuals whose prosecutions involved a trial resulting in an acquittal or conviction included an expert at some stage of their case (83%).

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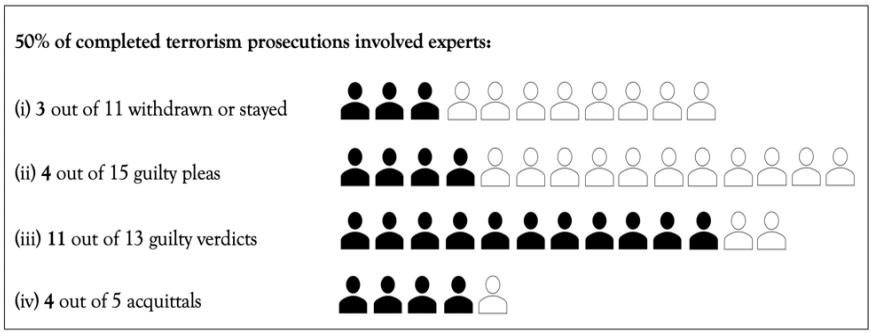
50 This total excludes individuals awaiting trial or in trial at the time that this article was written and those charged in absentia. For a list of the individuals prosecuted for terrorism in Canada, see Nesbitt, *supra* note 2 at 100–105. It also includes Chibeb Esseghaier and Raed Jaser, whose guilty verdicts were recently overturned by the Ontario Court of Appeal. See *Esseghaier,* ONCA, *supra* note 2. Three prosecutions are ongoing: Awso Peshdary, Ikar Mao and a Kingston youth. See Ling et al, *supra* note 2; RCMP, *Terrorism Charges in Ontario*, *supra* note 2; Aedan Helmer, "Peshdary trial: Informant lost out on bonus after leaking identity as secret RCMP agent to family", *Ottawa Citizen* (11 June 2019), online: <ottawacitizen.com/news/local-news/peshdary-trial-informant-lost-out-on-bonus-after-leaking-identity-as-secret-rcmp-agent-to-family> [perma.cc/6BMK-CYFC].

51 There have been four joint trials: Amanda Korody and John Nuttall (*Nuttall Entrapment Application*, *supra* note 38), Sabrine Djermane and El Mahdi Jamali (*R v Jamali*, 2017 QCCS 6077 [*Jamali* 2017]), Asad Ansari and Steven Vikash Chand ("Surprise Guilty Plea in Toronto Terror Trial", *The Canadian Press* (10 May 2010), online: <www.cbc.ca/news/canada/toronto/surprise-guilty-plea-in-toronto-terror-trial1.891490> [perma.cc/X8EF-XWVW]), and Raed Jaser and Chibeb Esseghaier (*R v Esseghaier*, 2015 ONSC 5855 [*Esseghaier* (Second Sentencing Hearing)]. 12 individuals were tried separately: Ayanle Hassan Ali (*Ali*, *supra* note 41), Othman Ayed Hamdan (*R v Hamdan*, 2017 BCSC 1770 [*Hamdan*]), Khurram Syed Sher (*R v Sher*, 2014 ONSC 4790), Shareef Abdelhaleem (*R v Abdelhaleem*, 2011 ONSC 1428 [*Abdelhaleem*]), Ismael Habib (*R v Habib*, 2017 QCCQ 1581 [*Habib*]), Momin Khawaja (*Khawaja* ONSC, *supra* note 12), Said Namouh (*R v Namouh*, 2009 QCCQ 9324 [*Namouh*]), Nishanthan Yogakrishnan (*R v NY*, [2009] OJ No 6495 [*NY*]), Rehab Dughmosh (*Dughmosh*, *supra* note 42), Misbahuddin Ahmed (*R v Ahmed*, 2014 ONSC 6153 [*Ahmed*]), Mohamed Hersi (*R v Hersi*, 2014 ONSC 4414 [*Hersi*]) and a Quebec youth (*R v LSJPA*, 2015 QCCQ 12938 [*LSJPA*]). No experts testified during the trial stage of the Ansari/Chand and Esseghaier/Jaser joint trials. No experts testified at the trial stage during the prosecutions of Abdelhaleem, Habib, Sher, and Yogakrishnan. See Appendix A below.

The following graphic shows expert appearances[52] according to each prosecution's outcome:



(i);[53] (ii);[54] (iii);[55] (iv).[56]

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52 For a list of these expert appearances, see Appendix A below. The discrepancy between the number of trials and outcomes associated with a trial (i.e., guilty verdicts and acquittals) arises because four joint trials were held (see the cases listed, n 51).

53 The three individuals whose prosecution featured expert evidence, despite their charges being stayed, were John Nuttall, Amanda Korody, and an Alberta youth. See Gareth Hampshire, "Terror charges stayed against Alberta teen", *CBC News* (23 September 2016), online: <www.cbc.ca/news/canada/edmonton/terror-charges-stayed-against-alberta-teen-1.3776673> [perma.cc /MP7J-HT56]. Nuttal and Korody were convicted, but their charges were stayed after a successful entrapment application (*Nuttall Entrapment Application*, *supra* note 38).

54 The four individuals referred to here are Fahim Ahmad (*R v Ahmad*, 2010 ONSC 5874 [*Ahmad* 2010]); Amara (*Amara*, *supra* note 38); Saad Gaya (*R v Gaya*, 2010 ONSC 434 [*Gaya*]); and Saad Khalid (*R v Khalid*, 2009 CarswellOnt 9874, 91 WCB (2d) 53 (ONSC) [*Khalid* Sentencing]).

55 The 11 individuals referred to here are Shareef Abdelhaleem (*Abdelhaleem*, *supra* note 51), Misbahuddin Ahmed (*Ahmed*, *supra* note 51), Steven Chand (*R v Chand*, 2010 ONSC 6538 [*Chand*]), Rehab Dughmosh (*Dughmosh*, *supra* note 42), Chibeb Esseghaier (*Esseghaier* (Second Sentencing Hearing), *supra* note 51), Mohamed Hersi (*Hersi*, *supra* note 51), Raed Jaser (*Esseghaier* (Second Sentencing Hearing), *supra* note 51), Momin Khawaja (*Khawaja* ONSC, *supra* note 12), Saïd Namouh (*Namouh*, *supra* note 51), a Quebec Youth (*LSJPA*, *supra* note 51), and Nishanthan Yogakrishnan (*NY*, *supra* note 51). This count includes Esseghaier and Jaser, but note that this verdict was recently overturned in *Esseghaier* ONCA, *supra* note 2, and a new trial ordered.

56 The four individuals referred to here are Ayanle Hassan Ali (*Ali*, *supra* note 41), Sabrine Djermane and El Mahdi Jamali (*Jamali* 2017, *supra* note 51), and Othman Hamdan (*Hamdan*, *supra* note 51).

Unfortunately, there is no Canadian data to compare these numbers either to trials in general in Canada, or to other comparable or perhaps similar offences — perhaps reinforcing the need to begin studying expert evidence in Canada in more detail. However, several older studies out of the US indicate that the US usage rate in general criminal trials, for what it is worth, is generally lower than we are seeing in Canadian terrorism trials.[57] Anecdotally, the use of experts in terrorism trials appears to be much higher than one would expect across the Canadian judicial system, though, again, numbers do not exist to demonstrate the veracity of that observation or the extent of the divergence, which we would hypothesize is quite high. So far, a total of 29 different individuals have been qualified as experts in terrorism trials,[58] though we also identified a number of incidents where Crown witnesses, usually police, offered testimony that arguably required an expert qualification but was proffered without a formal designation as such by the court (a concern we return to in Part IV).[59] In any event, the 29 formally qualified experts made a total of 40 appearances before various courts, with six experts making multiple appearances.[60]

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57 A 1966 US study found that an expert witness was called in approximately 25–30% of criminal trials by jury. They surveyed approximately 7000 trials. See Harry Kalven Jr & Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company, 1966). A 1994 US study found that 61% of criminal cases involved expert witnesses. This was based on surveying judges in three US cities. See Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, "An Empirical Examination of the Use of Expert Witnesses in the Courts: Part II: A Three City Study" (1994) 34:2 Jurimetrics 193 at 204. A 2010 US study found that psychologists and psychiatrists were the most frequent type of scientific or medical expert across all dockets (29%). See Stephanie Domitrovich, Mara L Merlino & James T Richardson, "State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons" (2010) 50:3 Jurimetrics 371 at 383.

58 For the full list of these individuals, see Appendix A below.

59 The authors believe that this would be an extremely fruitful avenue for future study.

60 Sgt. Sylvain Fiset had four appearances (*Khawaja* ONSC, *supra* note 12 at para 61; *Jamali*, *supra* note 38 at para 24; Isabel Teotonio, "Video shows Toronto 18 Convict Testing Bomb Trigger", *The Toronto Star* (20 October 2009), online: <www.thestar.com /news/crime/2009/10/20/video_shows_toronto_18_convict_testing_bomb_triggerh tml> [perma.cc/6RCM-XXBL]]; *Amara*, *supra* note 38 at para 38). Cst. Tarek Mokdad (*Jamali* 2017, *supra* note 51 at para 11; *Hamdan*, *supra* note 51 at para 46; *LSJPA*, *supra* note 51), Dr. Julian Gojer (*Chand*, *supra* note 55; *Amara*, *supra* note 38 at para 85; *Ahmad* 2010, *supra* note 54 at para 37), and Dr. Lisa Ramshaw (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Gaya*, *supra* note 54 at para 41; *Khalid* Sentencing, *supra* note 54 at para 26) each had three appearances. Donna Garbutt (*Amara*, *supra* note 38 at para 38; Teotonio, *supra* note 60), and Dr. Phillip Klassen (*Ali*, *supra* note 41

A. The "Type of Expert"

We have broken these experts down into three broad categories for the purposes of understanding why they were called (and, as it turns out, when they were called): social science experts[61] (proving an act or activity satisfies the definition of terrorist activity, explaining religious or political materials and their significance, and so on); technical experts[62] (authenticating electronic evidence and proving explosive offences like bomb making, as per sections 81 and 82 offences in the *Criminal Code*); and experts in psychology or psychiatry[63] (NCR assessments, fitness assessments, and sentencing

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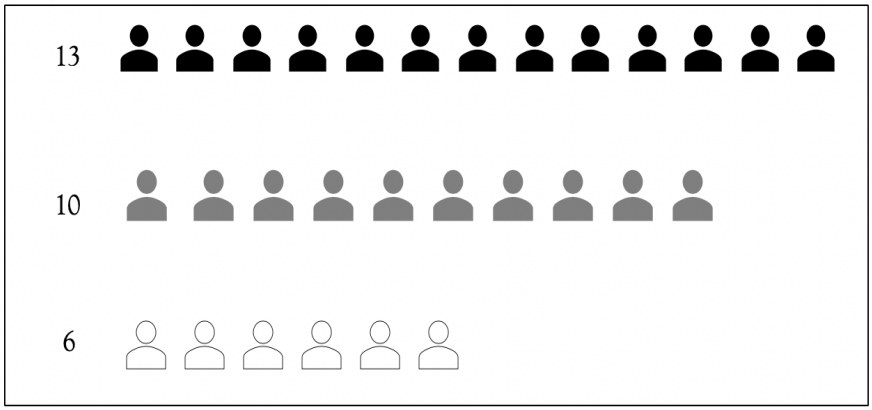
at para 7; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63) had two appearances.

61 The social science experts are Abdi Aynte (*Hersi*, *supra* note 51 at para 21); Cst. Tarek Mokdad (*Hamdan*, *supra* note 51 at 46); Dr. Barbara Perry (*R v Hersi*, 2014 ONSC 1273 [*Hersi* Dr. Perry Voir Dire]); Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at para 476); Dr. Reuven Paz (*Namouh*, *supra* note 51 at para 45); Dr. Rita Katz (*Namouh*, *supra* note 51 at paras 28–32); Dr. Sean Maloney (*Ahmed Trial Transcript*, Day 13 (2 June 2014) at 1263 (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law) [*Ahmed Trial Transcript*]); Matthew Bryden (*Hersi*, *supra* note 51 at para 20); Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 55); Mohammed Fadel (*R v Khalid*, 2009 CarswellOnt 5007 at paras 59–61, 88 WCB (2d) 648 [*Khalid Gardiner Hearing*]).

62 The technical experts are Cpl. Barry Salt (Geordon Omand, "Accused B.C. terrorists' laptop full of extremist content, violent video games: trial", *The Vancouver Sun* (29 April 2015), online: <www.vancouversun.com/technology/accused+terrorists+laptop+full+extremist+content+violent+video+games+trial/11014453/story.html> [perma.cc/42WD-8ABN] [Omand, "Laptop Full of Extremist Content"]); Cst. Peter Cucheran (Geordon Omand, "B.C. Bomb Plot Trial Hears from RCMP Explosives Expert", *The Globe and Mail* (15 May 2015), online: <www.theglobeandmail.com/> [perma.cc/Z4ZP-AAHU] [Omand, "B.C. Bomb Plot Trial"]); Cst. Robin Shook (*R v Hamdan*, 2017 BCSC 676 at para 37 [*Hamdan Voir Dire*]); Donna Garbutt (Teotonio, *supra* note 60); Kevin Ripa (*Hamdan Voir Dire*, *supra* note 62 at para 31); Sgt. Sylvain Fiset (*Khawaja* ONSC, *supra* note 12 at para 61).

63 The psychiatric/psychology experts counted here are: Dr. Ann Marie Dewhurst (*R v JR (Alberta Youth)*, 2015 ABQB 712 at paras 20–21 [*JR (Alberta Youth)*]), Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 7), Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at para 46), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 37; *Chand*, *supra* note 55; *Amara*, *supra* note 38 at 85), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Khalid* Sentencing, *supra* note 54 at para 26), Dr. Philip Klassen (*Ali*, *supra* note 41 at para 7; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Sumeeta Chatterjee (*Dughmosh*, *supra* note 42), Dr. Vinesh Gupta (*JR (Alberta Youth)*, *supra* note 63), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), and Dr. Nathan Pollock (*NY*, *supra* note

reports) speaking to behavior and mental health (usually appearing at criminal trials during the sentencing phase of the proceedings). Future studies may be able to further refine these categories, though we think of them as a useful starting place. The graphic below illustrates the numbers of qualified experts across these three categories:



Psychiatry & Psychology:

Social Science:

Technical:

Further breakdowns and details of these three categories are provided below.

1. Psychiatric/Psychological

Experts with a background in psychology and psychiatry represented the largest category of experts. 13 individuals were qualified as experts in this category and together, they made a total of 18 appearances (or 45% of all appearances). 13 of these appearances occurred at the sentencing stage, which accounts for 33% of all of the expert appearances we examined. Two

51). This table also includes the psychiatric experts tendered at the behest of the amici in *Esseghaier* (Dr. Philip Klassen and Dr. Lisa Ramshaw) and *Dughmosh* (Dr. Sumeeta Chatterjee).

experts appeared before trial at a hearing to determine whether pre-trial detention was warranted.[64] Two appeared at Ayanle Hassan Ali's trial, where their evidence went to the issue of whether the accused warranted an NCR designation after a guilty plea to the non-terrorism charges that he faced. Dr. Sumeetra Chatterjee appeared pre-trial in *Dughmosh*, where she assessed whether Ms. Dughmosh was fit to stand trial, although her report was considered in the sentencing judge's reasons.[65]

Generally, this category of experts displayed no special expertise or particular interest in terrorism per se. 11 were either forensic psychiatrists or forensic psychologists who worked with a wide range of offenders. One was a psychiatrist with a general practice.[66] At least four maintained a private practice at their own clinic, while nine were employed in an academic and/or government institution.[67] Out of this group of 13 experts, only two demonstrated a particular interest in terrorism. Dr. Wagdy Loza, a forensic psychiatrist, developed a tool for assessing recidivism risk for religious extremists in 2007.[68] As well, Dr. Jess Ghannam, who appeared at Raed Jaser's sentencing, had evaluated the mental health of detainees at Guantanamo Bay. The sentencing judge, however, did not find that Dr. Ghannam's terrorism-related background added any weight to his expert assessment.[69] In contrast, as will be discussed below, the fact that this category of experts lacked particular expertise in terrorism offenders seemed to lessen the weight that judges placed on their evidence.

As already noted, this category of experts made 13 appearance at the sentencing stage. 11 of these appearances concerned an offender's rehabilitative prospects and their likelihood to repeat offend (recidivism). Sentencing reports were tendered at each of these appearances, which were all at the behest of the offender.[70] In fact, an offender's recidivism risk and

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64 *Ali*, *supra* note 41 at para 7.

65 *Dughmosh*, *supra* note 42 at para 19.

66 Dr. Arif Syed (*R v Amara*, 2010 ONSC 251 at para 24 [*Amara Voir Dire*]).

67 Those employed in academia and/or in a government institution were: Dr. Hy Bloom, Dr. Julian Gojer, Dr. Wagdy Loza, Dr. Philip Klassen, Dr. Gary Chaimowitz, Dr. Sumeeta Chatterjee, Dr. Lisa Ramshaw, Dr. Jess Ghannam, and Dr. Nathan Pollock. Those with exclusively private practices were: Dr. Steven Cohen, Dr. Vinesh Gupta, Dr. Ann Marie Dewhurst, and Dr. Arif Syed. For complete citations on this point, see Appendix B below.

68 *Ahmed*, *supra* note 51 at para 30.

69 *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 40, 52–53.

70 The 11 appearances counted here are: Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Hy Bloom (*Abdelaheem*, *supra* note 51 at para 46), Dr. Jess Ghannam (*Esseghaier*

rehabilitative prospects were the issues that expert evidence was most frequently tendered across all categories of expert evidence in terrorism prosecutions.[71]

There are several possible reasons for the preponderance of expert evidence on these issues. First, the relative seriousness of terrorism offences and the correspondingly long sentences that flow[72] may have spurred defence counsel to seek out quality expert evidence. Relatedly, the Supreme Court's judgement in *Khawaja* — the only Supreme Court judgement dealing with the principles of sentencing in the terrorism context — effectively requires individuals convicted of terrorism offences to show evidence at the sentencing hearing that they are unlikely to re-offend. Indeed, the Supreme Court held that an offender's failure to tender evidence on this point is sufficient to justify a harsher sentence.[73] Third, there is the simple fact that 15 terrorism offenders pled guilty, which meant that an offender's recidivism risk and rehabilitative prospects were at issue in more cases than, for instance, whether an offender participated in the activity of a terrorist group.[74] Fourth and finally, there seems to be a legitimate connection between some of the accused and mental health or capacity concerns, while many other accused were youthful, first-time offenders[75] (which, historically, has been a sign in criminal law to consider the individual's capacity to 'turn things around' and rehabilitate). The fact that at least some Canadian courts have repeatedly refused to treat youthfulness meaningfully as a relevant mitigating factor in terrorism

(Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 37; *Chand*, *supra* note 55; *Amara*, *supra* note 3838 at 45), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Khalid Sentencing*, *supra* note 54 at para 26), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), and Dr. Nathan Pollock (*NY*, *supra* note 51).

71 For comparison, the entire category of social science experts made 12 appearances and by no means did these 12 appearances concern the same legal issue. For instance, Dr. Omid Safi testified in relation to an entrapment application (*Nuttall Entrapment Application*, *supra* note 38 at para 476), Mohamed Fadel's testimony went to Khalid's moral culpability (*Khalid Gardiner Hearing*, *supra* note 61 at paras 59–61), and Dr. Barbara Perry's proposed testimony supported an allegation that an undercover officer was Islamophobic (*Hersi* Dr. Perry Voir Dire, *supra* note 61). See the section on social science experts below.

72 Nesbitt, Oxoby & Potier, *supra* note 5 at 569–70, 613–14 (relatively long sentences).

73 See *R v Khawaja*, 2012 SCC 69 at para 123 [*Khawaja* SCC]. For a broad discussion of this topic, see Nesbitt, Oxoby & Potier, *supra* note 5 at 597–603.

74 Nesbitt, *supra* note 2 at 110.

75 *Ibid* at 114.

sentencing decisions, in stark contrast to the usual approach to youth in the criminal justice system, might also be forcing defence lawyers to lead more evidence in support of the prospects of a youthful, first-time offender to rehabilitate.[76]

We turn now to the sentencing reports themselves. The reports featured interviews with the offender on their crime (especially their motive), opined on their personality, and summarized their biographic and medical history.[77] In several cases, the offender's family and friends were also interviewed.[78] Offenders were also evaluated using diagnostic tools designed to assist the evaluation of their recidivism risk. In two cases, offenders were evaluated using tools designed especially for terrorism offenders.[79] The sentencing reports tended to be extensive, but they varied in length and apparent thoroughness. In *Ahmed*, Dr. Loza testified that Mr. Ahmed's sentencing report involved more work than any other he had completed over his long career working in corrections and with offenders. Dr. Loza spent seven-and-a-half hours interviewing the offender and another 60 hours reviewing the trial transcripts.[80] Not all experts were as thorough. For instance, Dr. Gojer's report in *Ahmad* was apparently based on a single, two-and-a-half-hour interview and was prepared without considering the evidence on Ahmad's terrorist activity.[81] The relative novelty of assessing a terrorism offender and the seriousness of the offence may account for the extra attention some of these experts gave to their reports. In any event, in the future, defence counsel may wish to consider the thoroughness of an expert before approaching them for a report; our study suggests the divergence can indeed be wide.

The sentencing reports provide a window into the motivations and mental health of terrorism offenders in Canada. It is outside the scope of

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76 Nesbitt, Oxoby & Potier, *supra* note 5 at 59–97.

77 *Abdelhaleem*, *supra* note 51 at paras 46–57; *Ahmad*, *supra* note 54 at paras 37–44; *Amara*, *supra* note 38 at paras 45–61; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 41–43.

78 *Abdelhaleem*, *supra* note 51 at para 47; *Ahmad* 2010, *supra* note 54 at para 44; *Amara*, *supra* note 38 at para 45.

79 The first is the Violent Extremist Risk Assessment (developed by Pressman & Flockton). See *Amara*, *supra* note 38 at para 41; *Ahmed*, *supra* note 51 at para 32. The second is the Assessment and Treatment of Radicalization Scale (developed by Loza). See *Ahmed*, *supra* note 51 at para 30.

80 *Ahmed*, *supra* note 51 at para 17.

81 *Ahmad* 2010, *supra* note 54 at para 44. See also *Amara*, *supra* note 38 where the report was prepared based on 4 hours of interviews with the offender.

this paper to fully canvass the findings of these reports on the mental health of terrorism offenders. However, the key findings are relevant to appreciating the role psychiatric and psychological experts played in terrorism prosecutions and how judges received their evidence. Five reports found that the offender expressed remorse or regret over their offence.[82] Two reports found the offender made no such expression. Notably, in two instances (*Abdelhaleem* and *Jaser*), religious or ideological motivation was considered a less significant factor in the commission of the offence.[83] Dr. Ghannam, for instance, determined that Mr. Jaser's offence followed from his drug addiction. Dr. Bloom found one Toronto 18 plotter lacked entrenched ideological views and was motivated out of a desire for financial gain, to please his father, and to achieve notoriety in the Islamic world.[84] Moreover, several sentencing reports found that the offenders were high functioning, socially responsible, and otherwise lacking the characteristics associated with violent offenders.[85] In several reports, these relatively positive findings led to a conclusion that the offender's rehabilitative prospects were positive and their recidivism risk was low.[86] Nevertheless, despite these relatively favourable conclusions in sentencing reports, judges seemed to place minimal weight on these reports and imposed relatively harsh sentences.[87] This outcome will be evaluated in more detail below, when discussing the judicial treatment of experts to date.

Psychiatric and psychological expert evidence was also tendered on the issue of whether an accused was NRC or unfit to stand trial. In these cases, experts attempted to distinguish between mental illness and mere extremist religious beliefs. *Ali* is the sole case where experts testified in relation to a defence of NCR. In *Ali,* the accused stabbed several uniformed personnel at a Canadian Armed Forces recruiting centre. He was charged with a variety of crimes, including nine counts of committing indictable offences "for the

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82 Five reports made findings of remorse or regret: *Ahmed*, supra note 51 at para 24, 41, 46; *Amara*, *supra* note 38 at para 123; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 42; *Khalid Sentencing*, *supra* note 54 at para 54; *Gaya*, *supra* note 54 at para 35.

83 *Abdelhaleem*, *supra* note 51 at para 51; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38.

84 *Abdelhaleem*, *supra* note 51 at para 52.

85 *Ahmed*, *supra* note 51 at para 36; *Amara*, *supra* note 38 at para 45; *Khalid* Sentencing, *supra* note 54 at paras 27–30; *Gaya*, *supra* note 55 at para 43.

86 Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14 at 562–66.

87 For more discussion, see Nesbitt, Oxoby & Potier, *supra* note 5 at 594–95.

benefit of, at the direction of or in association with a terrorist group" contrary to section 83.2 of the *Criminal Code*.[88] Two experts testified at trial, one for the defence (Dr. Gary Chaimowitz) and one for the Crown (Dr. Phillip Klassen). The experts agreed that Mr. Ali had schizophrenia and that his illness manifested through his religious beliefs.[89] Both experts agreed that Mr. Ali's mental illness contributed to the development of his radical views.[90] However, Dr. Klassen and Dr. Chaimowitz noted the possibility that Mr. Ali's actions could be attributed to his extremist religious beliefs, not his mental illness. Both experts ultimately rejected this hypothesis. Dr. Klassen tentatively concluded that it was more likely that Mr. Ali's illness coupled with his radical views compromised his moral reasoning and drove his actions. Dr. Chaimowitz agreed, although he was more adamant that Mr. Ali's delusions undermined his moral judgment.[91] Thus, both experts supported a finding that Mr. Ali was not criminally responsible. The trial judge accepted these findings and the guilty plea agreement, though the Crown proceeded separately with the associated terrorism charge, which was tried (and failed) separately.[92]

Experts were also called on to draw the line between mental illness and religious belief in *Esseghaier*.[93] In that case, Dr. Ramshaw — who was called by the defence and had previously appeared as a defence expert and court-appointed expert[94] — opined that Mr. Esseghaier was unfit to participate in sentencing. She found that Mr. Essaghaier was exhibiting delusions and other behavior indicating schizophrenia, noting that he believed "the officers and prisoners [at the Detention Centre] had conspired to make each of the days shorter by creating fake light in his cell."[95] By contrast, a second expert, Dr. Klassen — who had also appeared as a Crown expert in *Ali* — agreed that Essaghaier was mentally ill but found that he was fit to participate in the sentencing.[96] However, in cross-examination, Dr. Klassen opined that it was also possible that Esseghaier was not ill but just very

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88 *Ali*, *supra* note 41 at para 1.

89 *Ibid* at paras 10, 24–26.

90 *Ibid* at paras 42–43, 45–47.

91 *Ibid* at para 47.

92 *Ibid* at para 101.

93 *Esseghaier* (First Sentencing Hearing), *supra* note 40.

94 Dr. Ramshaw was a defence expert for Gaya and Khalid (*Gaya*, *supra* note 54 at paras 41–43; *Khalid* Sentencing, *supra* note 54 at paras 22–33).

95 *Esseghaier* (First Sentencing Hearing), *supra* note 40 at para 29.

96 *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 65.

religious.[97] The sentencing judge, for his part, rejected both experts' findings that Mr. Esseghaier was mentally ill, or at least too ill to be criminally responsible for his actions, and determined that he was fit to participate in the sentencing proceedings.[98]

As *Esseghaier* shows, the fact that terrorism and the instincts that motivate such behavior can be so hard to understand has led to some confusion in courts. In particular, there has been some confusion regarding whether an offender is suffering a serious mental illness or is guided by extreme religious or ideological beliefs that exist independent of the mental illness. The Canadian experience has borne out that the study of the relationship between extremist, terrorist beliefs and mental illnesses (like schizophrenia) remains a valid topic of study, if only because the relationship between the two seems to have caused problems for the courts — and for medical experts such as Dr. Klassen. Teasing out this relationship is not merely of academic interest, since *Ali*, *Esseghaier*, and *Dughmosh* show that determining the interaction between the two is relevant to issues of fitness and, ultimately, criminal responsibility. It may also be relevant to determining whether an offender is more amenable to rehabilitation (assuming that they can receive treatment for the mental illness that led to their offending), though courts to date have been extremely reluctant to accept such testimony. In sum, the link between mental illness and terrorism looks to be an area that will continue to require expert evidence in terrorism prosecutions.

2. Social Science Experts

Ten individuals have been qualified as social science experts in Canadian terrorism trials.[99] These ten individuals made a total of 12 appearance before various courts, accounting for 30% of all expert appearances in all terrorism trials. Compared to the other categories, the experts in this category came from a more diverse range of backgrounds. Five of these experts were employed in academia, with specializations varying from Canadian military history, Islamic faith and thought, Islamic law, and the sociology of hate. Two studied the history and politics of

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97 *Ibid* at para 81.

98 *Ibid* at para 82.

99 As noted above, the concept of social science evidence embraces expert evidence covering religious, political, historical, or sociological topics.

Somalia and worked as consultants or in journalism.[100] Three experts had specialized expertise in terrorism, two were private analysts, and one, Cst. Tarek Mokdad, was an investigator with the RCMP.[101] One expert was an Imam (Navaid Aziz).[102] Given the diversity of backgrounds, it is unsurprising that the subject-matter of their testimony was also highly variable. Broadly speaking, their testimony involved explaining religious ideology or texts,[103] general political or historical issues,[104] and the specific activities of a terrorist group.[105]

Despite these differences, most appearances by social science experts (ten out of 12) concerned the same general purpose: proving or disproving the *mens rea* and *actus reus* elements of the terrorism offences at trial and, specifically, the predicates of the definition of terrorist activity or the definition of a terrorist group. For instance, in *Hersi*, the accused was charged with knowingly attempting to participate in the activity of a terrorist group (section 83.18 of the *Criminal Code*) after planning a trip to Somalia, via Egypt, and informing an undercover officer that he intended to join Al-Shabaab.[106] The Crown's expert, Matthew Bryden, a political analyst, attested to both the *actus reus* and *mens rea* of the offence.[107] For one, he opined on whether Al-Shabaab was a terrorist group and how it recruits foreign fighters to engage in violent activity, both points going to the *actus reus* of the offence.[108] He also opined on how notorious Al-Shabaab's activities were, which went to establishing the knowledge requirement in the offence's *mens rea*.[109]

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100 Abdi Aynte and Matthew Bryden: *R v Hersi*, 2014 ONSC 1258 at para 10 [*Hersi* Bryden Voir Dire]; *Hersi Trial Transcripts*, at 321–22 (ll 30–ll 24) (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law).

101 *Hamdan*, *supra* note 51 at para 46. Dr. Reuven Paz and Dr. Rita Katz were private analysts. See *Namouh*, *supra* note 51 at paras 32, 45.

102 *Hamdan*, *supra* note 51 at para 55.

103 *Ibid*. See also *Khalid Gardiner Hearing*, *supra* note 61 at para 100; *Jamali* 2017, *supra* note 51 at para 11.

104 *Hersi*, *supra* note 51 at paras 20–21, 23–24; *Ahmed Trial Transcript*, *supra* note 61 at 1276–1302.

105 In *Namouh*, Dr. Katz expounded on the activity of the al-Qaeda linked Global Islamic Media Front. See *Namouh*, *supra* note 51 at paras 28, 48–62. In *Hersi*, Bryden and Aynte opined on al-Shabab. See *Hersi*, *supra* note 51 at paras 20, 24.

106 *Hersi*, *supra* note 51 at paras 10–11.

107 *Hersi* Bryden Voir Dire, *supra* note 100 at para 19.

108 *Ibid*.

109 *Ibid*. See also *Hersi*, *supra* note 51 at paras 20–21.

Ahmed provides another example. In that case, Misbahuddin Ahmed was charged under section 83.18 of the *Criminal Code* — participating in the activities of a terrorist group — after plotting with his co-accused, Hiva Alizadeh, to detonate a bomb.[110] The Crown's theory was that Mr. Ahmed and Mr. Alizadeh formed a terrorist group, drawing upon materials and skills that Mr. Alizadeh acquired in an Afghan training camp.[111] To support this claim, the Crown led evidence from Dr. Sean Maloney, a military historian with expertise in Afghanistan, who opined on the type of training camp Mr. Alizadeh attended.[112] Dr. Maloney explained that the camps provided extremist religious indoctrination, gave instruction on conducting violent attacks (including bomb-making), and encouraged attacks in the countries of its foreign participants.[113] Thus, Dr. Maloney's evidence went to establishing that, together, Mr. Ahmed and Mr. Alizadeh formed a terrorist "entity" whose purpose was carrying out terrorist activity (which, again, is one definition of a terrorist group in the *Criminal Code*).

In general, social science experts provided evidence on the *actus reus* and *mens rea* — such as that discussed above — in three different ways: interpreting specific pieces of evidence (e.g., Navaid Aziz in *Hamdan*), providing a general background (e.g., Dr. Maloney in *Ahmed*), and, in one case, expounding on an in-depth analysis of an accused's activities within a terrorist group (Dr. Rita Katz in *Namouh*).[114] The first approach, a focused interpretation of specific pieces of evidence, arose in *Hamdan* and *Ahmed*. In *Hamdan*, two experts, Cst. Tarek Mokdad and Navaid Aziz offered opinion evidence on the question of whether Mr. Hamdan's Facebook posts counselled terrorist activity.[115] Cst. Mokdad is an investigator with the RCMP who developed an interest in "jihadist extremist groups", cultivated

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110 *Ahmed*, *supra* note 51 at para 1.

111 Chris Cobb, "Ahmed Says He Wanted to Set His Alleged Terrorism Accomplice on Right Path", *The Ottawa Citizen* (24 June 2014), online: <ottawacitizen.com/news/local-news/ahmed-says-he-wanted-to-set-his-alleged-terrorism-accomplice-on-right-path> [perma.cc/3928-LWKW]; Colin Freeze, "Details of terror plot emerge after Ottawa man's guilty plea", *The Globe and Mail* (17 September 2014), online: <www.theglobeandmail.com/news/> [perma.cc/TA97-RW6H].

112 *Ahmed Trial Transcript*, *supra* note 61 at 1298–1301.

113 *Ibid*; Dr Sean Maloney, "Jihadist Activities in Afghanistan: An Overview" (Expert Report) at 16–17 (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law).

114 *Hamdan*, *supra* note 51 at paras 46, 55; *Ahmed Trial Transcript*, *supra* note 61 at 1276–1302; *Namouh*, *supra* note 51 at paras 71–73.

115 *Hamdan*, *supra* note 51 at paras 99–102, 106, 148–50.

without formal study or education on the topic.[116] Mr. Aziz is an Imam and the leader of an institute in Calgary offering Islamic studies.[117] In *Hamdan*, both experts went through individual Facebook posts and offered their opinion on the ideological or political message that they encapsulated. For instance, where there was a post quoted from the Quran or Hadiths, Mr. Aziz explained how mainstream Muslims would interpret the passage compared to Salafist jihadists, and he offered his view on which interpretation Mr. Hamdan seemed to favour and why.[118] Expert testimony on the ideological or political significance of individual pieces of evidence also figured in *Ahmed*. In that case, Dr. Sean Maloney opined, *inter alia*, on the ideological significance of a video found on compact disks in Mr. Ahmed and Mr. Alizadeh's residence.[119] The video depicted individuals participating in military drills, purportedly in Afghanistan. Dr. Maloney explained the features of the video that indicated it depicted an al-Qaeda training camp.[120]

Not all social science evidence was so narrowly focused on interpreting individual pieces of evidence. Social science experts also provided general background relevant to interpreting the evidential record on an accused's activities as a whole. In *Hamdan*, for instance, Cst. Mokdad surveyed ISIS' use of social media to propagate its message and recruit supporters. Cst. Mokdad explained that Mr. Hamdan's posts picked-up and parroted ISIS messaging.[121] In *Ahmed*, Dr. Maloney opined on the network of terrorist training camps, various jihadist groups founded in Afghanistan, and the recruitment of trainees from all over the world to these camps.[122] The Crown expert in *Hersi*, Matthew Bryden, and the defence expert, Abdi Aynte, also provided a general overview of Al-Shabaab's activity.[123] In these instances, the experts were not so focused on interpreting the ideological or political significance of individual pieces of evidence, but rather on providing a context in which to interpret the accused's activities.

The final (third) approach, where an expert provides an in-depth analysis of the accused's terrorist activities, arose in *Namouh*. In *Namouh*, the

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116 *Ibid* at para 86.
117 *Ibid* at para 99.
118 *Ibid* at paras 148–150.
119 *Ahmed Trial Transcript*, *supra* note 61 at 1303.
120 *Ibid* at 1302–03.
121 *Hamdan*, *supra* note 51 at para 46.
122 *Ahmed Trial Transcript*, *supra* note 61 at 1302.
123 *Hersi*, *supra* note 51 at 20–21, 23–24; *Hersi* Bryden Voir Dire, *supra* note 100 at para 28.

accused was alleged to have participated in al–Qaeda's propaganda wing, the Global Islamic Media Front (GIMF). The Crown's main expert witness was Dr. Rita Katz, the director of SITE Intelligence (a private firm providing intelligence and analyses on terrorist groups).[124] While Dr. Katz's report consisted of a general overview of GIMF's operations, it also detailed her organization's investigation of Mr. Namouh's alleged activities on GIMF. She documented, for instance, that a special thread was created on GIMF's forum to praise Mr. Namouh's contributions to GIMF.[125] She also noted Mr. Namouh's statements on the GIMF site, wherein he commented on "his hatred for the West, and even for other non-jihadist Muslims, as well as his strong love for jihad and al-Qaeda."[126] Thus, Dr. Katz's evidence relayed a detailed investigation of the accused's activities and covered what typically might come from a police investigator rather than a private expert witness.

Expert social science evidence was also led in *Nuttall* to support the accused's entrapment application. Following their conviction at trial, Mr. Nuttall and Ms. Korody brought an entrapment application, maintaining that the RCMP induced them to plant the bomb at the BC legislature that led to their conviction. To support their application, they tendered expert evidence from Dr. Omid Safi, a professor in Islamic faith and thought.[127] Dr. Safi's testified that the undercover RCMP officer working with Mr. Nuttall and Ms. Korody misrepresented Islamic tenets and encouraged them to adopt a narrow, radical, and violent view of Islam.[128] Butler J. explained how this evidence supported a finding of entrapment:

> As Dr. Safi clarified in his evidence, by promoting the introspective approach to the interpretation of the faith, and at the same time failing to point out to Mr. Nuttall the Modernist non-violent approach to jihad, the RCMP isolated Mr. Nuttall from any moderate viewpoint and simultaneously propelled him toward a more radical concept of jihad.[129]

As already noted, social science experts were the second most frequent category of experts called in terrorism trials. Yet, given the ideological and motive requirements in the definition of terrorist activity, it seems that social science experts ought to have been called even more frequently. It is,

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124 *Namouh*, *supra* note 51 at para 32.
125 *Ibid* at para 71.
126 *Ibid* at para 72
127 *Nuttall Entrapment Application*, *supra* note 38 at para 476.
128 *Ibid* at paras 482–83, 485–86, 489.
129 *Ibid* at para 480.

however, important to keep in mind that social science expertise is particularly relevant at the trial stage, where the Crown and defence are contesting whether the elements of the offences are met. Thus, where an offender pled guilty, it figures that social science experts will not feature prominently in their case (the *Gardiner* hearing in *Khalid* is the exception here).[130] Indeed, at the trial stage, social science experts were the most frequently cited expert — only seven technical experts and two psychiatry or psychology experts figured at the trial stage, whereas social science experts made 11 appearances at this stage of proceedings.[131] Nevertheless, a social science expert did not appear in nine of the 16 cases that went to trial.[132]

There are at least two factors that seem to have excused resort to social science expert witnesses in some of these instances. First, trial judges have relied on judicial notice to substitute expert opinion evidence in at least two cases that we uncovered. In both of these cases, judges relied on judicial notice in determining whether the armed conflict exception applied, which operates as a defence to terrorism charges where the defendant can prove that they were operating within the bounds of international law associated with armed conflict. Put simply, it ensures that an otherwise legal military bombing during war (armed conflict, technically) is not considered terrorism. In *Khawaja*, the accused claimed that he built a detonator to support the Taliban government in Afghanistan and so, as a result of being a legitimate participant in an international armed conflict, the armed conflict exception applied. Rather than resorting to extensive submissions or expert evidence as to whether there was an armed conflict in Afghanistan and, more to the point, whether the armed insurgents' (Taliban's) activities were terrorist in nature (and thus, the armed conflict exception did not apply), the trial judge simply took judicial notice of the fact that there was an armed conflict in Afghanistan at the time of Mr. Khawaja's offences and that the insurgents' actions were terrorist. Thus, it fell outside of the bounds

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130 Pursuant to the *Criminal Code*, *supra* note 1, s 724(3), a *Gardiner* hearing is held during sentencing when there is a dispute or conflict between the parties concerning the facts that are relevant to the determination of an offender's sentence following a guilty plea. During the hearing, evidence is led on the fact(s) in issue according to the ordinary rules of evidence. See also *R v Gardiner*, [1982] 2 SCR 368, 140 DLR (3rd) 612.

131 Social science experts figured only in *Hamdan*, *Hersi*, *Ahmed*, *Khalid*, *Nuttall*, *Namouh*, and *Jamali*.

132 As noted above, social science experts made a total of 12 appearances. Mohamed Fadel's appearance at a *Gardiner* hearing was the sole social science appearance outside of the trial stage.

of the armed conflict exception.[133] The same issue arose in *R v LSJPA*. In that case, the trial judge relied on judicial notice to find an armed conflict existed in Syria and that ISIS was a terrorist group.[134] *Khawaja* and *LSJPA* show that Crown and defence counsel may encourage a trial judge to rely on judicial notice, at least as it relates to the applicability of the armed conflict exception in places like Syria or Afghanistan. This factor accounts for the absence of expert evidence on, at least, the armed conflict exception — which is admittedly rather rare and tangential to the vast majority of cases so far (indeed, it was raised only in these two cases and not as a major issue for trial).

Second, in a few cases, the evidence tendered at trial sufficed, seemingly without the need for opinion evidence, to show the ideological purpose and motive of the accused, as well their involvement with a terrorist group. For example, in *Habib*, the accused was charged with attempting to leave Canada for the purpose of participating in the activity of a terrorist group (section 83.181 of the *Criminal Code*). During the RCMP's investigation of Mr. Habib, they set up a Mr. Big operation,[135] which led Mr. Habib to admit that he joined ISIS in Syria, subsequently returned to Canada, and planned to rejoin the group.[136] Since ISIS is a listed terrorist entity, Habib's admission provided a firm basis to infer that the elements of section 83.181 were met in his case. As but another prominent example, in *Khawaja*, the judge drew inferences from the lay witness testimony attesting to Mr. Khawaja's violent extremist views, rather than relying on experts to help

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133 See *Khawaja* ONSC, *supra* note 12 at paras 1, 5–6. See especially *Khawaja* ONSC, *supra* note 12 at para 125. *Cf* United Nations Security Council, *Resolution 1378 (2001)* S Res 1378 (2001), UNSCOR, 2001, 1 and other UN Security Council resolutions on which the judge relied to make the finding. See also *Criminal Code, supra* note 1 at 83.01(1)(b): The armed conflict exception "does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict." The international law requirement will exclude acts intended to terrorize a population, since such actions contravene the *Geneva Conventions*: *Khawaja* SCC, *supra* note 73 at para 102.

134 *LSJPA*, *supra* note 51 at paras 233–57.

135 For an excellent article on Mr. Big Stings in Canada, see Adelina Iftene, "The Hart of the (Mr.) Big Problem" (2016) 63 Crim LQ 151.

136 *Habib*, *supra* note 51 at paras 60–62.

draw the link for the court.[137]

With that said, we had still expected to see a good deal more social science experts at terrorism trials. To start, all of the trials to date have concerned al-Qaida-inspired terrorism, meaning that understanding religious and cultural texts not well-understood by the judges presiding over Canadian terrorism cases to date has played a prominent role in almost every case to date. Moreover, understanding foreign terrorist groups, or cultural touchstones of Islamist extremist ideology has been central to every trial to date (the one non-Islamist extremist prosecution to date was a guilty plea, not a trial). Finally, as we will discuss in further detail below, the defence presumably has a real interest in adding nuance to how an accused might understand a religious text or ideological communication but have not made significant use of social science experts to date.

3. Technical Experts

Six technical experts figured in terrorism prosecutions, accounting for ten appearance or 25% of all appearances. Five were employed with the RCMP and one worked as a private consultant.[138] None demonstrated special expertise or interest in terrorism offenders. Broadly speaking, technical experts further subdivided into two types: those with expertise in explosives and those with expertise in digital forensics (technology).

Expert evidence on explosives was relevant to three issues. First, it went to support a finding of guilt on elements of the predicate offence to a terrorism charge (making a bomb for a terrorist group, for example) and the definition of terrorist activity. 12 individuals were charged with a terrorism offence and a predicate offence involving explosives.[139] In the cases that

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137 *Khawaja* ONSC, *supra* note 12 at paras 7, 130. Three witnesses, along with Mr. Khawaja's own correspondence, established his interest in and desire to support violent extremist activity.

138 The technical experts employed with the RCMP were Sgt. Sylvain Fiset, Donna Garbutt, Cpl. Barry Salt, Cst. Peter Cucheran, and Cst. Robin Shook. The private consultant was Kevin Ripa. For complete citations on these experts' employment, see Appendix B below.

139 The 12 cases were: *Khawaja* ONSC, *supra* note 12 at para 1; El Mahdi Jamali and Sabrine Djermane ("Montreal couple cleared of terror charges, boyfriend guilty of explosives-related offence", *CBC News* (19 December 2017), online: <www.cbc.ca/news/canada/> [perma.cc/6YBS-A2WM] [CBC News, "Montreal Couple Cleared"]; *Jamali*, *supra* note 38; *Abdelhaleem*, *supra* note 51; *R v Alizadeh*, 2014 ONSC 5421; *Amara*, *supra* note 38 at paras 4–5; *Gaya*, *supra* note 54 at para 2; *Khalid* Sentencing, *supra* note 54 at para 3; John Nuttall and Amanda Korody in *Nuttall Entrapment Application*, *supra* note

went to trial, expert opinion evidence was led to interpret the evidence of explosives in all but one case. For instance, in *Khawaja*, the accused worked on a detonator, nicknamed the "hifidigimonster", for a terrorist cell in London, England. The Crown charged Mr. Khawaja with two counts under section 83.2, where the predicate offences were the explosive offences in subsection 81(1)(c) and subsection 81(1)(d) of the *Criminal Code*.[140] To support the charges under these predicate offences, the Crown tendered the expert opinion of Sgt. Fiset, who opined that the electrical components discovered in the accused's possession could function as a detonator for a 600 kg bomb.[141] This amount of explosives, Sgt. Fiset explained, would cause serious damage to infrastructure, death, and serious bodily harm. The trial judge found Sgt. Fiset's evidence went to establishing that Mr. Khawaja committed both of the predicate explosive offences.[142]

Second, in several cases, expert evidence on explosives was also relevant to the *mens rea* of the terrorism offence proper. *Khawaja* again provides an illustrative example. In that case, Mr. Khawaja maintained that he built the detonator for use in Afghanistan, although the Crown showed that the terrorist cell that commissioned the detonator planned to use it for a fertilizer bomb in London.[143] In his testimony, Sgt. Fiset opined that the detonator was most useful in underdeveloped environments (like Afghanistan), not a developed urban environment, as one would just use a cellphone in a city.[144] This finding led the trial judge to conclude that Mr. Khawaja was ultimately in the dark about the plan to use the detonator in London. Consequently, the trial judge concluded that the Crown failed to show Mr. Khawaja had the requisite *mens rea* for a section 83.2 offence (the

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38 at para 5; Misbahuddin Ahmed (Chris Cobb, "Convicted terrorist unaware he was committing crime, expert testifies", *The Ottawa Citizen* (15 October 2014), online: <ottawacitizen.com/news/local-news/convicted-terrorist-unaware-he-was-committing-crime-expert-testifies> [perma.cc/GAV5-FCF7]; Qayyum Abdul Jamal (Isabel Teotonio, "Four Have Terror Charges Stayed", *The Toronto Star* (15 April 2008), online: <www.thestar.com/news/gta/2008/04/15/four_have_terror_charges_stayed.html> [perma.cc/FPK2-UYCW] [Teotonio, "Four Have Charges Stayed"]). Ahmed was the sole individual whose case proceeded to trial on an explosive offence, but no explosive expert apparently testified.

140 *Khawaja* ONSC, *supra* note 12 at para 1.

141 *Ibid* at paras 61–67.

142 *Ibid* at para 100.

143 *Ibid* at paras 6, 109.

144 *Ibid* at paras 70–71.

commission of an offence for a terrorist group).[145] Lastly, in three of the Toronto 18 cases, the sentencing judge relied on an expert report regarding the extent of the explosive devices at issue in that terrorism plot. The judge found that to be indicative of the moral culpability of the offenders.[146] Thus, evidence from explosive experts played at least three different roles in terrorism prosecutions.

The second type of technical expert evidence we identified spoke to digital forensics. There are two examples where this type of expert evidence was led. The first arose in *Hamdan.* In that case, Mr. Hamdan was charged with three counts of counselling the commission of an offence for the benefit of a terrorist group and one count of instructing persons to carry out terrorist activity.[147] The counts related to a series of Facebook (social media) posts. The RCMP used non-forensic grade software to take screenshots of the posts, which omitted the posts' metadata and source code. At a *voir dire* on the admissibility of the posts, defence counsel maintained that since this information was lost, the screenshots did not meet the best evidence rule, nor could they be authenticated per section 31.1 of the *Canada Evidence Act*.[148] In short, the posts were inadmissible. During the *voir dire*, both the Crown and defence called expert evidence relating to digital forensics. The defence expert was Kevin Ripa, a private consultant, who was qualified as an "expert in the field of digital forensic analysis, and internet and webpage architecture."[149] Mr. Ripa opined that the failure to capture the source code meant that he was unable to analyze whether the posts had been altered or corrupted.[150] The trial judge accepted Mr. Ripa's evidence that the RCMP was less than meticulous in capturing the posts.[151] Nevertheless, the judge found that the screenshots satisfied the best evidence rule and could be admitted, citing the relatively low bar for satisfying these two requirements.[152]

The second example of expert evidence on digital forensics arose in *Nuttall.* In that case, Mr. Nuttall and Ms. Korody were charged under

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145 *Ibid* at paras 100–01.

146 *Amara*, *supra* note 38 at paras 38, 102; *Gaya*, *supra* note 54 at para 27; *Khalid Gardiner Hearing*, *supra* note 61 at para 55.

147 *Hamdan*, *supra* note 51 at para 2.

148 *Hamdan Voir Dire*, *supra* note 62 at paras 39–41.

149 *Ibid* at para 31.

150 *Ibid* at para 33.

151 *Ibid* at paras 79–80.

152 *Ibid* at paras 43–52, 82–85.

section 83.2, committing an indictable offence for the benefit of a terrorist group, and section 83.19, knowingly facilitating terrorist activity.[153] The charges arose out of an undercover investigation into what became Nuttall and Korody's plan to place a homemade explosive on the grounds of the British Columbia legislature in Victoria. During their jury trial, the Crown called Cpl. Barry Salt, an expert in digital forensics, who opined on the extremist content found on the laptops taken from the accused (including an al-Qaeda bombmaking recipe), the significance of the content's location on the laptop, and the likelihood that one of the accused was responsible for accessing it.[154] While it is obviously unknown how the jury relied on this evidence, it was relevant, for instance, to establishing the high *mens rea* requirement in section 83.19, which requires that an accused specifically intended to carry out terrorist activity.[155]

As already noted, technical experts accounted for about 25% of appearances and were, therefore, the smallest category of experts appearing in terrorism prosecutions. There are several reasons that can account for the comparatively fewer appearances of technical experts to date. For one, in many of the terrorism cases prosecuted to date, the evidence grounding the charges in terrorism prosecutions has not required technical or scientific opinion expertise to interpret. In other words, while police had to call officers responsible for scraping social media or collecting bomb-making materials, it was sufficient for those experts to state the facts (that is, what they did, why, and so on). The courts have not largely seen it fit to require expert opinion evidence to help explain the meaning of the resultant evidence. Cases involving bomb-making plots are notable exceptions to this rule, although only three of the four trials involving bomb plots featured explosive experts.[156] As well, while several terrorism cases have involved RCMP investigators testifying to forensic searches of laptops or other electronic devices, this evidence appears to have been tendered through ordinary fact witnesses.[157] *Nuttall* and *Hamdan* are exceptions, as opinion

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153 *Nuttall*, *supra* note 38 at para 5.

154 Omand, "Laptop Full of Extremist Content", *supra* note 62.

155 Nesbitt & Hagg, *supra* note 4 at 637.

156 The four trials involving explosive offences were: Nuttall and Korody, Ahmed, Djermane and Jamali, and Khawaja (see the sources cited, n 139). The three trials featuring explosives experts were Nuttall and Korody, Djermane and Jamali, and Korody (see the sources cited, n 139).

157 See, for instance, *Khawaja* ONSC, *supra* note 12 at paras 16, 34–36, 48, 99; *LSJPA*, *supra* note 51 at paras 32–39.

evidence on digital forensics was required for the issues in those cases. Thus, the relatively low numbers of technical experts show that the evidence in terrorism cases calls, or at least has called, more frequently for religious or ideological expertise than technical or scientific expertise.

A second factor is that one form of technical expertise, translating foreign languages, was provided through individuals qualified as social science experts or dispensed with entirely because the relevant texts in evidence were already in English. For example, in *Hamdan*, Mr. Aziz provided Arabic translation and social science testimony at the same time.[158] The same practice occurred in *Khalid*, where Professor Fadel both translated and interpreted the religious texts on Mr. Khalid's computer.[159] *Khalid*, *Djermane*, and *Nuttall* are examples where the extremist literature in evidence was already in English.[160]

Finally, Canada has had relatively few cases to date concerning the actions of "foreign fighters" (as of 2013, sections 83.181, 83.191, and 83.202 of the *Criminal Code*).[161] Of those, all have either been guilty pleas or cases that were prosecuted on the basis of evidence collected within Canada (that is, as the individual is planning to travel), as opposed to cases where the evidence tendered in court was collected abroad. But, there is some concern that things might change and that Canada will have to address its "foreign fighter" problem.[162] The Crown will then almost certainly have to rely on evidence collected abroad — in places like Syria and Somalia where Canadian officials have no known footprint — to secure prosecutions. This, in turn, will require more complex evidence including, one would imagine, more technical evidence related to social media posts, wiretaps, geolocations (including those provided by other countries like Canada's so-called "Five-Eyes" partners), and so on. If that is correct, then we may indeed see an increase in technical experts in terrorism trials to come. Likewise, *Hamdan* was the first case that contemplated Canada's "instructing" a terrorist group offence (section 83.21), and there have not yet been charges under Canada's

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158 *Hamdan*, *supra* note 51 at para 55.

159 See *Khalid Gardiner Hearing*, *supra* note 61 at paras 98, 100.

160 *Ibid*. See also Paul Cherry, "Terror Trial: Bomb Recipe Came from al-Qaida Publication, Court Told", *The Montreal Gazette* (30 October 2017), online: <montrealgazette.com/news/local-news/terror-trial-bomb-recipe-came-from-al-qaidas-inspire-court-told> [perma.cc/TMM4-Q8ZD] [Cherry, "Terror Trial"]; Omand, "Laptop Full of Extremist Content," *supra* note 62.

161 See Nesbitt, *supra* note 2 at 115, 120–22.

162 *Ibid*.

recently-updated "counselling [the] commission of [a] terrorism offence" provision (which was updated as of June 2019 in *An Act Respecting National Security, 2017*).[163] As *Hamdan* revealed, it is likely that future charges under such provisions would contemplate at least some online activity, thereby creating the possibility of more experts in this technical area. As a result, though the number of technical experts called to date was lower than we had initially hypothesized, that might change as the type of cases — and particularly the type of terrorism offence charged — changes.

B. When was the Evidence Called and by Whom?

We also looked at when the expert was called, that is to say, the stage of trial, as well as by whom the expert was called (defence or Crown). The table below provides a visual:[164]

	Pretrial	Trial	Sentencing
Crown Experts	0	1	0
	0	8	0
	0	8	4
Defence Experts	2	1	11
	0	3	1
	0	1	0

Psychology: Social Science: Technical:

163 Bill C-59, *An Act respecting national security matters*, 1st Sess, 42nd Parl, 2017 (as passed by the House of Commons 19 June 2018); *Criminal Code*, *supra* note 1, s 83.221.

164 This table shows the number of expert appearances by stage of proceedings. Three psychiatric experts appearing at behest of *amicus* are excluded: the two psychiatric experts at sentencing in *Esseghaier* (First Sentencing Hearing), *supra* note 40 at paras 26 and 36 (Dr. Lisa Ramshaw and Dr. Phillip Klassen, respectively) and the expert in *Dughmosh*, *supra* note 42 at para 19 (Dr. Sumeeta Chatterjee), who assessed the availability of an NCR defence and whose findings were also relied on in sentencing. Dr. Omid Safi, who appeared on behalf of the defence in *Nuttall Entrapment Application*, *supra* note 38 is counted at the trial stage.

(Further breakdowns of the Pretrial,[165] Trial,[166] and Sentencing[167] categories are provided in the footnotes below).

Though the above table does not show it, three psychiatric experts have also appeared as *amici* at the behest of trial judges: two psychiatric experts in *Esseghaier* at sentencing and one in *Dughmosh*, who assessed the availability of an NCR defence and whose findings were also relied on in sentencing.[168]

One can see from the table that the tendency is for the Crown to call experts during trial proper. This can be explained — and indeed, the

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165 During pre-trial proceedings, defence counsel tendered expert evidence from two individuals: Dr. Vinesh Gupta and Dr. Anne-Marie Dewhurst. See *JR (Alberta Youth)*, *supra* note 63.

166 During trials, the Crown tendered expert evidence from the following individuals: Dr. Sean Maloney (*Ahmed Trial Transcript*, *supra* note 61 at 1263), Cst. Tarek Mokdad (*Jamali* 2017, *supra* note 51 at para 11; *Hamdan*, *supra* note 51 at para 46; *LSJPA*, *supra* note 51 at para 60), Sgt. Sylvain Fiset (*R v Jamali* 2017, *supra* note 38 at para 24; *Khawaja* ONSC, *supra* note 12 at para 61), Dr. Rita Katz (*Namouh*, *supra* note 51 at para 32), Dr. Reuven Paz (*Namouh*, *supra* note 51 at paras 45–46), Cst. Peter Cucheran (Omand, "B.C. Bomb Plot Trial", *supra* note 62), Cpl. Barry Salt (Omand, "Laptop Full of Extremist Content", *supra* note 63), Matthew Bryden (*Hersi*, *supra* note 51 at paras 20–21; *Hersi* Bryden Voir Dire, *supra* note 100), and Dr. Philip Klassen (*Ali*, *supra* note 41 at para 7). This count excludes Dr. Sumeeta Chatterjee, who appeared on behalf of the amicus in *Dughmosh*, *supra* note 42 at para 19. Defence counsel tendered expert evidence from the following individuals: Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 7), Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 55), Abdi Aynte (*Hersi*, *supra* note 51 at paras 20–21), Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at para 476), and Dr. Barbara Perry (*Hersi* Dr. Perry Voir Dire, *supra* note 61).

167 During sentencing, the Crown tendered expert evidence from two individuals: Donna Grabutt (Teotonio, *supra* note 60; *Amara*, *supra* note 38 at para 38, *Khalid Gardiner Hearing*, *supra* note 61 at para 55), Sgt. Sylvain Fiset (Teotonio, *supra* note 60; *Amara*, *supra* note 38 at para 38; *Khalid Gardiner Hearing*, *supra* note 62 at para 55). This count excludes the two psychiatric experts called in *Esseghaier*, supra note 40 at paras 26, 36, who appeared at the behest of *amici* (Dr. Lisa Ramshaw and Dr. Phillip Klassen). The defence tendered expert evidence from the following individuals: Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at para 46), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 37; *Amara*, *supra* note 38 at para 31; *Chand*, *supra* note at para 65), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Khalid* Sentencing, *supra* note 54 at para 26), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Nathan Pollock (*NY*, *supra* note 51 at para 7) and Mohammed Fadel (*Khalid Gardiner Hearing*, *supra* note 61 at para 59).

168 *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Dughmosh*, *supra* note 42 at paras 19, 35.

evidence seems to bear it out — fairly simply. First, it is on the Crown to prove terrorist activity beyond a reasonable doubt and, particularly, the religious or ideological motive. Given that 55 of 56 charges to date have been against "Islamist Extremists", the Crown would have to prove religious ideology and motivation.[169] Second, this sort of information, as well as details regarding terrorist financing, bomb making, authentication of online videos, and so on, all require technical expertise. It is thus no surprise to see six RCMP officers testifying as experts (and, as discussed below, a host of other RCMP officers offering what is arguably expert testimony without ever having been formally admitted as expert witnesses).[170]

Nevertheless, it is surprising to see that only four defence experts — three in the social sciences — have been called during trial (pre-guilt) to speak to the elements of the offences, particularly when compared with the 16 Crown experts — eight in the social sciences. By contrast, the defence called all of the psychiatric evidence at sentencing, which is twice as many experts as the defence called at any other stage of proceedings.

For reasons that will be apparent momentarily, this brings us nicely to the judicial treatment of experts to date, including how they have treated experts at various stages of the proceedings. For a large portion of experts, the treatment is classified as unknown (see Appendix A for the associated numbers).[171] This is because either the expert appeared in a jury trial or there was no decision available where an assessment of the judicial

treatment of the expert could be made. The following table sets out the judicial treatment of experts where such a determination[172] was possible:

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169 The exception was *Thambaithurai*, *supra* note 11, where the accused was convicted for terrorist financing for fundraising for the LTTE, a listed terrorist entity from Sri Lanka.

170 The RCMP experts were Sgt. Sylvain Fiset, Donna Garbutt, Cst. Tarek Mokdad, Cst. Peter Cucheran, Cst. Robin Shook, and Cpl. Barry Salt (see, n 63). See also *Hamdan Voir Dire*, *supra* note 62 at para 37; *Khawaja* ONSC, *supra* note 12.

171 The table below shows the treatment of experts in 30 out of the 40 recorded appearances. Treatment of experts in seven appearances is unknown, either because the judge mentioned the expert without comment or because there are no reported decisions assessing the expert's evidence that is available (as in, for example, a jury trial). The treatment of the psychiatric experts in *Esseghaier*, supra note 40 (Dr. Philip Klassen and Dr. Lisa Ramshaw) and *Dughmosh*, *supra* note 42 (Dr. Sumeeta Chatterjee) is known but excluded because they were appointed at the behest of the amicus.

172 Treatment was classed as positive if (a) the expert evidence was admitted and the expert's evidence was expressly relied on in the judge's reasoning or (b) the expert evidence was admitted and was otherwise treated positively (e.g., the judge praised the expert's methods). Treatment was classed as negative if (a) the judge refused to admit the expert

Psychology: Social Science: Technical:

(positive,[173] mixed,[174] and negative treatment[175])

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or (b) the judge admitted the expert evidence but criticized or found fault with the evidence. Mixed treatment arose where the judge's reasoning relied on aspects of the expert's opinion but criticized other parts of it.

173 The Crown experts that were treated positively were: Donna Garbutt (based on the sentencing judge's reliance on the findings of the expert report Garbutt prepared: Teotonio, *supra* note 60; *Amara*, *supra* note 38 at paras 38–39, 102; *Khalid Gardiner Hearing*, *supra* note 61 at para 55), Sgt. Sylvain Fiset, (Teotonio, *supra* note 60; *Amara*, *supra* note 38 at paras 38–39, 102; *Khalid Gardiner Hearing*, *supra* note 61 at para 55; *Khawaja* ONSC, *supra* note 12 at paras 61, 100), Matthew Bryden (*Hersi*, *supra* note 51 at para 20), Cst. Tarek Mokdad (*LSJPA*, *supra* note 51 at paras 60, 218), Dr. Rita Katz (*Namouh*, *supra* note 51 at paras 70–73), Dr. Philip Klassen (*Ali*, *supra* note 41 at para 18), and Dr. Reuven Paz (*Namouh*, *supra* note 51 at paras 45–46). The defence experts that were treated positively were: Abdi Aynte (*Hersi*, *supra* note 51 at paras 21, 24), Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at paras 476, 701, 703, 705, 707, 712, 715), Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 99), Mohammed Fadel (*Khalid Gardiner Hearing*, *supra* note 61 at para 100), Kevin Ripa (*Hamdan Voir Dire*, *supra* note 62 at para 101), Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 18), Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at paras 74, 76), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 69; *Khalid*, *supra* note 55 at paras 26, 63, 101, 128), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 69), and Dr. Nathan Pollock (*NY*, *supra* note 51 at paras 7–8).

174 Dr. Wagdy Loza was the defence expert with a mixed treatment (*Ahmed*, *supra* note 51 at paras 39, 45, 51).

175 The Crown experts that were treated negatively were: Cst. Tarek Mokdad (*Hamdan*, *supra* note 51 at paras 92–98) and Cst. Robin Shook (*Hamdan Voir Dire*, *supra* note 62 at paras 37, 79–80). The defence experts that were treated negatively were Dr. Arif Syed (*Amara*, *supra* note 38 at paras 95, 97–98), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 52–53), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 44); *Amara*, *supra* note 38 at paras 95, 97–98; *Chand*, *supra* note at

In general, Crown experts received more "positive" treatment from the courts than defence experts. However, this might also be explained by what experts were called and, in particular, for what purpose. In particular, psychological experts were the most disputed category of expert by a fair margin, whereas the testimonies of both social science and technical experts were generally treated favourably by judges. In fact, seven of 14 experts that we coded as related to psychology had mixed or negative treatment, compared to one out of six technical experts and two out of ten social science experts. As a result, at this stage, it is unclear whether the defence experts have been treated more unfavourably because they are defence experts, because they tend to speak at sentencing to rehabilitation and mental health (psychology experts), or perhaps simply because the low sample size is skewing the trends thus far and, as the use of experts increases, these numbers will adjust.

However, for now, there is qualitative evidence to suggest that the treatment of experts is more associated with their area of expertise than anything else and this should be scrutinized going forward, as the sample sizes increase. Several qualitative academic studies have now discussed the judicial treatment of rehabilitation of convicted terrorists and, particularly, how judges have tended to be skeptical of the possibility of terrorist rehabilitation. Judges have even gone so far as to put the onus on the defence to prove a capacity for rehabilitation, lest the accused's sentence be aggravated.[176] If that research is to be believed, it is perhaps not surprising then to see expert evidence dismissed when it speaks directly to prospects for rehabilitation. Instead, it may be that expert reports on recidivism and rehabilitation are not given significant weight by courts because, as several cases in our study suggest, there is not enough research on how to evaluate terrorism offenders:

> When it comes to predicting whether Mr. Chand is likely to [reoffend], I am not prepared to give Dr. Gojer's evidence much weight. This is not a criticism of Dr. Gojer but recognition of the fact that, at the moment, forensic psychiatry and psychology have little to offer in this area.[177]

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para 71), and Dr. Barbara Perry (*Hersi* Dr. Perry Voir Dire, *supra* note 61 at paras 29–31).

176 Nesbitt, Oxoby & Potier, *supra* note 5 at 597–603; Zaia, "Mental Health Experts in Terrorism Cases," *supra* note 14, particularly at 566–67.

177 *Chand*, *supra* note 55 at para 71. In *Abdelhaleem*, *supra* note 51 at para 48, Dr. Bloom stated that "[a]ssessing individuals charged with terrorism-related offences is a relatively novel area in the field of psychiatry" and he was "not aware of any universally accepted

If courts are particularly risk-averse when it comes to the sentencing of terrorism offenders (meaning that they tend toward longer sentences and carceral terms), which research strongly suggests has indeed been the case,[178] and if, as seems to be the case, they are looking for proof that an individual can be rehabilitated or will not re-offend,[179] then courts will be more likely to treat skeptically any expert evaluations that suggest the possibility of rehabilitation. A mere possibility offers insufficient certainty in the context of terrorism offences, meaning that while the expert opinion might be honestly received, it will also be kindly dismissed.

But, of course, this could also be a case of confirmation bias: even if we accept that courts have scrutinized the rehabilitation of terrorists in a way not seen with other crimes, this does not necessarily mean that courts have been biased, in the traditional sense of the term, against such experts in terrorism trials. Perhaps, as another option, it is because the quality of the expert testimony or the way that it was presented was lacking. This did indeed appear to be the case in several situations, including the trial of Raed Jaser:

> Dr. Ghannam's analysis of the wiretap evidence adduced at trial was biased and selective and did not live up to the standards of objectivity expected of expert witnesses. He appeared to simply adopt his client Jaser's analysis, rather than doing an independent, objective, and principled analysis of his own."[180]

In the end, the fact that psychology experts adduced primarily by defence at sentencing hearings seem to be treated differently from other expert testimony deserves further qualitative study, and we hope that researchers will take up the mantle. Will the trend continue, and will such expert testimony be dismissed to a greater degree than that of other experts? Is there good reason for that, that is, is it simply because of the quality of the field or the testimony? Or might it simply be that courts have less use for expert testimony with respect to prospects for rehabilitation than other types?

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risk assessment tool that could predict an individual's risk of recidivism for such offences." Dr. Wagdy Loza in *Ahmed*, *supra* note 51 at para 28 also noted that the "currently available" risk assessment tools have not yet been standardized for terrorism offenders and so are less appropriate for terrorism offenders. See generally Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14 at 562–66.

178 Nesbitt, Oxoby & Potier, *supra* note 5 at 597–603.

179 *Ibid* at 600–01. Recall here that, as mentioned, it seems that courts have put the onus on offenders to prove that they can be rehabilitated.

180 *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 52 [emphasis added].

C. Gender

Finally, of the experts called to date, six have been women and 23 have been men (79% percent men).[181] The disproportionate number of male experts is, perhaps cynically, not surprising, but it is another area worthy of further qualitative study. Does this reflect a failure of legal counsel to canvass for gender parity in expertise? Worse, does it signal an implicit bias? Is it reproducing the gender-breakdown in the fields that have provided experts in Canada (security or terrorism studies, for example)? There is, we suggest, clearly some interesting gender and qualitative (case study) work to be done to better understand the nature and effects of the gender breakdown of expert opinion evidence to date. We hope that others will use these rather stark initial numbers associated with the gender of expert witnesses at terrorism trials as an opportunity to evaluate the experts, their testimony, and their treatment from a gender lens. Some initial questions from the authors include: Is the trend to date merely the result of a small sample size, or is there a gendered element to the numbers (and, particularly, the low number of women experts)? Given that fewer female experts have been called to testify, it begs the question of how female experts are treated judicially, and what accounts for the treatment? A good example for a future case study is the judicial treatment of Dr. Barbara Perry's proposed testimony.[182] Dr. Perry is a leading Canadian luminary and an expert in extremism by any measure, whose treatment (followed/not) we classified as negative (not).[183] How does the treatment of those like Dr. Perry compare to similar experts who happen to be male? Does the Crown have a moral or even a legal obligation to help ensure better gender parity of

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181 The female experts were: Donna Garbutt, Dr. Sumeeta Chatterjee, Dr. Lisa Ramshaw, Dr. Barbara Perry, Dr. Ann Marie Dewhurst and Dr. Rita Katz. See Appendix B below for complete citations.

182 In *Hersi*, Dr. Barbara Perry was called to testify regarding whether an undercover police officer demonstrated Islamophobia in interpreting aspects of Hersi's behaviour. Dr. Perry's evidence was found inadmissible for various reasons: 1) it lacked probative value, since Dr. Perry admitted that she could not determine if the undercover officer displayed Islamophobia without knowing the officer, and Hersi never testified that his behaviour had an innocent motive that was misconstrued, 2) Her methods lacked reliability: "[i]mportantly, the individuals who were interviewed [for the study] were not selected randomly" and "[s]he is also inclined to overstate the evidence in order to make her point." See *Hersi* Dr. Perry Voir Dire, *supra* note 61 at paras 29–30.

183 For background on Dr. Perry and her expertise, see "Barbara Perry" (last visited 23 June 2020), online: *Ontario Tech, Social Science & Humanities* <socialscienceandhumanities.uoit.ca/research/researcher-profiles/dr.-barbara-perry.php> [perma.cc/4DPU-WNC8].

experts at trial? What role might the defence play, particularly considering the intersection of low total numbers of female experts called and the low total number of social science experts in particular called at trial (pre-guilt) by the defence? Whatever the answers are to these questions, the preliminary numbers herein indicate a fairly stark gender divide, one that begs for further study in the years to come.

IV. Applying the Data to Past and Future Terrorism Cases

In this final part, we draw out some of the implications and lessons learned from the above numbers, particularly those relevant to practitioners or for future study.

The data suggests that our three hypotheses largely held true, those being: (1) that Canada's terrorism offences are structured such that expert opinion evidence would play an important and prevalent role in terrorism prosecutions and, in particular, that social science expertise would be used to help understand the foundational (predicate) elements of terrorism offences (terrorist activity and terrorist groups); (2) that technical expertise would be used in at least some terrorism trials; and (3) that we would see a large number of psycho-social experts speaking to the capacity of accused. However, in this study, we did not see the scope of confirmation of our hypotheses that we expected. We have offered above some preliminary explanations for why that might have been the case and perhaps why that might change (and the number of experts used might even increase) going forward. Nevertheless, there is a need for further evaluation of some of the trends seen herein. There are also a number of implications and lessons learned from this study that will not be evident until the numbers above are pieced together. Let us do that now.

Experts were used in fully half of all completed trials. The Crown, for its part, relied on more experts at pre-verdict (at trial), whereas the defence tended to rely on psychiatric experts at sentencing proceedings. But we also saw that the testimonies of Crown experts and experts at trial were generally considered favourably by the judiciary, whereas the result was much more mixed for primarily defence experts testifying at sentencing hearings (or during pre-trial capacity hearings). So, the question arises: what, if anything, is the cause of this trend? Is there a trend emerging where defence experts are being dismissed and, if so, why? Is it that expert evidence with respect to

the facts of the case is generally being accepted — reinforcing the need for defence to find appropriate experts on crucial elements of the offence during trial — while psychology experts, which were almost exclusively called by defence during sentencing, tend to be dismissed by judges? The answers have a number of important repercussions, so let us briefly discuss them now, particularly as they relate to lessons for practitioners going forward.

First, we saw that the Crown was significantly more likely to call social science experts to speak to the elements of the terrorism offences. Coupled with the fact that such expertise was generally treated favourably by the court, this begs the question of why defence has not called many experts during trial, that is, pre-verdict? If this evidence is most likely to be accepted, which this study has found to date, and if the vast majority of these experts are speaking to foundational elements of the offence, which this study also found to be true, then defence lawyers in the future should be seriously considering whether they require their own experts at trial. Certainly the comparative value of calling an expert at trial versus at sentencing seems to be high, both because such experts to date are more likely to be treated favourably by the court and because the expertise founds the judicial understanding of the basic elements of the offence and thus, whether the person is found guilty at all.

Of course, one reason why we might be seeing a greater number of experts called by the Crown at trial is an inequality of arms as between the defence and the Crown. That is, given the importance of such experts to elements of the offences and thus, to findings of guilt or innocence, it is important that defence has the same capacity to call experts at trial for highly technical elements of terrorism trials. Now, this might implicate access to financial resources to pay experts, an inequality of arms that is often a concern as between the Crown and defence. But, if the government has simultaneously created a system of terrorism offences that require social science expertise to understand at the basic level (i.e., the elements of the offence) and we see legal aid cuts across the country, then we have a fairly serious systemic access to justice and rule of law issue here. That is mitigated somewhat by the reality that experts are supposed to help the court and not advocate for the party calling them, though that will likely be cold comfort for defence lawyers (and future accused) in Canada.

Inequality of arms in this sense does not simply mean the capacity to pay for needed experts. For defence lawyers — not accustomed to running terrorism trials in Canada, being that they remain fortunately rare and are

nobody's bread and butter — it also means who to be aware of when social science experts might help, how they can shed light on crucial issues, how defence might properly understand religious and social contexts that are used to create inferences about religiously-motivated terrorist offences, and so on. By contrast, the Crown prosecution service is developing a highly-qualified cadre of experts in terrorism and the December 2019 Mandate Letter to the Attorney General and Minister of Justice in Canada proposes the creation of a "Director of Terrorism Prosecution", which will serve to increase Crown capacity in this area.[184] Now, greater Crown capacity to properly understand and prosecute terrorism offences in Canada should surely be lauded. However, it is well worth monitoring the effect of these advancements on defence and particularly whether they have the capacity to offer needed expert evidence for their clients when it is so crucial to the outcome (guilt or innocence) of the case.

As to the defence tendency to call psycho-social evidence at sentencing, what we can say is that the quality of the expert and particularly their familiarity with mental health, terrorism, recidivism, and rehabilitation (and options to help with rehabilitation) seem to have made a big difference at trial in terms of judicial treatment of the expert testimony. Those with a specialization or experience in terrorism tended to garner greater judicial respect than generalists. Defence lawyers should keep this in mind when calling such experts in future trials.

Tactically, the other implications of these findings for defence lawyers are a little trickier. On the one hand, it would seem that defence resources are much better spent on experts at trial, both because the testimony of experts at trial is more likely to be treated favourably and because such experts tend to speak to the elements of the charged offences and thus, guilt or innocence. The flip side of this is that Canadian courts have created a unique "tactical burden"[185] on the defence to call evidence that speaks to the defendant's capacity for rehabilitation: "The [Court in Esseghaier] created an aggravating factor out of a traditional mitigating factor (rehabilitation) and then, presumably because rehabilitation is not a traditional aggravating factor in sentencing, did not require the Crown to

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184 Douglas Quan, "Can New Federal Unit Address Canada's 'Inconsistent Track Record' in Terrorism Prosecutions?", *The National Post* (2 January 2020), online: <nationalpost.com/news/canada/can-new-federal-unit-address-canadas-inconsistent-track-record-in-terrorism-prosecutions> [perma.cc/7TNG-WWAS].

185 *R v Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 97.

prove it beyond a reasonable doubt as is normally required for aggravating factors."[186] As such, the lesson for the defence might better be that they should be calling an expert to speak to the accused's capacity for rehabilitation in virtually all cases and thus, that the number of such experts to date is far too low.

In the end, the use of experts at sentencing coupled with the court's approach to sentencing terrorism (the creation of a tactical burden to speak to prospects for rehabilitation) and the tendency to dismiss such expert testimony whenever it is equivocal (which it always will be because one cannot predict with certainty whether an offender will re-offend) has required defence counsel to search out and pay experts to evaluate and speak to the defendant's capacity. This has also resulted in a situation where prospects for rehabilitation, though necessarily playing a key role at sentencing by virtue of the tactical burden on defence, nevertheless rarely play the "mitigating" role that the *Criminal Code* says it must.[187] Courts might reasonably ask whether, viewing the discrete rules and approaches to psycho-social expert testimony as a whole rather than in isolation, the system of sentencing terrorism offenders offers procedural fairness for the defence. To be clear, we make no claim one way or another here. Instead, we merely point out the inconsistency that seems to arise from the sentencing practices in terrorism cases and the burden that seems to have been placed on defence.

Courts — and perhaps future academics studying this area — might also reasonably ask whether there is a problem with understanding medical and psychological testimony, regardless of mental health and capacity, particularly as it is presented at sentencing. In other words, why are courts so much more likely to dismiss such medical testimony, which the experts obviously feel is relevant and helpful?

Finally, though not the original intention of this study, the authors anecdotally noted on more than one occasion instances where experts could have helped better understand an issue or piece of evidence at trial — usually a religious text or complex social dynamic — but they were not called. Perhaps this should have been foreseen: one of the impetuses for this study in the first place was why, in Canada's very first terrorism trial, *R v Khawaja*, the Crown asked the judge to take judicial notice of the fact that an armed conflict in Afghanistan existed at the relevant time (as has already been

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186 Nesbitt, Oxoby & Potier, *supra* note 5 at 600–01.

187 *Criminal Code*, *supra* note 1, s 718(d).

discussed).[188] As the trial judge noted therein, expert opinion evidence was indeed preferable to judicial notice on this question, given the issue seemingly required drawing inferences from specialized knowledge about the Taliban, their activities, and their motivation.[189] However, the trial judge determined that judicial notice could substitute for expert evidence in the case, given some facts about the Taliban were so notorious.[190] Relying on these facts, he concluded that the Taliban insurgency constituted terrorist activity and the exception did not apply to Mr. Khawaja.[191] Similarly, in *LSJPA*, the accused was charged with attempting to leave Canada for the purpose of participating in the activity of a terrorist group (section 83.181 of the *Criminal Code*). The Crown alleged that the accused planned to join ISIS in Syria. Similar to Mr. Khawaja's argument, the accused maintained the armed conflict exception applied to ISIS' activity in Syria. No expert evidence was led by either the Crown or defence on this point. This is a prime example of a situation where, arguably, the issues were far too complex for a finding of judicial notice and instead, an expert could have provided helpful information (likely to reach the same result).

But the authors also noted numerous incidents, prime for further study, where police witnesses or informants presented evidence that looked to skirt the line with expert opinion.[192] Religious symbology and ideation were discussed in every trial to date, yet social science experts only appeared 12 times across all cases. Some of this is surely the result of a decision not to require expert evidence in cases that, upon examination from afar, might be prime for such evidence. On the other hand, perhaps they actually used expert evidence without labelling it as such. However, surely some of these instances resulted from situations where neither the Crown, the judge, nor

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188 See *supra* note 133 and accompanying text.

189 *Khawaja* ONSC, *supra* note 12 at para 110.

190 *Ibid* at para 113.

191 The trial judge determined that the exception did not apply to Mr. Khawaja, not because the Taliban's actions met the definition of terrorist activity (something that is necessary to even engage the exception), but because Mr. Khawaja's was not actually fighting in the armed conflict in Afghanistan – the actions for which he was charged were carried out in Canada, the UK, and Pakistan. See *Khawaja* ONSC, *supra* note 12 at para 128. The Supreme Court of Canada rejected this interpretation of the exception's scope, holding that it could be relied on if the conflict occurred in a country other than the one where actions underlying the alleged offence took place. See *Khawaja* SCC, *supra* note 73 at para 96.

192 See for example *R v Ahmad,* 2009 CanLII 84777 (Ont SC) at paras 118–35.

even defence recognized the necessity, or at least the benefit, that expert social science evidence could provide.

This brings us to a final consideration, that being the real need in the context of terrorism trials to define the scope of witness' area(s) of expertise and keep their testimony within that circumscribed scope of expertise. The Goudge Inquiry into Coroner Charles Smith's testimony across a number of trials is perhaps the preeminent Canadian example of why it is so important to properly define the subject area of the witness' expertise and keep the questions, and thus the experts, within that scope.[193] A failure to so circumscribe expert opinion evidence is no small thing because it can, as was the case for Charles Smith (on more than one occasion), lead to wrongful convictions, the very worst outcome for a justice system. Yet, despite the importance of properly recognizing the need and place for expert opinion evidence, and then properly defining the expert's subject-matter expertise and limiting testimony thereto, this warning was perhaps not always followed in the cases studied here. Too often, it appears that complex phenomena that are surely outside the day-to-day training of most lawyers, such as the specifics of particular religions or ideologies, foreign conflicts, or technical international legal doctrines, were evaluated without the use of any experts. Meanwhile, some experts that were called in Canadian terrorism trials have been given extraordinary leeway to opine on a broad range of topics; examples of the latter include the testimony of Dr. Rita Katz in *Namouh*, who opined on virtually all aspects of the GIMF and Namouh's activities[194] and Cst. Tarek Mokdad in *Hamdan*, who opined on both religious doctrine and ISIS' recruitment practices, despite not being necessarily qualified — and certainly not qualified as an expert before the Court — for testimony on either subject.[195]

V. CONCLUSION

We hope that this study provides insight for prosecutors and defence on the use of experts and the opportunities for such opinion evidence to help the courts and the cases of the lawyers. Expert witnesses are indeed extremely important in terrorism trials, and it was the authors' finding that

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193 Goudge, *Report*, *supra* note 20 at 475.

194 *Namouh*, *supra* note 51.

195 *Hamdan*, *supra* note 51 at paras 46, 95–96.

we likely need to see more use of expert opinion evidence in future terrorism trials to ensure fair, robust legal outcomes.

We have noted some lessons learned for practitioners, as well as areas of concern or to keep an eye on moving forward. In particular, we have noted the likely need for greater resort to expert opinion evidence, particularly social science expertise, coupled with the possible rise in technical experts if Canada sees an increase in prosecutions against so-called foreign fighters. Defence, in particular, might look to make greater use of experts, particularly at the trial stage where their testimony is, thus far, treated more favourably and where defence experts can speak to crucial elements of the criminal offence — like whether an individual was truly motivated by a religious ideology — and thus, to the ultimate guilt or innocence of the accused. The defences' use of experts at sentencing, particularly as concerns the capacity for rehabilitation, is decidedly mixed. Defence may think about the value of experts at this stage, particularly if there is a trade-off with their capacity to bring experts at other times during the trial (particularly pre-findings of guilt). Of course, it may also be for the court to reckon with why the testimonies of recognized experts in their fields are being dismissed to an extent not seen with other experts (who have generally been treated favourably by the courts), when it is medical/psychological and speaks to rehabilitation.

We have also noted several concerns with respect to the use of expert evidence, particularly so if its use increases. First, there is a stark gender disparity in the experts called in trials to date, one that requires both further study and, surely, a correction. Second, there is a real risk of an inequality of arms between the prosecution and defence developing with respect to terrorism trials, especially given the reliance on expertise to speak to various foundational elements of terrorism offences.

A final concern for the court, and indeed for academics looking for future fruitful areas of study in terrorism trials, is the courts' anecdotal reliance on non-experts (or, at least, persons not properly qualified as experts) for insights that look startlingly like they require expertise — that they are beyond the ken of the common lawyer. Given what we know of the dangers of failing to properly scrutinize expert opinion evidence and the scope of expertise of those that offer opinion evidence, there is the real risk of wrongful convictions without increased scrutiny of both expert evidence and non-expert evidence that skirts the line with expert opinion evidence. A wrongful conviction is the very worst outcome for a legal system and, for

this reason alone, we hope going forward that expert evidence in terrorism trials will be given greater attention and scrutiny by researchers and practitioners alike.

Appendix A: List of Accused and Associated Experts in Terrorism Trials

Accused	Expert	Defence or Crown	Class	Stage of Proceedings	Treatment
Shareef Abdelhaleem	Dr. Hy Bloom[196]	D	Psychiatry/Psychology	Sentencing	Positive
Fahim Ahmad	Dr. Julian Gojer[197]	D	Psychiatry/Psychology	Sentencing	Negative
Misbahuddin Ahmed	Dr. Wagdy Loza[198]	D	Psychiatry/Psychology	Sentencing	Mixed
	Dr. Sean Maloney[199]	C	Social Science	Trial	Unknown
Ayanle Hassan Ali	Dr. Philip Klassen[200]	C	Psychiatry/Psychology	Trial	Positive
	Dr. Gary Chaimowitz[201]	D	Psychiatry/Psychology	Trial	Positive
Zakaria Amara	Dr. Arif Syed[202]	D	Psychiatry/Psychology	Sentencing	Negative
	Dr. Julian Gojer[203]	D	Psychiatry/Psychology	Sentencing	Negative
	Donna Garbutt[204]	C	Technical	Sentencing	Positive
	Sgt. Sylvain Fiset[205]	C	Technical	Sentencing	Positive

196 *Abdelhaleem*, *supra* note 51 at paras 46–57, 74–76, 78.
197 *Ahmad* 2010, *supra* note 54 at paras 37–44.
198 *Ahmed*, *supra* note 51 at paras 13–51; *R v Ahmed*, 2017 ONCA 76.
199 *Ahmed Trial Transcript*, *supra* note 61.
200 *Ali*, *supra* note 41 at paras 7–10.
201 *Ibid.*
202 *Amara Voir Dire*, *supra* note 66; *Amara*, *supra* note 38 at paras 44–61, 75–98.
203 *Amara Voir Dire*, *supra* note 66.
204 *Amara*, *supra* note 38.
205 *Ibid.*

Steven Vikash Chand	Dr. Julian Gojer[206]	D	Psychiatry/Psychology	Sentencing	Negative
Rehab Dughmosh	Dr. Sumeeta Chatterjee[207]	Amicus	Psychiatry/Psychology	Pre-Trial/Sentencing	Positive
Sabrine Djermane	Cst. Tarek Mokdad[208]	C	Social Science	Trial	Unknown
	Sgt. Sylvain Fiset[209]	C	Technical	Trial	Unknown
Chibeb Esseghaier	Dr. Lisa Ramshaw[210]	Amicus	Psychiatry/Psychology	Sentencing	Negative
	Dr. Philip Klassen[211]	Amicus	Psychiatry/Psychology	Sentencing	Mixed
Saad Gaya	Dr. Lisa Ramshaw[212]	D	Psychiatry/Psychology	Sentencing	Positive
	Dr. Steven Cohen[213]	D	Psychiatry/Psychology	Sentencing	Positive

206 *Chand*, *supra* note 55 at paras 65–71.

207 Rehab Dughmosh was subject to a psychiatric assessment before standing trial to determine the availability of a defence of not criminally responsible; this report was also relied on in her sentencing (see *Dughmosh*, *supra* note 42 at paras 19, 24–25, 27); Alyshah Hasham, "Canadian Tire Attacker Paranoid, Deluded, Court-Ordered Report Finds", *The Toronto Star* (21 January 2019), online: <www.thestar.com/news/gta/2019/01/21/canadian-tire-attacker-paranoid-deluded-court-ordered-report-finds.html> [perma.cc/4LWX-VNGF].

208 *Jamali* 2017, *supra* note 51 at para 11. See generally Paul Cherry, "Terror expert says accused couple showed interest in extremist imam", *The Montreal Gazette* (3 November 2017), online: <montrealgazette.com/news/local-news/terror-trial-expert-analyzes-videos-photos-found-on-computers-of-accused-couple> [perma.cc/5W5Q-M6M8].

209 *Jamali*, *supra* note 38 at para 24.

210 *Esseghaier (First Sentencing Hearing)*, *supra* note 40 at paras 26, 61–62; *Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

211 *Esseghaier (First Sentencing Hearing)*, *supra* note 40 at para 36; *Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

212 *Gaya*, *supra* note 54 at paras 41–43, 69, 73; *R v Gaya*, 2010 ONCA 860 at paras 12, 14, 16 [*Gaya* Sentencing Appeal].

213 *Gaya*, *supra* note 54 at para 43; *Gaya* Sentencing Appeal, *supra* note 212.

Othman Ayed Hamdan	Cst. Tarek Mokdad[214]	C	Social Science	Trial	Negative
	Navaid Aziz[215]	D	Social Science	Trial	Positive
	Cst. Robin Shook[216]	C	Technical	Pre-Trial	Negative
	Kevin Ripa[217]	D	Technical	Pre-Trial	Positive
Mohammed Hassan Hersi	Matthew Bryden[218]	C	Social Science	Trial	Positive
	Abdi Aynte[219]	D	Social Science	Trial	Positive
	Dr. Barbara Perry[220]	D	Social Science	Trial	Negative
El Mahdi Jamali	Cst. Tarek Mokdad[221]	C	Social Science	Trial	Unknown
	Sgt. Sylvain Fiset[222]	C	Technical	Trial	Unknown
Raed Jaser	Dr. Jess Ghannam[223]	D	Psychiatry/Psychology	Sentencing	Negative
JR (Alberta Youth)	Dr. Vinesh Gupta[224]	D	Psychiatry/Psychology	Pre-Trial	Unknown
	Dr. Ann Marie Dewhurst[225]	D	Psychiatry/Psychology	Pre-Trial	Unknown

214 *Hamdan*, *supra* note 51 at paras 46, 51, 55–98 [*Hamdan*].
215 *Ibid* at paras 55, 94, 99–102, 106, 148–50, 173.
216 *Hamdan Voir Dire*, *supra* note 62 at para 37.
217 *Ibid* at para 31.
218 See *Hersi* Bryden Voir Dire, *supra* note 100 at para 3; *Hersi*, *supra* note 51 at paras 20, 23.
219 *Hersi*, *supra* note 51 at paras 21, 24.
220 *Hersi* Dr. Perry Voir Dire, *supra* note 61.
221 *Jamali* 2017, *supra* note 51 at paras 11, 31.
222 *Jamali*, *supra* note 38 at para 24. See also Cherry, "Terror Trial", *supra* note 160.
223 *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 38–53.
224 *JR (Alberta Youth)*, *supra* note 63 at paras 20–21.
225 *Ibid*.

Saad Khalid	Donna Garbutt[226]	C	Technical	Sentencing	Positive
	Sgt. Sylvain Fiset[227]	C	Technical	Sentencing	Positive
	Dr. Lisa Ramshaw[228]	D	Psychiatry/Psychology	Sentencing	Positive
	Mohammed Fadel[229]	D	Social Science	Sentencing	Positive
Momin Khawaja	Sgt. Sylvain Fiset[230]	C	Technical	Trial	Positive
Amanda Korody	Cst. Peter Cucheran[231]	C	Technical	Trial	Unknown
	Dr. Omid Safi[232]	D	Social Science	Entrapment Application	Positive
	Cpl. Barry Salt[233]	C	Technical	Trial	Unknown

226 See Teotonio, *supra* note 60.

227 *Ibid.*

228 *Khalid* Sentencing, *supra* note 54 at paras 22–33, 128, 145; *Khalid Gardiner Hearing*, *supra* note 61 at paras 56–58.

229 *Khalid Gardiner Hearing*, *supra* note 61 at paras 59–61, 100, 104–106.

230 *Khawaja* ONSC, *supra* note 12 at paras 61–72; *Khawaja* ONCA, *supra* note 4 at paras 48–50, 226–29.

231 See Omand, "B.C. Bomb Plot Trial", *supra* note 62.

232 *Nuttall Entrapment Application*, *supra* note 38 at paras 476–503, 696–717; *R v Nuttall*, 2016 BCSC 466 [*Nuttall Voir Dire re Entrapment Application*].

233 Omand, "Laptop Full of Extremist Content", *supra* note 62.

Quebec Youth (LSJPA)	Cst. Tarek Mokdad[234]	C	Social Science	Trial	Positive
Said Namouh	Dr. Rita Katz[235]	C	Social Science	Trial	Positive
	Dr. Reuven Paz[236]	C	Social Science	Trial	Positive
John Stuart Nuttall	Cst. Peter Cucheran[237]	C	Technical	Trial	Unknown
	Dr. Omid Safi[238]	D	Social Science	Entrapment Application	Positive
	Cpl. Barry Salt[239]	C	Technical	Trial	Unknown
Nishanthan Yogakrishnan	Dr. Nathan Pollock[240]	D	Psychiatry/Psychology	Sentencing	Positive

234 *LSJPA*, *supra* note 51 at paras 60–85, 218.

235 *Namouh*, *supra* note 51 at paras 28, 31–48, 70, 73; *R v Namouh*, 2010 QCCQ 943 at para 72 [*Namouh* Sentencing].

236 *Namouh*, *supra* note 51 at paras 45–47.

237 See Omand, "Laptop Full of Extremist Content", *supra* note 62; Omand, "B.C. Bomb Plot Trial", *supra* note 62.

238 *Nuttall Entrapment Application*, *supra* note 38; *Nuttall Voir Dire re Entrapment Application*, *supra* note 232.

239 Omand, "Laptop Full of Extremist Content", *supra* note 62; Omand, "B.C. Bomb Plot Trial", *supra* note 62.

240 *NY*, *supra* note 51 at paras 7–8.

Appendix B: Biographical Details of Experts in Terrorism Trials

Name of Expert	Gender	Specialization	Employment Background	Residence
Dr. Hy Bloom[241]	M	Forensic psychiatry	Academia/Private consultant	Canada
Dr. Julian Gojer[242]	M	Forensic psychiatry	Academia/Clinical practice	Canada
Dr. Wagdy Loza[243]	M	Forensic psychology	Academia/Prison Administrator	Canada
Dr. Nathan Pollock[244]	M	Forensic psychology	Academia/Clinical practice	Canada
Dr. Sean Maloney[245]	M	Canadian military historian	Academia	Canada
Dr. Philip Klassen[246]	M	Forensic psychiatry	Academia/Clinical practice	Canada
Dr. Gary Chaimowitz[247]	M	Forensic psychiatry	Academia/Clinical practice	Canada
Dr. Sumeeta Chatterjee[248]	F	Forensic psychiatry	Academia/Clinical practice	Canada
Dr. Arif Syed[249]	M	General psychiatrist	Clinical practice	Canada
Donna Garbutt[250]	F	Explosives	RCMP	Canada
Sgt. Sylvain Fiset[251]	M	Explosives	RCMP	Canada
Cst. Tarek Mokdad[252]	M	Islamic-inspired terrorism	RCMP	Canada
Dr. Lisa Ramshaw[253]	F	Forensic psychiatry	Academia	Canada

241 *Abdelhaleem*, *supra* note 51 at paras 46–57, 74–76, 78.
242 See *Ahmad* 2010, *supra* note 54 at paras 37–44.
243 See Ahmed, *supra* note 51 at paras 13–51.
244 *NY*, *supra* note 51.
245 *Ahmed Trial Transcript*, *supra* note 61.
246 See *Ali*, *supra* note 41.
247 *Ibid.*
248 *Dughmosh*, *supra* note 42.
249 *Amara Voir Dire*, *supra* note 66; *Amara*, *supra* note 38 at paras 44–61, 75–98.
250 *Amara*, *supra* note 38.
251 *Ibid.*
252 See *R v Namouh*, 2017 QCCS 6077.
253 *Esseghaier (First Sentencing Hearing)*, *supra* note 40; *R v Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

Dr. Steven Cohen[254]	M	Forensic psychiatry	Clinical practice	Canada
Mohammad Navaid Aziz[255]	M	Islam & Islamic thought	Imam	Canada
Cst. Robin Shook[256]	M	Digital forensics	RCMP	Canada
Kevin Ripa[257]	M	Digital forensics	Private consultant	Canada
Cpl. Barry Salt[258]	M	Digital forensics	RCMP	Canada
Matthew Bryden[259]	M	Somalia/Horn of Africa	Political analyst/private consultant	Kenya
Abdi Aynte[260]	M	Somalia/Horn of Africa	Journalist/Political Consultant	Canada
Dr. Barbara Perry[261]	F	Sociology of hate crimes	Academia	Canada
Dr. Jess Ghannam[262]	M	Clinical psychology	Academia/Clinical practice	Canada
Dr. Vinesh Gupta[263]	M	Adolescent forensic psychiatrist	Clinical practice	Canada
Dr. Ann Marie Dewhurst[264]	F	Adolescent forensic psychologist	Clinical practice	Canada
Dr. Mohammed Fadel[265]	M	Islamic law & thought	Academia	Canada
Sgt. Sylvain Fiset[266]	M	Explosives	RCMP	Canada

254 See *Gaya*, *supra* note 54 at paras 41–43; *Gaya* Sentencing Appeal, *supra* note 212.

255 See *Hamdan*, *supra* note 51 at paras 55, 94, 99–102, 106, 148–50, 173.

256 See *Hamdan Voir Dire*, *supra* note 62.

257 *Ibid.*

258 Cpl. Barry Salt appeared in the case against John Nuttall. See Omand, "Laptop Full of Extremist Content", *supra* note 62.

259 See *Hersi* Bryden Voir Dire, *supra* note 100; *Hersi*, *supra* note 51.

260 See *Hersi*, *supra* note 51.

261 See *Hersi* Dr. Perry Voir Dire, *supra* note 61.

262 See *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 38–53.

263 See *JR (Alberta Youth)*, *supra* note 63.

264 *Ibid* at para 21.

265 See *Khalid Gardiner Hearing*, *supra* note 61.

266 *Khawaja* ONSC, *supra* note 12; *Khawaja* ONCA, *supra* note 4 at paras 226–29.

Cst. Peter Cucheran[267]	M	Explosives	RCMP	Canada
Dr. Omid Safi[268]	M	Contemporary and pre-modern Islamic thought	Academia	USA
Dr. Rita Katz[269]	F	Islamic-inspired terrorism	Private analyst/consultant	USA
Dr. Reuven Paz[270]	M	Islamic-inspired terrorism	Private analyst/consultant	Israel

267 See Omand, "Laptop Full of Extemist Content", *supra* note 62; Omand, "B.C. Bomb Plot Trial", *supra* note 62.

268 *Nuttall Entrapment Application*, *supra* note 38 at paras 473–503, 696–717; *Nuttall Voir Dire re Entrapment Application*, *supra* note 232.

269 *Namouh* Sentencing, *supra* note 255; *Namouh*, *supra* note 51 at paras 31–48, 70, 73.

270 *Namouh*, *supra* note 51.

The Unclear Picture of Social Media Evidence

LISA A. SILVER [*]

Digital evidence does not reside easily in our rules of evidence. Although the end product can be viewed as a form of real evidence, akin to documents or static pieces of paper,[1] digital evidence defies such neat evidentiary categorization. It is not static. It moves and changes. At its core, digital evidence cannot be passed hand to hand like a document. Rather, it flows from one form to another through a web of technology. Instead of viewing our evidential rules afresh in light of the special attributes of digital evidence, we attempt to "cut and paste" digital evidence into the traditional Wigmore evidentiary rules.[2]

Overlaid onto this new digital world is the heady atmosphere of social media, which can provide the source of such evidence. Social media evidence is part diary, part conversation, part image, part bravado, part truth, and presents in real time, past time, or even infinite time. Our legal relationship to social media, as they say in Facebook status-speak is, well, "complicated." To relieve our sense of legal disquiet, we naturally turn to those evidentiary rules that we already have in place for support. These rules, codified in our statutory electronic document framework in the *Canada Evidence Act*,[3] were created to assist in the introduction of computerized data or electronically stored information (ESI). The sections provide evidentiary shortcuts for the admissibility of a broad spectrum of digital evidence, including social media evidence. Instead of embracing social media for what is — an online community — we have simplified it in the name of administrative efficiency.

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1 Michael T Clanchy, *From Memory to Written Record: England 1066-1307* (Hoboken**:** John Wiley & Sons, 2012).

2 *R v Ball*, 2019 BCCA 32 at para 65 [*Ball*].

3 RSC 1985, c C-5 [*CEA*].

Administrative efficiency and legal process rights do not necessarily share the same objectives.[4] With simplification of introduction comes the potential for cutting *Charter* imbued corners without due regard to the negative potentialities such easy admissibility can create. Those potential negative effects, involving an unfair trial leading to a miscarriage of justice, should not be considered fanciful. As we have seen in other admissibility simplifications, such as with expert evidence, if our admissibility methodology is not mindful of the potential harm admissibility rules can produce, the integrity of our justice system may be at risk. This does not mean that we cannot use the old evidentiary framework. This means we must do so with new age mindfulness by ensuring those checks and balances inherent in our admissibility principles are consistently applied by the court. We have those evidentiary tools at hand, notably the gatekeeper function, which protects the integrity of the trial process. In this digital age, we must not be reticent to use our "old" tools in our approach to "new" forms of evidence.

Unfortunately, even within the statutory framework our courts struggle with this form of evidence. Admissibility requirements are inconsistently applied. Where once evidentiary rules provided clarity, in the realm of social media those rules simply obscure. Not only are the rules in flux, but the manner in which the evidence is given adds to the complexity. This uneven treatment brings into question whether our legal principles are robust enough for the digital age. How the courts apply these rules will impact the future of our criminal law and may challenge our conception of evidence.

Part I of the article will provide the backdrop for our incursion into digital space as we take an exponential journey through the advent of social media and the appearance of social media as a form of evidence in the courtroom. In Part II of the article, we take a deeper look at the construction of evidentiary categories and the preference for social media evidence to be viewed in the courtroom as documentary evidence, providing a perfect platform for the application of the *CEA*. We will then identify the myriad problems in the admissibility process in Part III. This discussion will situate admissibility concerns within recent provincial appellate cases, highlighting, in real terms, the potential for miscarriages of justice under the present approach. Finally, in Part IV, a practical solution will be provided consistent with the special nature of social media evidence by drawing on features found in another enhanced admissibility approach, namely expert evidence.

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4 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536, Lamer J.

I. The Advent of Social Media Evidence

A. Social Media as Community

Before we discuss social media as evidence, we need to understand social media itself. Social media is not just a consequence of the Internet, it is the essence of it. The Internet or the ARPANET, as it was first created in the 1970s, was a collaborative community of like-minded researchers who wanted a digital space or cyberspace to share technological resources.[5] This drive to be in collaboration is not just an academic trait but is also inherent in our humanity. Indeed, it is our need for togetherness and collaboration that creates community. Aristotle, who was active well before the electronic era, opined that we are social beings.[6] This social aspect of community is realized through our ability to communicate. In order to create this community, we need space, be it real or virtual. Social media is just such a dedicated place where we can form "communities of interest."[7] The original premise of social media, as an academic research platform, emphasizes the openness and label free attitude of cultural togetherness where "anything goes."[8] Of course, in the cyberworld where this "goes" may be viral, creating communities that stretch across the globe.

It is the digital side of social media that lends itself to creating a community space, which is uniquely personal and collective. It is the technological version of community, which synthesizes us and them into a community of one and many. Through the digital platform, social media compresses and distorts time and space such that "netizens", or those who use social media, are at the same time everywhere and nowhere. This incorporeal status changes our concept of community in a radical way, particularly in the legal sense of the word. The ungrounding of community from an earthly physicality gives social media content a meaning in law. This is cyberspace as we know it, spinning into the void with a panoply of ideas, which must be reined in by the strictures of the legal world.

By placing the two side-by-side, we can see the disconnect between our cyberworld and our earthly one. Yet, the two are intertwined. Social media

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5 Judy Malloy, "The Origins of Social Media," in Judy Malloy, ed, *Social Media Archeology and Poetics* (Boston: MIT Press, 2016) 3 at 3.

6 Aristotle, *Politics*, translated by Benjamin Jowett (Kitchner: Batoche Books, 1999) at Book One, 1253a (translated as "political animal").

7 Malloy, *supra* note 5.

8 *Ibid* at 4.

is dependent on community as we know it, as it is community as we understand it — just in a slightly off-kilter package. This sci-fi attitude of social media does bend the mind. Being "here, there, and everywhere"[9] blurs our conventional approaches to social norms. This does not necessarily require us to discard those norms, but it does require us to view those norms through a digitized perspective. In the legal world, this conversation is heavily explored within the section 8 reasonable expectation of privacy doctrine, where social media erases the line between public and private spheres. This disappearance of space is of no concern in the social media world, but it raises numerous issues in the legal material one. Law is not easily unfettered from long-held social practices. It feeds on continuity and tradition. Social media does not.

The peripheral mechanics of social media is evident; it arises from our desire to gather together in a community. Yet, this is a community undefined by quantity, quality or placement. Flowing from community, is the need to communicate ideas to one or to all. In law, it is the communication which becomes the representation of the flow of ideas and the anchor to which the legal rules and principles can attach.

B. Social Media as an Evidential Artefact

I have argued thus far that social media is a means of human collectiveness and community, ephemeral notions that are difficult to intellectualize. Yet, there is a concreteness to social media. This dual nature of what can be seen and what is not seen arises from social media's uncanny ability to act as both conduits of communication and representations of communication. It is this capacity, to enable community and to create community, that defines social media as a singular space and place. It is more than a marketplace of ideas; it is a living room of experience. How, then, does the law turn a place into a piece of evidence?

Social media as a conduit and representation of communication leaves a trace of itself by creating a social artefact. A social artefact is described as "a discrete material object, consciously produced or transformed by human activity, under the influence of the physical and/or cultural environment."[10] Social media naturally produces these social artefacts, be it a conversation

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9 The Beatles, "Here, There and Everywhere," recorded 1966, *Revolver*, Parlophone, released 1966, record.

10 Mark Suchman, "The Contract as Social Artifact" (2003) 37:1 Law & Soc'y Rev 91 at 98.

in a chat room, a picture on Instagram, or an emoji on Facebook. When such artefacts become subject to a criminal investigation, the social object becomes a legal one. Within the legal landscape, therefore, the social artefact found in social media can be reconstituted as a legal artefact or, more specifically, an evidential artefact.

Evidence is, as described, a legal construct. Social media information, as a social artefact, starts outside of the rule of law but needs those rules to become evidence. A chat room conversation or a Facebook image travels through a specific set of evidentiary rules and principles before becoming an evidential artefact proffered at trial. Evidence has physicality and weight, but it is also a state of mind. A chat room conversation may comply with the requisite evidentiary rules, but it only becomes evidence upon judicial approbation and pronouncement. Before that judicial acceptance, the proffered item is merely an evidence "becomer"[11]; it has only the potential of being considered evidence at trial. It is a chat in a chat room, nothing more. It is, therefore, in the courtroom, where that potential is actualized. It is in that admissibility process where social media transforms into evidence and becomes subject to the rule of law.

C. Social Media as Evidence

In criminal cases, social media evidence has steadily increased as part of the evidentiary record of a case. Unsurprisingly, this increase lags behind the actual usage rates. Facebook, which was created in February 2004 and reached its first 100 million users world-wide by 2008,[12] is not mentioned in Canadian criminal case law[13] until that 2008 milestone year.[14] To give this mention perspective, there were a total of 12 such mentions in 2008 criminal cases.[15] Further, in none of these 12 decisions is Facebook a matter

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11 "becomer" (last modified 14 November 2019), online: *Witionary* <en.wiktionary.org/wiki/becomer> [perma.cc/2CYL-UMNG].

12 Geoffrey A Fowler, "Facebook: One Billion and Counting", *The Wall Street Journal* (4 October 2012), online: <www.wsj.com/articles/> [perma.cc/3LLG-YKMR].

13 Based on a WestLaw database search, excluding commissions and tribunals.

14 See *R c Cormier*, 2008 QCCQ 44, Durand JCQ [*Cormier*]. But see *V(WR) v V(SL)*, 2007 NSSC 251 at para 31, MacAdam J (first mention in non-criminal case).

15 *Cormier*, *supra* note 14; *R v Sather*, 2008 ONCJ 98 [*Sather*]; *R v P(AP)*, 2008 ONCJ 196; *R v Alshammiry*, 2008 CarswellOnt 9534 (Ont Ct J) rev'd 2010 ONCA 550; *R v Momprevil*, 2008 ONCJ 734; *R v Blake*, 2008 ONCJ 384; *R v S(J)*, 2008 CarswellOnt 6310 (Ont Sup Ct J); *R v Woods*, 2008 ONCJ 395; *R v Goulette*, 2008 NBPC 48; *R v Alshammiry*, 2008 CarswellOnt 9533 rev'd 2010 ONCA 550; *R v B(BS)*, 2008 BCSC 1526; *R v D(R)*, 2008 ONCJ 584.

of controversy or the subject of an admissibility discussion. In one decision, expert evidence was called at trial to explain how Facebook is used and why it used as a social network platform.[16]

Facebook Messenger became the communication platform for the Facebook community in 2011.[17] By this time, the mentions of "Facebook" increase in case authority[18] with the first Supreme Court of Canada criminal case mention in the 2013 decision of *R v Vu*.[19] Of course, *Vu* stands as the seminal decision on using search warrants to search computers. Specifically, in *Vu*, the search involved retrieving MSN chat communications and Facebook images.[20] A broad database search, covering all mentions of the "Facebook" term, brings over 4000 case mentions. Approximately half of those cases are from the past three years.

Twitter, a slightly newer platform created in 2006,[21] receives much less case attention with 423 decisions since the first mention in the 2009 criminal case of *R v Puddicombe*.[22] Again, over half of those mentions are from the past three years. Only three decisions of the Supreme Court of Canada have thus far mentioned Twitter, with two of those three decisions being criminal cases.[23] Although Facebook dominates in the social media lives of many,[24] recent studies suggest that teenagers are shifting to image-

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16 *Sather*, *supra* note 15 at para 9.

17 Joshua Boyd, "The History of Facebook: From BASIC to Global Giant" (25 January 2019), online: *Brandwatch* <www.brandwatch.com/blog/history-of-facebook> [perma.cc/XZM7-RH7X].

18 Westlaw search for "Facebook" before 2011 results in 479 decision but the same search for the two year period, from January 1 2012 to January 1 2014, result in 632 case mentions, including three from the Supreme Court of Canada: *A.B. (Litigation Guardian of) v Bragg Communications Inc*, 2012 SCC 46; *Sun-Rype Products Ltd v Archer Daniels Midland*, 2013 SCC 58; *R v Vu*, 2013 SCC 60 [*Vu*].

19 *Supra* note 18 at para 28.

20 *Ibid*.

21 Amanda MacArthur, "The Real History of Twitter, in Brief" *Lifewire* (1 July 2019) online: <www.lifewire.com/history-of-twitter-3288854> [perma.cc/3AJZ-4RXH].

22 *R v Puddicombe*, [2009] OJ No 6472 (ON SC), Benotto J (application for publication ban on first degree murder and conspiracy to commit first degree murder).

23 *Crookes v Wikimedia Foundation Inc*, 2011 SCC 57 (decision on online defamation); *R v J(KR)*, 2016 SCC 31 (child pornography discussion and how social media has "fundamentally altered" social context for sexual offences); *R v Vice Media Canada Inc*, 2018 SCC 53 (mentioned as part of the facts).

24 J Clement, "Number of Facebook users worldwide 2008-2019" (last visited 9 August 2019), online: *Statista* <www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [perma.cc/HLE7-HR7E] (Facebook is the biggest social

based social media such as YouTube, Instagram, and Snapchat.[25] All of these platforms are mentioned to varying degrees in case law: YouTube[26] 433 hits since 2007, Instagram[27] 221 since 2014, and Snapchat[28] 112 since 2016. It is only a matter of time until these case mentions increase.

By far, the most prolific social media communication is through text messaging,[29] either through SMS/MMS platforms or Facebook Messenger.[30] The term "text message" returns over 5000 case mentions using a simple plain language search. The short form name, "texting," returns approximately 1400 mentions. If the search is broadened to include e-mail, another communication platform arising from the beginnings of social networking,[31] approximately 5000 decisions mention "email" with about 900 more referencing the older term "electronic communication." Still broader are the approximately 1500 mentions of "social media" in case law.

The purpose for this statistical journey is to highlight the increased presence of social media in the Canadian courtroom. Although this simple database analysis gives no insight into why the social media terms are mentioned in cases, it does give context to the use of social media as evidence in court. In fact, social media is often the context in which criminal

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network worldwide with 2.41 billion monthly active users as of the second quarter of 2019).

25 Monica Anderson & Jingjing Jiang, "Teens, Social Media, and Technology 2018" (31 May 2018), online: *Pew Research Center* <www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/> [perma.cc/GFR6-NNFS].

26 See e.g. *R v Neeld*, 2007 BCPC 212 (first case mention of YouTube). See also "History of YouTube" (last visited 11 November 2019), online: *Wikipedia* <en.wikipedia.org/wiki/History_of_YouTube> [perma.cc/TTV6-6CBJ] (YouTube was established in 2005).

27 See e.g. *Stokes v Stokes*, 2014 ONSC 1311 (oldest case mention); *R v G(PG)*, 2014 NSPC 79 (oldest criminal case mention). See also Dan Blystone, "The Story of Instagram: The Rise of the #1 Photo-Sharing App" (19 May 2019), online: *Investopedia* <www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp> [perma.cc/SJB9-YVKK] (Instagram was released in October 2010).

28 See e.g. *R v F(T)*, 2016 BCPC 6 (oldest case mention). See also Mark Molloy, "Who owns Snapchat and when was it created?", *The Telegraph* (25 July 2017) online: <www.telegraph.co.uk/technology/0/owns-snapchat-created/> [perma.cc/PKR6-U8WQ] (Snapchat was released in July 2011).

29 See *R v Marakah*, 2017 SCC 59 at paras 18, 33–37, McLachlin CJC.

30 J Clement, "Leading messaging Apps used in Canada as of May 2018" (22 March 2019), online: *Statista* <www.statista.com/statistics/882273/canada-leading-messaging-apps/> [perma.cc/V27T-B6NC].

31 David R. Woolley, "PLATO: The Emergence of Online Community." in Judy Malloy, ed, *Social Media Archeology and Poetics* (Boston: MIT Press, 2016) 116.

offences can be committed. It can provide a space in which offences are committed and it can provide proof of it as well.

For social media to cross that threshold from the digital space to the place of trial requires the application of the rules of evidence. However, unlike social media, those rules are not multi-dimensional or community-building. They are fact focused and decision oriented. Although much has been done in the last two decades to untether evidentiary principles from rigidly organized evidentiary rules, those rules are still treated as sacrosanct requirements, "ancient and hallowed,"[32] and impervious to change. The disjunct between social media and social media as evidence lies at the inconsistent and confusing manner in which such evidence is treated in court. The disharmony is not just awkward, but it is dangerous as it weakens the gatekeeper function of the trial judge. But it is the categorical approach to evidence, more than anything else, that creates the perfect environment for this weakening of judicial oversight, a weakening re-enforced by the admissibility process.

II. CATEGORIZING SOCIAL MEDIA EVIDENCE

A. The Underlying Objectives of Evidence and the Gatekeeper Function

In teaching evidence, it is crucial to remind students, throughout the course, of the underlying objectives of the law of evidence. This contextual framework is important; without it, the law of evidence becomes a jumble of rules to be memorized by rote instead of an intellectual exercise, which provides a firm basis for argument in the context of a real case. A lawyer who objects to the admissibility of evidence without understanding why they are doing so cannot possibly persuade a judge on the issue unless the lawyer understands why opposing counsel wants the information introduced. This ability to respond requires two kinds of knowledge: knowledge of the case and knowledge of the law. Knowledge of the case requires a lawyer to pre-think the facts and legal issues in their case to arrive at a working theory or theme.

Theme and theory are basic advocacy tools. But these tools are only the machinery. To articulate the case knowledge, the lawyer must have the law

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[32] See e.g. *R v Leipert*, [1997] 1 SCR 281 at para 9, 143 DLR (4th) 38, McLachlin J (referencing informer privilege, which is a rule of evidence).

knowledge. The law knowledge is "[t]he ultimate aim of any trial, criminal or civil" which is "to seek and to ascertain the truth." [33] This truth-seeking function of a trial informs the rules of evidence and permits judges "to do justice according to [the] law."[34] Justice is an action, as in "to do" justice and therefore implies positive acts of fairness and equity. In criminal law, justice is not just a "to do" action; even when a judge is not "doing" justice, they must ensure that there is not a lack of it. A lack of justice can lead to not just an absence of it but, worse, a miscarriage of justice.

The term "miscarriage of justice" is elusive. It has no definite meaning. Rather, it describes an event when, according to subsection 686(1)(a)(iii) of the *Criminal Code*, the trial error "is severe enough to render the trial unfair or to create the appearance of unfairness."[35] Justice Cromwell, as he then was, on the Nova Scotia Court of Appeal, describes these two types of unfairness within the meaning of subsection 686(1)(a)(iii) in *R v Wolkins*.[36] The first form of unfairness relates to the actual trial itself while the latter form involves the integrity of the administration of justice that is at risk when what happens during a trial "shakes public confidence."[37] Often, a miscarriage of justice occurs when the "principles of fundamental justice" have been violated,[38] yet another elusive term. Principles of fundamental justice are not exhaustive but consist of those fundamental rules society sees as crucial to ensure and maintain justice in our judicial system.[39] The connection between these fundamental principles and our justice system are expressed in our evidentiary process.

Evidentiary rules, which serve to operationalize substantive law's use in the adversarial system,[40] must continually fulfill the dual objectives of truth and justice. These rules are made to be wielded not only by lawyers, but also by judges. In the evidentiary world, judges have a positive duty "to do justice," not only as the ultimate decision maker but also as the continuing

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33 *R v Nikolovski*, [1996] 3 SCR 1197 at para 13, 141 DLR (4th) 647, Cory J [*Nikolovski*].

34 *Imperial Oil v Jacques*, 2014 SCC 66 at para 24, Lebel & Wagner JJ.

35 *R v Khan*, 2001 SCC 86 at para 69, Lebel J [*Khan*].

36 2005 NSCA 2.

37 *Ibid* at para 89.

38 See e.g. *R v Broyles*, [1991] 3 SCR 595, [1992] 1 WWR 289 (violation of the accused right to silence); *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7 (violation of right to counsel); *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733 [*Lifchus*] (error in charge to the jury on the burden of proof).

39 *R v Malmo-Lavine; R v Caine*, 2003 SCC 74 at paras 112–13.

40 David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin, 2015) at 2.

gatekeeper. This dual judicial role ensures that the dual objectives of the rules of evidence — truth and justice — are never forgotten or set aside during the course of a trial.

The gatekeeping concept provides apt imagery in the application of evidentiary rules. Evidence is admitted through the "gate" by an arms-length guardian whose sole function is to provide oversight to the entire trial process.[41] A gatekeeper does not make findings of fact. Rather, the gatekeeper balances the costs and benefits of the evidence free from the additional burden of that final value judgment. By separating the function of gatekeeper from final arbiter, we ensure that the evidence used in that final decision is not weighed down by prejudice or coloured by improper reasoning. It creates a level field of justice upon which admissible evidence is heard, weighed, and valued. Without this calibration of the underlying objectives, the rules become empty and are applied without knowledge to the detriment of the system and the people who are affected by it.

B. The Categorical Approach to Evidence

Rules do not live in a vacuum. In practical terms, most legal concepts do not live separate and apart. This is even more so for evidence, which is often referential to another piece of evidence. Connections between pieces of evidence often require connections between the rules of evidence. Traditionally, these connections were viewed through the lens of categorization, in which differing types of evidence were labelled and pigeon-holed for further treatment. This structural rigidity is still embedded in the more relaxed principled approach brought in by the Supreme Court of Canada to re-align the traditional rules with the underlying dual objective of evidence rules: truth and justice. Social media evidence highlights the weaknesses in this approach as it defies evidentiary categorization, often blurring the lines between the air-tight categories employed in the law of evidence.

Categories abound in the rules of evidence. We can view the entire law of evidence through the lens of meta-categories. Justice Paciocco and Lee Stuesser in *The Law of Evidence*[42] describe three types of evidential rules: "rules of process," "rules of admissibility," and "rules of reasoning."[43]

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41 See *R v Grant*, 2015 SCC 9 at para 44, Karakatsanis J [*Grant*].

42 Paciocco & Stuesser, *supra* note 40.

43 *Ibid*.

Process-oriented evidentiary rules engage the how part of evidence; it can help us understand how evidence is introduced in court. For instance, issues involving the scope of cross examination[44] would fall under this process category. The rules of admissibility involve how the evidence, which is created by the process, such as cross examination, is admitted as part of the evidential record. Many of our rules of evidence revolve around this discussion, such as the admissibility of hearsay[45] or expert testimony.[46] The third meta-category engages the rules of reasoning. After the testimony is given and the content of that testimony is admitted, the trier of fact must assess that evidence in the final fact-finding portion of the trial. The application of the burden of proof to this assessment is an example of this kind of rule.[47]

These three categories seem linear in time: first, we elicit evidence, second, we determine if it is admissible, and third, the trier of fact assesses the admitted evidence. Yet, viewing these categories as merely linear reinforces the categorical approach. Evidence, like social media, bounces around categories and is difficult to compartmentalize. How a question is asked in court can engage admissibility concerns (hearsay for example) and concomitantly cause decision-making difficulties (what to do with hearsay).

Moving from big picture evidence to the types of evidence proffered in court also suggests a categorical scheme. Evidence can be testimonial or real.[48] Testimonial evidence is directly observed by the trier of fact and is based on inferences drawn or reasoning. Real evidence, on the other hand, is based on the "direct self-perception"[49] of the senses. The trier of fact, when faced with real evidence, becomes the witness as they hear the accused in the wiretap, read the inculpatory document, or see the bloody shirt. Because of this personal direct relationship between the trier and the evidence, threshold authenticity becomes a precondition to admissibility. Authenticity requires an investigation into whether the real evidence is what it claims to be. This differs from testimonial evidence where the person, for

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44 See *R v Lyttle*, 2004 SCC 5.

45 See e.g. *R v Khelawon*, 2006 SCC 57.

46 See e.g. *White Burgess v Haliburton*, 2015 SCC 23 [*White Burgess*].

47 See e.g. *Lifchus, supra* note 38; *R v W(D)*, [1991] 1 SCR 742, 63 CCC (2d) 397.

48 See Wigmore, *Evidence* (Chadbourn Rev, 1972), § 1150 at 322.

49 John Henry Wigmore, *Evidence in Trials at Common Law,* revised by John T McNaughton (Boston: Little, Brown and Company, 1961) vol 4 at 1150 (also references as "autoptic proference").

admissibility purposes, is taken at their word, leaving credibility issues for the final determination.

C. Categorizing Social Media Evidence

Social media evidence presents deeply embedded categorization difficulties. Social media evidence is a mere representation of a community, a community which flourishes beyond the bounded space of the courtroom and beyond our imagination. It is also a representation of communication. There are multi-layers to this communication. It can present as words, but, in reality, it is words channelled through the digital space. It can also present as an image that requires interpretation and iconic meaning. It can be instantaneous or not. It can be printed out and, therefore, tactile or not. It can be transient or leave a permanent record somewhere. What this shape-shifting means is that social media evidence cannot be easily controlled through the categorical structure. Social media evidence is legitimately many different kinds of evidence — from real to testimonial, from documentary to pictorial.

Categories of evidence can mix, such as when testimonial evidence is required to introduce real evidence. For example, the witness to a stabbing identifies the knife used at the time. Nevertheless, mixing does not change the essential nature of the witness as testimonial and the knife as real evidence. Social media evidence does blur these categories to such a degree that the law of evidence must step in to give it a familiar label, a category by which the lawyers and judges can comfortably apply the known rules of evidence for admissibility purposes. Unfortunately, the courts have not applied consistent categories to social media during the admissibility process.

1. Categorizing Through the Admissibility Process

i. Social Media as Real Evidence

By 2011, admissibility of Facebook evidence started to attract case commentary. One of the first decisions to discuss Facebook admissibility issues was the civil case, *McDonell v Levie*.[50] Admissibility is discussed in the

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[50] 2011 ONSC 7151 [*McDonell*]. It should however be noted that there are earlier civil decisions grappling with Facebook evidence during the discovery process. One of the earliest examples is in *Weber v Dyck*, [2007] OJ No 2384, 158 ACWS (3d) 205 (Ont Master), in which Master Pope ordered production of MySpace photographs in a claim

broadest sense, relying on the civil rule requirement for relevancy as the standard for determining admissibility.[51] Relevancy is not the only concern. Justice Arrell, in ordering the Plaintiff to "preserve and print" photographs from the account, also considered privacy concerns.[52] Almost three weeks later, the British Columbia Court of Appeal released *R v Vu*.[53] Although admissibility of images from the seized computer and cell phone and the information taken from MSN messenger and Facebook were an issue in the case, the decision was firmly fixed on the constitutionality of the search and seizure.[54]

Admissibility of Facebook evidence was directly in issue a few months later in *R v RL*.[55] In this *voir dire* ruling, Justice Eberhard considered the admission of "five pages from the complainant's Facebook."[56] The evidence was in the form of a computer print-out of the pages done by the accused person's wife, who was the complainant's Facebook "friend." Another witness, who was not an expert but merely a user, was called to explain how the profile name of the Facebook account could only be changed by the person with the account password.[57] Justice Eberhard found the evidence was "presumptively"[58] from the complainant's Facebook account and "that as a form of record"[59] of the complainant's statements, they were admissible. The balance of the ruling determines the relevancy of the contents, page by page. Some pages are not relevant and immediately found inadmissible.[60] Other pages are deemed inadmissible as their content offers "small probative value on points otherwise admitted, patent prejudicial effect, diversion of the focus of the trial and the effect it would have on the trial continuing expeditiously."[61]

Although Justice Eberhard did not attempt to label or categorize the Facebook evidence, he does refer to the evidence as "pages," suggesting a

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for damages as a result of injuries suffered in a motor vehicle accident. The photographs showed the Plaintiff playing the piano.

51 *McDonell, supra* note 50 at para 6.

52 *Ibid* at para 16.

53 2011 BCCA 536.

54 *Ibid* at para 18.

55 2012 ONSC 2439, Eberhard J [*RL*].

56 *Ibid* at para 1.

57 *Ibid* at para 2.

58 *Ibid* at para 3.

59 *Ibid*.

60 *Ibid* at para 11.

61 *Ibid* at para 23.

documentary approach. Indeed, even before the decision in *RL*, the law provided for admissibility of electronic documents through amendments to the *Canada Evidence Act* in 2000.[62] Social media evidence, as a printed page, fits nicely within the electronic document definition under section 31.8 of the Act. Yet, this regime is not applied systematically to social media evidence. For instance, similar to the *RL* approach, Madam Justice Bruce applied common law admissibility rules in admitting Facebook evidence in the 2013 *Moazami* decision.[63] Justice Gogan applied common law principles to the statutory sections in *R v Bernard*.[64]

In the 2014 decision of *R c Soh*,[65] the defence opposed the admissibility of the Facebook evidence because the Crown failed to comply with the *CEA* regime. Some of the evidence was produced by the police as a photograph image of the computer screen showing the Facebook profile. On this basis, the Crown argued for admissibility of the evidence as "real evidence" pursuant to the common law admissibility rules for photographs. Madam Justice LaVigne found that both the screen captures and the photographs of the screen[66] were electronic documents and, therefore, admissible under the *CEA*. She also found that the probative value outweighed prejudicial effect, such that the evidence would not be excluded under the gatekeeper function.

Whatever the label, either record or image, by 2014, social media evidence is perceived as "real evidence" that can be introduced through the *CEA*. Two years later, following the *Soh* decision, Justice Gogan of the Nova Scotia Supreme Court also applied the *CEA* regime to the admissibility of screenshots or photographs of Facebook Wall posts in *R v Bernard*.[67] Applying the regime to the screenshots, according to Gogan J, is a matter of "common sense" as "one should not be able to circumvent the admissibility rules for electronic information simply by taking a photograph of the information."[68] Justice Gogan then made an explicit finding "that the information is properly characterized as documentary electronic information."[69]

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62 See *CEA*, *supra* note 3, ss 31.1-31.8.
63 *R v Moazami*, 2013 BCSC 2398.
64 2016 NSSC 358 [*Bernard*].
65 2014 NBQB 20, LaVigne J.
66 See also *R v Avanes*, 2015 ONCJ 606 [*Avanes*].
67 *Supra* note 64, Gogan J.
68 *Ibid* at para 44.
69 *Ibid* at para 50.

ii. Social Media as Image

Yet, the *CEA* approach did not erase the tension between words and image. Categorization, as we have seen, is further complicated by introduction of the evidence as a photograph of the computer screen. Admissibility of photographic evidence is treated differently.[70] Historically, photographic evidence was considered more "scientific" and, therefore, more objective than an eyewitness to an event.[71] This concept of image-based objectivity is reflected in the Supreme Court of Canada decision in *R v Nikolovski*.[72] There, the majority decision, written by Justice Cory in 1996, mused on the evidentiary value of video-recorded evidence as "a constant, unbiased witness with instant and total recall of all that is observed."[73] This praise for the image resurfaced more recently in *R v St-Cloud*[74] where, in Justice Wagner's view, video evidence is "more reliable" than circumstantial or testimonial evidence.[75]

Despite this view, although the image is produced through a scientific process, that self-same science provides a perfect platform for manipulation and fabrication of the image.[76] This raises inherent admissibility concerns with both the authenticity and integrity threshold requirements. Within this context, the admissibility of photographic evidence was thoroughly discussed and reviewed in the 1968 decision of the Nova Scotia Court of Appeal in *R v Creemer and Cormier*.[77] The resultant framework for admissibility includes factors that recognize and protect against the potential for manipulation. Admissibility, therefore, depends on accuracy "in truly representing the facts,"[78] the item's "fairness and absence of any intention to mislead"[79] and their "verification"[80] under oath by a person capable of doing so.[81]

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70 Rodney GS Carter, "'Ocular Proof': Photographs as Legal Evidence" (2010) 69 Archivaria 23.

71 *Ibid* at 33–34.

72 *Supra* note 33.

73 *Ibid* at para 21.

74 2015 SCC 27.

75 *Ibid* at para 160.

76 Carter, *supra* note 70 at 35–36.

77 (1967), [1968] 1 CCC 14, [1967] NSJ No 3 (NSCA) [*Creemer*].

78 *Ibid* at 21.

79 *Ibid*.

80 *Ibid*.

81 *Ibid*. See also Carter, *supra* note 70 at 38–39.

The *Creemer* framework was applied in the exclusion of an unattributed digital photograph downloaded from an internet social media website in *R v Andalib-Goortani*.[82] Notably, Justice Trotter, as he then was, in this 2014 decision, applied the *Creemer* common law framework and not the available *CEA* electronic document regime to the admissibility issue. Subsequent courts have also applied the common law *Creemer* admissibility framework to audio and visual digital recordings.[83] To add to the confusion, in *R v Tello*, a 2018 decision on the admissibility of digital photographs of text messages, Justice Campbell applied the *Creemer* framework in finding the photographs were properly admitted.[84] Even in the context of the *CEA* admissibility regime, we can see the influence of the *Creemer* framework. For instance, returning to the *Bernard* decision, Justice Gogan, in declining to admit the photographs or screen captures of the Facebook Wall posts under the *CEA* regime, is "mindful" of Justice Trotter's decision in *Andalib-Goortani*.[85]

It should be noted that the *Creemer* framework is not a constant in the admissibility of image-based evidence. In *Nikolovski*,[86] Justice Cory found authentication and, therefore, admissibility depended on establishing that the "videotape has not been altered or changed, and that it depicts the scene of the crime."[87] Conversely, the Alberta Court of Appeal in *R v Bulldog*[88] interpreted the authenticity test differently. There, the Court suggested that the admissibility of digital-recorded evidence requires the Crown show "a substantially accurate and fair representation of what it purports to show."[89] Arguably, *Bulldog* dilutes the effect of *Nikolovski* by re-focusing the burden on the Crown to show an absence of manipulation to requiring the Crown to show that the image is, on the whole, an accurate and fair depiction of what it claims to be. The concern in *Bulldog* is whether the evidence, as an image, is a fair representation of the events depicted, not whether the image has been altered.[90] It is accuracy not alteration that matters.[91] Even though

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82 2014 ONSC 4690, Trotter J [*Andalib-Goortani*].

83 See e.g. *R v Penney*, 2002 NFCA 15 [*Penney*]; *R v Parsons*, 2017 CanLII 82901 (NLSC) [*Parsons*].

84 2018 ONSC 356 at para 9.

85 *Bernard*, *supra* note 64 at para 58.

86 *Supra* note 33.

87 *Ibid* at 816.

88 2015 ABCA 251 [*Bulldog*].

89 *Ibid* at para 33.

90 *Ibid* at para 32.

91 *Ibid*.

this test may be more in line with the authentication requirement under the *CEA*, accuracy is not an embedded requirement under the *CEA* authentication section 31.1.

This question of whether social media is image or document is an important one considering the potentially differing admissibility requirements. The concern with admissibility of both types of evidence is the authenticity of the evidence. However, as will be discussed later in this article, the fulfillment of the Best Evidence Rule through the use of presumptions of integrity, creates an admissibility imbalance between the common law image approach and the statutory one. The *CEA* presumptions place the onus onto the party objecting to the introduction of the evidence to raise a realistic concern with the integrity of the digital evidence. Some of the *CEA* requirements are fulfilled by the introduction of some evidence on the issue.[92] With image-based admissibility, the burden of proof is firmly fixed on the party introducing the image. The standard too may arguably be different, with the common law generally applying a balance of probabilities standard for admissibility issues.[93] The standard for admissibility of image-based evidence is not as clear, with some courts viewing authenticity as a threshold issue needing only "some evidence."[94] While in *Bulldog*, the Alberta Court of Appeal, without definitively approving of the balance of probabilities standard for admissibility, applied it.[95]

This difference is also important on an esoteric level, as our discussion brings us into the realm of visual culture and the cross-disciplinary field of visual jurisprudence. Visual jurisprudence, a concept promoted by Richard K. Sherwin, Director of the Visual Persuasion project at the New York Law School, calls for the synthesis of the rule of law with emotion.[96] Namely, a recognition that what our eyes see is not translated merely into data but into a compilation of thoughts, emotions, and interpretations.

The visual interpretative and representative function is found in evidence, particularly social media evidence. Social media evidence is encased in the visual. It is created and appreciated through the "spectator's

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92 See *CEA*, *supra* note 3, ss 31.2, 31.3(a) and "evidence capable of supporting a finding." See also footnote 137.

93 *Bulldog*, *supra* note 88 at para 38.

94 See e.g. *Andalib-Goortani*, *supra* note 82 at para 25; David Tanovich, "*R. v. Andalib-Goortani*: Authentication & the Internet" (2014) 13 CR (7th) 140.

95 *Supra* note 88 at paras 38, 40–41.

96 Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque (UK: Routledge, 2012) at 5–6 [Sherwin, "Visualizing Law"].*

gaze"[97] where imagery abounds. This relationship between observer and social media is the unseen presence in social media evidence that confounds the court's own relationship with such evidence as the trier of fact. The image that social media projects carries with it a partial gaze that superficially reflects the full meaning of the evidential artefact. The placement of the trial judge, as the decision-maker, further obscures meaning as the judge also views the evidence through a judicial gaze drawing inferences of fact based on the rule of law and the judge's own emotive responses to the evidence.

The reality of how an image impacts the spectator runs contrary to the legal concept of "acting judicially."[98] To act "judicially" requires dispassionate, disengaged consideration where the trier of fact applies the law and adjudicates "on the basis of the record and nothing else."[99] Yet, this judicial action cannot be equated with the judicial gaze, which emanates from the human personality. As Sherwin suggests, "law lives differently in a visual expressive system than in one exclusively made up of words."[100]

The constellation of issues raised by social media evidence is more than the rules of evidence. It engages us in the re-imagining of the legal landscape. It requires us to "gaze" at our rules of evidence with eyes wide open to the impact our rules have in cyberspace. Instead of collapsing evidence into neat legally created categories, we must create space in the judicial gaze to widen the purposive lens. We must build into our rules of evidence a sense of the visual and encourage our decision-makers to embrace "visual literacy"[101] as an aspect of their judicial function.

This "embodied seeing"[102] will provide a richer and more robust evidential framework in which our new electronic age can reside in the rule

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97 This is a key concept of visual cultural studies. See Marita Sturken & Lisa Cartwright, *Practices of Looking: An introduction to Visual Culture*, 2nd ed. (New York: Oxford University Press, 2009) at 103–05 (the spectator's gaze refers to our relationships with images).

98 *R v Biniaris*, 2000 SCC 15 at para 39, Arbour J.

99 *Ibid* at para 40.

100 Sherwin, "Visualizing Law", *supra* note 96 at 18.

101 *Ibid* at 30, 40 ("visual evidence cannot be reduced to a mere application of the rules of evidence – all of those rules do come into play but in order to determine matters of admissibility, reliability, authenticity, probative value, non-prejudicial – must go beyond these set rules and understand how visual images make and convey meaning, both explicitly and implicitly").

102 Richard K Sherwin, "What Authorizes the Image? The Visual Economy of Post-Secular Jurisprudence" in Desmond Manderson, ed, *Law and the Visual: Representations, Technologies and Critique* (Toronto: University of Toronto Press, 2018) 330 at 333.

of law. Giving the digital space in our rule of law recognizes the normative aspect of law as a reflection of who we are as a society and what matters to us. It provides legitimacy for that emotive connective "feeling" we have when we read, hear, or talk about the impact of law on our everyday lives. This connection promotes law's legitimacy and "binds us to law's authority."[103] As we return to the law of evidence and the underlying premises of that body of rules, we will take this sensibility of the visual with us.

iii. Social Media as Testimonial

The final twist to social media evidence is its ability to sound like testimonial evidence. Although distilled to an animate hard piece of evidence like a document or photograph, Facebook messaging and even Instagram imagery involves a narrative that is crystallized into a written or textual conversation, either with one's self or with others. This diary-like quality of social media evidence suggests documentary evidence with a healthy dose of testimonial features.

Social media evidence can also be purely testimonial, adding another layer to the confusion of how to handle social media evidence. Such evidence can "live" as part of a person's historical narrative as events the witness has experienced or directly observed. In that case, a witness may testify to such an observation without engaging social media as a "real" evidential artefact. The Ontario Court of Appeal considers just that situation in the 2019 *R v Farouk*[104] decision. The website evidence was not admitted as being highly prejudicial with low probative value, yet part of the phone number was referenced at trial and again highlighted in the Crown's closing address to the jury. The argument on the appeal that the evidence was either hearsay or electronic evidence and, therefore, must be authenticated, was dismissed. Justice Harvison-Young, in dismissing the appeal, found the evidence was not electronic documentary evidence pursuant to the *CEA* but was merely testimonial in nature.[105]

iv. Social Media Evidence as Documentary Evidence

One of the more popular ways of viewing social media evidence is through the statutory electronic document admissibility regime in the

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103 *Ibid* at 335, 337.

104 2019 ONCA 662 [*Farouk*].

105 *Ibid* at paras 59–60.

Canada Evidence Act. This regime is decidedly documentary based, providing a stream-lined admissibility process based on the integrity of the container, being the computer, to provide a *prima facie* admissibility process. Integrity is also a prerequisite to admissibility, but court interpretation of that requirement fails to match the enhanced integrity requirements found with image-based digital evidence. The *CEA* regime was created after thorough discussion and detailed recommendations of the Uniform Law Conference (ULC), which discussed the issue from 1993 to 1997.[106]

From the beginning, the ULC considered digital evidence as documentary evidence. This makes sense considering the recommendations were very much connected to computerized documents, particularly those flowing from a civil action and subject to discovery requirements. This explains why integrity focuses on the computer as container as opposed to the actual data, which cannot be understandable, in its raw form, to the human imagination. Although, the *CEA* fits the documentary profile, it does not, as will be discussed, fit the social media one as well. This is not to suggest that the those involved in the Uniform Law Conference were missing the complexities of social media evidence. Rather, this occurred because social media evidence was simply not on the radar at the time, either historically or as a future proposition. Social media, therefore, became subject to this regime more by its final resting place as the computer/container. The definition of electronic document was broad enough to capture social media in its computerized form, which packaged the information into a documentary scheme.

The creation of the e-discovery process in civil matters also supports this documentary approach to digital evidence. The e-discovery process is informed by the Sedona Principles and the 14 principles arising out of the Sedona Conference in the United States.[107] These principles form the basis of changes to the Federal Rules of Civil Procedure in 2006 on "electronically stored information" or ESI.[108] Specifically, the principles provide organizing rules to assist in the use of ESI in litigation matters. Those principles migrated to Canada and became known as the Sedona Canada Principles,

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106 See "Older Uniform Acts" (last visited 2 May 2020), online: *Uniform Law Conference of Canada* <ulcc.ca/en/uniform-acts-new-order/> [perma.cc/B398-RSSX].

107 The Sedona Conference, "The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production" (2018) 19 Sedona Conference J 1.

108 *Ibid*.

which were originally drafted by the Sedona Working Group 7, published in 2008, and updated in 2015.[109] The revised principles specifically include social media as ESI. Although the principles recognize the differences inherent in ESI and traditional paper documents,[110] they focus on the e-discovery process involving the storing and production of ESI.

There is a cautionary quality to the Sedona Principles. The principles not only create a workable framework for the exchange of ESI documents, they also continually remind the litigator of the uniqueness of that framework. Issues of preservation and technological acumen lie at the heart of these principles, creating an approach to ESI that preserves the integrity of the process and the integrity of the justice system. Of necessity, the principles are obligatory in tone but describe the obligations as a shared responsibility with counsel, the court, and the entire administration of justice. This concern for the authenticity of the ESI is an important feature of the principles and will be further discussed under the next part of this article.

It becomes clear when contrasting the historical approach to electronic information in the *CEA* with the approach to ESI in civil e-discovery rules, that although both premise their subsequent rules on electronic artefacts as documents, e-discovery rules are more purposive than categorical. The civil rules are driven by the concern for storage, manipulation, and integrity in light of lawyers' obligation to disclose. They also arise at a later juncture when social media is becoming a social phenomenon. Conversely, the *CEA* is concerned with admissibility and providing, as do many sections in the *CEA*, an efficient and effective way of admitting evidence at trial. This is not a purely statutory desire, but it is consistent with evidential objectives of truth-seeking and with the evidentiary rules favouring categorical admission with exclusion as an exception.

The representation, therefore, imposed by common law and statutory law conceptualizes social media evidence as a piece of paper, a print-out, and a document. It is something to be archived and then introduced in court like a record. This approach compresses the intricacies of social media onto a page. Like other documentary pieces of evidence, the law also provides for evidential short-cuts to ensure admissibility and use is streamlined. This

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109 The Sedona Conference Working Group 7, "The Sedona Canada Principles Addressing Electronic Discovery" (November 2015), online (pdf): <www.canlii.org/en/info/sedonacanada/2015principles_en.pdf> [perma.cc/FN68-YZNB].

110 *Ibid* at v.

obscures the real picture of social media evidence and perpetuates the false conception of social media evidence as a piece of paper to be stamped and filed as Exhibit "A".

Documentary evidence is familiar territory for the law of evidence. As early as the 13th century, documentary evidence enjoyed pride of place in the courtroom over parole testimony.[111] In his seminal treatise on the subject, *From Memory to Written Record: England 1066-1307*, Professor Clanchy traces the legal shift in the British courts from testimonial evidence, based on human memory and perspective, to the written word as artefacts of the events. Instead of the dynamic, colourful presentation of personal recollection and description, the courts turned to the black and white of the tightly controlled print medium. Documents, unlike testimony, could be handled and seen but not heard. Much like Justice Cory's comments on the superiority of recordings over witness testimony, documents could be viewed and re-viewed by the court at leisure and, therefore, were less demanding of the trier. Moreover, documents were "durable and searchable,"[112] representing literate, educated society. On this basis of perceived objectivity, documentary evidence became the "official memory"[113] as opposed to the personal one.

Even the word "document" signifies how we view objects so labelled: the Latin root of the word, *docere*, means "to show, teach, cause to know,"[114] giving the object a doctrinal flavour. This root meaning underlies the Latin word *documentum* meaning "example, proof, lesson." Later, in the medieval world, as written discourse became more widespread, "document" gained the further meaning of "official written instrument, authoritative paper." This suggests documents are a repository of knowledge, providing proof of its content. Documents, therefore, have a built-in conception of probative value. This is consistent with court treatment of documentary evidence. The justice system tends to take documents at face value, hence the evidentiary short cuts for documentary admission in both common law and statutory

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111 Clanchy, *supra* note 1.

112 *Ibid* at 26.

113 *Ibid* at 25–30.

114 The etymology of the proto-indo-european root word is "dek" meaning "to take, accept" also suggests an object that is acceptable and admissible. See "document" (last visited 12 November 2019), online: *Online Etymology Dictionary* <www.etymonline.com/word/document> [perma.cc/9JP4-62YJ].

authorities.[115] This is all the more reason for the law to be mindful of this documentary bias in admitting such evidence and in exercising the "second look" through the gatekeeper exclusionary discretion.

This preference for documentary records will be discussed further in the next part of the article, as the rules of admissibility of records and documents run parallel to this written record preference. The evidential documentary advantage will become clear in discussing the *CEA* rules surrounding admissibility. This advantage seems to disappear when applied to social media evidence, requiring a re-assessment of the social media evidence admissibility approach.

III. Social Media Evidence and the Problem of Admissibility

A. Inconsistency

As discussed thus far, the penchant for pigeon-holing evidence into categories together with the unclear nature of social media evidence results in inconsistent approaches to the admissibility of social media evidence. This can be viewed as an admissibility continuum whereby social media as a novel form of evidence is admitted through the basic rules of evidence, then it is perceived by the court as either image or document by applying the common law "real" evidence principles involving authenticity. In the final step of the continuum, social media evidence is contained within an observable package with the emphasis on the end product as a print-out of pages. This final characterization of social media places this evidence neatly into the electronic document regime in the *CEA*, shedding the less structured common law approach.

This continuum, however, obscures the reality: case law suggests that the courts are rendering inconsistent admissibility decisions by using differing modes of admissibility. This creates differing tests and standards for admissibility dependent on how the court perceives the social media evidence. As discussed earlier, social media as image focuses on alteration of the image or intent to deceive. The image line of cases places the burden on the party introducing the evidence with no shortcuts or presumptions in place, as in the *CEA*. More importantly, inconsistency means the embedded

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[115] See e.g. *Ares v Venner*, [1970] SCR 608, 1970 CanLII 5. See also *CEA*, *supra* note 3, s 30.

safeguards found in our admissibility rules are missing. The move from applying the general rules for admissibility has resulted in few decisions invoking the gatekeeper function. Instead, social media evidence is admitted under the chosen admissibility regime and any residual concerns with the evidence is left to weight.

There is an argument that social media evidence that is primarily textual, such as Facebook messages and chatroom conversations, should be differentiated from social media as images such as Facebook photographs. Image carries with it the predilection for the trier of fact to readily accept image at face value despite testimonial evidence to the contrary.[116] In the US Supreme Court decision of *Scott v Harris*,[117] Justice Scalia upheld a summary judgment decision, dismissing a civil claim against the police for a negligent police chase that rendered the accused a paraplegic, purely on the basis of police in car video of the pursuit. In Justice Scalia's opinion, the video "speaks for itself."[118] The strongly worded dissent by Justice Stevenson and subsequent social science study disagreed.[119] Image is confined by its frame of reference, while the trier of fact must look beyond it.[120]

Although image can be overwhelming and distract the trier of fact from the proper weighing of that evidence, admissibility of documentary evidence, through the best evidence rule (BER), is also concerned with alteration and accuracy. Indeed, as will be explored further below, the BER is founded on the court's search for truth through the pristine nature of the original document. The problem with favouring the *CEA* regime instead of the common law approach lies in how the *CEA* fulfills the BER through the application of presumptions of integrity that create short-cuts around the alteration and accuracy concerns. In a series of recent cases on

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116 Sherwin, "Visualizing Law", *supra* note 96 at 38–40 (Sherwin refers to the Marx brothers classic, Duck Soup, where Chico dressed as Groucho challenges actor Margaret Dumount's exclamation that he (Groucho) already left her room as she see him leave "with her own eyes" by retorting "who are you going to believe, me, or your own eyes.")

117 550 US 372 (2007).

118 To further validate that statement, the video was also posted on the SCOTUS website for public review.

119 Daniel M Kahan, David A Hoffman & Donald Braman, "Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism" (2009) 122:3 Harv L Rev 837.

120 Anecdotally, while presenting this paper at a conference in Winnipeg, I took a Snapchat photograph of the Museum of Human Rights. My daughter responded with "Great pic. I see all the snow melted." What my daughter failed to see was the enormous pile of snow just outside of the photo frame of reference.

admissibility,[121] appellate level courts have closed the admissibility continuum in favour of a consistent admissibility practice through the *CEA* electronic document regime. This assists in the inconsistency issue, but it has only exacerbated the true concern with admissibility, which is trial fairness. There is no room in the *CEA* regime for the gatekeeper function and once admitted under that regime, the social media evidence faces no further threshold scrutiny. The gatekeeper function involves the added benefit of keeping at the forefront throughout the trial the purpose or reason for the introduction of the evidence.

This connection between admissibility and weight is essential. Losing sight of the reason for admitting the evidence often results in trial errors at the appellate level. Admissibility and weight are separate enterprises but are linked. The true delicacy in a trial is to straddle the line between the two processes, which are both considering the same piece of evidence but through a different lens coloured by differing tests and standards of proof. Admissibility and weight must not be conflated,[122] but proper admissibility sets the stage for a fair trial. Justice Dickson reiterates this sentiment in *R v Ball*, by finding that an accused person is "entitled to be tried on only carefully scrutinized and plainly admissible evidence."[123] The integrity of the trial depends on the integrity of the admissibility process.

For example, a database search on admissibility of Facebook evidence lists 36 criminal cases.[124] Of the 33 cases,[125] 17 decisions do not enter into threshold admissibility discussions[126] even though, in some cases, the Facebook evidence is used as admissions made by the accused,[127] as expert

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121 *R v Ball*, 2019 BCCA 32 [*Ball*]; *R v SH,* 2019 ONCA 669, aff'd 2020 SCC 3 [*SH*]; *R v Durocher*, 2019 SKCA 97 [*Durocher*].

122 *Durocher*, *supra* note 121 at para 45.

123 *Supra* note 121 at para 88.

124 Simple CanLII database search terms were used (i.e."Facebook /s admissibility /s evidence" and specifying "R" in the case name box). Search was done as of October 2019.

125 The list contained 35 cases but three of the cases were mentioned twice.

126 *R v B(B),* 2011 ONCJ 582 [*B(B)*]; *R v Eaton*, 2013 ONSC 3133 [*Eaton*]; *R v J*, 2013 NSSC 107; *R v Thorburn*, 2013 ABPC 230; *R v GT*, 2015 BCSC 1718 [*GT*]; *R v Niang*, 2015 ONCJ 719 [*Niang*]; *R v Yellowhead*, 2015 BCCA 389 [*Yellowhead*]; *R v JSM*, 2015 NSSC 312 [*JSM*]; *R v Vollrath*, 2016 ABPC 130 [*Vollrath*]; *R v Howe*, 2016 NSSC 267; *R v Bredo*, 2016 BCSC 2580; *R v Sheek-Hussein*, 2017 ONSC 1764 [*Sheek-Hussein*]; *R v Souvannarath*, 2017 NSSC 107; *R v ASD* ; *R v Papasotiriou and Ivezic*, 2017 ONSC 7221; *R v CFN*, 2018 YKSC 19; *R v Simard*, 2019 BCSC 532.

127 See *B(B), supra* note 126 at para 49; *GT*, *supra* note 126; *JSM*, *supra* note 126 at para 53.

evidence,[128] or even proof of identification.[129] It is concerning that courts, when faced with such evidence, do not recognize the need to first determine whether the social media evidence is admissible as social media evidence and then consider the use for which the evidence will be made based on other evidentiary rules. Equally concerning, it is not clear in many of these decisions the role of counsel in identifying the need for such an admissibility discussion.

B. *CEA* & Authentication

The *CEA*, as suggested, is the admissibility regime of choice, so it is to the *CEA* we now must turn to fully appreciate the unclear picture of social media as evidence in the courtroom. The definition of electronic document under section 31.8 is broadly described as any "data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device."[130] Social media as an evidential artefact easily fits this definition.

Notably, these sections repeatedly use the phrase "recorded or stored" as if both terms are functionally similar concepts. This may be so when using traditional ESI such as excel worksheets or word processing documents. Typically, in creating a digital invoice, we are recording and storing. We can then send the invoice via email and that invoice, when received by the recipient, can be said to store that electronic document. Conceptually, this does not hold true for social media evidence. A person can create the chat message through a computer device, but then that message resides in cyberspace and is not necessarily "stored" on any device at all. This issue is akin to the difficulties the courts have with finding an accused person in possession of child pornography under subsection 163.1(2) and why the alternate separate offence under subsection 163.1(3) of "transmitting" or "makes available," is more applicable in certain circumstances.[131] A traditional ESI often does reside in a computer system, where a Facebook profile page does not reside anywhere but in cyberspace. This cyber-evidence

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128 See *Eaton*, *supra* note 126.

129 *Niang*, *supra* note 126; *Vollrath*, supra note 126 at paras 100–11; *Sheek-Hussein*, *supra* note 126 at para 100.

130 *CEA*, *supra* note 3, s 31.8.

131 See *R v Morelli*, 2010 SCC 8.

can be retrieved through any computer system, but it is questionable whether it is then truly "stored."

Generally, there are two separate but related requirements for admissibility under the *CEA*. The first step requires threshold authenticity under section 31.1.[132] This authenticity stage parallels the common law requirement for admissibility of real evidence.[133] Although the Saskatchewan Court of Appeal in *Hirsch*[134] describes the section as a "codification"[135] of common law authenticity, there is a difference. Under section 31.1, the threshold for authenticity under the section is low, merely requiring "evidence capable of supporting a finding" that the evidence is what "it claims to be."[136] This "some evidence"[137] standard of proof may be consistent with threshold authenticity under the common law, but it is lower than the balance of probabilities standard of proof that some courts have required for digital photographic and recorded evidence.[138] Although image based evidence has developed different than textual, social media evidence is not always textual and is not, as argued, completely documentary. In fact, social media evidence, like photographs and digital recordings, is open to modification and fabrication.

Justice Paciocco, as he then was, in the *JV* decision, explains the lower standard as "more in the nature of a showing of a *prima facie* case for authenticity, than full establishment."[139] Admissibility is, therefore, concerned with whether the evidence is "worth showing"[140] to the trier of fact. If it is, it is the province of the trier of fact to determine "what to make of it."[141] Although, this posits a bright line between admissibility and weight,

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132 Section 31.1 of the *CEA* reads as follows: "Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be."

133 See *R v Hirsch*, 2017 SKCA 14 [*Hirsch*]; *R v CL*, 2017 ONSC 3583 [*CL*].

134 *Supra* note 133.

135 *Ibid* at para 18.

136 *Ibid*.

137 *R v Himes*, 2016 ONSC 249 at para 47 [*Himes*]. See also *R v CB*, 2019 ONCA 380 [*CB*], Watt JA (commenting on threshold authentication and the inference that could be drawn on authorship in the absence of evidence that gives an "air of reality" to a claim that this may not be so); *R v JV*, 2015 ONCJ 837 at para 10, Paciocco J.

138 See *Bulldog, supra* note 83 at 38, 40. *Penney, supra* note 83 at para 47; *Parsons, supra* note 83; *R v Iyer*, 2015 ABQB 577 at para 9; *R v He*, 2017 ONCJ 790 at para 2.

139 *JV, supra* at note 137 at para 11.

140 *Ibid.*

141 *Ibid*. See also *R v Donald* (1958), 121 CCC 304, [1958] NBJ No 7 (NBCA) at para 7.

what is worthy evidence depends on threshold relevancy that, in turn, does depend on the genuineness of the real evidence. As mentioned, Facebook messages can be created by someone other than the accused, which can bring admissibility under the *CEA* into issue.[142]

Compounding this problem is the standard of proof required for the second stage of *CEA* admissibility involving the best evidence rule and the presumptions of integrity, some of which require the higher standard of balance of probabilities as opposed to the "some evidence" standard.[143] This inconsistency in application of a standard "standard of proof" highlights the gaps in the electronic document admissibility regime and heightens the need for a gatekeeper function.

This low admissibility standard is mirrored by the low test employed under the section. The electronic document must first be authentic, meaning "what it is purported to be." This requirement is fulfilled by some evidence the item is what it claims to be.[144] In *Himes*,[145] the Court found section 31.1 fulfilled where the complainant identified the print out copies of the Facebook messages as the messages the complainant received from the accused.[146] Similarly, in *Hirsch*, authenticity was fulfilled by the complainant's testimony, who had a personal relationship with the accused, that the Facebook screen captures showed the Facebook profile page of the accused.

These cases suggest authentication also requires some evidence that the messages themselves are real. In *CB*, Justice Watt found, as a "matter of logic," that the authentication of text messages is akin to the "reply letter doctrine" used in common law to authenticate written correspondence.[147] This view flattens out social media evidence into a handwritten letter sent through post or what we now call "snail mail." As attractive as this logic is, it misses the point: the product of social media or the output of the data can be viewed as word-based and, therefore, looking like a letter, but social media does not crystalize into that final product until someone makes it so.

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142 See *Ball*, *supra* note 121.

143 See *SH*, *supra* note 121 (where Justice Tulloch in dissent suggests the standard for admissibility is lower under s. 31.3(b) of the *CEA* than under s. 31.3(a)).

144 Rosemary Pattenden, "Authenticating 'Things' in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials" (2008) 12:4 Intl J Evidence & Proof 273 at 275.

145 *Supra* note 137.

146 *Ibid* at para 47.

147 *Supra* note 137 at para 69.

Social media, while it travels through cyberspace, can be altered, modified, and fabricated. Replying to a text message does not mean that the person receiving the message is the intended recipient, nor does it mean the person who originally sent the message was the owner of the device or computer system which purportedly sent it.

In the 2019 *Ball* decision, Justice Dickson for the British Columbia Court of Appeal suggests that section 31.1 authentication does "not necessarily mean that it is genuine,"[148] leaving that issue to weight. This position seems at odds with common law conceptions of the authentication process. Authentication of real evidence is needed as a form of relevancy: if a proffered item is not genuine, then the items connection to the proceedings is severed. The difficulty lies in the scope of the claim of what it purports to be. For instance, a screenshot of a Facebook page taken by the investigating officer should not pass the authentication hurdle based only on the police officer's evidence confirming the image looks like the one that he captured. The Facebook page only becomes relevant where there is some threshold evidence of identity — that it is the Facebook page of a particular person connected to the case at hand. Otherwise, the item is not what it purports to be. This threshold determination would require a consideration of whether the item is facially "genuine." Although statutory authentication is not a virtue test, it still should require a relevancy test before turning to the BER and the presumptions of integrity.

C. The Best Evidence Rule and the Presumption of Integrity

Authentication is augmented by[149] or an "adjunct to"[150] the statutory application of the Best Evidence Rule (BER) under section 31.2. These descriptors, "augment" and "adjunct", remind us that authentication and the application of the BER are related concepts. The use of the BER in the digital context confirms the evidentiary categorization of social media evidence as documentary. The BER, also known as the documentary originals rule, is premised on the belief that changes or alterations to a document can best be seen on the original document. In other words, copies are subject to either unintentional changes (think medieval scribes) or intentional ones (think white out and a photocopier). To ensure that the

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148 *Supra* note 121 at para 70.

149 *Ibid* at para 72.

150 *Supra* note 133 at para 23 quoting David M Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11:2 CJLT 181.

document entered and to be relied upon is a true reflection of its contents, the document so entered must be the original. Again, this rule is connected to relevancy, materiality, and the truth-seeking function of the trial. It is also connected to final weight, as the admissibility process ensures that the final probative weighing of the document will be done with the best evidence at hand.

The BER seems out of place in the digital world. According to Justice Baltman in *CL*, the BER in the digital world assures "the court that the document submitted is the same as the one that was input into the computer."[151] But does it? There are no "originals" in the digital world; ESI is just that, bits of data stored as a representation of a document. So too social media fits uncomfortably into the BER. By focusing on the end product as a document, the entire social media journey through the ethernet is ignored. Contextual nuances are removed in favour of the wrappings. This becomes even more apparent in the fulfillment of the BER under the *CEA*. Consistent with the emphasis on documents as an efficient form of probative evidence, the *CEA* electronic regime provides evidentiary short cuts to fulfill the BER. Justice Caldwell, in the *Hirsch* decision, opines that the BER presumptions are in place precisely because electronic evidence cannot be produced as originals.[152] Instead, the presumptions substitute for the integrity of the document, which cannot be otherwise shown. This may explain the reason for the presumptions, but it does not alleviate the concerns with providing an evidentiary shortcut which cannot provide substantive integrity of the actual evidence introduced. Rather, the use of these presumptions give the trial process a false sense of integrity that is simply not there.

These shortcuts come in the form of a number of presumptions of integrity which, if factually proven, fulfill the BER requirement. The presumptions themselves are documentary oriented and reflect other non-digital documentary rules. For example, the presumption under paragraph 31.3(c) is consistent with section 30 business records, which are created in the "usual and ordinary course of business." Unlike section 30, the electronic document is admissible but not for the truth of its contents. Again, these rules seem to have been written with traditional ESI in mind and not social media evidence.

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151 *Ibid.*

152 *Supra* note 133 at para 22.

The presumptions under section 31.3[153] focus on the integrity of the process rather than the integrity of the evidence itself. This process emphasis looks to the container, be it artificial or connected to an individual, as a reliable substitute for the evidence itself. In other words, the concern is with where the evidence resides, not the integrity of the evidence itself. The presumption most relied upon for social media evidence is paragraph 31.3(a), establishing integrity through proof of "evidence capable of supporting a finding" of proper operation of the computer system where the evidence is recorded or stored. Typically, this proof requires evidence that the computer system was "operating properly" "at all material times."

The proof can come in many forms depending on the circumstances. Generally, it comes from the person who owns or has custody of the computer system. The difficulty with using this presumption as proof of integrity is the ephemeral nature of social media evidence. As mentioned, social media evidence does not reside in any particular place, nor in any identifiable form. A Facebook profile page, for instance, can be accessed on multiple computing devices at multiple times. Proof of operation of whichever computer is used to access the information for trial is a poor indicator of the integrity of the actual evidence as contemplated by the BER. It certainly cannot ensure that the social media evidence "accurately reflects the original information input into a computing device by its author."[154]

As with authenticity, there is conflicting authority of the standard to be applied. Justice Dickson in *Ball* considered the standard for all of the presumptions to be on a balance of probability.[155] Other cases have discerned differences in the standard required for paragraphs 31.3(a) and 31.3(b). The Ontario Court of Appeal in *SH*[156] finds the threshold under paragraph 31.3(a) to be lower than the threshold in 31.3(b), based on the words used in each paragraph to describe the proof requirement. Paragraph 31.3(a) uses the familiar "evidence capable of supporting a finding," which is also used under the authentication section under 31.1. As discussed earlier, courts have interpreted section 31.1 to require a low threshold. Paragraph 31.3(b) requires the circumstances be "established," suggesting a

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153 There are other presumptions available such as section 31.4 of the *CEA* and the presumptions regarding secure electronic signatures but these are more closely aligned to the civil e-discovery process.

154 *Ball*, *supra* note 121 at para 73; *SH*, *supra* note 121 at para 124; *Hirsch*, *supra* note 133 at para 23.

155 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *JV*, *supra* note 137 at para 21.

156 *Supra* note 121 at paras 25, 125.

higher threshold.[157] Although the words used in both subsections differ, case authority does not discuss the reasoning behind this critical differential.

Paragraph 31.3(b) permits the application of BER in circumstances where the electronic document was "recorded or stored by a party adverse in interest to the party seeking to introduce it." For example, this presumption could be used when the accused person's computer is seized and the Crown is seeking introduction of ESI from the computer. It could also include text messages found on an accused person's smart phone.

In the *Hirsch* case, the Saskatchewan Court of Appeal found the Crown fulfilled the BER through the use of the paragraph 31.3(b) presumption by introducing copies of the accused's Facebook page in the form of screen capture images taken by the complainant's friend.[158] Justice Caldwell in *Hirsch* contemplates the possibility there are two electronic records in issue: one being the Facebook page as it appears on the computer screen and the other as created by the screen capture image.[159] While acknowledging the "fluidity and impermanence" of Facebook postings, Justice Caldwell found it more "compelling" to view the screen captures as providing the "best evidence" available for the Crown.[160]

This reference to "best evidence" applies the more generous meaning of the phrase[161] rather than the traditional original documents definition. It also suggests that courts are applying a "functional approach"[162] to the admissibility of social media evidence. Such an approach is similar to the principled approach to admissibility now favoured in admitting hearsay statements.[163] In the context of social media evidence, this functional approach can bear out two meanings: it can assist in simplifying the highly technical aspects of digital evidence and permit judges to take a generous view of judicial notice. In the words of Justice Paciocco in his article on

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157 See also *Avanes*, *supra* note 66 at paras 55–57.

158 *Supra* note 133 at para 7.

159 *Ibid* at para 24.

160 *Ibid*.

161 See Ron Delisle et al, *Evidence Principles and Problems* (Toronto: Carswell, 2015) at 409-410.

162 See David M Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11:2 CJLT 181. See also *Ball*, *supra* note 121 at paras 75–80.

163 See *Khan*, *supra* note 35.

digital evidence, this approach will permit judges "to cope with technology that is broadly relied upon by ordinary persons."[164]

The other meaning applies the "functional approach to interpretation and application of the statutory framework,"[165] which appears to suggest a rather sweeping application to the electronic document regime. Although a functional approach may have some benefits, such as circumventing needless proof of how Facebook works, it can also cut the wrong corners in the name of pragmatism. This is apparent in *Hirsch* and recent appellate decisions like *Durocher*[166] and *SH*,[167] where the Courts are not so much concerned with the lack of proper admissibility procedure as they are with the outcome. In *Durocher*, the Saskatchewan Court of Appeal found that the trial judge was not in error when he failed to inquire into the admissibility of the social media evidence pursuant to the *CEA*. The majority decision in *SH* came to a similar conclusion where the trial judge, rather late in the trial, required *CEA* admissibility but through an inapplicable presumption of integrity under paragraph 31.3(b). Both appellate courts came to their position after applying the *CEA* requirements after the fact and finding the social media evidence admissible. Although this position is consistent with the notion of content over form, which appellate courts readily apply,[168] when the process is the point of the exercise, such as in admissibility, the functional approach loses its proper function and true meaning when the court enters into admissibility guess work at the appellate stage. This is particularly true when admissibility is a gatekeeper trial function connected to the ultimate trial verdict.

The *Ball* and *SH* decisions are an indication that the overlay of the *CEA* regime onto social media evidence is more complex than first imagined. For instance, in the 2015 *JV*[169] decision, Justice Paciocco, as he then was, found

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164 Paciocco *supra* note 162 at 226.

165 *Ball*, *supra* note 121 at para 75.

166 *Supra* note 121.

167 *Supra* note 121.

168 See e.g. *R v Calnen*, 2019 SCC 6 at para 163, Martin J. ("jury charges do not have to adhere to prescriptive formulae); *R v REM*, 2008 SCC 51 at paras 25–27, McLachlin CJ ((approving of Binnie J in *Sheppard* who warns against a formalistic approach in considering sufficiency of reasons and instead approves of a functional approach where the Court considers the sufficiency in light of the function of the reasons as informational, accountability, and meaningful appeal); *R v Boucher*, 2005 SCC 72 at para 29, Deschamps J, ("*W(D)* is not a sacrosanct formula that serves as a straitjacket for trial courts").

169 *Supra* note 137.

little trouble with paragraph 31.3(a). He found that the integrity of the computer system was established by inferring the accuracy of the chatroom messages from the evidence of the complainant. Therefore, remarked Justice Paciocco, the computer system "did what they were meant to do, namely capture the recognized conversation."[170] Conversely, in the dissent of the 2019 *SH* decision, Justice Tulloch stresses the presumption under paragraph 31.3(a) requires evidence that the system was working at "all material times."[171] This was questionable on the evidence in *SH*, as the Crown failed to call evidence of the owner of the device.[172] Similarly, in *Ball*, another 2019 appellate decision, the Crown failed to lead evidence of the accuracy of the time stamps from the verifying witness, resulting in a failure to establish the system was working at "all material times."[173]

Justice Tulloch went even further in his strict reading of the *CEA* requirements. The majority, in dismissing the appeal in *SH*, relied heavily on the data extraction evidence from the cell phone associated with the accused. In Justice Tulloch's view, this showed the cell phone data was accurately extracted but was not "fully responsive" to BER concerns that "the data on the cell phone accurately reflected the information originally inputted into the cell phone by the appellant and C.H., or whether the cell phone was properly operating at the time when the messages were sent and received."[174] The additional argument that an inference could be drawn because the cell phone was working properly from the fact the messages were stored "in a customary format" was rejected by Justice Tulloch.[175] In Justice Tulloch's view, the proper operation requirement is linked to the temporal factor. This requires proof of proper operation "at all material times"

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170 *Ibid* at para 24.

171 *Supra* note 121 at para 126. Note, that in the brief majority decision of the Supreme Court of Canada upholding the majority decision, Justice Moldaver, on behalf of Justices Abella and Côté, found that the evidenced adduced by the prosecution after the reopening of their case was "essentially confirmatory" evidence of constructive possession and that the evidence, before the reopening of the case, was "overwhelming." In those circumstances, the application of the curative proviso was appropriate. Justice Brown, with Justice Martin concurring, would have allowed the appeal and ordered a new trial on the basis that "the trial judge's error in allowing the Crown to split its case led to an unfair trial, which miscarriage of justice cannot be cured." Neither decision touches upon the admissibility regime for electronic evidence.

172 *Ibid* at para 129.

173 *Supra* note 121 at para 82.

174 *SH, supra* note 121 at para 131.

175 *Ibid* at para 132.

through evidence the time stamps were "accurate or reliable."[176] Accuracy may not be a concern in authentication under section 31.1 but it is, on a strict application of the 31.3(a) provision, a BER concern. This line of authority may bring the *CEA* requirements more in line to the photographic or image approach. However, a crucial dissimilarity exists: in the photographic/image regime, the burden of proof is firmly fixed on the party introducing the evidence while in the *CEA* regime, the opposing party must raise proof concerns.

To be fair, the presumptions can be rebutted by "evidence to the contrary." There is very little authority on what kind of evidence is needed and what the standard of proof is in those circumstances. It does require the opposing party to lay a foundational evidentiary basis for challenging the presumptions. Unlike the admissibility process under common law, these presumptions create a default situation and if counsel is unaware of their obligations, that default situation turns a presumption into a mandated fact.

Presumptions are an oddity in law; one may view presumptions as creating a false reality or legal fiction whereby one set of facts are proven by a different set. Legal principle imposes this legal artifice by placing comfort in the notion that the party affected by the presumption has the knowledge and the ability to rebut the legally constructed fact. For example, the presumption that the person sitting in the driver's seat of the car has care and control of the car for purposes of impaired driving offences makes factual and legal sense. It is the accused who has the information to rebut that presumption, and it is consistent with the permissible inference that a person intends the natural consequences of their actions.

The same cannot be said of the presumptions in the *CEA*. Certainly, under paragraph 31.3(a), the defence may not have the requisite knowledge to even appreciate that the computer system in question is not operating properly. Under 31.3(b), the presumption may make more sense as the evidence is emanating from the party's own device. But, when it comes to social media, this advantage is fleeting: social media does not reside in a device, nor is it really stored in a device — typically if it "resides" anywhere, that place is in cyberspace. Similarly, social media evidence can be created from any device and yet still look like it came from the accused person. For example, in *Ball*, the defence argued that the Crown witness, who was called to authenticate the Facebook messages, falsified the messages and created

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[176] *SH*, *supra* note 121 at para 132; *Ball*, *supra* note 121 at paras 84–85.

them by accessing the accused person's Facebook account.[177] Although in *Ball* admissibility was not properly considered at trial, Justice Dickson for the British Columbia Court of Appeal found that it was likely the Crown could not fulfill the paragraph 31.3(a) requirements.[178]

The *CEA*, geared toward traditional ESI, fails to capture what social media is and how it presents at trial. The admissibility regime is difficult to apply, resulting in inconsistent applications of the sections and an unclear understanding of how the sections work. It also, as will be discussed next, needs to be embedded in an entire admissibility framework and should not stand alone as the key to the introduction of social media evidence at trial.

D. The Gatekeeper Function

The trial judge's role as gatekeeper is referenced repeatedly throughout this article. The exclusionary discretion requires the judge to determine whether otherwise admissible evidence should be excluded where the prejudicial effect of admission outweighs the probative value of that evidence. It is an essential step in the admissibility process, yet here too, this step is inconsistently applied when it comes to threshold admissibility of social media evidence. As referenced earlier in this article, a database review of admissibility decisions for Facebook evidence indicates that out of 15 decisions which do consider threshold admissibility, six engage in the gatekeeper function to varying degrees.[179] Of those six decisions, three cases applied the common law to threshold admissibility[180] and one case[181] applied the exclusionary discretion after the Facebook evidence was admitted as accurate by the defence. Only in *Soh* (2014) and *TB* (2019) did the Court apply the gatekeeper function after determining admissibility under the *CEA*.

Significantly, none of the recent significant appellate decisions on the *CEA* electronic document regime[182] mention the gatekeeper function as an additional missing piece to the *CEA* admissibility process. The only recent appellate decision to make a passing reference to the gatekeeper function is

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177 *Supra* note 121 at para 23.

178 *Ibid* at paras 81–88.

179 *RL, supra* note 55; *R v Moazami*, 2013 BCSC 2398 [*Moazami*]; *Soh, supra* at note 65; *R v Savoie*, 2016 ABQB 89 [*Souvie*]; *R v Macdonald,* 2016 ABQB 154 [*MacDonald*]; *R v TB,* 2019 ABPC 260.

180 *RL, supra* note 55; *Moazami, supra* note 179; *MacDonald, supra* note 179.

181 *Souvie, supra* note 179.

182 See *Ball, supra* note 121; *SH, supra* note 121; *Durocher, supra* note 121.

Durocher.[183] The Saskatchewan Court of Appeal, in dismissing the conviction appeal, pointed to the failure of the defence counsel to "press for an admissibility *voir dire*, or suggest the evidence was not relevant or material to the charges or argue that the prejudicial effect of the Facebook messages exceeded their probative value."[184] The gatekeeper function is considered an alternative basis to challenge the admissibility of the Facebook evidence instead of an integral part of a robust admissibility regime.

The Court in *Durocher* seems to suggest that the defence is required to request the exercise of judicial discretion before it should be engaged. This is not consistent with the purpose of the gatekeeper function, which visualizes the trial judge as the protector of the integrity of the justice system. It is also not consistent with other admissibility regimes such as expert evidence, similar fact and hearsay evidence where the application of the gatekeeper function is presumed and, therefore, is a core responsibility to be performed by the trial judge. A failure to conduct such a responsibility may attract appellate review.[185] This is reinforced by the Alberta Court of Appeal's discussion of the hearsay issue where the "residual discretion" is specifically discussed as part of the principled approach to admissibility.[186]

This lack of attention to the gatekeeper's role in admissibility is most troubling. The evidentiary gatekeeper function is a "fundamentally important role" in which the judge "preserves" the accused person's rights and the integrity of the justice system.[187] Although the entire admissibility process involves such a gatekeeper function, it is in the application of the exclusionary discretion where the gatekeeper truly shines. Here, the judicial discretion goes beyond admissibility as defined by the rigid rules of evidence. Instead, this function enters into the realm of fairness and equity. When properly exercised, the exclusionary function ensures a fair trial, which is the ultimate goal for all of those affected by the justice system.

The importance of this judicial second look at admissible evidence can be viewed in light of digital evidence realities and the drive for accuracy, continuity, and integrity of the evidence. The Sedona Canadian Principles, although applicable to the civil litigation e-discovery scheme, highlight the

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183 *Supra* note 121.

184 *Ibid* at para 51.

185 *R v Dominic*, 2016 ABCA 114.

186 *Ibid* at para 57.

187 *Grant*, *supra* note 41 at para 44, Karakatsanis J.

need for special caution in using digital evidence as "ESI behaves completely differently than paper documents."[188] Further, "ESI can be mishandled in ways that are unknown in the world of paper. Electronic information can be overwritten, hidden, altered and even completely deleted through inadvertent, incompetent, negligent or illicit handling without these effects being known until later."[189] This concern is echoed in other Sedona Principles concerned with continuity, alterations of metadata and the "dynamic, changeable nature" of the ESI. Although the principles continue to be focused on the final discoverable product as a readable document or at least retrievable data, not unlike the primary focus in the *CEA*, these sentiments suggest we need a more robust admissibility process, particularly in the criminal context where fair trial issues are of primary concern.

The advantages of applying the cost-benefit analysis of the gatekeeper cannot be overemphasized. For instance, the informativeness of the social media evidence would also be reviewed in considering the probative value of the evidence. Again, relevancy, accuracy, and reliability would be considered, not assessed as the ultimate trier, but weighed in relation to the possible prejudicial effect of the evidence. The potential prejudice could engage moral and/or reasoning prejudice. Social media evidence, depending on its presentation, can distract the trier from the testimonial evidence at trial. Viewed as documents with inherent probative value, a trier could place more weight on the evidence than is warranted. Further, the evidence can engage other admissibility concerns, such as hearsay and character evidence concerns, that can magnify the reasoning prejudice and may lead to moral prejudice as well.

Finally, as with expert evidence admissibility, the gatekeeper function ensures novel forms of evidence and novel admissibility procedures are, as Justice Dickson in *Ball* suggests, "carefully"[190] scrutinized through the gatekeeper function to ensure the fact-finding process remains focussed on whether the accused committed the offence beyond a reasonable doubt.[191] There are parallels here to expert evidence admissibility concerns. For expert evidence, the concern is that the trier will take the evidence at face value due to the expertise and knowledge of the witness. Here, the concern is that the trier will take the evidence at its face value because those involved in the

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188 The Sedona Conference Working Group 7, *supra* note 109 at v.

189 *Ibid.*

190 *Ball, supra* note 121 at para 88; See also *SH, supra* note 121 at para 137.

191 *R v Trochym,* 2007 SCC 6 at para 54, Binnie J.

justice system, lawyers, and judges alike simply do not properly understand what social media evidence is and how digital technology actually works. This is highlighted by Justice Tulloch's comments on the frailties in inferring proper operation of the system from the successful data extraction. These concerns are exacerbated by an admissibility regime founded on artificial presumptions of integrity that do not completely connect computer system operation integrity with the integrity of the actual evidence being introduced. Although trial objectives encourage parties to bring "forward the most complete evidentiary record possible,"[192] admissibility will necessarily be circumscribed where the evidence may "distort the fact-finding process."[193]

Another gatekeeper concern is privacy. In the *RL*[194] decision, one of the earliest reported decisions on the admissibility of Facebook evidence in the criminal context, the only case cited is the earlier *McDonnell*[195] civil decision, which specifically raises privacy as an admissibility concern. According to Justice Eberhard in *RL*, privacy concerns "may be overcome by relevance."[196] This concern is a decidedly gatekeeper issue. Justice Eberhard applied his gatekeeper function when he found that privacy concerns impact the prejudicial effect of the evidence, as any cross examination of the complainant on the Facebook contents would be "numbingly intimidating" involving "silly, profane, vulgar teenage rants."[197] In later decisions on admissibility, privacy as a gatekeeper issue does not figure as a factor.[198] Yet, privacy as a normative concept does loom large in section 8 search and seizure decisions. Considering social media and cyber communications do give rise to privacy concerns in the search and seizure of that evidence, it should be viewed as a valid consideration in the gatekeeper exclusionary discretion. The fact that it does not may be a function of the rigidly defined evidential rules, which lack this normative insight. At this early stage, gaps in the evidential approach to social media evidence already appear. It is

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192 *Ibid*.

193 *Ibid*. See also *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193; *R v J-LJ*, 2000 SCC 51 at para 29; *R v Bingley*, 2017 SCC 12 at para 13.

194 *Supra* note 55.

195 *Supra* note 50.

196 *Supra* note 55 at para 3.

197 *Ibid* at paras 12–15.

198 A search did not produce any criminal decision other than *RL*, *supra* note 55, that includes privacy interests in the admissibility discussion.

perhaps this social media context of personal and private space that imbues social media evidence with a special quality.

E. Trial Fairness

The failure to engage in the gatekeeper function and the lack of a consistent judicial approach impacts trial fairness. Two 2019 appellate decisions, *Ball*[199] and the dissenting decision of Justice Tulloch in *SH*,[200] connect the failure to properly conduct threshold admissibility of social media evidence to trial unfairness resulting in a miscarriage of justice. Justice Dickson's comments in *Ball* particularly reflect this sentiment when she cautioned that the accused is "entitled to be tried on only carefully scrutinized and plainly admissible evidence."[201] Justice Tulloch also comments on the repercussions of improper admissibility but focuses on the impact to the accused who is then "deprived... of a fundamental procedural right that was a safeguard of his right to a fair trial."[202]

Another recent decision from the Ontario Court of Appeal, *R v CB*,[203] views the unfairness through a different perspective, involving the introduction by the defence of digital evidence that was deemed inadmissible at trial. In that case, the digital evidence consisted of text messages and photographs residing on a smart phone social media platform.

At trial, the defence sought to use the evidence in cross-examination of the complainants. Yet again, at trial, social media evidence was introduced and discussed without a clear basis for threshold admissibility as digital evidence. The trial judge in *CB*, without applying the *CEA* regime, found that the digital evidence had no probative value, as there was no forensic evidence connecting the content of the data to the complainant. In short, although the trial judge did not use the words "authenticate" or "authentication," the evidence was inadmissible due to a failure to authenticate.[204] Yet again, appellate intervention is required and yet again, the appellate court applies common law and *CEA* principles to the decision, after the fact.[205] In *CB*, Justice Watt, allows the appeal, quashes the convictions and orders a new trial.

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199 *Ball*, *supra* note 121.
200 *SH*, *supra* note 121.
201 *Ball*, *supra* note 121 at para 88.
202 *SH*, *supra* note 121 at para 42.
203 *Supra* note 137.
204 *Ibid* at para 56.
205 *Ibid* at para 78.

CB also exemplifies the other recurrent unfair trial dimension: the lack of evidence at trial to overcome the presumption for integrity. But *CB* takes this absence of evidence a step further. Here, the fresh evidence on appeal relating to the authenticity of the data extracted from the cell phone was admitted not only for authentication proper, but for impeachment purposes. The timing and authenticity of the text messages and photographs were a key issue in CB's defence. The data was needed for impeachment purposes to bring into question the credibility and reliability of the Crown's evidence. Justice Watt, speaking for the Court, admitted the fresh evidence for threshold authentication purposes and to be considered in a "credibility/reliability analysis."[206]

R v Finck[207] serves as a different cautionary tale. In *Finck*, a new trial was ordered because trial counsel failed to introduce social media evidence, which was in counsel's possession.[208] The *Durocher* case also serves as a warning to counsel to be vigilant where social media evidence is proffered at trial. Similar warnings can be gleaned from *SH*, where Crown and defence counsel failed to appreciate the significance of the evidence[209] leaving it to the trial judge who, much later in the proceedings, realized that admissibility issues should be considered. Even in *Ball,* where the Court did send the matter back for a new trial based on miscarriage of justice, the trial unfairness was "largely borne of insufficient vigilance to ensure its protection."[210] It is important to note that in *Ball*, *Durocher*, and *Finck*, the grounds for appeal were also bound up with ineffective assistance of counsel concerns as a result of the lack of vigilance.[211]

Justice Tulloch, at paragraph 118 of *Ball*, suggested a heightened fairness concern in reviewing admissibility of "novel legal issues such as the admissibility of electronic documents." The uncertainty concerning the application of the *CEA* regime and the true nature of social media evidence are reflected in this novelty. Issues of accuracy, raised by the low threshold of section 31.1 and the liberal use of presumptions which do not logically connect with the underlying premise of the BER, further enhance trial fairness concerns. Both accuracy and integrity raise reliability issues.

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206 *Ibid* at para 145.
207 2019 NSCA 60.
208 *Ibid* at paras 53, 62.
209 *SH*, *supra* note 121 at para 58.
210 *Ball*, *supra* note 121 at para 122.
211 See also *Yellowhead, supra* note 126.

Interestingly, Bill C-6, which amended the *CEA* to add the electronic document regime, suggested the amendments would "clarify how the courts would assess the reliability of electronic records used as evidence."[212] Reliability as an objective is noticeably lacking in the *CEA* regime. Yet, threshold reliability, according to Justice Karakatsanis in *R v Youvarajah* "serves an important function" as do "rules of evidence and principles governing admissibility of evidence."[213] She went further and explained that those rules and principles:

> [E]xist in the first place because experience teaches that certain types of evidence can be presumptively unreliable (or prejudicial) and can undermine the truth-seeking function of a trial. Rules of admissibility of evidence address trial fairness and provide predictability. They also provide the means to maintain control over the scope of criminal trials to keep them manageable and focussed on probative and relevant evidence.[214]

Finally, an appellate caution. In the majority decisions of *SH, Durocher*, *Hirsch*, and *Farouk,* the *CEA* regime is applied after the fact by appellate courts to assess whether there is no substantial wrong or miscarriage of justice[215] for appellate purposes, without the benefit of a complete record testing admissibility issues at the time that the evidence was heard. To apply admissibility after the fact in an evidential vacuum, albeit in the context of appellate review, may further compound the fair trial concerns. As echoed by Justice Tulloch in *SH* at paragraph 119, it was incumbent on the Crown to "reveal" its case and the responsibility of the defence to respond at the time of trial when the proper mechanisms are in place to test the evidence. It is at trial where, ultimately, guilt or innocence are at risk and where issues should be litigated, argued, and properly determined, not at the time of the hearing of the appeal when the trial justice is long past.

IV. CONCLUSION: THE SOLUTION(S)

The specialness of social media and the problems surrounding the present approach to admissibility of such evidence have been identified, and now a solution is needed. There are two possible approaches: one which is pragmatic and the other, a more ideologically based solution. The pragmatic

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212 *Avanes*, *supra* note 66 at para 60.

213 2013 SCC 41 at para 25.

214 *Ibid*.

215 See *Criminal Code*, RSC 1985, c C-46, s 686(1)(b)(iii).

solution does not create a new approach but rather looks to other evidential categories where the traditional admissibility framework was not robust enough to protect fair trial concerns. Novel legal regimes need a framework that recognizes the modernity of the evidence, yet also recognizes that novelty may breed complacency or the path of least resistance. Consistency and clarity are key to containing novelty. Therefore, a robust and well-described approach is required.

For this, we must turn to the expert evidence regime carefully circumscribed in *White Burgess v Haliburton*.[216] This renewed expert evidence regime melds the traditional with an enhanced gatekeeper function. It takes well-used criteria and then re-filters it through the gatekeeper lens with an additional reliability factor. It also bridges the evidential spectrum from threshold admissibility to gatekeeper and then onwards to ultimate weight. This same approach can be employed for the admissibility of social media evidence. It provides counsel and the court with a road map where vigilance is promoted and legal principles are used. As with expert evidence, an electronic evidence admissibility *voir dire* should be required in all instances where social media evidence will be introduced. This is so "a reasoned determination"[217] may be made on its admissibility. The trial judge should not wait for counsel to engage the process but should raise the issue at the outset. For consistency, the *voir dire* should apply the admissibility regime under the *CEA*.

The enhanced gatekeeper function, through the exercise of the exclusionary discretion, will lie at the centre of this new admissibility framework. Similar to the expert evidence approach, the gatekeeper function will enter into a cost benefit analysis filtering the issues engaged by the *CEA* admissibility requirements through the gatekeeper lens. In addition, as with the expert evidence regime, the gatekeeper step will also view the threshold reliability of the evidence in weighing the prejudicial effect in light of the probative value of the evidence. As part of this second look, the gatekeeper will be informed by case law and Sedona-like principles which embrace social media as a community space *qua* evidential artefact. Then, if admissible, those defining factors will continue through to the trial with the application of the higher standard of proof beyond a reasonable doubt and the full weighing of the evidence within the entirety of the trial evidence.

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216 *Supra* note 46.

217 *Ball, supra* note 121 at para 67.

Although this is the recommended approach, this article has highlighted the inherent frailties in the *CEA* regime when it comes to social media evidence. Until the *CEA* sections are challenged or amended, the above recommendation will provide structure and scaffolding for the enhanced gatekeeper function. In any event, it is important to comment on the changes, which should be made to the *CEA* regime to bring it into line with the common law admissibility process. The standard of proof for fulfilling the BER should be entirely on a balance of probabilities. In fact, this standard is consistent with the "common law rule relating to the admissibility of evidence."[218] That standard is not a heavy burden and will adequately protect the fair trial requirement. The use of integrity presumptions are also questionable but at least with an embedded enhanced gatekeeper function, counsel will be aware of their obligation to rebut the evidence and how to do so. The other option is to bypass entirely the *CEA* regime for social media evidence in favour of the common law approach. This would leave the *CEA* for the ESI as initially contemplated, which as Word documents and Excel sheets better fulfill the premise of the sections.

There is a more radical solution. This solution requires a bit of soul searching or net-angst as we fashion a unique admissibility regime reflective of the true nature of social media evidence. This would require a more contextual approach to admissibility that visualizes social media evidence as a community as opposed to mere evidentiary categories. If, instead, evidential rules are viewed as creating a community of information to be used in the determination of legal issues, the law of evidence would move away from categories and toward a multi-dimensional assessment of admissibility. This evidence-as-community approach would be referential to the representative feature of social media evidence in terms of how it enhances or advances a party's case and also deferential to the ultimate objective of evidence as truth-seeking and fairness function. This, in my view, will require more than a tweak to our Wigmore rules and statutory procedures. It will need a re-visioning of who we are in the digital world and whether our Wigmore rules can stand the test of time.

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218 See *R v LTH*, 2008 SCC 49 at para 70, Rothstein J.

Cree Law and the Duty to Assist in the Present Day

DAVID MILWARD

I. INTRODUCTION

The world's first ever joint degree in both common law and Indigenous legal orders is now in its second year of operation at the University of Victoria Law School. It is a four-year law degree program where students take early year transsystemic law courses that expose them to both fundamental areas of Canadian law (e.g. constitutional, criminal, property) and laws originating from several different Indigenous legal orders, as well as field school courses where they are exposed to law as lived experiences in Indigenous communities. Another mandate of the program is for faculty to engage in research that explores laws originating from Indigenous legal orders and their possible use in contemporary communities.[1]

This article is the first attempt, on my part, to engage with that particular stream of scholarship. There is a particular facet of Cree law that I wish to explore. Sylvia McAdam uses the term 'pastamowin' to describe laws against causing harm to other people.[2] She is also clear that the law not only prohibits overt actions that cause harm, but also allowing harm to happen by not helping somebody who needs it.[3] She describes it, while offering a contract with Canadian common law, as follows:

> It is also important to state that silence and non-action do not exempt any human being from breaking the laws. It's considered a *pastamowin* to remain silent or take no action while a harm is being done to another human being or to anything in

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1 "Joint Program in Canadian Common Law and Indigenous Legal Order: UVic's Proposed Indigenous Law Program: An Overview" (last visited 28 February 2020), online (pdf): *University of Victoria Law* <www.uviclss.ca/blog/wp-content/uploads/2016/02/JID-Scope-and-Components-26-January-2016-1.pdf> [perma.cc/D2GV-QQYK].

2 Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyawa Legal Systems* (Vancouver: UBC Press, 2015).

3 *Ibid* at 40.

> creation. In common law it is called acquiescence; acquiescence is compliance, or when you are silent it is considered consent from a reasonable person. In other words, if a person is getting assaulted and you do nothing to stop or assist, then you have committed a *pastamowin* because you failed to prevent or protect another human being.[4]

The common law does not impose a general duty to help others, but instead only requires assistance when there is a specific legal (not moral) duty to do so. The reasons for this preference include, but are not limited to, a hesitancy to force citizens to take the risks of potentially dangerous situations on themselves and potential difficulties with enforcing such laws.

Self-determination for Indigenous communities is, in truth, a variegated and relative concept. There may be instances when Indigenous communities are still able to use their own legal principles to resolve conflicts and tense situations, entirely outside the Canadian legal system. But this kind of exercise in self-determination often depends on Canadian authorities, such as police officers, who may otherwise want to formally lay charges under the *Criminal Code*,[5] unaware of the situations that communities are trying to resolve it on their own.[6]

In other instances, there may be an agreement between Canadian authorities and Indigenous peoples that provides allowances for Indigenous approaches to justice. But, the extent to which such agreements could be called self-determination may be limited. Such agreements often limit Indigenous approaches to summary (less serious) offences.[7] As another example, there is an agreement between the James Bay Cree and the Province of Quebec for the administration of justice. The agreement provides extensive funding, starting at $13 million annually and with yearly increases to account for inflation, for programs administered by the Cree.[8]

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4 *Ibid*.

5 *Criminal Code*, RSC 1985, c C-46.

6 For an academic discussion of a Mi'kmaq Indigenous legal order operating in such a fashion, see Leslie Jane McMillan, *Koqqwaja'ltimk: Mi'kmaq Legal Consciousness* (PhD Dissertation, University of British Columbia, 2002) [unpublished] at 74. For judicial recognition that Indigenous legal orders often try to resolve conflicts outside the Canadian legal system, and with reference to the Inuit in Nunavut, see *R v Itturiligaq*, 2018 NUCJ 31 at paras 119–20.

7 For two examples, see *Sechelt Indian Band Self-Government Act*, SC 1986, c 27; *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39 (38th Sess), Bs 133–36.

8 *Agreement Concerning the Administration of Justice for the Crees Between Le Government Du Québec and The Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority*, 7 February 2002, online: <www.autochtones.gouv.qc.ca/relations_autochtones/entent

I do not wish to devalue the good that the programs may accomplish, but it is open to question to what degree such an agreement does amount to self-determination. The agreement makes numerous references to matters such as programs for incarcerated Indigenous persons, court sessions, conditional sentences, suspended sentences, and interim detention of Indigenous persons.[9] The programs themselves account for Indigenous perspectives during what fundamentally remains as Canadian criminal processes, with Canadian criminal sanctions as the end results. And it is surely the case that substantive Canadian criminal law continues to define what are the sanctionable offences.[10]

These efforts at exercising jurisdiction, while they may realize benefits for some Indigenous communities, are also limited in scope. The agreements between Indigenous communities and either federal or provincial governments tend to preserve the continuing application of Canadian state criminal law with narrow allowances for Indigenous approaches. The 'under the table' efforts, in particular, may be happenstance in what they can accomplish. Perhaps self-determination in its truest sense can only be realized through a fulsome implementation of Call to Action 42 from the final report of the Truth and Reconciliation Commission.[11] It reads:

> We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.[12]

If the Call to Action is fully implemented, it would mean that Indigenous exercises of self-determination would, to a very real degree, no longer depend on happenstance or be confined to narrow parameters by restrictive state agreements. That, in turn, means that Indigenous legal orders could freely use laws grounded in their traditions, including substantive criminal law that defines what is or what is not sanctionable conduct, even if those laws differ markedly from Canadian law.

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es/cris/entente-justice-en.pdf> [perma.cc/C3DH-DKA6].

9 *Ibid* at paras 5, 8.

10 *Ibid* at para 5.

11 *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at no 42, online: <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> [perma.cc/2BCN-VXVX].

12 *Ibid*.

The question entertained by this paper is to what extent the law that required helping fellow community members can be a law that is used in full force as a part of Cree self-determination. It could be that the law is alive and well in some Indigenous communities and that it continues to guide life in Cree communities to this day. Although, the extent to which that is the case remains uncertain and undocumented. A possible merit of implementing Call to Action #42 is that it guarantees a legal space for the Cree law to operate without external constraints, where otherwise it could end up suppressed or driven 'under the table' by Canadian state law. And, for purposes of the discussion in this paper, that state law is decidedly against imposing a general duty to assist.

Another distinct possibility is that, in some instances, colonialism may have led to a loss of connection with traditional laws that had been part of Indigenous legal orders, although that loss may not necessarily be permanent or place traditional laws beyond recovery. Carol LaPrairie explains this with reference to the James Bay Cree:

> Residential schools, the decline of traditional activities, the emergence of the reserve system which binds people together in unnatural ways, and the creation of band government which locates power and resources in the hands of a few have dictated the form of reserve life across the country and have profoundly affected institutions such as kinship networks, families, as well as the unspoken rules of behaviour in traditional societies. The lack of respect for others, and the absence of shame about one's bad behaviour and about harming another or the community were, to many Cree for example, the most troubling aspects of contemporary life.[13]

Another potential merit of implementing Call to Action 42 is that it enables the recovery or revival of past laws that, in some Cree communities, may have fallen into disuse.

There is some merit to the application of laws requiring assistance or giving warning in Indigenous communities, as Indigenous peoples are victimized far out of proportion to non-Indigenous Canadians. And yet there may be concerns, especially as the law deals with a situation where the selfish choice that disobeys the law may frequently be the easier choice. The crucial point is whether members of a Cree community can sufficiently internalize (or have internalized) that law, such that it becomes a meaningful and persuasive guide to conduct.

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[13] Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34:3 Can J Crim 281 at 287 [footnotes omitted].

Various bodies of legal theory provide insights on when and how law can be internalized. A desire to remain in the esteem of society, and a parallel avoidance of stigma, can provide powerful incentives to comply with the law. That may be especially the case in smaller Indigenous communities where everybody knows everybody. Demands to accept adverse consequences, even physical danger, present a powerful obstacle against internalizing the law. The normalization of violence in many Indigenous communities may augment those concerns considerably.

My argument is therefore that Cree communities, at least those troubled by normalized violence, may find it advisable to embark on one of two courses if they wish to revive the law that requires assistance to those in danger. One route is to first reshape the values of the community through gradual persuasion to internalize coming to the aid of others prior to enacting a law enforced through sanctions. The other approach is to proceed with a law, but one that relies on more lenient sanctions in an effort to encourage internalization. The paper begins with an overview of Canadian law on omissions.

II. Canadian Law and the Duty to Assist

Whether or not the law should criminalize a passive state, in particular an omission to aid somebody who is in a distressing situation, is a question that continues to generate controversy and debate. The answer in common law jurisdictions, including Canada, is clear. The law does not criminalize an omission to act unless there is a specific (not general) legal duty to act and the accused fails to act in accordance with that duty. A classical statement on the issue comes from the Supreme Court of Canada case, *Dunlop & Sylvester v The Queen*.[14] The case involved the sexual assault of a teenaged girl by several members of a motorcycle crowd. She could positively identify only Dunlop and Sylvester among the group as having been there.[15] She also testified that they participated in the sexual assault by numerous members of the club. However, she also conceded during cross-examination that neither accused had been among the initial group that approached her and restrained her.[16] What led to the case taking on a lengthy history of appeals was when the trial judge also instructed the jury to consider whether

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14 *Dunlop & Sylvester v The Queen*, [1979] 2 SCR 881, 99 DLR (3d) 301 [*Dunlop & Sylvester*].

15 *Ibid* at 886–87.

16 *Ibid* at 886–88.

the two accused were, aside from the original sexual assault charges, guilty of aiding the other members of the club in carrying out the sexual assaults under subsection 21(2) of the *Criminal Code*.[17]

What the Court found especially problematic was this section of a recharge given to the jury by the trial judge:

> But when you are considering what I have said, going back to that middle section of the definition I read, everyone is a party to an offence who does or omits to do anything for the purpose of aiding another person to commit it, I should say the phrase omitting to do anything, that phrase, omitting to do anything means intentionally omitting to do something for the purpose of aiding another to commit an offence, that if it had been done, would have been prevented or hindered the person from committing an offence. Intentionally omitting to do something for the purpose of aiding another to commit the offence, that if it had been done, would have prevented or hindered the person from committing the offence.[18]

One issue with the recharge was that it implied that the accused could be convicted for aiding an offence under section 21 on the basis of an omission to act.[19] The Court provided this well-known excerpt in response:

> Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.[20]

The Court ultimately entered a verdict of acquittal. Courts of appeal often send cases back to retrial as the usual remedy but in this instance, the Supreme Court concluded that after two previous retrials, that was enough jeopardy for the two accused to face.[21]

There are examples of legal duties to assist in specific situations. For example, there is a common law duty to rectify a dangerous situation that the accused has personally created. That duty does not extend to addressing a dangerous situation that somebody else has created.[22] Specific duties to assist can also be created by statute. For example, section 14 of British Columbia's *Child, Family and Community Service Act* reads:

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17 *Ibid* at 888; *Criminal Code*, *supra* note 5, s 21(2).

18 *Dunlop & Sylvester*, *supra* note 14 at 899 [emphasis added].

19 *Ibid.*

20 *Ibid* at 891.

21 *Ibid* at 900.

22 *R v Miller*, [1983] 2 AC 161, [1983] 1 All ER 978 (HL (Eng)).

> **14** (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.
>
> (2) Subsection (1) applies even if the information on which the belief is based
> (a) is privileged, except as a result of a solicitor-client relationship, or
> (b) is confidential and its disclosure is prohibited under another Act.
>
> (3) A person who contravenes subsection (1) commits an offence.
>
> (4) A person who knowingly reports to a director, or a person designated by a director, false information that a child needs protection commits an offence.
>
> (5) No action for damages may be brought against a person for reporting information under this section unless the person knowingly reported false information.
>
> (6) A person who commits an offence under this section is liable to a fine of up to $10 000 or to imprisonment for up to 6 months, or to both.
>
> (7) The limitation period governing the commencement of a proceeding under the *Offence Act* does not apply to a proceeding relating to an offence under this section.[23]

Note that a failure to report is subject to punishment including a maximum fine of $10,000 or a maximum jail term of 6 months.[24] These duties are limited and represent exceptions to the general rule that there is no general criminal liability for an omission to act, including not rendering assistance to somebody else. It is a different matter in several other jurisdictions.

Continental jurisdictions in Europe tend to have what are known as bad Samaritan laws. That means that laws that make it a criminal offence not to help someone who is danger or is being victimized. Examples include Belgium, Czechoslovakia, Denmark, France, Germany, Holland, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Switzerland, and Turkey.[25] In France, as an example, the failure to assist is subject to five years imprisonment and a maximum 75,000 Euros fine.[26]

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23 *Child, Family and Community Service Act*, RSBC 1996, c 46.

24 *Ibid*, s 14(6).

25 Ken Levy, "Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism" (2010) 44:3 Georgia L Rev 607 at 613, 616.

26 Art 113-10 C pén, art 223-6 (2005).

A few American state jurisdictions have themselves adopted bad Samaritan laws. Examples include Minnesota,[27] Rhode Island,[28] Vermont,[29] and Wisconsin.[30] Other states have adopted what can be thought of as halfway measures. What is involved are laws that require at least contacting emergency assistance authorities (e.g. police or paramedics) that are trained to handle situations where someone may need help, but without requiring the caller to directly immerse themselves in the situation. Examples include Florida,[31] Hawaii,[32] Massachusetts,[33] Ohio,[34] and Washington State.[35]

Certainly, the fact that the laws of different nation-states can yield such different answers on the same subject matter indicates a great deal of subjectivity. And it turns out that there is a great deal of academic debate about whether a general duty to assist should be enforceable through criminal law, with numerous arguments both for and against.

A. Arguments For and Against

1. Moral Enforcement

One of the most obvious arguments in favour of bad Samaritan laws is that human life itself should be held sacred and preserved whenever possible:

> And while our intuition is that failing to attempt to rescue is not as morally blameworthy as actively attempting to kill, the former still exhibits a fundamental disregard for the victim's life. To this extent, to the extent that bad Samaritanism fails to respect and promote the premium that we place on human life, especially innocent human life, it conflicts with the value that motivates our laws against homicide and manslaughter. And because bad Samaritanism conflicts with this very same value, it too should be deemed a serious criminal offense. Call this the "Life Is Sacred Argument."[36]

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27 Minn Stat Ann, § 604A.01 (West 2000 & Sup 2008).
28 2 RI Gen Law, § 11-1-5.1 (2002).
29 VT Stat Ann tit 12, s 519 (2002).
30 Wis Stat Ann, § 940.34 (West 2005).
31 Fla Stat Ann, § 794.027 (West 2007).
32 Haw Rev Stat, § 663-1.6 (1993).
33 Mass Gen Laws Ann, c 268, § 40 (West 2008).
34 Ohio Rev Code Ann, § 2921.22 (West 2006 & Supp 2009).
35 Wash Rev Code Ann, § 9.69.100 (West 2003).
36 Levy, *supra* note 25 at 613. See also Miriam Gur-Arye, "A Failure to Prevent Crime: Should It Be Criminal?" (2001) 20:2 Crim Justice Ethics 3 at 6–7.

That a citizen may not help another who is danger can certainly upset some peoples' notions of right and wrong. For example, former Hartford Police Chief Daryl Roberts stated this in response when several people did nothing after witnessing what was ultimately a fatal running over of Angel Arce Torres:

> This is a clear indication of what we have become when you see a man laying in the street, hit by a car and people drive around him and walk by him.... At the end of the day, we have to look at ourselves and understand that our moral values have now changed. We have no regard for each other.[37]

Deterrence is one of the classic justifications for criminal punishment.[38] And one could suggest that there is a utilitarian justification for bad Samaritan laws. The aspiration is to minimize needless deaths and injuries by force of legal compulsion.[39] And indeed, Miriam Gur-Arye raises the question of whether the absence of a bad Samaritan law would encourage people to neglect to render assistance.[40] However, much of the dialogue around whether there should be bad Samaritan laws focuses less on the utilitarian and more on the question of morals and values.

Another function of criminal law is denunciation, to affirm and announce to the public at large what is acceptable behaviour and what is not.[41] The question could of course be raised as to whether one comes before the other, law or societal values. Does law shape society's morals over time through the consistent punishment and public condemnation of prohibited behaviours? Or does law change and reshape itself to reflect society's morals?[42] It is certainly conceivable, even likely, that each informs the development of the other.

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37 Daneen L. Brown, "The Psychology of Apathy: Is our indifference a learned behavior or an instinct?", *The Houston Chronicle* (20 July 2008), online <www.chron.com/life/article/The-psychology-of-apathy-1760171.php > [perma.cc/G3UA-Q9SA].

38 Paul H Robinson & John M Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best" (2003) 91:5 Geo LJ 949.

39 Levy, *supra* note 25 at 626–27; Damien Schiff, "Samaritans: Good, Bad, and Ugly: A Comparative Law Analysis" (2005) 11:1 Roger Williams U L Rev 77 at 119–21.

40 *Supra* note 36 at 13–14.

41 Max Lowenstein, "Towards an Understanding of Judicial Denunciation: Relating Theory to Practice by Comparing the Perceptions of English and Danish Lower Court Judges When Sentencing Minor Theft Offenders" (2013) 13:1 Criminology & Crim Justice 21.

42 Tom R Tyler & John M Darley, "Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account when Formulating Substantive Law" (1000) 28:3 Hofstra L Rev 707. See also Joshua

A possible objection is that an omission to help is a rarity, so much so that it may not be worth the trouble of enacting and enforcing a bad Samaritan law.[43] Proponents of bad Samaritan laws have at least two responses to that contention. One is that proving the rarity of omissions to assist is elusive.[44] The other reply is that the infrequency of given conduct does not correlate with its moral blameworthiness (with murder perhaps being a case in point).[45]

Ken Levy sees a moral enhancement value in enacting a bad Samaritan law.[46] Such a law would, in his view, serve a function of putting society on notice that aiding one another is to be the expectation.[47] It would send the message that not rendering aid is morally unacceptable and affirm the values behind laws against homicide.[48] To take it further, he does not see other parts of the legal system as up to the task of inculcating an ethos for people to aid each other when needed.[49] For example, addressing omissions only through torts does not utilize criminal law's power to deliver a public message to society at large.[50] Furthermore, tort law invites complicated questions about how much a person's life and safety is worth in quantifiable monetary terms. In other words, tort law may treat a person's life and safety in equivocal terms to the often condemnatory function inherent in criminal punishment.[51] Likewise Qingxiu Bu is of the opinion that there is a real problem of moral apathy in Chinese society.[52] He sees enforcing a bad Samaritan law as desirable, with the purpose of providing moral guidance and improvement to the Chinese population.[53]

Amelia Ashton offers a different argument. She suggests that enforcing a bad Samaritan law may actually have an effect contrary to what is

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Kleinfeld, "Three Principles of Democratic Criminal Justice" (2017) 111:6 Nw UL Rev 1455.

43 Anthony Woozley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69:7 Va L Rev 1273 at 1277; Levy, *supra* note 25 at 676–78.

44 Levy, *supra* note 25 at 682–83.

45 *Ibid* at 683–84.

46 *Ibid* at 663.

47 *Ibid* at 662–63.

48 *Ibid* at 628.

49 *Ibid* at 661–65.

50 *Ibid* at 688–89.

51 *Ibid* at 688–89.

52 Qingxiu Bu, "The Good Samaritan in the Chinese Society: Morality vis-a-vis the Law" (2017) 49 Intl J L, Crime & Justice 46 at 157.

53 *Ibid* at 135–36.

intended.[54] When one person helps another, it actually ends up losing its moral dimensions if a bad Samaritan law is in the background. That is because one person helps another out of legal compulsion and not so much out of free moral choice.[55]

2. Questions of Risk

Much of the debate focuses on questions of individual liberty vis-a-vis the state and questions of risk, and the two sets of questions are often bound up with each other. The decision of whether or not to legally compel assistance to others is inherently tied up with the tension between individual autonomy and community solidarity.[56] There is the frequent libertarian objection which holds that the decision of whether to rescue should be left to the individual's own moral choice.[57] Proponents of bad Samaritan laws, in turn, argue that no society is so fundamentally libertarian that it refuses to criminalize any and all omissions.[58] For example, Woozley argues that there are plenty of other instances where, if there is a moral imperative to do something (e.g. answer to a witness subpoena) or not do something (e.g. kill another), the law takes it further and provides a legal imperative as well. There should be no real obstacle to enacting a bad Samaritan law when European democracies do it as well.[59]

The tension becomes more complex when it gets tied up with the question of risks faced by the person who may be in a position to assist another.[60] As Damien Schiff states: "In summary, although duties to rescue are not completely at odds with human behavior, to be effective they must

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54 Amelia Ashton, "Rescuing the Hero: The Ramifications of Expanding the Duty of Rescue on Society and the Law" (2009) 59:1 Duke LJ 69 at 69–71.

55 *Ibid* at 69–71, 89, 100. See also Woozley, *supra* note 43 at 1292–93; Sally Kift, "Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law" (1997) 1:2 MacArthur L Rev 212 at 218–19.

56 Diego Pol Longo, "Are We Bad Samaritans? A Comparative Analysis of Duty to Rescue Legislation and Cadaveric Organ Donation Systems in Spain and the United States" (2011) 39:1 Syracuse J Intl L & Com 55.

57 Levy, *supra* note 25 at 656–58; Schiff, *supra* note 39 at 114–19; Gur-Arye, *supra* note 36 at 8–9; Woozley, *supra* note 43 at 1274, 1293–96; Peter M Agulnick & Heidi V Rivkin, "Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law" (1998) 8 Touro Intl L Rev 93 at 96–97.

58 Levy, *supra* note 25 at 661–62.

59 Woozley, *supra* note 43 at 1299–1300.

60 Gur-Arye, *supra* note 36 at 7–8.

take into account various human inadequacies and fears."[61]

Some proponents of bad Samaritan laws argue that libertarian concerns can be addressed adequately by minimizing the risks involved with rendering assistance. Levy argues that the libertarian objection can be dealt with by insisting that bad Samaritan laws should be limited to easy nearby rescues.[62] In his view, a cost-benefit analysis that maximizes benefits through saving others from death or injury while minimizing costs by lessening the risks to the rescue tips the utilitarian equation in favour of a bad Samaritan law that insists on easy rescues.[63]

The repugnancy that can be felt when somebody does not provide assistance in a situation of low risk can perhaps be found in the story of Glenda Moore. She was out with her two young sons, Conner aged four and Brandon aged two, when flood waters hit Staten Island on account of Hurricane Sandy.[64] She tried desperately to bring them to her sister's house in her Ford Explorer SUV, but the flood waters forced her vehicle into a watery ditch.[65] She managed to get her boys out of their seats and bring them along as she sought shelter.[66] She knocked on the door of a man who thereafter would only identify himself as Allen, but he refused entry.[67] She attempted to break in through his back door using a flowerpot but did not succeed.[68] A wave of water then tore the boys from her grip and she desperately sought help from other neighbours to search for the boys, but none would come to her aid.[69] The boys' lifeless and drowned bodies were found the next day.[70] Allen replied to the subsequent public furor that followed in these words: "It's unfortunate. She shouldn't have been out though. You know, it's one of those things... I'm not a rescue worker... If I would have been outside, I would have been dead."[71] These words might

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61 *Supra* note 43 at 113–14.

62 *Supra* note 25 at 659–60.

63 *Ibid* at 660.

64 Kirsten West Savali, "Hurricane Sandy's 'Kitty Genovese Moment': The Ugly Side of Humanity", *News One* (3 November 2012), online: <newsone.com/2072946/hurricane-sandy-kitty-genovese-glenda-moore/> [perma.cc/SB56-EGSZ].

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*.

70 *Ibid*.

71 *Ibid*.

suggest that he felt that there was a real risk involved with helping. On the other hand, an editorial was dismissive towards Allen as follows:

> He didn't have to leave the comfort of his home. He didn't have to lift a branch or build a bridge. He simply had to open his door to a woman and two small children in the middle of the most powerful storm ever to impact the Atlantic Coast — and he couldn't even be bothered to do that.[72]

For proponents of bad Samaritan laws, occurrences like with Glenda Moore (if you dismiss Allen's voiced objections) can beg the question of why the law cannot compel coming to the aid of another when there is little to no risk involved. Gur-Arye, for example, argues in favour of a broad duty to assist law, but with broad exceptions where it would be unfair to expect the accused to affect a rescue or intervene (i.e. the risk to the accused would be too much).[73]

In fact, it could be suggested that the reason that some American states have been willing to experiment with duty to report laws is that their appeal lies in an even further minimization of risk. They do not even require a citizen to directly affect a rescue, even an easy one with no apparent risk to the rescue. Any perceived risk is minimized even further by requiring no more than a phone call to report the situation, so that trained personnel can address it directly instead.[74] Schiff concludes that a law that requires no more strikes the right balance between the competing concerns.[75]

However, detractors suggest that questions of risk and obligation are more complicated than what may come across from the arguments of the proponents. The contrary arguments suggest that there is actually a definite amount of uncertainty in how to gauge the appropriate level of risk to take on, even when somebody is faced with a situation where society at large may feel that they should have helped another.[76]

This reality can perhaps be seen in the story of David Cash and Jeremy Strohmeyer. David Cash made minimal efforts to stop his friend, Jeremy Strohmeyer, from strangling a seven-year-old girl to death, who had wandered away from her father, in the ladies' washroom of a Las Vegas

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72 *Ibid.*

73 Gur-Arye, *supra* note 36 at 23.

74 Levy, *supra* note 25 at 621.

75 *Supra* note 43 at 134–35. See also Gur-Arye, *supra* note 36 at 7.

76 FJD Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue" (1965) 14:4 Am J Comp L 630 at 632–33.

casino.[77] The pair went to other casinos afterwards.[78] Strohmeyer avoided the death penalty and was sentenced to life imprisonment without parole.[79] His plea for allowing the possibility of parole was denied by a Nevada state court judge in July of 2018.[80]

Cash himself was never charged, since he did not directly participate in either the sexual assault or murder and there was no law in force at the time that obliged him to act against Strohmeyer.[81] That did not stop stigma or societal condemnation from hounding him afterwards. He attended the University of California, Berkeley shortly after the murder.[82] Numerous students waged a campaign of public shaming and social ostracization to try and persuade him to leave campus.[83] Nevada enacted a bad Samaritan law soon after the case concluded, precisely in response to Cash's lack of assistance to the victim.[84]

Part of the picture is the close friendship between the pair. Cash, as a stereotyped high school 'nerd', previously had few friends among his peers.[85] Strohmeyer became the tough and rebellious friend that he looked up to.[86] One could of course object that Cash still had a responsibility to separate friendship from moral obligation and intervene against Strohmeyer, and therefore the situation was not truly all that ambiguous. However, there remains a definite ambiguity in the whole situation when you factor in that Cash, given the reasons that he looked up to Strohmeyer in the first place, apprehended a danger to himself. During an interview, he expressed

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77 Nora Zamichow, "The Fractured Life of Jeremy Strohmeyer", (19 July 1998) *Los Angeles Times*, online, <www.latimes.com> [perma.cc/G3G3-GJRX].

78 *Ibid*.

79 David Ferrara, "Judge denies new sentence for man who killed girl at Nevada casino" (23 July 2018), online: *Las Vegas Review-Journal* <www.reviewjournal.com/crime/courts/judge-denies-new-sentence-> [perma.cc/33ZR-9ATE].

80 *Ibid*.

81 "Berkeley students remain in uproar over David Cash", *Las Vegas Sun* (1 October 1998), online: <lasvegassun.com/news/1998/oct/01/> [perma.cc/UFZ4-AZ3L].

82 *Ibid*.

83 *Ibid*.

84 Rachel Crosby, "In Strohmeyer case, 'bad Samaritan' David Cash led to new law" (19 May 2017), online: *Law Vegas Review-Journal* <www.reviewjournal.com/crime/homicides/in-strohmeyer-case-bad-samaritan-david-cash> [perma.cc/A4NT-6VRH].

85 Zamichow, *supra* note 77.

86 *Ibid*.

resentment towards the notion that he should put himself at risk for a girl that he did not know personally.[87]

Indeed, Steven Heyman notes that there have frequently been instances where good Samaritans have been shot or stabbed while trying to stop crimes in progress.[88] Another fairly frequent occurrence is drowning during attempted rescues, even in situations that involve relatively calm bodies of fresh water (e.g. a lake). A study of 88 news reported incidents of failed rescue attempts in Turkey, in a period running from 2005 to 2008, found that 60 primary drowning victims and 114 rescuers had died during the incidents.[89] More than one scenario can manifest during a failed drowning rescue. One is that sometimes a real risk may be apparent (e.g. a rushing current that took the primary victim with it or the primary victim had sunk deeper into the water) and the would-be rescuer knew of the risk and accepted it. Another scenario is that the level of risk involved can be fatally underestimated. The latter scenario suggests that trying to evaluate the level of risk remains an exercise fraught with error and uncertainty. For the law to try and demarcate between a level of risk that is too high to demand intervention and a lower acceptable level of risk where the law can compel and oblige a rescue, is a doomed enterprise for the critics of bad Samaritan laws.

Keep in mind that these events frequently occur even without the pressure of a legal compulsion to attempt rescue. And so, opponents of bad Samaritan laws argue that calling upon the force of the law to provide additional pressure to affect rescues would only increase the occurrences of tragedy.[90] Levy, however, counters that there is no empirical evidence to support the claim that such occurrences would increase as a result of bad Samaritan laws.[91] He further adds the hope that bad Samaritan laws can encourage citizens to educate themselves on how to affect a rescue and when not to attempt a rescue that is too dangerous.[92]

The critics may suggest that it is unreasonable to expect someone to provide assistance when that person perceives a distinct and tangible danger

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87 *Ibid*.

88 Stephen J Heyman, "Foundations of the Duty to Rescue" (1994) 47:3 Vand L Rev 673 at 678–79, 713–14.

89 Adnan Turgut & Tevfik Turgut, "A Study on Rescuer Drowning and Multiple Drowning Incidents" (2012) 43:2 J Safety Research 129.

90 Levy, *supra* note 25 at 678–79.

91 *Ibid* at 685.

92 *Ibid* at 685–86.

to their person. There may be an additional phenomenon whereby a person may, even if subconsciously, overestimate the risk of providing assistance. That psychological phenomenon is known as the bystander effect, whereby a person finds it more difficult to assist when there are other persons in the vicinity who are also in a position to help but do not take the first initiative.[93] The incident that triggered the naming of the bystander effect and its subsequent study was the murder of Kitty Genovese in New York City, by Winston Mosely on March 13, 1964.[94] Initial news reports estimated that at least 38 persons witnessed the initial attack that involved multiple stab wounds in the early hours of the morning.[95] There has since been some debate over whether the witnesses numbered as much as 38 and if all of them actually saw the attack or heard her screams.[96] What is apparent is that at least several people either saw the attack or heard it and chose neither to provide physical assistance or even call for help.[97] Mosely drove away for about ten minutes, during which Genovese managed to stumble to the back entrance of her apartment building.[98] Mosely returned and inflicted several more stab wounds while she in the back stairwell of the building.[99] Genovese died en route to a hospital.[100]

Subsequent studies have since revealed various dynamics that inform the bystander effect. For example, the larger the number of passive bystanders, the more likely the bystander effect will prevent intervention.[101] Persons who possess greater skills relevant to the rescue situation are more likely to intervene compared to those who possess less relevant skills.[102] The bystander effect is decreased when it involves harm to something or someone that is known and valued by the person (e.g. littering in a well-

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93 Greg Rutkowski, Charles Gruber & Daniel Romer, "Group Cohesiveness, Social norms and Bystander Intervention" (1983) 44:3 J Personal & Soc Psychology 545.

94 Rachel Manning, Mark Levine & Allan Collins, "Kitty Genovese and the Social Psychology of Helping: The Parable of the 38 Witnesses" (2007) 62:6 American Psychologist 555 at 555–56.

95 *Ibid*.

96 *Ibid* at 557–58.

97 *Ibid* at 555–58.

98 *Ibid* at 558.

99 *Ibid*.

100 "Kitty Genovese" (last modified 21 August 2018), online: *History* <www.history.com/topics/crime/kitty-genovese> [perma.cc/S23S-MK24].

101 Rutkowski, Gruber & Romer, *supra* note 93.

102 Robert Cramer et al, "Subject Competence and the Minimization of the Bystander Effect" (1988) 18:13 J Applied Social Psychology 1133.

known park in a small local neighbourhood) but remains noticeable when the subject (e.g. graffiti on a large mall that is used generally by the public) is less known and valued by the person.[103] Ironically, a lower risk situation is more likely to result in the bystander effect than a high risk situation. The reason appears to be that a higher risk situation is more likely to trigger an acute awareness that the other person is in a perilous situation and in need of help.[104] What is known of the bystander effect is that it can effectively block an aiding response, very often in situations where bad Samaritan laws would demand that response (e.g. deemed lower-risk situations). If that is the case, is it fair of bad Samaritan laws to insist on the response when it may be at odds with human nature?

Lastly, another potential risk is the exposure to legal liability if the rescue goes awry. However, proponents of bad Samaritan laws argue that exceptions based on attempting assistance in good faith adequately address such concerns.[105]

3. A False Distinction?

There is also considerable debate around whether the distinction between actions and omissions is a sound one. A key objection to bad Samaritan laws is that there is a fundamental difference between actually doing something and allowing it to happen.[106] Bad Samaritan laws would, therefore, violate the *actus reus* requirement.[107] But, Levy points out that punishing omissions does not necessarily mean punishing only negative thoughts.[108] Criminal law in common law jurisdictions frequently criminalize certain categories of omissions.[109]

Proponents of bad Samaritan laws question whether positive action can truly be distinguished from omissions.[110] It can perhaps be hard to tell one apart from the other.[111] The distinction becoming blurry can perhaps be

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103 Peggy Chekroun & Markus Brauer, "The Bystander Effect and Social Control Behavior: The Effect on the Presence of Others on People's Reactions to Norm Violations" (1992) 32:6 European J Soc Psychology 853.

104 Peter Fisher, "The Bystander Effect: A Meta-Analytic Review on Bystander Intervention in Dangerous and Non-Dangerous Situations" (2011) 137:4 Psychological Bulletin 517.

105 Woozley, *supra* note 43 at 1276.

106 Levy, *supra* note 25 at 648–49.

107 *Ibid* 663–64.

108 *Ibid*.

109 *Ibid* at 664–65.

110 *Ibid* at 629–38.

111 Woozley, *supra* note 43 at 1299.

seen in this notorious photograph, taken during the 1993 Sudan famine, by South African photojournalist, Kevin Carter:

Figure 1 "Famine in Sudan" (photograph) Kevin Carter/Sygma Premium via Getty Images, USA, 587828802 (1 March 1993).

The young boy in the picture has collapsed from exhaustion while trying to reach a feeding centre. The vulture is obviously waiting for the boy to expire in order to begin feeding. Carter waited 20 minutes in the hope that the vulture would spread its wings and thereby provide an artistically better photograph.[112] He left the scene without helping the child reach the feeding centre, which was mere metres away, when it became apparent that the vulture would not 'cooperate'; although he claims to have chased away the vulture.[113] The child survived that incident, but died of malaria 14 years afterwards.[114] Carter won a Pulitzer Prize in 1994 for the picture, which had been published in the *New York Times*, although he did not enjoy it.[115] He

112 "Starving Child and Vulture" (last visited 11 June 2020), online: *Time, 100 Photos* <100photos.time.com/photos/kevin-carter> [perma.cc/KJM7-BHNF].

113 Scott MacLeod, "The Life and Death of Kevin Carter" (24 June 2001), online: *Time Magazine* <content.time.com/time/magazine/> [perma.cc/5H3T-YA33].

114 "Starving Child and Vulture", *supra* note 112.

115 *Ibid.*

committed suicide by carbon monoxide poisoning three months after winning the prize.[116]

To be fair, Carter and other photojournalists had been instructed beforehand not to touch any civilians suffering from the famine due to concerns of spreading the disease.[117] That did not stop people from questioning his sense of ethics or morality. For example, Reenah Shah Stamets wrote in a Florida newspaper: "To many who see the picture, there is only one way to respond to such a tragedy: Go, pick up the girl, make sure she's safe, make sure she's fed. Otherwise, the man adjusting his lens to take just the right frame of her suffering might just as well be a predator, another vulture on the scene."[118] For the sake of discussion, if one assumes the very worst about Carter, the scenario itself can be suggestive of a mixture of exploitative action and passive inaction.

Whether the distinction is truly tenable leads into other, interrelated debates. One such debate is whether someone who fails to assist can also be considered as causing, even if indirectly, harm to the person who was in danger.[119] A theoretical concept that is used to describe criminal law is what is known as the 'harm principle'; that the criminal law strives to avoid tangible forms of harm to citizens, such as bodily harm or even damage to property.[120] An objection to bad Samaritan laws can be based on the harm principle; that it was the actual perpetrator who caused the harm, not the bad Samaritan. Levy, however, points out that criminal law does not always base offences on the harm principle.[121]

Arthur Leavens regards the distinction between positive actions and omissions as untenable.[122] In his view, a better foundation for criminal

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116 Blessy Augustine, "The vulture in the frame" (13 October 2017), online: *Hindu Business Line* <www.thehindubusinessline.com/blink/watch/the-vulture-in-the-frame/article9901741.ece> [perma.cc/D8U4-89HD]; Stephan Roget, "The Pulitzer Prize-Winning Photo So Emotionally Devastating, The Photographer Took His Own Life" (16 January 2020), online: *Ranker* <www.ranker.com/list/vulture-and-little-girl-photo-story/stephan roget?page=2> [perma.cc/8U66-XMYL].

117 Roget, *supra* note 116.

118 Reenah Shah Stamets, "Were his priorities out of focus?", T*ampa Bay Times* (14 April 2005), online: <www.tampabay.com/archive/1994/04/14/were-his-priorities-out-of-focus/> [perma.cc/59BQ-XF7Y].

119 Levy, *supra* note 25 at 649–52.

120 *R v Malmo-Levine*; *R v Caine*, [2003] 3 SCR 571.

121 *Ibid* at 665–66.

122 Arthur Leavens, "A Causation Approach to Criminal Omissions" (1988) 76:3 Cal L Rev 547 at 551–52, 562–63.

liability is a holistic analysis of the causal relationship between the accused and the victim.[123] This theory contemplates that not rendering aid can be a causal contributor to the harm suffered by the victim, therefore justifying convicting the accused for a crime.[124] But Schiff argues that result does not necessarily equate with causation and, therefore, it is a flawed foundation for a bad Samaritan law.[125]

An argument can be made that the bad Samaritan, through a complex chain of causation, shares causal responsibility for the harm.[126] Feldbrugge in particular argues:

> There is ultimately no fundamental difference between intentional homicide and failure to rescue committed intentionally; the second offense is essentially nothing but the least serious form of the first. It is, however, convenient under the present circumstances to retain a special offense of failure to rescue. Where acts which would avert the death of the victim, and which it is homicide not to perform, involve a certain measure of inconvenience or danger to the potential rescuer, where the chance of averting the death of the victim seems small, or where the causal connection between the offender's inactivity and the death of the victim is not abundantly clear, it appears preferable to punish the offender under a provision less strict than that governing intentional homicide.[127]

Whether the distinction is tenable also raises questions about degrees of blameworthiness and proportionality in punishment. Is it proportionate to equally punish both the murderer and somebody who did not render aid?[128] Levy, for example, supports a bad Samaritan law so long as the omission to render aid receives significantly less punishment than the direct punishment of a crime.[129] It has been noted that common law crimes based on omissions are based on a breach of trust in certain relationships (e.g. doctor-patient).[130] Alison McIntrye is likewise supportive of bad Samaritan laws with lesser punishments, and her position includes a critique of existing law that only criminalizes omissions in the context of particular relationships.[131] Why should criminal law severely punish an omission in

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123 *Ibid* at 552.
124 *Ibid* at 572–83, 591.
125 *Supra* note 39 at 125–27.
126 Levy, *supra* note 25 at 666–70.
127 *Supra* note 76 at 651.
128 Levy, *supra* note 25 at 644.
129 *Ibid* at 670–72.
130 Gur-Arye, *supra* note 22 at 8–13.
131 Alison McIntyre, "Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes" (1994) 23:2 Philosophy & Public Affairs 157 at 159, 161, 186–89.

the context of a recognized relationship and yet visit no consequence where severe harm occurred, but there was no legally recognized special relationship?[132]

However, a general duty to assist that is enforced through relatively lesser sanctions can itself invite criticism. Is the bad Samaritan less blameworthy simply because he allowed someone to die instead of overtly killing someone?[133] Does reprehensibility increase when the bad Samaritan benefits from allowing someone else to die?[134] If the moral difference between the bad Samaritan and the primary actor is only slight, does that justify significantly different punishments?[135] Damien Schiff is of the view that a bad Samaritan law that provided only minor punishments would be contrary to the proportionality principle, since any degree of blameworthiness between the primary actor and the bad Samaritan is minor.[136] There are also pragmatic concerns tied to conviction with trying to prosecute bad Samaritan cases.

4. Questions of Enforceability

One possible objection is that proving failure to assist can be difficult, particularly since it involves proving a relatively passive state in comparison to prosecuting offences that are based on overt actions of the accused.[137] Proponents of bad Samaritan laws will of course insist that any difficulties in proof are not reasons to refrain from criminalization. It could also be asserted that some instances will be easy to prosecute.[138]

Concerns over proof and enforceability can become even more acute in instances where numerous people pass by a situation and do not assist. Can you identify all of the individuals who could have rendered assistance but did not? Even if you could, would you be able to prove the lack of assistance beyond a reasonable doubt for all of them?[139] And indeed, a concern that has been raised with respect to trying to deter a lack of assistance to others

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132 *Ibid*.

133 Levy, *supra* note 25 at 638–40.

134 *Ibid* at 640–46.

135 *Ibid* at 644–46.

136 *Supra* note 39 at 687–88.

137 Levy, *supra* note 25 at 675; Woozley, *supra* note 43 at 1277.

138 Levy, *supra* note 25 at 681.

139 *Ibid* at 672–75; Leon Sheleff, *The Bystander: Law, Behavior and Ethics* (Lexington, Massachusetts: Lexington Books, 1978) at 14–23.

in need is that it only accomplishes pushing such instances of apathy underground.[140]

The dynamics can perhaps be seen in the infamous torture-murder of then 23-year-old, Ilan Halimi, a Jewish man living in Paris until his death on January 20, 2006.[141] Halimi had been working as a mobile phone salesperson when he met a woman of Iranian descent who called herself "Audrey".[142] They agreed to meet at an apartment for what he understood to be a date. It was a lure, as waiting for him in the apartment was a self-styled gang of "Barbarians", many of whom were Muslims of African descent with anti-Semitic beliefs.[143] After abducting him, they proceeded to torture him for 24 days with cuts and burns that covered at least 80% of his body, while demanding a ransom of $540,000 from his family (although the amounts were decreased over the course of the ordeal).[144] At the end, he was found naked and handcuffed, dying mere minutes after an ambulance began to transport him to a hospital.[145]

A total of 16 people were convicted for direct participation in the torture and murder.[146] The gang leader, Youssouf Fofana, was sentenced to life imprisonment with parole ineligibility for 22 years.[147] The woman who lured Halimi was sentenced to nine years.[148] The other participants received a wide array of sentences ranging from eight months to 18 years.[149]

What is also apparent is that numerous people in the neighbourhood observed the torture while it was in progress, but no one reported it to authorities.[150] There is a question of whether not reporting the torture to

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140 Levy, *supra* note 25 at 683.

141 Michael Gurfinkiel, "Tale of Torture and Murder Horrifies the Whole of France", *The New York Sun* (22 February 2006), online: <www.nysun.com/foreign/tale-of-torture-and-murder-horrifies-the-whole/27948/> [perma.cc/YRC7-7PCH].

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 "Court Sentences 16 Over Murder of Ilan Halimi: Appeals court near Paris hears appeals of defendants already convicted by a lower court into the slaying of Halimi", *Haaretz* (17 December 2010), online: <www.haaretz.com/jewish/1.5094848> [perma.cc/9PY5-5KUJ].

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 "The Rising Tide of Anti-Semitism", *The Washington Post* (2 April 2006), online: <www.washingtontimes.com> [perma.cc/KP4T-SY2H].

authorities, at least when residents were safely at a distance from the "Barbarians" gang, would have contravened French criminal law.[151] Only one person was ever convicted of a failure to report. Alcino Ribeiro learned that his son, Jerome Ribeiro, had initially participated in at least the confinement of Halimi but left after six days. Alcino counselled his son not to tell anyone about what was going on.[152] He was sentenced to eight months, but even then, the sentence itself was ultimately suspended.[153]

It is entirely possible (though not certain) that Ribeiro was prosecuted, but not the bystanders in the neighbourhood, because proof was possible for the former but not the latter. If that is indeed the case, it may illustrate the difficulties of proving cases when prosecuting numerous bystanders, not all of whom may even be identified. Proponents of bad Samaritan laws will of course insist that enforceability issues are not necessarily a bar to criminalization.[154] But, even if French authorities could identify all of the neighbourhood bystanders so as to pursue prosecution, the situation is still not free of difficulties. Prosecutors will make public policy decisions as to who to prosecute (i.e. who is particularly blameworthy).[155] Would such decisions be arbitrary and unfair though?[156] Would a decision to prosecute only some of the bystanders who observed Halimi's torture and not others be open to such criticisms? Or, if the authorities prosecuted all of the offenders, would it exacerbate already uneasy ethnic tensions involving Muslims in France?[157]

Even if the state can gather enough evidence and bring forward a case for prosecution, there may still be concerns. There is a concern about the prospect of jury nullification; that juries may sympathize with the bad Samaritan and be predisposed towards a not guilty verdict, no matter how strongly the prosecution may prove the necessary elements of the offence.[158] Perhaps members of a jury may sympathize with a bad Samaritan accused

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151 *Supra* note 26.

152 "Procès en appel du Gang des Barbares, La cruelle loi du silence" (26 November 2010), online: *Justice for Ilan Halimi* <justicepourilanparradioj.unblog.fr/2010/11/26/proces-en-appel-du-gang-des-barbares-la-cruelle-loi-du-silence/> [perma.cc/T7QK-VTZ4].

153 *Ibid.*

154 Levy, *supra* note 25 at 680.

155 *Ibid.*

156 Woozley, *supra* note 43 at 1290–91.

157 Karima Laachir, "France's 'Ethnic' Minorities and the Question of Exclusion" (2007) 12:1 Mediterranean Politics 99.

158 Levy, *supra* note 25 at 675–76.

under the realization that it could be difficult for themselves to begin a rescue in similar situations. And indeed, it has been found that a willingness to help may depend on the perception of the person in need of help. People are more likely to assist those that they do not deem to be responsible for their own predicament[159] and are more likely to rescue when they perceive the victim as dependent on another.[160] What if the jury perceives that the victim brought the situation upon themselves? What if the jury perceives the victim as previously being relatively healthy and self-sufficient? Proponents of bad Samaritan laws counter that jury nullification is a prospect for any offence, such that it is not a reason not to criminalize. Nor is there proof that jury nullification would be frequent.[161] Criminal law should still serve its symbolic functions aside from pragmatic objections.[162] It is now time to explore how Cree law approaches matters.

III. CREE LAW AND THE DUTY TO ASSIST

A. *Mi-she-shek-kak* (The Giant Skunk)

Cree law, unlike common law legal systems, did impose a general duty to either assist, if it was within one's own capabilities, or to at least warn others of danger if addressing a dangerous situation that was beyond one's capabilities. The primary antagonist of the Swampy Cree legend of *Mi-she-shek-kak* was the Giant Skunk. The Giant Skunk was mortally feared because of its great size and smell. It also eats other animals.[163] It is important to situate the narrative in the broader concept of Cree law. The *Wetiko* is an important concept in both Cree law, as well as numerous other Indigenous legal orders. Hadley Friedland notes that the *Wetiko* has often been tied to stereotypical notions of cannibalism and mental health disorder.[164] But Friedland maintains that *Wetiko* is a broad legal category meant to describe anyone who has become a danger to those around them, in contravention

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159 Schiff, *supra* note 39 at 111; Feldbrugge, *supra* note 76 at 639–40.

160 Viola Brady, "The Duty to Rescue in Tort Law: Implications of Research on Altruism" (1980) 55:3 Ind LJ 551 at 552–53.

161 Levy, *supra* note 25 at 682.

162 *Ibid* at 684.

163 Louis Bird, *Telling Our Stories: Omushkego Legends & Histories from Hudson Bay* (Toronto: University of Toronto Press, 2011) at 69–70.

164 Hadley Friedland, *The WetikoLegal Principles: Cree and Anishninabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018) at 23–24, 33.

of the community's social norms, and to such a degree that the community is obliged to address the danger in one way or another.[165]

The Giant Skunk, although it is not explicitly called a *Wetiko* in a written version of the legend provided by a Swampy Cree Elder, Louis Bird, is effectively a *Wetiko* for the purposes of the narrative. The danger that the Giant Skunk poses is so great that all the other animals of the land gather together into a council to discuss how to address its threat.[166] The preliminary step of a council meeting resonates with Friedland, relating it to an essential first legal response to a *Wetiko*; which was for the community to gather together for collective deliberations and decision-making.[167] It should be noted that such collective discussions not only focused on how to manage the danger presented by a *Wetiko*, but they also explored how the *Wetiko* could be aided to become better and cease being dangerous to him or herself and others.[168] The council decides to kill it if an opportunity arises. But for now, all other animals are to avoid crossing its trail to avoid getting its attention.[169] And indeed, this choice also resonates with Friedland, describing how avoiding the *Wetiko* and separating him or her from the collective, even if temporarily, was the preferred approach before, and relative to, dealing with a *Wetiko* in a more violent fashion.[170]

The narrative takes a dramatic turn when Weasel takes a shortcut, underneath the snow that crosses the Giant Skunk's trail, to get home and eat earlier. Weasel admits to his wife after supper what he had done but is sure that the Giant Skunk will not notice. Weasel's wife is concerned that the Giant Skunk will realize that his trail has been crossed.[171] The Giant Skunk does notice and feels insulted. He decides to pursue and kill the other animals.[172]

Weasel, meanwhile, flees his home with his family and warns the other animals.[173] The other animals decide to continue their policy of avoidance and flee for the mountains. But they are forced to reweigh their options when their children and elderly are becoming tired. It is obvious that the

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165 *Ibid* at 58–61, 70–73.
166 Bird, *supra* note 163 at 70.
167 Friedland, *supra* note 164 at 83–85.
168 *Ibid*.
169 Bird, *supra* note 163 at 70.
170 Friedland, *supra* note 164 at 100–01.
171 Bird, *supra* note 163 at 70–71.
172 *Ibid* at 71–72.
173 *Ibid* at 72.

Giant Skunk will catch up. The animals hold another council and decide that they have to make a stand in a large valley lake in the mountains.[174] Friedland explains that executing a *Wetiko* was a possibility, but only when the alternatives turned out to be insufficient to protect the community.[175]

The animals make no effort to hide their trail in order to lure the Giant Skunk into a trap.[176] The women, elderly, and children are led away further into the mountains. Only the adult males participate in the coming battle.[177] Recall that one of the key reasons for common law systems not imposing general duties to assist is a hesitancy to engage in potentially complex risk analyses. What the narrative shows is that Cree law embraces the risk analysis in this context. Those with diminished physical capacity, the women, children, and elderly, are exempted from participating in the struggle to come. The healthy adult males are fully expected to take very real and potentially mortal risks upon themselves.

The other animals go to Big Cat for help in killing the Giant Skunk, but Big Cat initially does not want to get involved. He just wants to rest in his cave, but he does eventually decide to help.[178] Big Cat agrees to help on the condition that the other animals prepare a place from which he can jump onto the Giant Skunk.[179]

Giant Skunk tries to provoke the other animals into an argument so that he has an excuse to kill them. The other animals initially avoid it. Wolverine, however, as part of the plan to start the fight, insults the Giant Skunk by calling him "Bulgy Cheek".[180] Giant Skunk starts to turn around and begin the fight. Wolverine jumps on Giant Skunk's anus and holds his tail down to prevent him from using his spray. The other animals jump down on Giant Skunk to try and kill him.[181] They finally succeed when Big Cat, albeit reluctantly and taking his time to do so, jumps on Giant Skunk's neck.[182]

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174 *Ibid* at 73.
175 Friedland, *supra* note 164 at 101–03.
176 Bird, *supra* note 163 at 73–74.
177 *Ibid* at 74.
178 *Ibid* at 72.
179 *Ibid* at 74.
180 *Ibid* at 74–75.
181 *Ibid* at 75.
182 *Ibid* at 75.

Wolverine lets go of the anus but without first putting down the tail. He gets hit by Giant Skunk's spray and ends up in pain.[183] Wolverine cannot wash off in nearby lakes and rivers since the animals drink from them. He washes off in Hudson Bay and James Bay, which is why the waters in both are now salty and undrinkable. 'Winnipeg' means "dirty (salted) water".[184]

B. *Mistacayawasis*

The legend of the Giant Skunk is an example of when members of the community act in accordance with the law and, therefore, the narrative itself does not contain a punishment for failure to act. How about when somebody fails to act on the duty? A Rock Cree narrative called *Mistacayawsis* speaks to that particular point.

The main characters are two sisters who are married to a pair of brothers. The older sister became a *Wetiko*. She murdered and ate the two young sons and husband of the younger sister. The older sister's husband comes home and realizes what she had done. He overpowers her and has the chance to kill her, but then he decides that he has nothing left to live for, letting her kill and eat him. The sisters move to a nearby camp. The younger sister provides no warning to the camp, for she fears that the older sister would kill her. The older sister proceeds to murder two more boys. The second murder was witnessed by one of the men in the camp after he became suspicious following the disappearance of the first boy. The members of the camp ambush the sisters and fire arrows at them. The younger sister dies immediately during the volley. The older sister survives and kills her sister's assailants. She afterwards comes to a realization of what she has become and finds the lone survivor of the camp, a young boy named *mistacayawsis*. He kills her on her instructions, through the only method possible for her, by cutting off the finger which contained her heart.[185]

The written narrative put together by Robert Brightman includes references such as "[t]he younger sister was not able to say anything because she thought her older sister would kill her[,]... [s]till there was nothing that her younger sister could do[, and]... [t]here was nothing that the younger sister could say."[186] However, the camp was itself convinced that the younger

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183 *Ibid* at 76.

184 *Ibid* at 76–78.

185 Robert A Brightman, *ācaoōhkīwina and ācimōwina: Traditional Narratives of the Rock Cree Indians* (Regina: University of Regina Press, 2007) at 99–101.

186 *Ibid* at 100.

sister could have done something and, therefore, they deemed her just as worthy of execution as her older sister. The narrative states that "[t]hey killed her because she always stayed with that *wītikōw* woman and they thought this about her, '[s]he also is a *wītikōw*.'"[187] The camp as a community was likely of the view that the younger sister could have ceased to remain in the company of the older sister when she first started to manifest *Wetiko* behavior, and that she could have warned the camp about the older sister on their arrival. For them to say that the younger sister was also a *Wetiko* meant that, in their eyes, she was just as responsible for the deaths of the two boys from their camp as the older sister.

Her outcome makes it clear that Cree law could mandate punishment for those who did not act on their general duty to render aid or at least give warning when fellow community members were in danger. However, the Swampy Cree *Legend of We-mish-shoosh* makes it clear that Cree law could show leniency towards what would otherwise be sanctionable acts when it was known that they were done out of fear of another. The legend itself involves a powerful chief who is, for all intents and purposes, a serial killer. The chief's two daughters aid him by luring young men into his camp so that he can kill them and take their possessions. The chief is ultimately bested and killed by a gifted young medicine man as a matter of justice. The chief is given the fate that he has brought upon himself, but the daughters are free to go without consequence in recognition that they lived in terror of their own father.[188]

This nuance also shapes the contours of duties to assist and warn. Friedland suggests that the duty to assist and intervene directly in a dangerous situation was operative when the person in question possessed the capabilities to do so.[189] However, if it was clear that the situation itself was beyond the capabilities of the person in question, the law could require, at a minimum, that they warn others of the danger and no more than that.[190] The *Mistacayawsis* narrative may not necessarily have demanded that the younger sister act directly against her sibling, but it does regard the younger sister's fate as just for not even observing the minimum duty to warn.

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187 *Ibid* at 100.

188 Bird, *supra* note 163 at 107–123.

189 Hadley Friedland, "Accessing Justice and Reconciliation: Cree Legal Summary" (2012) at 32–34, online (pdf): *University of Victoria, Indigenous Legal Research Unit* <www.indigenousbar.ca/indigenouslaw.pdf> [perma.cc/66V4-PBWH].

190 Friedland, *supra* note 164 at 93–96.

The next question becomes, even if Cree law mandated a general duty to assist in the past, should it do so in the future as an exercise of self-determination? One can perhaps see a real social need for it. Statistics on criminal victimization of Indigenous peoples are glaring. An assessment of the 2014 General Social Survey on Victimization reveals that Indigenous peoples (28%) are more likely to be the victims of crime in comparison to non-Indigenous peoples (18%).[191] Indigenous peoples were more than twice as likely to be violently victimized (163 incidents per 1,000 people) than non-Indigenous peoples (74 incidents per 1,000 peoples).[192] The picture is even more alarming for Indigenous women, who are violently victimized (220 incidents per 1,000 people) at rates that were approximately double those suffered by Indigenous men (110 incidents per 1,000 people), almost triple that of non-Indigenous women (81 incidents per 1,000 people), and more than triple that of non-Indigenous men (66 incidents per 1,000 people).[193] Indigenous police services are also underfunded. They have complained that underfunding in comparison to mainstream police services has meant aging and defective equipment, while Indigenous gangs concentrate their activity on reserves because they know that inadequate funding has turned those reserves into law enforcement vacuums.[194]

The victimization is itself often a result of compounded vulnerabilities. Certainly, there is a degree to which Indigenous peoples victimize each other, which is recognized through a phenomenon that is termed 'intergenerational trauma'. Those Indigenous children who attended the residential schools were left without the skills or qualifications to pursue livelihoods; with low self-esteem as Indigenous persons; in an angry and traumatized state of being and vulnerable to substance abuse, violence, and other behaviour issues. Those children would take out their pain and problems on those nearest to them: their own family members. The next

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191 Statistics Canada, *Victimization of Aboriginal people in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 June 2016) at 3, online: <www150.statcan.gc.ca > [perma.cc/5FSW-QRAN].

192 *Ibid*.

193 *Ibid*.

194 Elias Abboud, "Lack of funds for policing turning Indigenous communities into organized crime hubs, Quebec hearing told", *CBC News* (22 March 2018), online: <www.cbc.ca/news/canada/montreal/> [perma.cc/4NER-2D9Q]; Morgan Lowrie, "Indigenous police chief urges governments to take action on underfunding", *The Globe & Mail* (5 June 2019), online: <www.theglobeandmail.com/canada/article-indigenous-police-chief-calls-urges-governments-to-take-action-on/> [perma.cc/9A9M-YFZC].

generation of children are subjected to physical and sexual violence in their home environments and, therefore, develop the same issues as the previous generation. And so, the seeds planted by the residential schools pass on trauma from one generation to the next.[195] There is also recognition that a significant degree of victimization comes from racism directed towards Indigenous peoples by non-Indigenous peoples. The fact that Indigenous women are either murdered or go missing at rates that far exceed those of non-Indigenous women, so much so as to necessitate a national inquiry on that very issue, surely indicates a very real problem of racialized violence against Indigenous peoples.[196]

Perhaps a Cree community may decide to enact a general legal duty to assist in reducing victimization in communities, whatever the source of that violence is. Perhaps such a law can mark a shift towards a greater communal preservation of safety, taking at least some of the onus away from strapped law enforcement agencies. It is far from given that reviving Cree law to assist and warn could accomplish those objectives in contemporary circumstances, laudable as they may seem. Nor can one assume that every Cree community would see a traditional law to render assistance or give warning as an answer. For example, some Cree communities may decide for themselves that a police force resembling municipal police forces in mainstream Canada is sufficient. Whether the use of Cree law to assist or warn is possible or advisable is the subject of the following discussions.

IV. SHOULD THE CREE LAW BE REVIVED?

A. The Need for Internalization

It is, of course, one matter to enact a law. It can be quite another to expect it to have any meaningful societal impact or effect. It is inevitable that not everyone will comply with a given law all of the time. But there can be instances or situations that raise the question of whether there is any

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195 Peter Menzies, "Developing an Aboriginal Healing Model for Intergenerational Trauma" (2013) 46:2 Intl J of Health Promotion & Education 41; Lloyd Hawkeye Robertson, "The Residential School Experience: Syndrome or Historic Trauma" (2006) 4:1 Pimatisiwin 1.

196 Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (Gatineau, Quebec: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019), online: <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a.pdf> [perma.cc/8HYS-WLLM].

significant point served by having that law in the first place. For example, Québec has its own provincial *Charter of Human Rights and Freedoms*.[197] Article 2 of that *Charter* requires people to render assistance albeit without risk to themselves.[198] Québec, as a province, cannot prosecute refusals to help since it would be an intrusion on federal jurisdiction over criminal law.[199] A failure to help, however, could expose one to civil liability under Québec law. In 2001, several people ignored the plight of a beaten girl, found unconscious near Metro Vendome Station for three hours, by simply walking past her without rendering any aid or even calling for help.[200]

In contrast, a teenaged girl of Saanich descent saved three men from drowning in the Gorge Waterway in Victoria after she dived in "without a second thought".[201] She barely made it back to the docks with the people she rescued, as her own body started to give out.[202] She had to be taken to the hospital for hypothermia after paramedics arrived.[203] It is unclear from the news story whether she was acting on her own individual moral compass or whether she was acting on ingrained Saanich legal principle. The story nonetheless illustrates that there is potential in Indigenous communities, Cree communities included, for a law requiring assistance to others to take hold and have positive effects.

The potential is there, and perhaps that point is demonstrated by the efforts of the Cree community of *Asuniwuche Winek* near the town that is now known as Grand Cache, Alberta. The community continued to use its own traditional laws to resolve disputes, relatively unnoticed by mainstream justice, even into the 1970s.[204] The community, in consultation with Hadley Friedland, began the development of a justice program grounded in Cree

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197 *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Charter*].

198 *Ibid*, art 2.

199 See the distribution of legislative powers, including criminal law, under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

200 "Vigil held for Montreal teen ignored after beating", *CBC News* (21 May 2001), online: <www.cbc.ca/news/canada/vigil-held-for-montreal-teen> [perma.cc/HAT3-H7R3].

201 April Lawrence, "'I feel proud': 17-year-old Saanich girl jumps into ocean to save three strangers", *CHEK News* (16 March 2018), online: <www.cheknews.ca/i-feel-proud-17-year-old-saanich-girl-jumps-into-ocean> [perma.cc/T2PW-JH8V].

202 *Ibid*.

203 *Ibid*.

204 Hadley Friedland, *Reclaiming the Language of Law: Exploring the Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta, 2016) [unpublished] at 201–02.

legal principles.[205] Cree law was to be the authority for assessing whether harmful behavior had occurred that necessitated community intervention and for guiding the process and outcomes for addressing harm.[206] The feedback process for developing the program included the theme that safety for the broader community and all its members was to be the responsibility of the community and its members.[207] That included the right of vulnerable members of the community to expect help when they needed it and for those capable of providing assistance to provide it when needed.[208]

But it is not a given that any and every Indigenous community can get to that point. The intergenerational trauma that troubles many Indigenous communities often goes hand in hand with another recognized phenomena, the normalization of violence, which will be explored in more detail below. Whether an Indigenous community can reach a point where it can apply a law that requires assisting others is necessarily a complex question.

Perhaps the complexities can be summarized as a question of whether a law can be sufficiently internalized by its subjects, such that it would have a real and meaningful power to guide the behaviour of its subjects.[209] Québec had a law requiring assistance and it was supported by the prospect of civil liability. Despite this, those who passed the beaten girl by had not sufficiently internalized that law so as to act in accordance with it. Using the traditional law that requires assistance or giving warning may be problematic in some Indigenous communities, especially those overtaken by the normalization of violence. These scenarios may be examples of where the law is not sufficiently internalized and thus, it has no meaningful effect.

We must, of course, be careful to avoid depicting all Indigenous communities according to broad stereotypes. Perhaps the *Asuniwuche Winek* community is an example of where the Cree law has already been internalized, provides a meaningful guide to shaping community conduct,

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205 *Ibid* at 200–28.

206 *Ibid*.

207 *Ibid* at 230.

208 *Ibid* at 252–55.

209 Anthony J Sebok, "Is the Rule of Recognition a Rule?" (1997) 72 Notre Dame L Rev 1539; Melvin A Eisenberg, "The Concept of National Law and the Rule of Recognition" (2002) 29:4 Fla St UL Rev 1229; Larry Alexander & Frederick Schauer, "Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance" in Matthew D Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the United States Constitution* (London: Oxford University Press, 2009) 175.

and thereby renders the ensuing discussions mute insofar as the *Asuniwuche Winek* community is concerned. Perhaps the Saanich girl had internalized Saanich law so as to rescue the three men from drowning without any hesitation. The discussion now considers several theoretical perspectives on the internalization of law.

B. Legal Theory and Internalization

Two significant and contrasting bodies of legal theory are natural law theory and legal positivism. The former holds that human laws such as statutes and customs fundamentally reflect an underlying moral foundation that society and its members adhere to, even if subconsciously. The latter views law as an artificial creation of humanity that serves expedient social ends and is not necessarily constrained by an underlying moral foundation.[210] I do not wish to fully canvass the theoretical debates between these two bodies, which is extensive and has been ongoing for decades. I instead wish to glean from them the rich insights that they offer on the internalization of law. They share remarkable similarities with each other, even as they are articulated from quite different conceptual views of the law.

One of the earliest and still most important theorists of legal positivism is H.L.A. Hart. His theories were, in part, a reaction to conceptions of law that had been articulated by John Austin. According to Austin, a sovereign command backed up by the threat of a sanction are necessary components of law.[211] Without the threat of forceful sanction, any commands are reduced to simply requests by the sovereign.[212] Hart argues that there is nothing to distinguish Austin's conceptions of law as sovereign commands from other interactions that are resolved by nothing more than the application of brute physical force (e.g. armed robbery).[213] What distinguishes law from such raw physical interactions is the acceptance of the law by its subjects. It is now known as Hart's internal point of view that the citizen makes an internal reasoned choice to accept the law as binding on his or her own behaviour.[214] Hart describes the internal point of view as follows:

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210 Edward S. Adams & Torben Spaak, "Fuzzifying the Natural Law: Legal Positivist Debate" (1995) 43:1 Buff L Rev 85.

211 John Austin, *The Province of Jurisprudence Determined*, 5th ed by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).

212 *Ibid* at 13, 18–25.

213 HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) at 78.

214 *Ibid* at 56.

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self- criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought' 'must' and 'should', 'right' and 'wrong'.[215]

But this process of reflection and acceptance is not to be mistaken for a natural law theorist's idea that acceptance means acceptance of an underlying morality behind the law. Hart relates that internal acceptance of law can happen for numerous and variegated reasons:

> [I]t is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so ... their allegiance to the system may be based on many different considerations: calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.[216]

Internalization of law is also an important concept for natural law theorists. In *The Morality of Law*, Lon L Fuller argues that law is subject to an internal morality consisting of eight principles: (1) the rules must be expressed in general terms; (2) the rules must be publicly promulgated; (3) the rules must be (for the most part) prospective in effect; (4) the rules must be expressed in understandable terms; (5) the rules must be consistent with one another; (6) the rules must not require conduct beyond the powers of the affected parties; (7) the rules must not be changed so frequently that the subject cannot rely on them; and (8) the rules must be administered in a manner consistent with their wording.[217] All of these eight principles speak, on some level, to internalization. Principles one, two, four, five, and seven speak to accessibility to the subjects as a prerequisite to the choice to internalize. Principles three and eight speak to fairness in application to maintain at least a minimum baseline of legitimacy before the subjects can internalize the law as an accepted guide to behaviour. The sixth point, and the one of particular interest to my discussion, is the idea that the law

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215 *Ibid*.

216 *Ibid* at 198–99, 203.

217 Lon L Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1964) at 39.

cannot impose an unreasonable degree of cost or risk on the subjects if there is to be any hope that the subjects will internalize the law.

Rodriguez-Blanco argues that, to a certain degree, Hart's social normativity cannot exist without, and is ultimately parasitic on, the justified normativity inherent in natural law theory.[218] When a person decides whether or not to comply with the law, the person's own internal reasonings hinge not just on whether they personally accept that law as valid, but also on references to the significant societal/social consensus that may be underlying that law. The person has a social stake in remaining compliant with the law.[219] What is implicit in that argument is that the fear of stigma and being ostracized may itself be a powerful incentive to comply with the law.

The positivist and natural law theorists recognize, on some level, the dynamics that inform a decision as to whether or not to obey and internalize a law. Rodriguez-Blanco articulates a stake in adhering to societal consensus as an impetus to internalize a law.[220] Hart himself alludes to "demands for conformity" and "the mere wish to do as others do" as impetuses towards internalizing a law.[221] On the other hand, Fuller recognizes that a law can make demands of citizens that become unreasonable so that, on the balance, even risking societal stigma and disobeying the law may become the preferable choice for some people.[222]

Socioeconomics uses social norms as a lens for viewing the degree to which people will comply with or internalize the law. It can imply a utilitarian choice on whether or not to comply with the law, and a social norm that is strongly internalized within a community can present a significant cost for disobedience, as expressed through stigma and ostracization.[223] The positivists and natural law theorists recognize some of the practical dynamics that inform a decision as to whether or not to obey the law, and yet that recognition is but a component of larger theoretical models that they concern themselves with. Socioeconomics theory takes

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218 Veronica Rodriguez-Blanco, "Social and Justified Legal Normativity: Unlocking the Mystery of the Relationship" (2012) 25:3 Ratio Juris 409 at 409, 411, 430.

219 *Ibid* at 422–24.

220 *Ibid*.

221 *Supra* note 213 at 56, 86, 191, 203.

222 *Supra* note 217 at 39.

223 Cass R Sunstein, "Social Norms and Social Roles" (1996) 96:4 Columbia Law Rev. 903 at 935.

that recognition to the next level and makes it the explicit focus of utilitarian cost-benefit analyses.

Grasmick and Appleton argue that the threat of criminal punishment as deterrence may be more effective by reason of the prospect of social stigma rather than the actual physical consequences realized through incarceration.[224] Robert Ellickson offers an even more specific insight. He argues that social norms have an especially strong hold on small communities, where its members constantly (even if informally) encourage each other to live up to those norms and where transgressions can result in an especially severe stigma.[225]

Sometimes that fear of stigma and stake in compliance can be powerful enough to persuade people to engage in behaviour that they otherwise would not in the absence thereof. Tom Tyler and Yuen Ho argue that if people view the legal system as legitimate, they are more willing to obey the law out of a sense of obligation to the collective in comparison to a reliance on deterrence and punishment.[226] That can even translate into actions that sacrifice self-interest for the sake of the collective.[227]

The theoretical insights on how the stake in adhering to collective values can lead to an internalization of the law also aligns with empirical research on how the bystander effect can be attenuated. Two experiments conducted by Marco van Bommel and others gauged the level of responsiveness to online pleas for aid.[228] One experiment "introduced an accountability cue by making participants' screennames more salient", should they choose to offer or withhold aid, while the other "used a webcam".[229] Both cues had the result of reversing the bystander effect, which was observed in the responses before the cues were introduced.[230] Another study found that the bystander effect was attenuated by increased familiarity

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224 Harold Grasmick & Lynn Appleton, "Legal Punishment and Social Stigma: A Comparison of Two Models" (1977) 58:1 Soc Science Q 15.

225 Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994) at 167.

226 Tom R Tyler & Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage Foundation, 2002) at 102, 159–60.

227 *Ibid*.

228 Marco van Bommel et al, "Be Aware to Care: Public Self-Awareness Leads to a Reversal of the Bystander Effect" (2012) 48:4 J Experimental Soc Psychology 926.

229 *Ibid* at 926.

230 *Ibid* at 926–29.

and relationships between the members of a group.[231]

One can perhaps see these dynamics at play in the Giant Skunk story. Part of common law's hesitation to impose a general duty to assist is a reluctance to force citizens to take very real risks upon themselves. That could be a reflection of Fuller's point that the law cannot demand conduct beyond the powers of the subjects.[232] In fact, Cree law may also reflect a hesitancy to impose unreasonable risks on those who are incapable of taking them on, but with quite different results. Note that in the Giant Skunk story, the women, children, and elderly were exempted from participating in the battle. The *Mistacayawsis* may not necessarily have expected the younger sister to physically confront her sibling, who had become powerful and all but invincible, but it did expect her to at least warn the village of the danger that her sibling presented.

Cree law, beyond the exemptions, obliged the acceptance of very real and mortal risks in the battle against Giant Skunk, and yet every healthy adult male animal willingly threw themselves into the fray. Does each individual animal fear stigma before the others if they stay out of the conflict? The Weasel warns the other animals of what he did after heeding advice from his wife and reconsidering the possibility that Giant Skunk knew his trail had been crossed. What if Giant Skunk, without warning, started to slaughter the other animals and it came out amongst the survivors that Weasel did not reveal the cause so that they could prepare? Would Weasel have been shamed and casted out by the survivors? What stigma would Wolverine faced had he not performed the crucial role of holding down Giant Skunk's anus? Big Cat initially did not want to get involved but became willing to help when he was assured of a secure place from which he could jump onto Giant Skunk's neck. Did Big Cat also implicitly relent (even if not explicitly stated in the narrative) for fear of stigma, should the survivors remember his refusal to help?

If one applies the insights provided by the natural law and positivist theorists, and the cost-benefit analysis of the socioeconomic theorists, the equation leads to definite and identifiable results. Common law systems have, for the most, part decided that the real risks that can result from rendering assistance are too much for the legal system to force on citizens.

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231 Mark Levine & Simon Crowther, "The Responsive Bystander: How Social Group Membership and Group Size Can Encourage as Well as Inhibit Bystander Intervention" (2008) 95:6 J Personal & Soc Psychology 1429.

232 *Supra* note 217 at 39.

There may be a degree of societal stigma for not helping, as the stories of Kevin Carter and Glenda Moore illustrate, but perhaps it was attenuated by a realization that the risks involved introduce a degree of moral complexity such that the law should not force the point. Failure to help in accordance with Cree law and values would definitely countenance a pronounced stigma to follow. That stigma takes on considerable strength on account of the collective good being such an integral objective of Cree law, and it becomes much more keenly felt in smaller Cree communities where everyone would know if a member did not live up to the law's expectations. Such was the strength of the stigma when almost everyone in the village, without hesitation, killed the younger sister in the *Mistacayawsis* narrative for a perceived failure to give warning that the older sister had become a dangerous *wetiko*. That stigma may have been powerful enough to oblige individual members of a Cree community to accept considerable physical risks on themselves.

For historical Cree communities, the utilitarian cost-benefit equation, on the balance, landed squarely in favour of a legal obligation to help others in danger, at least for those who had the physical capacity to provide assistance. If helping others could involve real physical dangers for Cree people in the past, it was outweighed by the loss of place in the community and stigma if the legal obligation to help was not adhered to. The equation played out in certain ways for historical Cree communities. It is not a given that the equation would play out in the same way in contemporary and present circumstances. And there is more than one reason why it may play out differently. Some Cree communities may decide that dedicated professional services may be an adequate and alternative way of addressing community safety, although I have previously pointed out there are problems with the lack of resourcing for Indigenous police forces. Another reason may be that in some communities, a recognized phenomenon known as the normalization of violence may present a very significant obstacle.

C. Normalization of Violence and its Repercussions

The cost-benefit analysis played out a certain way in historical Indigenous communities, with the result of general obligations to assist being entrenched in parts of their legal orders. We now live in different times, during which colonialism has wrought damage against Indigenous peoples. One unfortunate effect of colonialism has been the erosion and suppression of traditional Indigenous legal orders, at least for some

communities. The concerns are exacerbated by colonialism introducing a troubling new phenomenon in Indigenous communities, the normalization of violence.

A report on Indigenous domestic violence from the Aboriginal Healing Foundation indicates:

> While it is generally acknowledged that family violence and abuse did occur prior to European contact, both the historical and anthropological records indicate that it was not a normal feature of everyday life. Indeed, in many Aboriginal societies, an abusive man would soon be confronted by his male relatives (or the relatives of the victim) and, if the abuse continued, the abuser could face dire consequences, including banishment, castration and death.[233]

Colonialism has been especially harmful to Indigenous women. Colonial processes, such as the Residential schools, that introduced intergenerational trauma into Indigenous communities and the imposition of patriarchal band and council systems, through the *Indian Act*, have devalued and eroded the valued place that Indigenous women used to enjoy in their societies. It has been replaced with a warped culture that has accepted the worst of Western patriarchal influences. Where family and sexual violence had previously been prohibited by Indigenous legal orders, the new warped culture normalizes violence against Indigenous women and children.[234] Indigenous women are three times more likely than non-Indigenous women to be subject to family violence.[235]

Anne McGillivray and Brenda Comaskey point out that the problem of domestic violence in Indigenous communities may be of such a severity that it forces many Indigenous women to migrate from their reserve

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233 Michael Bopp, Judie Bopp & Phil Lane, *Aboriginal Domestic Violence in Canada* (Ottawa: Aboriginal Healing Foundation, 2003) at 11, no 7, online: <www.ahf.ca/downloads/domestic-violence.pdf> [perma.cc/F3R4-TA7Q].

234 Anne McGillivray & Brenda Comaskey, *Black Eyes All The Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999); Lisa J Udel, "Revision & Resistance: The Politics of Native Women's Motherwork" (2001) 22:2 Frontiers: A J Women Studies 43; Jennifer Kwan, "From Taboo to Epidemic: Family Violence in Aboriginal Communities" (2015) 2:1/8 Global Sociaelfare 1; Pertice Moffitt et al, "Intimate Partner Violence in the Canadian Territorial North: Perspectives From a Literature Review and a Media Watch" (2013) 72 Intl J of Circumpolar Health 1.

235 Statistics Canada, *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009*, by Shannon Brennan, Catalogue No 85-002-X (Ottawa: Statistics Canada, 17 May 2011), online: <www150.statcan.gc.ca/n1/en/pub> [perma.cc/X6KH-V4C9].

communities to urban centres.[236] Resources that are available for abused women, like domestic violence shelters, are simply unavailable to many abused Indigenous women.[237] This reflects, in part, the lack of serious community support for victimized women and children.[238] The resources and political structures remain firmly in control of a unique brand of Indigenous patriarchy that has been spawned under the *Indian Act* band and council system.[239] Many Indigenous women find themselves compelled to migrate to urban centres for fear of their own personal safety and the safety of their children.[240] The normalization of violence can also mean the corruption of Indigenous justice initiatives. Bruce Miller relates that such abuses of power have plagued the South Vancouver Island Justice Education Project.[241] Elders, often from powerful families, would try to convince female victims to acquiesce in lighter sanctions for offenders under the project, rather than going through the usual justice system.[242] Their tactics included attempts at laying guilt trips, attempted persuasions in favour of dropping the allegations, the threat of witchcraft to inflict harm, or threatening to send the abuser to use physical intimidation.[243] Some women felt that the problem was exacerbated by the fact that some of the elders were themselves convicted sex offenders, which left them wondering how seriously their safety and concerns would be addressed.[244] The ultimate result was that the project was terminated in 1993.[245]

These developments mean that the cost-benefit analysis will yield a fundamentally different equation and result. The past likely saw a stigma for not only causing harm to fellow community members but also failing to either give warning or come to the aid of somebody who was in danger of harm. Normalization of violence in many contemporary Indigenous communities means a lack of stigma for causing harm and implicitly, a lack of stigma for not coming to the assistance of another. There is little benefit

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236 *Supra* note 234 at 134.
237 *Ibid.*
238 *Ibid* at 132–34.
239 *Ibid* at 22.
240 *Ibid* at 133–34.
241 Bruce G Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln, Nebraska: University of Nebraska Press, 2001) at 175–200.
242 *Ibid* at 198–99.
243 *Ibid.*
244 *Ibid.*
245 *Ibid.*

to gain by trying to adhere to past standards that may have been substantially eroded.

In contrast, the normalization of violence also heightens considerably the costs that may stem from trying to come to aid of others. The concern is that if violence is so normalized in a given Indigenous community, would trying to come to the aid of another itself expose the person who renders aid to very real danger? Certainly, Cree law often asked at least those who possessed the physical capability to render aid to accept very real levels of physical risk to answer to their obligations to the community. But does the normalization of violence elevate the levels of risk to a degree of harm that may not have been contemplated by historical Cree law? That may be the case. In other instances, the law required, at most, giving warning from those who may have been less capable. But would even requiring that invite danger and retaliation in a community beset by the normalization of violence?

As McGillivray and Comaskey point out, many Indigenous women migrate to urban centres with their children out of fear for themselves and their children after repeated victimization.[246] That decision to migrate may also be implicitly informed by a perception that few, if any, people in their own reserve communities would ever have come to their assistance. In the past, a member of a Cree community could expect many of the other community members to come to their aid. The normalization of violence has turned the social fabric upside down in many communities. Many of the community members that a person would expect to come to their aid will now be the perpetrators, tied to the perpetrators and helping them instead, or otherwise apathetic or disinclined towards rendering any kind of assistance.

A person in danger in a contemporary community may now encounter a phenomenon that goes beyond an apathetic bystander effect. Those who may be in a position to help or at least provide warning may be hesitant to do so not just on account of any sort of psychological discomfort described by the bystander effect but may themselves become fearful for their safety, stemming from the normalization of violence. The bystander effect may be overtaken by a perceived self-endangerment effect. Sharon McIvor, a Lower Nicola First Nations woman and an advocate against violence against Indigenous women, participated in efforts to shut down justice initiatives

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246 *Supra* note 234 at 134.

in Vancouver Island.[247] She discussed how reporting domestic abuse or sexual assaults frequently resulted in reprisal assaults and death threats from the perpetrators.[248] And the problem was exacerbated by the perpetrators enjoying connections and support from *Indian Act* band council members, or Elders who controlled the justice initiatives.[249]

Certainly, past Cree law that demanded assistance could demand acceptance of a very real level of physical risk for those who are physically capable of rendering assistance. But perhaps demanding that acceptance of risk has now become unreasonable since the normalization of violence in many Indigenous communities promises danger and risk to a severity that perhaps past Cree law did not account for. Now, it must be acknowledged that Cree law, in some instances, required no more than providing a warning, at least for those who were less capable. But would there still be danger and risk associated with outing oneself in a community where violence has been normalized? Recall McIvor's account of how even reporting to authorities has been met with retaliation.[250]

Imagine that Cree community leaders try to revive the law to help others but the community itself suffers from a normalization of violence. Also imagine that someone is prosecuted for failing to help someone or to give warning in accordance with that law and yet the reason for withholding help was fear of harm and retaliation. Now recall the fate of the younger sister in the *Mistacayawsis* narrative, where the younger sister's death was regarded as just for not even taking the minimal step of providing a warning. Perhaps the prosecution for failure to assist or give warning can end up harsh or even unjust because the community member was forced between a rock and a hard place. The demand is either render aid or give warning, and face certain and severe danger, or refuse to give aid or a warning and face prosecution. It is not to say that all Indigenous communities, Cree communities included, are beset by the normalization of violence. But for those that are suffering from normalization of violence, what does that mean for any efforts to revive a law requiring aid to those in danger? Is it a potential cure, or is it a cure that would become worse than the disease?

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247 Indigenous Peoples Solidarity Movement Ottawa, "Sharon McIvor - Seeking Justice for Missing and Murdered Indigenous Women" (1 January 2011), online (video): *YouTube* <www.youtube.com/watch?v=TfqVcCvVGRg> [perma.cc/8N3Y-LULD].

248 *Ibid.*

249 *Ibid.*

250 *Ibid.*

V. Ways Forward

It may be that in some Indigenous communities, the ethos of coming to the aid of others in danger, or at least provide warning, may be internalized enough so that the cost-benefit equation means that those communities can now use past laws that required aid. Other Indigenous communities, especially those beset by the normalization of violence, may yield different results from the equation such that reviving past laws requiring aid may not be workable in the foreseeable future. And it could be that some of those communities may decide to never attempt the revival of such laws. Self-determination does, after all, involve the freedom to choose to be free of external colonial interference.

That is not to say that the possibility will be permanently foreclosed for such communities. Amitai Etzioni points out that social norms are not fixed and static; they are dynamic fields.[251] Social norms may, at some point, reflect peoples' initial inclinations or be inherited through historical transmissions over generations.[252] But, communities and people can and do change their social norms over time through various processes, such as reflecting on previous norms, evolving them to better suit contemporary needs, or altering them when there are tangible incentives to do so.[253] How about those communities that may be interested in reviving past laws requiring aid but where an honest application of the cost-benefit analysis presents troubling implications? There may be more than one way to go about matters.

One possible approach is to try to encourage community members to internalize the values underlying a law that requires aid but before actually reviving and applying the law that requires aid. Richard McAdams offers the insight that societal internalization has to be in place before a law based on prescription and punishment can have any meaningful purchase.[254] Laws are much more likely to be complied with and obeyed when the law's goals and objectives are congruent with the social norms internalized by the

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251 Amitai Etzioni, "Social Norms: Internalization, Persuasion, and History" (2000) 34:1 Law & Soc'y Rev 157.

252 *Ibid* at 157.

253 *Ibid* at 166, 175–76.

254 Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 Mich L Rev 338.

community's members and certainly more so in comparison to laws that rely on little else besides the brute force of punishment.[255]

Robert Cooter also theorizes that in order for law to be effective, it must be internalized by citizens.[256] He notes that if the costs of compliance with the law come across as too high for citizens, frequent disobedience results as a matter of course.[257] State law relies on the classic formula of criminal punishments to try and make the costs of disobedience exceed the perceived costs of compliance.[258] However, such a tried formula does not work so well in encouraging what he terms civic virtues: actions where a citizen invests time and energy into behaviours that further the public good such as volunteer work for charities or voting in elections.[259] The reason is that cultivating civic virtues requires intimate knowledge of each citizen's behaviour, which is simply beyond the capacity of the state to accumulate.[260] That intimate knowledge is only possessed by the citizen's immediate circle of friends, family, and associates.[261] Therefore, the state should strive to channel those relationships and knowledge bases of character by using different methods such as public advertising that extols the benefits of civic acts or reintegrative shaming that allows a wrongdoer to change their behaviour in gentler, more welcoming ways.[262] The state can thereby align law with morality, and achieve the legal system's underlying objectives, but in ways that do not rely on the classic punishment doled out in response to transgression.[263]

Applying McAdams[264] and Cooter's[265] insights to Indigenous communities and law may mean that it is a matter of putting the cart before the horse. It amounts to trying to undo the internalization of normalized violence and replacing it with Indigenous values that involve looking out for fellow community members. And, by extension, it almost amounts to trying to alter the equation so that the cost-benefit analysis yields different

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255 *Ibid* at 380–81.

256 Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms" (2000) 86:8 Va L Rev 1577 at 1581–94.

257 *Ibid* at 1581–1601.

258 *Ibid*.

259 *Ibid* at 1597.

260 *Ibid*.

261 *Ibid*.

262 *Ibid* at 1597–98.

263 *Ibid*.

264 *Supra* note 254.

265 *Supra* note 256.

results that are more amenable to reviving past laws requiring aid. There have been efforts in Indigenous communities to undo the normalization of violence that have relied on gentle persuasion instead of legal obligation, although they did not have the revival of a past specific laws as their objective.

The municipality of Cotachachi in Ecuador has seen staggering levels of domestic and sexual violence against Indigenous women.[266] The response was the Statute of Buena Convivencia.[267] One of its measures was the use of both male and female trained promoters who worked to promote non-violent Indigenous masculinities amongst community members.[268] There is, as of yet, no empirical validation of its success.[269]

Beverly Shea, Amy Nahwegahbow and Neil Anderson performed a systematic review of numerous studies of Indigenous family violence prevention programs.[270] Themes in those programs included counselling for at risk families, trying to reduce risk factors for family violence (e.g. substance abuse), and trying to inculcate traditional Indigenous values among clients.[271] The authors could not find any empirical evidence of a reduction in family violence, but they noted that some of the studies provided quantitative evidence not directly tied to domestic violence, such as apparent acceptance of teachings by the clients and positive rapport between counsellors and clients.[272]

As another example, a study conducted in northern Saskatchewan shows that Cree and Dene elders' approaches to counselling and healing were effective in both reducing beatings against domestic violence victims and mitigating the trauma and symptoms experienced by victims after abuse.[273] The utility of these developments to the present discussion is

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266 Rachel Sieder & Maria Teresa Sierra, "Indigenous Women's Access to Justice in Latin America" (2010) CMI: Chr Michelsen Institute Working Paper No 2010:2 at 30–31, online: <www.cmi.no/publications/file/3880-indigenous-womens-access-to-justice-in-latin.pdf> [perma.cc/9548-663Q].

267 *Ibid*.

268 *Ibid*.

269 *Ibid*.

270 Beverly Shea, Amy Nahwegahbow & Neil Anderson, "Reduction of Family Violence in Aboriginal Communities: A Systematic Review of Interventions and Approaches" (2010) 8:2 Pimatisiwin 35.

271 *Ibid* at 1–2, 5, 15.

272 *Ibid* at 4, 9, 17–23.

273 Chassidy Pachula et al, "Using Traditional Spirituality to Reduce Domestic Violence

admittedly limited. Empirical evidence of success has not been established for all but one of the them. Nor did any of the initiatives have the revival of a past specific law as their ultimate objective. The initiatives, particularly the Cree and Dene example, may still illustrate that there is at least some merit to the idea of trying to reverse damaged normativities without calling upon forceful legal sanction to realize it. And it may be a preferable course to reviving a past law if a community is clearly not ready for it.

There is empirical research that validates that position. Daphna Lewinsohn-Zamir's conducted questionnaire experiments, each involving ninety-six students at the Hebrew University of Jerusalem.[274] In one experiment participants were presented with 12 different scenarios of how a citizen would respond to a new law that made recycling mandatory.[275] The scenarios were as follows:

> 1) The citizen recycled before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle.
>
> 2) The citizen did not recycle before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle. The citizen initially recycled to avoid the fine but now understands the importance of recycling.
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> 3) The citizen did not recycle before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle. The citizen recycles just to avoid the fine.
>
> 4) The citizen recycled before the law was enacted, but the law offered a higher negative incentive (e.g. larger fine if caught) to recycle.
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> 5) The citizen did not recycle before the law was enacted, but the law offered a higher negative incentive (e.g. higher fine if caught) to recycle. The citizen initially recycled to avoid the fine, but now understands the importance of recycling.

Within Aboriginal Communities" (2010) 16:1 J Alternative & Complementary Medicine 89.

274 Daphna Lewinsohn-Zamir, "The Importance of Being Earnest: Two Notions of Internalization" (2015) 65:2 UTLJ 37 at 64.

275 *Ibid* at 64–65.

> 6) The citizen did not recycle before the law was enacted, but the law offered a higher negative incentive (e.g. smaller fine if caught) to recycle. The citizen recycles just to avoid the fine.
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> 7) The citizen recycled before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle.
>
> 8) The citizen did not recycle before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle. The citizen initially recycled for a chance to win the lottery but now understands the importance of recycling.
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> 9) The citizen did not recycle before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle. The citizen recycles with the motivation to try and win the lottery.
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> 10) The citizen recycled before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle.
>
> 11) The citizen did not recycle before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle. The citizen initially recycled for a chance to win the lottery, but now understands the importance of recycling.
>
> 12) The citizen did not recycle before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle. The citizen recycles with the motivation to try and win the lottery.[276]

These scenarios were organized into four groupings on the basis of the type of incentive offered (e.g. low negative incentive, high negative incentive, low positive incentive, high positive incentive).[277] Within each grouping is the *ex-ante* scenario where the citizen already recycled beforehand, where the citizen recycles because they now appreciate the importance behind the new law (i.e. preference change), and where the citizen recycles only because of the incentive involved (i.e. behaviour

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276 *Ibid* at 65, 82–84.

277 *Ibid* at 65.

change).[278] Participants were asked to rate each scenario on a scale of one to nine based on what degree they assessed the citizen as making an independent, free will decision to recycle (with nine signifying that it was completely of their own free will).[279] Within each grouping, the *ex-ante* scenario always rated higher than the preference change scenario which, in turn, always rated higher than the behaviour change scenario.[280] The key finding is that any sub-grouping from the positive incentive scenarios always scored higher than their counterparts in the negative incentive scenarios.[281] For example, the *ex-ante* low positive scenario scored higher than the *ex-ante* low negative scenario, the preference low positive scenario scored higher than the preference low negative scenario, the behaviour high positive scenario scored higher than the behaviour high negative scenario, and so on.[282]

The second experiment involved questionnaires based on three different scenarios, whereby each could be resolved by a more coercive, direct remedy and a less coercive, indirect remedy.[283] One scenario involved a disagreement between a car owner and a mechanic who performed repairs over the amount owing to the mechanic.[284] The direct remedy was the Court ordering the car owner to pay the outstanding amount to the mechanic and the indirect remedy was the mechanic exercising a possessory lien over the car until the owner paid the outstanding amount.[285] The second scenario involved defamation, with the direct remedy being court-ordered damages and the indirect remedy being the slanderer making a voluntary payment of damages, under legal advice, to the defamed party in anticipation of reducing damages.[286] The third scenario involved a leak in a rented apartment.[287] The direct remedy is the Court ordering the landlord to fix the leak and the indirect remedy is the tenant exercising a right to rent abatement until the landlord fixes the leak.[288] Participants again always rated

278 *Ibid* at 82–84.
279 *Ibid* at 65, 67.
280 *Ibid* at 67.
281 *Ibid*.
282 *Ibid* at 64–66.
283 *Ibid* at 76–78.
284 *Ibid*.
285 *Ibid*.
286 *Ibid* at 76–80.
287 *Ibid* at 73, 77, 80.
288 *Ibid*.

the indirect remedies as more reflective of a free and independent decision on the part of the party having to make good on the remedy.[289]

Lewinsohn-Zamir connects her experiments to a substantial body of law and psychology literature that suggests that laws that rely heavily on coercive measures only succeed in suppressing behaviour, especially when people would prefer to engage in that behaviour absent the law.[290] Ultimately, it does not succeed in changing peoples' preferences or getting them to appreciate the values or objectives underlying the law.[291] And a great deal of that literature utilized similar experiments to gauge responses to coercive or less coercive legal measures. It is when the law utilizes less intrusive, more nuanced measures that it can actually shape peoples' preferences, even if they had previously been different.[292]

It could be that a Cree community makes the duty to assist legally enforceable but relies on more lenient sanctions likes small fines or restitution to the person who needed aid (and certainly not incarceration). Now, imagine that the expectation to aid others in danger becomes a settled expectation over time. The community may now be ready to elevate the harshness of available sanctions, possibly including incarceration. On the other hand, the community may remain content with the more lenient range of sanctions. Another Cree community may decide not to revive a duty to assist law in any form. Self-determination does, after all, mean the freedom of a people to make their own choices about what laws to use and what laws not to use.

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289 *Ibid* at 76–80.

290 *Ibid* at 51–52, 57, 61.

291 *Ibid* at 78–81.

292 *Ibid* at 54–63. The literature she is referring to includes Daryl J Bem, "An Experimental Analysis of Self-Persuasion" (1965) 1:3 J Experimental Soc Psychology 199; Richard M Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London, UK: Allen and Unwin, 1970); Justice Richard Eiser, *Social Psychology: Attitudes, Cognition and Social Behavior* (Cambridge, UK: Cambridge University Press, 1986) at 84; Dan M Kahan, "Trust, Collective Action, and Law" (2001) 81 BUL Rev 333; Uri Gneezy & Aldo Rustichini, "A Fine Is a Price" (2000) 29:1 J Legal Stud 1; Edward L Deci & Richard M Ryan & Richard Koestner, "A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation" (1999) 125:6 Psychological Bulletin 627; Bruno S Frey & Reto Jegen, "Motivation Crowding Theory: A Survey of Empirical Evidence" (2001) 15:5 J Economic Surveys 589; Cass R. Sunstein & Richard H. Thaler, "Libertarian Paternalism Is Not an Oxymoron" (2003) 70:4 U Chicago L Rev 1159.

VI. CONCLUSION

There may be some merit to the idea of allowing Cree communities to use duty to assist and duty to warn laws as a part of Indigenous self-determination. Common law refuses to impose a general duty to assist out of numerous concerns, particularly those relating to enforceability and forcing risks on citizens. And yet, critics hold that the bystander effect is not a kind of behaviour that the law should condone or even encourage. Cree law fundamentally viewed the bystander effect or otherwise not coming to the aid of somebody in danger, or at least giving warning of danger, as not living up to their responsibilities to the community and its members.

It is a contestable issue whether such laws can and should be used in at least some contemporary Cree communities. Such laws could perhaps provide a counter against Indigenous peoples being victimized at rates that well exceed those of non-Indigenous communities. And yet, the normalization of violence in some, but not all, communities may render such an endeavour ill-advised.

The crucial issue is whether members of a Cree community can sufficiently internalize the values underlying duty to assist and warn laws, so as to make their use tenable. Natural law, positivist, and especially socioeconomic theories of law provide insights on the relevant dynamics of internalization. The need to conform with the community's values and a corresponding avoidance of stigma for failing to do so can present powerful incentives to comply with duty to assist laws. That may be especially true for smaller Indigenous communities with a more intimate sense of community, where everybody more or less knows everybody else. But the normalization of violence can demand a greater cost of compliance than many community members can reasonably be expected to take upon themselves.

Some Cree communities, even if they did have self-determination, may not be ready to proceed with such laws. Internalization amongst broad community memberships may need to be in place as a prerequisite. There are two possible routes to obtain the foundation of internalization. One is to inculcate the values of responsibility to community and assisting others through education and other forms of mass persuasion but without forcing the point through legal sanctions. Another is to enact the law but call upon a more lenient set of remedies or sanctions for the time being. If either can, over time, encourage the needed internalization, a true criminal law that

imposes duties to assist and warn may be tenable, if communities choose to go in that direction.

Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* [1]

RUBY DHAND [*]
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I. INTRODUCTION

In Canada, civil mental health laws fall within provincial and territorial legislative jurisdictions. Within these 13 jurisdictions, there are significant differences between civil mental health statutes, particularly with respect to involuntary detention criteria and the legal tests for the capacity to consent and refuse treatment.[2] Nevertheless, in all Canadian jurisdictions, civil mental health legislation authorizes the non-criminal detention of persons with mental disabilities,[3] in psychiatric facilities,

1 We acknowledge and appreciate funding for this research provided by the Government of Canada's Office of Disability Issues. This research was conducted as part of a larger research project entitled, "Implementing Equal Access to Legal Capacity in Canada: Experience, Evidence and Legal Imperative", prepared for the Institute for Research and Development on Inclusion and Society (IRIS) by Michael Bach, Lana Kerzner, Ruby Dhand, Kerri Joffe, Faisal Bhaba, and Brendan Pooran, 2019.

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2 Halsbury's Laws of Canada (online), *Mental Health*, "Psychiatric Assessments and Admission Procedures: Legislative Framework: Saskatchewan (V.3.(10)) at HMN-104 "Voluntary Admissions".

3 We acknowledge that there are many terms used to describe mental disabilities, and that there is no consensus within legal and disability communities about the appropriate terminology. Given the legal analysis that is the focus of this paper, we use the legal term "mental disabilities" to describe persons who are recipients or former recipients of civil mental health and/or addiction services.

against their will and without their consent. Involuntary detention "has been described as 'the most significant deprivation of liberty without judicial process that is sanctioned by our society.'"[4] Involuntary detention and involuntary treatment are inextricably linked: in a number of Canadian jurisdictions, involuntary detention may deprive persons with mental disabilities of the right to refuse psychiatric treatment in certain circumstances.

Disability rights advocates have long rejected legal frameworks that provide for involuntary detention and involuntary treatment, on the basis of mental disability, as a violation of fundamental human rights. This is reflected in a number of international human rights treaties, including the *Convention on the Rights of Persons with Disabilities* (CRPD). The CPRD is a treaty that was created "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[5] The United Nations Office of the High Commissioner for Human Rights has explained that involuntary treatment and compulsory care regimes within domestic mental health legislation violate multiple rights articulated in the CRPD:

> Mental health legislation is unjustly discriminatory against people with psychosocial disability because it systematically uses mental disorder as criteria to limit legal capacity, a view echoed by the CRPD Committee. The proposition of applying supported decision making to mental health legislation is therefore problematic, given that principles of non-discrimination and equality underpin supported decision-making. Particular sections of the CRPD will create ongoing challenges to the operation of mental health legislation: in particular, Article 14, as relates to detention ('the existence of a disability shall in no case justify a deprivation of liberty'); Article 17, as relates to involuntary treatment ('(e)very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others'), and 25, and, again, Article 12, as relates to restrictions on legal capacity on the basis of a disability.[6]

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4 Raj Anand, "Involuntary Civil Commitment in Ontario: The Need to Curtail the Abuses in Psychiatry" (1979) 57:2 Can Bar Rev 250 at 251 cited in Isabel Grant & Peter J Carver, "*PS v Ontario*: Rethinking the Role of the *Charter* in Civil Commitment" (2016) 53:3 Osgoode Hall LJ 999 at 1001.

5 *Convention on the Rights of Persons with Disabilities*, A Res 61/106, UNGAOR, 61st Sess, Supp No 49 (2006) 2 at 4, art 1, online (pdf): <treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf> [perma.cc/22JM-C6JK] [*CRPD*].

6 Piers Gooding, "Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law" (2013) 20:3 Psychiatry, Psychology & L 431 at 440. See also United Nations General Assembly, OHCHR, Tenth session Agenda item

In Canada, persons with mental disabilities who are subjected to involuntary detention and treatment are vulnerable to violations of their *Charter*-protected rights, including the section 7 rights to life, liberty, and security of the person, because they are physically detained and deprived of the right to refuse treatment. Their section 15 rights to equality may also be violated, given that Canadian mental health laws subject only persons labelled with mental disabilities to involuntary detention and treatment. Despite the hope that the *Canadian Charter of Rights and Freedoms*[7] would serve to ensure greater recognition of the liberty and equality interests at stake within civil mental health law, scholars argue that this has not been fully realized.[8]

In this paper, we apply a *Charter* analysis to involuntary detention and involuntary treatment provisions in select Canadian jurisdictions. Specifically, we examine these provisions through the lens of the *Charter's* sections 7 and 15 rights.[9] Our *Charter* analysis is informed by the rights

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2, " Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities' Distr. GENERAL A/HRC/10/48 26 January 2009; Tina Minkowitz, "The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions" (2007) 34:2 Syracuse J Intl L & Com 405 at 405–28; Tina Minkowitz, "Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities" in Bernadette McSherry & Penelope Weller, eds, *Rethinking Rights-Based Mental Health Laws* (Oxford, UK: Hart, 2010) 151 at 151–77.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8 Grant & Carver, *supra* note 4.

9 We conducted extensive research and searches of all scholarly analyses of mental health law and the *Charter*, the *Convention on the Rights of Persons with Disabilities*, and supported decision-making in the mental health law context. Research was conducted in the Law Libraries databases, HeinOnline, ProQuest, SSRN, QuickLaw, CanLII, the Canadian Legal Literature Database, Google Scholar, and Google. We also searched for articles and books written by seminal authors writing on the topic, including Terry Carney, Sheila Wildeman, Anna Nilsson, Piers Gooding, Archie Kaiser, Tina Minkowitz, Anna Arstein-Kerslake, Steven Hoffman, and Michael Perlin. Further, we researched Canadian federal, provincial and territorial legislation and jurisprudence focusing on specific key words including: "legal capacity", "supported decision-making", "substitute decision-making", "best interests", "mental health law", and the "CRPD." Further, we reviewed research conducted by the Law Commissions within various provinces, NGOs, legal clinics, the Government of Canada, and the United Nations to provide insights

articulated in the CRPD. The CRPD was signed by Canada on March 30, 2007 and ratified on March 11, 2010.[10] Article 4(1)(a) of the CRPD requires state parties to use "all appropriate legislative, administrative and other measures"[11] to implement the rights contained therein. The Supreme Court of Canada has recognized that international human rights treaties, such as the CRPD, are a "relevant and persuasive factor in *Charter* interpretation"[12] and directed that Canadian laws should be interpreted and applied in a manner that is consistent with Canada's international human rights obligations.[13] Consequently, any *Charter* analysis of Canadian mental health legislation must consider the implications of the CRPD.

The CRPD includes, in its general principles (Article 3), individual autonomy and the freedom to make one's own choices. Article 12 of the CRPD recognizes that persons with disabilities are entitled to the right to "enjoy legal capacity on an equal basis with others."[14] Article 12 also requires states that are party to the CRPD to implement supported decision-making regimes, which do not remove decision-making rights based on disability or a functional test of a person's ability to make decisions. Instead, these regimes provide access to supports to enable persons with disabilities to exercise their decision-making rights on an equal basis as others.[15] It is important to note that Canada reserved the right to allow both supported and substitute-decision-making arrangements in "appropriate circumstances", which are subject to proper safeguards including review by

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and context. We are grateful to subject matter experts in Alberta, British Columbia, Ontario, and Yukon for sharing their expertise and time with us.

10 *CRPD*, *supra* note 5.

11 *Ibid*, art 4(1)(a). Lana Kerzner, "Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective" at 19, online (pdf): *National Resource Center for Supported Decision Making* online: <citizenship.sites.olt.ubc.ca/files/2014/07/> [perma.cc/6ZVB-YCXT].

12 *Reference re Public Service Employee Relations Act* (Alberta), [1987] 1 SCR 313 at 349, 38 DLR (4th) 161, Dickson CJC dissenting.

13 *R v Hape*, 2007 SCC 26 at para 35.

14 *CRPD*, *supra* note 5, art 12.

15 A fulsome description of Article 12, supported decision-making, and its implication for Canadian law and policy is beyond the scope of this paper. For a detailed analysis of these topics, refer to Michael Bach, Lana Kerzner, Ruby Dhand, Kerri Joffe, Faisal Bhabha and Brendan Pooran, "Implementing Equal Access to Legal Capacity in Canada: Experience, Evidence and Legal Imperative" (Toronto: IRIS – Institute for Research and Development on Inclusion and Society, 2019).

an independent tribunal.[16] This is inconsistent with Article 12 and the CRPD Committee's General Comment that Article 12 requires states to implement only supported decision-making regimes.[17]

In the *Charter* analysis that follows, we draw upon Article 12 of the CRPD and argue that one way in which Canadian mental health laws violate the *Charter* is by prohibiting involuntarily detained persons from accessing supports for decision-making. A determining element of any *Charter* claim is the purpose of the impugned legislative provision or state action. We, therefore, begin Part II with an examination of the purposes of mental health legislation in various jurisdictions. We highlight mental health provisions from the following jurisdictions: British Columbia, Alberta, New Brunswick, Nova Scotia, Saskatchewan, and Newfoundland and Labrador because they exemplify some of the challenges that mental health legislation poses for *Charter* analyses. Next, we review key *Charter* jurisprudence on involuntary detention and involuntary treatment laws. We also consider the role of less intrusive treatment options in *Charter* jurisprudence. In Part III, we provide a section 7 analysis of involuntary treatment provisions in British Columbia, Alberta, and New Brunswick - three jurisdictions which reveal some of the most extreme ways that civil mental health laws interfere with *Charter* rights. Part IV analyzes how civil mental health laws violate substantive equality rights, thereby amplifying their interference with *Charter* rights. Part V concludes with a summary of our findings and recommendations.

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16 *Convention on the Rights of Persons with Disabilities: Declarations and Reservations*, A/RES/61/106, UNOR, 2006, 3, online: <treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV15&chapter=4&clang=_en#EndDec> [perma.cc/M27U-NEU5]. See also Krista James & Laura Watts, Understanding the Lived Experiences of Supported Decision Making in Canada: Legal Capacity, Decision-Making and Guardianship" (March 2014) online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2014/03/capacity-guardianship-commissioned-paper-ccel.pdf> [perma.cc/24AW-AQ4S].

17 Committee on the Rights of Persons with Disabilities, *General Comment No 1 Article 12: Equal Recognition Before the Law*, CPRDOR, 11th Sess, UN Doc CPRD/C/GC/1 (2014) 1, online: <www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx> [perma.cc/FYH2-8R2D]; Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" (2007) 34:2 *Syracuse J Intl L & Com* 429.

II. BALANCING AUTONOMY AND PROTECTION IN CIVIL MENTAL HEALTH LAW

A. Contested Purposes of Mental Health Legislation

The purposes of mental health legislation are contested and evolving territory.[18] Despite the coercive nature of involuntary detention and involuntary treatment provisions, mental health legislation is often interpreted by Canadian courts as being 'protective'[19] and 'remedial'.[20] This interpretation is typically grounded in the *parens patriae* role of the state, which courts have described as "founded on necessity, namely the [state's] need to act for the protection of those who cannot care for themselves."[21] The objectives of mental health legislation have also been characterized as protecting public safety (sometimes referred to as "police powers") and improving the treatment of persons with mental disabilities.[22] In *Thompson v Ontario (Attorney General)*,[23] the Court of Appeal for Ontario found that Ontario mental health laws combine these two purposes into a single statute.[24]

While the purposes of most mental health statutes are characterized as treatment, protection, or both, mental health jurisprudence also recognizes

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18 Sophie Nunnelley, "Involuntary Hospitalization and Treatment: Themes and Controversies" in Jennifer A Chandler & Colleen M Flood, eds, *Law & Mind: Canadian Mental Health Law and Policy* (Markham, ON: LexisNexis Canada, 2016) 113 at 113–38 [Nunnelley, "Themes and Controversies"]; Michael L. Perlin and Eva Szeli, "Mental Health Law and Human Rights: Evolution and Contemporary Challenges" (2008) New York Law School Legal Studies Research Paper No 07/08-28, online: *SSRN* <papers.ssrn.com/> [perma.cc/UGY2-4M9G]; Geoffrey Reaume, "Understanding Critical Disability Studies" (2014) 186:16 CMAJ 1248 at 1248–49.

19 *Ontario (Public Trustee) v Brika* 1987, 61 OR (2d) 58 at 5, 1987 CarswellOnt 1013 (ONSC) mentioned in Tess C Sheldon, Karen R Spector & Mercedes Perez, "Re-Centering Equality: The Interplay Between Sections 7 and 15 of the Charter in Challenges to Psychiatric Detention" (2016) 35:2 NJCL 193 at 203–04; Michael L Perlin, "Chimes of Freedom: International Human Rights and Institutional Mental Disability Law" (2002) 21:3 NY L School J Intl & Comparative L 423 at 427.

20 Sheldon, Spector & Perez, *supra* note 19 at 203; Michael L Perlin, "International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent" (2006) 39:3 Israel LR 69 at 74.

21 *E (Mrs) v Eve*, [1986] 2 SCR 388 at 51, 31 DLR (4th) 1. The rationale was to be used for one's "best interest."

22 *Thompson v Ontario (Attorney General)*, 2016 ONCA 676 at para 8 [*Thompson* 2016].

23 *Ibid*.

24 *Ibid.*

the need to balance treatment-based and police power purposes with principles of autonomy, specifically the right to medical self-determination. For example, in *Starson v Swayze*,[25] the Supreme Court of Canada found that "[u]nwarranted findings of incapacity severely infringe upon a person's right to self-determination. Nevertheless, in some instances the well-being of patients who lack the capacity to make medical decisions depends upon state intervention... [t]he [Health Care Consent] Act aims to balance these competing interests of liberty and welfare."[26] In *L (AJ) v Kingston Psychiatric Hospital*[27] the Court of Appeal for Ontario found that "[t]he *Mental Health Act* attempts *inter alia* to balance the needs and rights of often vulnerable people with the community's interest in ensuring that mentally ill persons receive adequate treatment."[28]

Such balancing is also reflected in the express purpose provisions of some mental health statutes. For example, Nova Scotia's *Involuntary Psychiatric Treatment Act* states that its purpose is to ensure that mental health is addressed in accordance with guiding principles that include, "each person has the right to make treatment decisions to the extent of the person's capacity to do so; treatment must be offered in the least restrictive manner and environment with the goal of having the person live in the community or return home as soon as possible; and treatment should promote self-determination and self-reliance."[29]

The review of key jurisprudence above demonstrates how Canadian courts have and continue to grapple with the purposes of mental health legislation and the appropriate balance between protecting and treating persons with mental disabilities through coercive state practices (including involuntary detention criteria, involuntary treatment, lack of procedural safeguards, and intrusive treatment options), on the one hand, and upholding their rights to medical self-determination, on the other.

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25 2003 SCC 32 [*Starson*].

26 *Ibid* at para 75. Although *Starson* was not a constitutional case, it has had significant implications for the understanding of capacity law within the involuntary mental health care context.

27 2000 CarswellOnt 3428, 136 OAC 334.

28 *Ibid* at para 17.

29 *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, ss 2(b)–(c), (e).

B. Significant *Charter* Challenges to Involuntary Detention and Involuntary Treatment

Involuntary detention occurs when a person meets the involuntary admission criteria in the relevant provincial or territorial mental health statute. In all jurisdictions, involuntary admission procedures refer to five criteria for which a person with a mental disability can be involuntarily detained: mental disorder, harm, need for treatment, incapacity to consent to treatment, and unsuitability for voluntary admission.[30]

In 1988, the Manitoba Court of Appeal addressed the constitutionality of Manitoba's involuntary admission provisions in *Thwaites v Health Sciences Psychiatric Facility*.[31] At issue was the broad involuntary detention criteria in subsection 9(1) of the *Mental Health Act*, which provided for involuntary detention if the physician had examined the person and believed that "*the person should be confined as a patient at a psychiatric facility*".[32] Justice Philip found that Manitoba's involuntary admission provisions, described as "paternalistic legislation with the purpose and effect of imposing the will of the majority on an individual for his or her own good", were in violation of section 9 of the *Charter*.[33] Section 9 of the *Charter* provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[34] The Court grappled with the extent to which the involuntary admission provisions were rationally connected to the objectives of the legislation. In finding a *Charter* violation, Justice Philip stated:

> Firstly, I have concluded that the provisions have not been carefully chosen to achieve their objective; that they are arbitrary and unfair for the reasons set out above. Secondly, I do not think it can be said that, in the absence of a "dangerousness" or like standard, the provisions impair as little as possible on the right of a person "not to be arbitrarily detained." Finally, when compared with other legislation, including the amendments to the **Act** which have been passed but not proclaimed, the provisions strike the wrong balance between the liberty of the individual and the interests of the community. In the absence of objective standards, the possibility of compulsory examination and detention hangs over the heads of all persons suffering from a mental disorder, regardless of the nature of

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30 Nunnelley, "Themes and Controversies", *supra* note 18 at 113, 122. See generally Halsbury's Laws of Canada (online), *Mental Health*.

31 [1988] 3 WWR 217, 48 DLR (4th) 338 [*Thwaites*].

32 *Ibid* at 8 [emphasis in original].

33 *Ibid* at 4, 24.

34 *Charter*, *supra* note 7, s 9.

> the disorder, and the availability and suitability of alternative and less restrictive forms of treatment.[35]

As a result of the *Thwaites* decision, the Manitoba *Mental Health Act* was amended to include dangerousness in the harm criteria ("likely to cause serious harm to themselves or others or to suffer substantial mental or physical deterioration"), when assessing whether a person meets the admission requirements for involuntary detention.[36] Sophie Nunnelly argues that the Court in *Thwaites* "failed to indicate any functional means of distinguishing the category of persons for whom it is permissible to consider the health or harm consequences of non-treatment from persons permitted to refuse treatment 'regardless of the results' (*A.C.* 2009, para. 45)."[37]

In *McCorkell v Riverview Hospital*,[38] the constitutionality of British Columbia's involuntary detention criteria (as they were at the time) was unsuccessfully challenged.[39] Joseph McCorkell was detained involuntarily in 1991, after being diagnosed with bi-polar disorder and chronic alcoholism.[40] The basis of the *Charter* challenge was that the involuntary detention criteria, which provided that a person could be involuntarily detained if they require "care, supervision or control for his own protection or welfare or for the protection of others"[41] were vague and overbroad, contrary to section 7 of the *Charter*.[42] Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[43] It was

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35 *Thwaites*, *supra* note 31 at 23–24 [emphasis in original].

36 *Ibid* at 25. These provisions were later upheld in another *Charter* challenge. See *Bobbie v Health Sciences Centre* 1988, 56 Man R (2d) 208, [1989] 2 WWR 153.

37 Sophie Nunnelley, "Coercive Care in Civil Mental Health Law: An Autonomy Lens" (2014) Comparative Program on Health and Society Working Paper Series 2014-2015, online (pdf): <munkschool.utoronto.ca/cphs/wp-content/uploads/2016/08/1858-Nunnelley-Proof-R1-FINAL.pdf> [perma.cc/535Q-2A57] [Nunnelley, "Coercive Care in Civil Mental Health Law"].

38 [1993] 8 WWR 169, 104 DLR (4th) 391 [*McCorkell*]. The case was brought forward as a test case by the Community Legal Assistance Society (CLAS). It was argued that the BC MHA's involuntary detention criteria denied McCorkell his liberty in violation of section 7 of the *Charter* and resulted in arbitrary detention, as per section 9 of the *Charter*.

39 *Ibid.*

40 *Ibid.*

41 *Mental Health Act*, RSBC 1979, c 256, s 24(1).

42 *McCorkell*, *supra* note 38 at 2.

43 *Charter*, *supra* note 7, s 7.

argued that this lower harm criteria was vague because the legislation provided no criteria for the review of involuntary detention and such detention should only be justified on the dangerousness criteria.[44]

Relying on the *parens patriae* purpose of the legislation, Justice Donald upheld the lower harm criteria as follows:

> Unlike incarceration in the criminal justice system, involuntary committal is primarily directed to the benefit of the individual so that they will regain their health... [and] [i]n determining the fairness of the balance, I take into account my perception that Canadians want to live in a society that helps and protects the mentally ill and that they accept the burden of care which has always been part of our tradition.[45]

It is evident that the Court in *McCorkell* favoured the state's *parens patriae* role over the principle of autonomy and the right to self-determination. In contrast to the Courts in *Thwaites* and *McCorkell*, the Court of Appeal for Ontario, in *Fleming v Reid*,[46] recognized the importance of legal safeguards to promote the right to self-determination and the autonomy principle.[47] In considering the constitutionality of involuntary treatment orders, the Court of Appeal found that the provisions in the Ontario *Mental Health Act* that empowered the Ontario Review Board to authorize treatment of the patient, contrary to the individual's capable treatment refusal expressed through their substitute decision-maker (treatment refusal override), violated section 7 of the *Charter*.[48] The Court of Appeal found that these provisions deprived the appellant of his rights to liberty and security of the person, thereby affirming the "supremacy of prior capable wishes."[49] The Court found as follows:

> A legislative scheme that permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent giver's decision to refuse consent based on the patient's wishes should not be honoured, in my opinion, violates the 'basic tenets of our legal system' and cannot be in accordance with the principles of fundamental justice.[50]

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44 *McCorkell*, *supra* note 38 at 2, 47.
45 *Ibid* at 49–50.
46 (1991), 4 OR (3d) 74, 82 DLR (4th) 298 (ONCA) [*Fleming*].
47 *Ibid* at 37.
48 *Ibid* at 36–38.
49 *Ibid*. See generally Halsbury's Laws of Canada (online), *Mental Health*.
50 *Fleming*, *supra* note 46 at 32.

In describing the importance of informed consent vis-à-vis the right to refuse treatment, Justice Robins stated as follows:

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination.[51]

In applying the autonomy principle, the Court found:

> Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.[52]

Provisions of British Columbia's *Mental Health Act* are presently the subject of a *Charter* challenge in *MacLaren v British Columbia (Attorney General)*.[53] Relying on the decision in *Fleming*, the Council of Canadians with Disabilities is challenging British Columbia's deemed consent provisions (explained in more detail later in this paper), which deprive involuntarily detained persons with mental disabilities of the right to refuse psychiatric treatment.[54]

In *PS v Ontario*,[55] the Court of Appeal for Ontario addressed the extent to which liberty and autonomy can be infringed through coercive involuntary detention practices. PS was involuntarily detained for 19 years

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51 *Ibid* at 17–18.

52 *Ibid* at 20.

53 2018 BCSC 1753.

54 *Ibid* at paras 16, 18. It is important to note that the British Columbia Supreme Court denied public interest standing to the Council of Canadians with Disabilities, in an attempt to prevent them from bringing this case forward. The organization is presently appealing this decision. The appeal was successful and the Court of Appeal for British Columbia "set aside the order dismissing the action and remit the CCD's application for public interest standing to the Supreme Court of British Columbia for fresh consideration." See *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241. Also, see *Canadian Council with Disabilities v. Attorney General, Amended Notice of Civil Claim*, Vancouver Registry, No. S-167325 (BC SC) [*CCD*]; Community Legal Assistance Society, News Release, "Charter Challenge of Forced Psychiatric Treatment Filed in BC Supreme Court" (13 September 2016), online: <clasbc.net/charter-challenge> [perma.cc/HRD8-RM8S] [CLAS, "Charter Challenge"].

55 2014 ONCA 900 [*PS*].

without appropriate procedural safeguards and disability accommodation for his pre-lingual deafness.[56] The Court found that people with mental disabilities who are involuntarily detained for six months or longer must be provided procedural safeguards — consisting of review board oversight of the conditions and services of their detention.[57] The Court found that involuntary detention is "close or analogous to criminal proceedings" — detention of persons who are found NCRMD[58] under the Criminal Code[59] — and "that the provisions of the MHA dealing with involuntary committal violate s. 7 of the *Charter* by allowing for indeterminate detention without procedural protection of the liberty interests of long-term patients."[60] The Court used the heading "interplay between s. 15 and s. 7" to support the conclusion that "s. 15(1) violations increased the gravity of the s. 7 violations."[61] The lack of disability accommodations "decreased PS's prospects for timely community reintegration."[62]

The reasoning in *PS* provided the basis for a constitutional challenge to Alberta's *Mental Health Act*. *JH v Alberta*[63] challenged the constitutionality of sections 2, 4(1), 4(2), 7(1), 8(1), and 8(3) of the Alberta *Mental Health Act*. These sections of the *Mental Health Act* were found to infringe sections 7 and 9 of the *Charter* and were therefore struck down.[64] This case involves JH, who argues that his continued detention (nine months) was contrary to his *Charter*-protected liberty interests, given the lack of appropriate review board oversight, procedural safeguards, and justification provided by the lower harm criteria within Alberta's *Mental Health Act*.[65] Recognizing the importance of the right to medical self-determination, the Court of Queen's Bench of Alberta stated as follows:

> In JH's case, unfortunately, most of the provisions about how to legally treat someone without consent under the ***MHA*** were ignored. His competency was not properly addressed and certified until well into his stay (in March 2015), notice to

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56 *Ibid.*

57 *Ibid* at paras 126–29, 202.

58 NCRMD refers to not criminally responsible by reason of mental disorder.

59 *PS*, *supra* note 55 at paras 80–81.

60 *Ibid* at para 3.

61 *Ibid* at para 178.

62 *Ibid* at para 179.

63 *JH v Alberta Health Services*, 2019 ABQB 540 [*JH* 2019]; *JH v Alberta Health Services*, 2017 ABQB 477 (CanLII) [*JH* 2017].

64 *JH* 2019, *supra* note 63.

65 *Ibid*. See *JH* 2017, *supra* note 63, in which the Court ruled in favour of JH proceeding with the *Charter* challenge.

> any substitute decision maker was not made until April 2015, notice was not given about his right to appeal his competency finding until March of 2015, and despite this, he was treated without his consent. Accordingly, not only were his rights under the ***MHA*** breached, his right to security of the person pursuant to s. 7 were also breached.[66]

In *Thompson*,[67] the Court of Appeal for Ontario found that the lower harm criteria for involuntary admission did not violate the *Charter*. The Court of Appeal in *Thompson* dismissed a *Charter* challenge to Ontario's expanded involuntary admission criteria (called the Box B criteria) and a new community treatment order regime.[68] The admission criterion were expanded from "apparently suffering from mental disorder that would likely result in serious bodily harm to another person or to themselves (the 'Box A' criteria)" to also include the likelihood of "substantial mental or physical deterioration of the person or serious physical impairment of the person" (the 'Box B' criteria).[69]

Although the Court recognized the manner in which involuntary detention interferes with section 7 rights to liberty and security of the person, it ultimately found that the provisions were consistent with the purposes of the legislation which were public safety and improved treatment.[70] The assessment criteria and community treatment order provisions were found to be consistent with their dual purposes because they were applied in an individualized manner and persons subject to them had access to procedural and substantive safeguards.[71] Thus, the Court found the expanded "Box B criteria" and the new Community Treatment Order provisions within the *Mental Health Act* did not violate sections 7, 9, 10, 12, and 15 of the *Charter*. Interestingly, the Court did not engage in a full section 15 analysis and briefly stated that the new provisions do not create "invalid stereotypes" about mental disability because they "give[s] priority to the patient's views and require[s] an individualized assessment of the patient's capacity to make treatment decisions before the patient's views can be overridden."[72]

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66 *JH* 2019, *supra* note 63 at para 109 [emphasis in original].
67 *Thompson* 2016, *supra* note 22.
68 *Ibid* at paras 3, 63–67.
69 *Ibid* at paras 7–8.
70 *Ibid* at paras 46, 51.
71 *Ibid* at para 51.
72 *Ibid* at para 67.

C. Questioning the Established Purposes of Mental Health Laws

While courts continue to grapple with characterizing the purposes of mental health statutes and balancing protection, treatment, public safety, and autonomy, scholars have questioned the very validity of the established purposes of mental health laws.[73] The treatment-based purpose has been critiqued for failing to consider the actual punitive and coercive effects that are often experienced by persons who are involuntarily detained and/or involuntarily treated.[74] The police power purpose has been critiqued as discriminatory as a result of its implicit linking of mental disability with violence and danger. Such links raise concerns about whether mental health legislation is based upon erroneous, discriminatory, and harmful oppressive stereotypes that criminalize mental disabilities.[75]

Moreover, there is a growing body of evidence to support the argument that often, involuntary treatment does not yield its intended therapeutic benefits, thereby bringing into question the validity of the treatment purpose.[76] This has been reflected in the jurisprudence that addresses the lack of less restrictive treatment options for persons with mental disabilities. For example, in *JH v Alberta Health Services*,[77] the Alberta Court of Queen's Bench grappled with whether JH met the involuntary detention criteria set out in Alberta's *Mental Health Act*. The evidence of one of the physicians who assessed JH was that, "...without adequate supports in the community he is at risk to deteriorate and suffer serious physical impairment."[78] The

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73 Sheldon, Spector & Perez, *supra* note 19 at 223; Nunnelley, "Coercive Care in Civil Mental Health Law", *supra* note 37; Simon N Verdun-Jones & Michelle S Lawrence, "The Charter Right to Refuse Psychiatric Treatment: A Comparative Analysis of the Laws of Ontario and British Columbia Concerning the Right of Mental-Health Patients to Refuse Psychiatric Treatment" (2013) 46:2 UBC L Rev 489 at 489–90.

74 Sheldon, Spector & Perez, *supra* note 19 at 223.

75 See e.g. in *Thompson* 2016, *supra* note 22 at para 7. Belobaba J (the application judge) found that if Ontario`s mental health legislation had a singular purpose of public safety, specifically to protect the public from persons with mental disabilities who are prone to violence, the legislation would not have withstood Charter scrutiny because there is "no meaningful correlation between mental illness and violence" (see *Thompson* 2016, *supra* note 22 at para 50).

76 *Ibid*.

77 *JH* 2019, *supra* note 63; *JH* 2017, *supra* note 63.

78 *JH v Alberta Health Services*, 2015 ABQB 314 [*JH* 2015] at para 10. See also *JH* 2019, *supra* note 63.

physician gave evidence that he would not have kept JH involuntarily detained if "community supports" were in place; however, it, "...was not his job to seek out those supports."[79]

In a similar vein, the appellants in *Thompson* adduced evidence discounting the effectiveness of involuntary treatment and demonstrating its negative impact on dignity and recovery.[80] Although competing evidence was provided in support of the treatment regime at stake, Justice Belobaba nevertheless suggested that "[t]here is... a significant disagreement about the efficacy of a community treatment regime that is based on coercion"[81] and that a strong case had been made "for a government review of the impact and effectiveness of the Box B and CTO provisions."[82] Similarly, in *Thwaites*, the Manitoba Court of Appeal was attentive to the need to carefully design the legislative standards so that persons with mental disabilities would not be involuntarily detained if alternative and less restrictive forms of treatment were available.[83]

Collectively, the analyses of these cases demonstrate that some courts have been attentive to the possibility of decreasing intrusions into the autonomy of persons with mental disabilities who are involuntarily detained by using less restrictive and coercive, community-based treatment options. In addition, access to decision-making supports and tools may offer another alternative to decrease state interferences with autonomy. These Courts have implied that using less restrictive treatment options is imperative where *Charter*-protected liberty interests and the right to medical self-determination are at stake.

In the section that follows, we provide a section 7 analysis of involuntary treatment provisions in three jurisdictions: British Columbia, Alberta, and New Brunswick. The analysis draws upon the jurisprudential tensions inherent in characterizing the purposes of mental health statutes and

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79 *Ibid* at para 10. In analyzing the *JH* decision, Lorian Hardcastle has argued, "It is concerning that patients are involuntarily hospitalized merely because there are insufficient community supports. Several cases raise constitutional arguments where the liberty of individuals with mental illnesses is jeopardized due to resource constraints." See Lorian Hardcastle, "Is Alberta's Mental Health Act Sufficiently Protecting Patients?", Case Comment on *JH v Alberta Health Services* (18 September 2017), online (pdf): <ablawg.ca/wp-content/uploads.pdf> [perma.cc/PJ6W-VSGH]. See also *JH* 2019, *supra* note 63.

80 *Thompson v Ontario (Attorney General)*, 2013 ONSC 5392 [*Thompson* 2013].

81 *Ibid* at para 89.

82 *Ibid* at para 128.

83 *Thwaites*, *supra* note 31.

balancing protection, treatment, public safety, and autonomy. The following section further explores the manner in which prohibiting access to supports in decision-making violates *Charter*-protected liberty interests and the right to medical self-determination.

III. SECTION 7 AND INVOLUNTARY TREATMENT IN BRITISH COLUMBIA, ALBERTA, AND NEW BRUNSWICK

Jurisdictions in Canada differ in regard to whether persons with mental disabilities who are involuntarily detained are permitted to exercise their rights to medical self-determination. In many jurisdictions, the rights of involuntarily detained patients to consent or refuse psychiatric treatment are regulated by mental health statutes as well as health care consent legislation, including "advance health care directives, substitute decision-making legislation, long term care facility legislation and/or hospital legislation."[84] Persons with mental disabilities may be involuntarily detained but retain their capacity with respect to treatment decisions in Ontario,[85] Manitoba,[86] Prince Edward Island,[87] Northwest Territories,[88] and Nunavut.[89] In Saskatchewan,[90] Nova Scotia,[91] and Newfoundland and Labrador,[92] people who are assessed to have the capacity to make treatment decisions cannot be involuntarily detained. In Alberta, British Columbia, and New Brunswick, persons with mental disabilities may lose their capacity to make treatment decisions in certain circumstances, once they are involuntarily detained. In this section, we argue that British Columbia's "deemed consent" provisions and the "treatment refusal override" provisions in Alberta and New Brunswick reveal some of the most extreme

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84 Halsbury's Laws of Canada (online), *Mental Health*.

85 *Health Care Consent Act*, SO 1996, c 2, Sched A, s 25(2) [*HCCA* ON].

86 *Mental Health Act*, RSM, c 36, CCSM c M110.

87 *Consent to Treatment and Health Care Directives Act*, RSPEI 1996, c C-17.2.

88 *Personal Directives Act*, SNWT 2005, c 16.

89 *Mental Health Act*, RSNWT 1988, c M-10, s 8(1).

90 *Mental Health Services Act*, RSS 1986, c M-13.1, s 24(2)(a)(ii) [*MHSA*].

91 *Involuntary Psychiatric Treatment Act*, RSNS 2005, c 42, s 17(e) [*IPTA*].

92 *Mental Health Care and Treatment Act*, SNL 2006, c M-9.1 ss 17(1)(b)(ii)(C), 28 [*MHCTA*].

ways that civil mental health laws interfere with the *Charter*-protected right to liberty.[93]

A. British Columbia's Deemed Consent Provisions

In British Columbia, a person who is involuntarily detained under the *Mental Health Act*[94] is deemed to consent to any treatment that is authorized by the director of the facility. Subsection 31(1) of the *Mental Health Act* provides that:

> If a patient is detained in a designated facility under section 22, 28, 29, 30 or 42 or is released on leave or is transferred to an approved home under section 37 or 38, treatment authorized by the director is deemed to be given with the consent of the patient.[95]

Although British Columbia's *Health Care (Consent) and Care Facility (Admission) Act*[96] provides for the presumption of capacity for "giving, refusing or revoking consent to health care,"[97] this presumption does not apply to involuntary patients under the *Mental Health Act*.[98] British Columbia is the only jurisdiction in Canada which allows psychiatric treatment on the basis of deemed consent. The combined effect of these deemed consent provisions is that psychiatric treatment is compulsory for all involuntary patients, without regard for their capacity to give or refuse consent to treatment.

The only guidelines interpreting the deemed consent provisions are in the 2005 Government Guide to the *Mental Health Act*,[99] which states that "[w]here a patient is capable but refuses to sign the form, or where the patient is incapable, the form is given to the director or designate… [and] [i]t is strongly recommended that wherever possible, the person signing Form 5 as the director or designate should be someone other than the

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93 Given the lack of mental health services available in the Yukon, people with mental disabilities who are involuntarily detained are often transferred to Alberta or British Columbia. To this extent, the impugned provisions are also relevant to persons in the Yukon. See *Mental Health Act*, RSY 2002, c 150, s 24.

94 *Mental Health Act*, RSBC 1996, c 288, s 31 [*Mental Health Act* BC].

95 *Ibid*, s 31(1).

96 *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181 [*HCCFA*].

97 *Ibid*, s 3(1)(a).

98 *Ibid*, ss 2(a)–(c).

99 British Columbia, Ministry of Health, *Guide to the Mental Health Act* (Guide), 2005 Edition (Victoria: Ministry of Health, 4 April 2005) at 19, online (pdf): <www.health.gov.bc.ca/library/publications/year/2005/MentalHealthGuide.pdf> [perma.cc/3HFC-XD3M].

treating physician."[100] These guidelines are troubling because they suggest that the treating physician should not sign the form. Also, despite the Guide's reference to a "capacity assessment", there is no legal requirement in the *Mental Health Act* or its regulations for physicians to assess involuntary patients' capacity to give or refuse treatment.[101] Further, there is no legal requirement that the Consent for Treatment form be completed prior to administering the treatment and the legislation does not stipulate who should sign the form or for how long the form is valid. Empirical data suggests that, in practice, physicians often did not attempt to obtain consent to treat involuntary patients and the forms were "rarely" signed by involuntary patients.[102] Consequently, the effect of the deemed consent provisions is that even people who are capable, with respect to treatment, are stripped of their right to medical self-determination if they are involuntarily detained.

In British Columbia, people with mental disabilities who are involuntarily detained have no legal mechanism to review their deemed consent to treatment, whether before a review board or otherwise.[103] However, there is an option to "request a second medical opinion on the appropriateness of the treatment" in subsection 31(2) of the *Mental Health Act*.[104] These requests should be made to the director, who "must consider whether changes should be made in the authorized treatment for the patient and authorize changes the director considers should be made."[105] The empirical evidence suggests that "this role is again delegated and the second medical opinion is simply delivered to the treating physician."[106] Thus, the "second opinion" provisions are arguably ineffective and do not provide an appropriate procedural or substantive oversight mechanism for the deemed consent provisions.

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100 *Ibid*.

101 Laura Johnston, "Operating in Darkness: BC's Mental Health Act Detention System" (2017) at 85–86, online (pdf): *Community Legal Assistance Society* <d3n8a8pro7vhmx.cloudfront.net/clastest/pages/1794/attachments/original/152727872/CLAS_Operating_in_Darkness_November_2017.pdf?1527278723> [perma.cc/4BJX-65HE].

102 *Ibid* at 89.

103 *Mental Health Act* BC, *supra* note 94, s 31(2). This subsection of the Act states that "[a] patient to whom subsection (1) applies, or a person on the patient's behalf, may request a second medical opinion on the appropriateness of the treatment authorized by the director once" in each certification period.

104 *Ibid*.

105 *Ibid*, s 31(3).

106 Johnston, *supra* note 101 at 91.

B. Treatment Refusal Override Provisions in Alberta and New Brunswick

Included in mental health legislation in a number of other Canadian jurisdictions are powers known as treatment refusal override provisions. In Alberta and New Brunswick, involuntarily detained patients can refuse treatment but, subject to certain procedural safeguards, their refusal can be overridden, and they can be forced to undergo psychiatric treatment.[107]

Section 29 of Alberta's *Mental Health Act*[108] provides that the board of a hospital, a person in charge of the facility, or the attending physician may apply to a review panel for an order directing that treatment may be administered to a patient who is mentally capable of making treatment decisions and refuses treatment, or to a patient who is not capable of making treatment decisions but whose substitute decision-maker has refused treatment.[109] In effect, an involuntarily detained patient's capable treatment refusal can be overridden by a review board decision that the refused treatment is in the patient's "best interest".[110]

In New Brunswick, an involuntarily detained patient's capable treatment refusal can be overridden by order of a tribunal. Before making such an order, the tribunal must find that the "refusal does not constitute reliable and informed instructions based on the person's knowledge of the effect of the treatment[,]...the treatment is in the best interests of the person, and...without the treatment, the person would continue to be detained...with no reasonable prospect of discharge."[111] New Brunswick's *Mental Health Act* sets out the criteria against which the tribunal must assess whether overriding a capable person's treatment refusal is in their best interests.[112] If the tribunal refuses to make an order overriding a patient's

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107 *Mental Health Act*, RSNB 1973, c M-10, s 8.11(3) [*Mental Health Act* NB]; *Mental Health Act*, RSA 2000, c M-13, ss 28–29 [*Mental Health Act* AB].

108 *Mental Health Act* AB, *supra* note 107, s 29.

109 *Ibid.*

110 *Mental Health Act* AB, *supra* note 107, ss 29(3)(i)–(iv). The Act sets out factors against which the review board must assess best interests, including: "whether the mental condition of the patient will be or is likely to be improved by the treatment; whether the patient's condition will deteriorate or is likely to deteriorate without the treatment; whether the anticipated benefit from the treatment outweighs the risk of harm to the patient; [and] whether the treatment is the least restrictive and least intrusive treatment that meets the requirements."

111 *Mental Health Act* NB, *supra* note 107, ss 8.11(3)(b)–(d).

112 *Mental Health Act* NB, *supra* note 107, ss 8.11(4)(a)–(d). These subsections of the Act state that "In forming an opinion under subsection (1), (2) or (3) as to the best interests

treatment refusal, a physician may apply to a review board for such an order.[113] The review board must consider essentially the same issues as the tribunal before making such an order.[114]

C. Do Involuntary Treatment Provisions in British Columbia, Alberta, and New Brunswick Interfere with the Section 7 Right to Liberty?

Section 7 of the *Charter* provides that everyone has the right not to be deprived of liberty and security of the person, "except in accordance with the principles of fundamental justice."[115] The right to liberty protects an individual's personal autonomy. A violation occurs when state action, in purpose or effect, interferes with a person's physical liberty or fundamental personal decisions.[116]

British Columbia's deemed consent provisions are a particularly stark violation of the section 7 rights to liberty and security of the person. The deemed consent provisions, in concert with the relevant provisions of the *HCCFA*,[117] interfere with the right to liberty by removing a capable person's decision-making rights regarding consent to psychiatric treatment during their detention as an involuntary patient. A decision about whether to receive psychiatric treatment, which may include electroconvulsive shock treatment (ECT) or psychotropic drugs that carry serious psychological and physical side effects, is, no doubt, a fundamental personal decision. In *Fleming*, the Court of Appeal for Ontario found that "[f]ew medical

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of a person, the tribunal shall have regard to (a) whether or not the mental condition of the person will be or is likely to be substantially improved by routine clinical medical treatment, (b) whether or not the mental condition of the person will improve or is likely to improve without routine clinical medical treatment, (c) whether or not the anticipated benefit from the routine clinical medical treatment outweighs the risk of harm to the person, and (d) whether or not routine clinical medical treatment is the least restrictive and least intrusive treatment that meets the requirements of paragraphs (*a*), (*b*) and (*c*)."

113 *Ibid*, s 30.1(1).

114 *Ibid*, s 30.1(6.2).

115 *Charter*, *supra* note 7, s 7.

116 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 10, 104 DLR (4th) 342 [*Rodriguez*]. The SCC found that the right to security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."

117 *Supra* note 96.

procedures can be more intrusive than the forcible injection of powerful mind-altering drugs."[118] British Columbia law removes the rights of involuntarily detained persons to make these fundamental personal decisions, even when they meet the legal test for capacity to do so. Stripping an involuntarily detained person of their right to medical self-determination plainly interferes with their liberty and fundamental personal decisions.

A similar analysis applies to persons whose capable treatment refusal is overridden, as permitted by mental health statutes in Alberta and New Brunswick. The laws in these jurisdictions permit a physician or other designated person to administer psychiatric treatment despite the person's capable refusal, thereby interfering with involuntarily detained patients' physical liberty. In these circumstances, involuntarily detained persons are stripped of their right to medical self-determination. For instance, in *JH v Alberta Health Services*,[119] the Court recognized how the treatment refusal override provisions in Alberta were contrary to *Fleming* and *Carter* as follows:

> The ***MHA*** is outdated since the decisions of ***Fleming*** and ***Carter*** which have recognized the individual's rights to self determination in medical treatment decisions. In particular, s. 29 ultimately allows a competent patient's treatment decisions (and even their substitute decision maker's decision if incompetent) to be overridden by a Review Panel if the treatment was found to be in a patient's best interest. Most Canadian jurisdictions require consent for treatment by either a competent patient or his or her substitute decision maker. Notably, the ***Criminal Code*** s 672.55(1) also requires that an NCR patient not be subjected to psychiatric treatment unless they consent *and* the Review Board "considers the condition to be reasonable and necessary in the interests of the accuse."[120]

A key difference between the deemed consent provisions in British Columbia and the treatment refusal override provisions in Alberta and New Brunswick is the presence of procedural safeguards in the latter. This is addressed in the discussion below on the principles of fundamental justice. The right to liberty is infringed even for persons who do not meet the legal test for capacity to consent to health care decisions. In British Columbia, the *Health Care (Consent) and Care Facility (Admission) Act*[121] provides that substitute decision-makers are not authorized to consent to mental health admission or treatment on behalf of persons found to lack capacity to make

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118 *Fleming*, *supra* note 46 at 23.

119 *JH* 2019, *supra* note 63.

120 *Ibid* at paras 260–61 [emphasis in original].

121 *Supra* note 96.

their own decisions.[122] Under the *Representation Agreement Act*, persons may not authorize a representative to refuse consent to involuntary admission or treatment based on mental disability.[123]

These provisions interfere with incapable persons' decision-making rights regarding consent to psychiatric treatment by removing access to their personally appointed substitute or supported decision-maker. Access to a personally appointed substitute or supported decision-maker is important for ensuring that people are able to exercise their decision-making rights as fully as possible. In circumstances where a person is found to be incapable of making their own decisions, personally appointed substitutes or supported decision-makers can make decisions in accordance with the person's wishes, will, and preferences. That access to personally appointed substitutes or supported decision-makers that can enhance a person's decision-making autonomy has been judicially recognized in specific contexts and jurisdictions. For example, when interpreting the purpose of Ontario's *Health Care Consent Act*, in the context of consent to admission to a long-term care facility, the Ontario Superior Court found that "the purposes of the *H.C.C.A.*... make it clear that the autonomy of persons... is to be enhanced by both allowing those persons to have a representative of their choice assisting with the decision and for there to be a significant role for supportive family members in making those decisions."[124] By removing access to personally appointed substitutes and supported decision-makers, British Columbia's deemed consent provisions remove the rights of involuntarily detained persons to make fundamental personal decisions through their personally appointed substitutes or supported decision-makers, thereby interfering with their section 7 rights to liberty.

D. Do Involuntary Treatment Provisions in British Columbia, Alberta, and New Brunswick Interfere with the Right to Security of the Person?

The section 7 right to security of the person is violated when state action, in purpose or effect, interferes with physical or psychological

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122 *Ibid*, ss 2(a)–(c).

123 *Representation Agreement Act*, RSBC 1996, c 405, ss 11(1)(a)–(b) [*RAA*].

124 *S(J) v Evans*, 2016 ONSC 914 at para 21 [*Evans*]. The Court made these observations in relation to interpreting the purposes of Ontario`s *Health Care Consent Act*, as set out in s 1 of that legislation (*HCCA* ON, *supra* note 85, s 1).

integrity. In *Rodriguez*,[125] the Court emphasized that the ability to make fundamental life choices is a component of security of the person, in the sense that it includes the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity.[126]

In the case of involuntary patients who meet the legal test for the capacity to consent to health care decisions, British Columbia's deemed consent provisions interfere with security of the person by permitting the administration of non-consensual psychiatric treatment, non-consensual physical touching, and threatened use of physical restraints.[127] The provisions further interfere with security of the person by removing patients' rights to make choices regarding their physical and psychological integrity.[128] The same is true for involuntary patients who do not meet the legal test for capacity to consent to health care decisions, in the sense that the law removes their right to make choices regarding their physical or psychological integrity through their personally appointed substitutes or supported decision-makers.

Similarly, the treatment refusal override provisions in Alberta strip incapable involuntary patients of their right to consent or refuse treatment via their substitute decision-maker. A similar situation was found to violate section 7 of the *Charter* in the 1991 Ontario decision of *Fleming. v Reid.*[129] In that case, the Court of Appeal for Ontario found that the provisions then in force in Ontario's *Mental Health Act*, which empowered the Ontario Review Board to authorize treatment of incapable involuntarily detained patients, were contrary to the individual's capable refusal, as expressed through their substitute decision-maker.[130] As such, the provisions were found to be contrary to section 7 of the *Charter* because they deprived patients of their rights to security of the person.[131] The Court found that the common law right to bodily integrity and personal autonomy is deeply entrenched in Canadian law "and deserving of the highest order of

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125 *Supra* note 116.

126 *Ibid* at paras 587–89.

127 *CCD*, *supra* note 54.

128 *Ibid.*

129 *Fleming*, *supra* note 46.

130 *Ibid* at 36.

131 *Ibid.* Ontario's *Mental Health Act* has since been amended to remove the treatment refusal override power.

protection."[132] Forcing involuntarily detained patients to submit to psychiatric treatment by overriding their previously expressed capable wishes to refuse treatment, as articulated by their substitute decision-makers, was a clear violation of the right to security of the person. The treatment refusal override provisions in Alberta violate the section 7 right to security of the person for the same reasons articulated in the *Fleming* decision.

E. Do Involuntary Treatment Provisions in British Columbia, Alberta, and New Brunswick Interfere with Liberty and Security of the Person in a Manner that Accords with the Principles of Fundamental Justice?

Section 7 of the *Charter* provides that everyone has the right not to be deprived of liberty and security of the person, "except in accordance with the principles of fundamental justice."[133] A law or state action violates the principles of fundamental justice if it contravenes the basic tenets of our legal system.[134] A law can violate the principles of fundamental justice because it is vague, arbitrary, overbroad, or grossly disproportionate. Each of these principles is grounded in the concept of proportionality, focusing the analysis on whether the state has pursued its policy objectives in a manner that is appropriately proportionate.[135] In *Bedford*, the Supreme Court of Canada clarified that a law is arbitrary if there is no direct connection between the purpose of the law and the impugned effect on the individual, or if the law is inconsistent with its purpose.[136] In *Carter*, the Supreme Court described an arbitrary law as "one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law."[137]

A law will be overbroad if it includes some conduct that bears no relation to its purpose or if it is broader than needed to attain its purpose.[138] A law is grossly disproportionate if the state action or impugned provision

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132 *Fleming*, *supra* note 46 at 22–23.

133 *Charter*, *supra* note 7, s 7.

134 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

135 *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 120 [*Bedford*].

136 *Ibid* at para 111. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 83 [*Carter*].

137 *Carter*, *supra* note 136 at para 83. Access to medical assistance in dying for people with mental health disabilities, as per to the *Carter* decision, is highly contested amongst the disability communities. It is the beyond the scope of this paper to address this analysis.

138 *Bedford*, *supra* note 135 at paras 112–13.

is so extreme that it is disproportionate to any legitimate government interest.[139] Given the analytical focus on proportionality, a key step in determining whether a law violates the principles of fundamental justice is to understand the law's purpose.

1. British Columbia's Deemed Consent Provisions

British Columbia's *Mental Health Act* has no express purpose provision. In *McCorkell*, the British Columbia Supreme Court found that the purpose of the *Mental Health Act* was to ensure "the treatment of the mentally disordered who need protection and care in a provincial psychiatric hospital."[140]

Assuming that this is the sole purpose of the legislation, the deemed consent provisions are arbitrary because they do not fulfill their objective of treating persons with mental disabilities to protect and care for them. Academic literature and empirical studies provide evidence that involuntary psychiatric treatment can be harmful for patients and often does not achieve its intended therapeutic benefits.[141] In *Thompson v. Ontario,* the Ontario Superior Court reviewed a large body of evidence and acknowledged that involuntary treatment may cause more harm to patients than good.[142] Thus, while the deemed consent provisions allow for treatment, in many instances the treatment will not be protective or caring and may actually worsen the patient's mental health. The provisions are, therefore, arbitrary in the sense that they do not further the public good to which the law is directed.

The deemed consent provisions are overbroad because they effectively render involuntary patients who are mentally capable of consenting to health care decisions incapable of doing so by permitting the director of a facility to consent to treatment, even if the patient capably refuses such treatment. Capable patients are rendered incapable of consenting to or refusing psychiatric treatment without any meaningful assessment of their legal capacity.[143] Forcing treatment on persons with mental disabilities who are capable violates the recognized legal principle of medical self-

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139 *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 143.

140 *McCorkell*, *supra* note 38 at 42.

141 *Thompson* 2013, *supra* note 80 at paras 89–90; Sheldon, Spector & Perez, *supra* note 19 at 223.

142 *Thompson* 2013, *supra* note 80 at paras 89–90.

143 Johnston, *supra* note 101 at 89. Also, refer to previous section of this article, which discusses that there is no legal requirement for physicians to assess patient`s capacity to consent to treatment and empirical evidence shows that physicians rarely do so.

determination, expressed as the right to refuse medical treatment.[144] The Supreme Court of Canada has affirmed this right and commented on the appropriate balancing between medical self-determination and the state's interest in treating persons judged to need medical intervention:

> A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment...The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care...[and] the interest in the freedom to reject, or refuse to consent to, intrusions of her bodily integrity — outweighs the interest of the state in the preservation of life and health and the protection of the integrity of the medical profession. [145]

Such balancing, which protects the right to refuse medical treatment to a greater degree than the state's interest in treating persons that are judged to need medical intervention, is generally applicable in the context of health care consent. However, scholars have argued that a similar approach is often not followed in the context of involuntary treatment under mental health legislation.[146] There is no principled reason why such balancing should not apply, regardless of the context.[147] Capable patients have the right to give or refuse consent to medical treatment, even where serious risks or consequences may result. Stripping capable patients of this right in the mental health context goes further than needed to attain the legislative purpose of treating those who need protection or care and it is, therefore, overbroad.

In the case of incapable involuntary patients, the deemed consent provisions remove their rights to consent or refuse treatment through their personally appointed substitutes or supported decision-makers. Substitutes or supported decision-makers can give or refuse consent in a manner that accords more closely with the patient's right to medical self-determination than the deemed consent provided by a physician. By removing this option, the deemed consent provisions intrude on the patient's right to self-

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144 Verdun-Jones & Lawrence, *supra* note 73 at 490.

145 *AC v Manitoba (Director of Child & Family Services)*, 2009 SCC 30 at para 41, citing *Malette v Shulman* 1990, 72 OR (2d) 417 at 424, 426, 429–30, 67 DLR (4th) 321.

146 Nunnelley, "Coercive Care in Civil Mental Health Law", *supra* note 37 at 8.

147 For a fuller discussion of this issue, see the later analysis in Part IV, applying a s 15 *Charter* analysis.

determination more than necessary to achieve their objective, rendering them overbroad.

The above analysis demonstrates that there are strong arguments in favour of the deemed consent provisions violating the section 7 rights to liberty and security of the person, in a manner that does not accord with the principles of fundamental justice. This analysis assumes the traditional interpretation of the singular purpose of British Columbia's *Mental Health Act* as treating those in need of care and protection.

An even stronger argument emerges if the analysis starts from an understanding that the *Mental Health Act* ought to embody the dual purposes of treatment and safeguarding medical self-determination to the greatest extent possible. Accepting these dual purposes, it is clear that the Law is arbitrary because it effectively renders involuntary patients who are mentally capable of consenting to health care decisions incapable of doing so by permitting the director of a facility to consent to treatment, even if the patient themself refuses such treatment. This stripping of the fundamental right to medical self-determination clearly would not respect the second purpose of the Act. Nor would it appropriately balance the dual purposes of the Act.

In the case of incapable involuntary patients, the law removes their rights to consent or refuse treatment through their personally appointed substitute or supported decision-makers. However, a less restrictive course of action is available. Permitting incapable involuntary patients to exercise their decision-making rights through their personally appointed substitutes or supporters is less restrictive of these patients' liberty interests. Admittedly, a less restrictive approach would lead to some involuntarily detained persons with mental disabilities refusing psychiatric treatment and/or being involuntarily detained for a longer period. For some of these persons, not getting treatment will lead to deterioration in their mental and physical well-being. Despite this impact, it must be remembered that treatment is not, in this analysis, the sole purpose of the legislation. Rather, the legislation must balance the dual purposes of treatment and safeguarding medical self-determination. Achieving an appropriate balance of these purposes will necessarily mean that some involuntarily detained persons may refuse treatment.

As described above, Canadian common law and jurisprudence has long accepted that for capable persons, the right to refuse medical treatment must be protected to a greater degree than the state's interest in treating

them, even where refusing medical treatment may lead to poor health outcomes. This principle ought to be extended to incapable persons who can exercise their medical self-determination through their personally appointed substitute or supported decision-maker. By employing an overly restrictive approach to decision-making capacity, the deemed consent provisions are broader than needed to attain their dual purposes of treating and protecting persons with mental disabilities and safeguarding their medical self-determination. The provisions are arbitrary because they do not appropriately balance the dual purposes of the Act. By stripping incapable patients of their access to personally appointed substitute or supported decision-makers, the provisions allow for treatment of these individuals, but fail to safeguard their liberty to the greatest extent possible.

2. Treatment Refusal Override Provisions in Alberta and New Brunswick

A similar analysis applies to the ways in which the treatment refusal override provisions in Alberta and New Brunswick fail to meet the principles of fundamental justice. The mental health statutes that include treatment refusal override provisions have various purposes, which reflect the traditional treatment and protection purposes of mental health legislation. New Brunswick's *Mental Health Act* states that the purposes of the Act are: "(a) to protect persons from dangerous behaviour caused by a serious mental illness, (b) to provide treatment for persons suffering from a serious mental illness that is likely to result in dangerous behaviour, and (c) to provide when necessary for such involuntary custody, detention, restraint, observation, examination, assessment, care and treatment as are the least restrictive and intrusive for the achievement of the purposes set out in paragraphs (*a*) and (*b*)."[148] Alberta's *Mental Health Act* contains no express purpose provision. Like the deemed consent provisions, the treatment refusal override provisions are arbitrary because, to the extent that involuntary treatment may have poor health outcomes for patients, the provisions do not achieve their purposes of treating and caring for persons with mental disabilities.

An important difference between the deemed consent provisions and the treatment refusal override provisions is the extent to which they provide for procedural safeguards when removing involuntarily detained persons' decision-making rights. British Columbia's *Mental Health Act* provides for very limited procedural safeguards. Namely, involuntarily detained persons

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148 *Mental Health Act* NB, *supra* note 107, ss 1.1(a)–(c).

who are deemed to consent to treatment may request a second medical opinion as to the appropriateness of the treatment authorized.[149] More robust procedural safeguards are provided for in respect of the treatment refusal override provisions. In Alberta and New Brunswick, treatment cannot be given until an administrative tribunal or court holds a hearing and determines that such treatment meets the relevant statutory requirements. Involuntarily detained persons have participatory rights in these proceedings.[150]

Canadian jurisprudence has found that long-term, involuntary detention without these kinds of procedural safeguards violates section 7 in a manner that does not accord with the principles of fundamental justice. In *PS*, the Court of Appeal for Ontario found that people with mental disabilities who are involuntarily detained for six months or longer must be provided with procedural safeguards — consisting of review board oversight of the conditions and services of the detention.[151] The Court held "that the provisions of the MHA dealing with involuntary committal violate s. 7 of the *Charter* by allowing for indeterminate detention without procedural protection of the liberty interests of long-term patients."[152] Although *PS* was a challenge to involuntary detention provisions, the reasoning in the decision is also applicable to challenges to involuntary treatment provisions. *PS* implies that Canadian courts will treat the presence of adequate procedural safeguards as sufficient protection for the liberty interests of involuntarily detained patients who are found incapable of consenting to psychiatric treatment. Put another way, the presence of adequate procedural

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149 *Mental Health Act* BC, *supra* note 85, s 31(2).

150 *Mental Health Act* AB, *supra* note 98, s 40; *Mental Health Act* NB, *supra* note 98, s 7.6(5). Also, s 30.1(1) of the *Mental Health Act* NB, *supra* note 98 states that "If a tribunal refuses to make an order under section 8.11 authorizing the giving of routine clinical medical treatment without consent, the attending psychiatrist may file an application on a form provided by the Minister with the chairman of the review board having jurisdiction for an inquiry into whether routine clinical medical treatment should be given to an involuntary patient without consent."

151 *Supra* note 55 at paras 126–29, 202.

152 *Ibid* at para 3. This reasoning in *PS* is the basis for an upcoming section 7–10 *Charter* challenge to Alberta's *Mental Health Act* in *JH v Alberta*. This case involves JH, who argues that his continued detention (nine months) was contrary to his liberty protected interests under the *Charter* given the lack of appropriate review board oversight, procedural safeguards and justification provided by the lower harm threshold within Alberta's *Mental Health Act*. See *JH* 2017, *supra* note 63, in which the Court ruled in favor of JH proceeding with the *Charter* challenge.

safeguards may mean that the treatment refusal override provisions in Alberta and New Brunswick survive *Charter* scrutiny.

Contrary to *PS*, the presence of procedural safeguards does not, in practice, guarantee that involuntarily detained persons will have access to a fair process within which to assert their rights to medical self-determination. Often, involuntarily detained persons appear before administrative tribunals or courts without legal representation or rights information and with little understanding of the *Charter* arguments that can be made.[153] Conversely, medical practitioners or psychiatric institutions are typically represented by experienced lawyers. The processes are adversarial and legally complex.[154] In these contexts, involuntarily detained persons are at a significant power imbalance, and access to procedural safeguards does not necessarily bring about access to justice.

Furthermore, an argument can be made that access to an administrative, court, or tribunal proceeding is not the only procedural safeguard needed in the context of involuntary treatment. Rather, access to a personally appointed substitute or supported decision-maker, who can make decisions in accordance with a person's wishes, will, and preferences, is a decision-making safeguard which must be in place to protect the right to medical self-determination to the greatest extent possible. Access to these decision-making safeguards would ensure that decisions about treatment could be made by substitutes or supporters who could do so in accordance with the involuntarily detained person's wishes, will, and preferences. Without such access, involuntary treatment provisions fail to interfere with liberty interests in the least restrictive way possible. Viewed through this approach, the treatment refusal override provisions do not respect the principles of fundamental justice. By overriding the decision of a substitute or supported decision-maker, the treatment refusal override provisions do not provide for meaningful access to decision-making safeguards.

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153 Johnston, *supra* note 101 at 97–105. See generally Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne M Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 211 at 211–22.

154 Johnston, *supra* note 101 at 97–105.

F. Section 1: Do Involuntary Treatment Provisions in British Columbia, Alberta, and New Brunswick Interfere with Liberty and Security of the Person in a Manner That is Justified in a Free and Democratic Society?

Section 1 of the *Charter* provides that the rights and freedoms guaranteed therein are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[155] If the involuntary treatment and involuntary detention provisions described above were found to infringe any *Charter* rights, the state would have an opportunity to justify those infringements, pursuant to section 1.

In *R v Oakes*,[156] the Supreme Court set out the framework for a section 1 analysis. The *Oakes* test considers whether the objective of the impugned law or state action is sufficiently important and whether the measures adopted to achieve the objective are proportional.[157] Proportionality is analyzed with reference to three criteria: (1) the measures adopted must be rationally connected to the objective; (2) the means should impair as little as possible the right or freedom in question; and (3) there must be proportionality between the objective and the effects of the measures which are responsible for limiting the *Charter* right or freedom.[158] These criteria are similar to the concepts of arbitrariness, overbreadth, and gross disproportionality that are the subject of the section 7 inquiry into whether an infringement accords with the principles of fundamental justice. As explained by Hasan, "arbitrariness is analogous to 'rational connection'; overbreadth is analogous to 'minimal impairment'; and gross disproportionality is analogous to the weighing of salutary versus deleterious effects."[159]

Given the parallels between the analytical frameworks under section 1 and section 7's principles of fundamental justice, it is not hard to imagine that similar arguments may be relevant under section 1 as we have been put forward above in relation to section 7. Further, to the extent that community-based mental health services and supports are available, it could

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155 *Charter*, *supra* note 7, s 1.

156 [1986] 1 SCR 103, 1986 CanLII 46 [*Oakes*].

157 *Ibid* at 138–39.

158 *Ibid* at 138–40.

159 Nader R Hasan, "Three Theories of 'Principles of Fundamental Justice'" (Paper delivered at Osgoode's Annual Constitutional Cases Conference, 2013), (2013) 63:14 SCLR 339 at 369.

be argued that involuntary detention is not a minimal impairment of the right to liberty or security of the person. In addition, it could be argued that stripping persons with mental disabilities who are involuntarily detained of access to existing decision-making supports and tools fails to minimally impair their rights to medical self-determination, on an equal basis as others.

IV. INVOLUNTARY TREATMENT, INVOLUNTARY DETENTION, AND SECTION 15

Civil mental health law has significant and broad implications for the interpretation of the substantive equality provisions under section 15 of the *Charter*. However, there is a notable absence of section 15 jurisprudence in the civil mental health law context, as the jurisprudence focuses primarily on section 7.[160] This is troubling given the history of systemic discrimination and inequality faced by people with mental disabilities. We argue that *Charter* claims in civil mental health cases should be analyzed using section 15 and section 7 lenses. Applying both lenses will elucidate the compounding and intersecting nature of discrimination and liberty claims and enable the development of jurisprudence recognizing how the principle of substantive equality must be incorporated into the principles of fundamental justice. It would also further demonstrate the challenges of balancing civil mental health law's treatment-based and police power purposes with principles of equality and the right to medical self-determination.

In *PS v Ontario*, the Ontario Court of Appeal recognized the "[i]nterplay between s. 15 and s. 7" of the *Charter*, emphasizing how "s. 15(1) violations increased the gravity of the s. 7 violations."[161] Further, Sheldon, Perez, and Spector suggest that "a person's lived reality may be distorted by discretely pleading either s. 7 or 15, given the intersecting nature of liberty and equality in the context of psychiatric detention."[162] We support this assertion and acknowledge how, unlike in other health care contexts, persons with mental disabilities disproportionately experience

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160 Sheldon, Spector & Perez, *supra* note 19 at 223; Nunnelley, "Coercive Care in Civil Mental Health Law", *supra* note 37 at 8; Verdun-Jones & Lawrence, *supra* note 73 at 490.

161 *PS*, *supra* note 55 at para 178.

162 Sheldon, Spector & Perez, *supra* note 19 at 195.

discrimination and the coercive impacts of involuntary detention and compulsory treatment, as a result of being labelled "a person with a mental disability" and "incapable".[163]

Section 15(1), the *Charter's* equality rights provision, states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[164]

The section 15 test is based on the Supreme Court of Canada's decisions in *R v Kapp*[165] and later in *Withler v Canada (Attorney General)*[166] and *Quebec (Attorney General) v A*.[167] The two-part test analyzes whether: " (1) the law creates a distinction based on an enumerated or analogous ground; and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping".[168]

Applying a section 15 *Charter* analysis to involuntary detention and treatment provisions, we argue that civil mental health laws violate substantive equality rights in at least two ways. First, the involuntary detention and treatment provisions in British Columbia,[169] Saskatchewan,[170] Nova Scotia,[171] and Newfoundland and Labrador[172] are discriminatory because they create a standard of capacity to consent to treatment, which applies only in the civil mental health context and is different than the standard used in other health care contexts. Second, provisions in British Columbia,[173] Alberta,[174] and Newfoundland and

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163 Michael Perlin & Mehgan Gallagher, "'The Pain I Rise Above': How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities" (2017) New York Law School Research Paper No 3021044, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3021044> [perma.cc/84NT-UWZ9].

164 *Charter*, *supra* note 7, s 15(1).

165 2008 SCC 41 [*Kapp*].

166 2011 SCC 12 [*Withler*].

167 2013 SCC 5 [*Quebec v A*].

168 *Kapp*, *supra* note 165 at para 17.

169 *Mental Health Act* BC, *supra* note 94, s 31; *HCCFA*, *supra* note 96, ss 2(a)–(c); *RAA*, *supra* note 123, ss 11(1)(a)–(b).

170 *MHSA*, *supra* note 90, s 24(2)(a)(ii).

171 *IPTA*, *supra* note 91, s 17(e).

172 *MHCTA*, *supra* note 92, s 17(1)(b)(ii).

173 *Mental Health Act* BC, *supra* note 94, s 31; *RAA*, *supra* note 123, s 11(1)(a).

174 *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, s 23 [*AGTR*]; *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 88(2) [AGTA].

Labrador[175] prohibit persons with mental disabilities who are involuntarily detained from accessing decision-making supports and tools in those provinces.[176] The analysis reveals how the substantive equality rights of persons with mental disabilities intersect with their rights to liberty, autonomy, and the right to medical self-determination, pursuant to the principles of fundamental justice.

A. Do Laws That Establish a Higher Standard of Capacity Create a Distinction Based on an Enumerated Ground?

In Newfoundland and Labrador, Nova Scotia, and Saskatchewan, involuntary admission criteria impose a more rigorous capacity standard in the civil mental health context than the capacity standard applicable to other health care contexts.[177] Mental health legislation in these provinces requires that, "the patient must also be unable to fully appreciate the nature and consequences of the mental disorder or to make an informed decision regarding his or her need for treatment or care and supervision in order to be involuntarily detained."[178] In other (non-involuntary detention) contexts in these provinces, the standard for capacity to consent to health care treatment is "understand information relevant to the decision and... appreciate the consequences of making a decision."[179] The additional requirement to fully appreciate the nature and consequences of the decision, applicable in the involuntary detention context, arguably sets a more rigorous standard for capacity than the requirement to merely appreciate the consequences of making a decision, applicable in the general health care treatment context.

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175 *Advance Health Care Directives Act*, SNL 1995, c A-4.1, s 2(b)(ii) [*AHCDA*].

176 *Mental Health Act* BC, *supra* note 94, s 31; *RAA*, *supra* note 123, ss 11(1)(a)–(b); *AGTR*, *supra* note 174, s 23; *AGTA*, *supra* note 174, s 88(2); *AHCDA*, *supra* note 175, s 2(b)(ii).

177 In contrast, Ontario has the same capacity threshold in the civil mental health context as in other health care contexts. Ontario's *Health Care Consent Act* applies in both contexts. See *HCCA* ON, *supra* note 85, s 4(1) [emphasis added] which states as follows: "A person is capable with respect to a treatment, admission to or confining in a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission, confining or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

178 Refer to *MHCTA*, *supra* note 92, s 17(1)(b)(ii)(B); *IPTA*, *supra* note 91, s 17(e); *MHSA*, *supra* note 90, s 24(2)(a)(ii).

179 *AHCDA*, *supra* note 175, s 14.

The situation is slightly different in British Columbia. As described previously in this paper, the British Columbia *Mental Health Act* does not create a different standard of capacity, but rather requires no finding of incapacity at any point during the involuntary admission process. Specifically, persons with mental disabilities who are involuntarily detained and are capable of making treatment decisions are unable to refuse treatment due to the deemed consent provisions. Deemed consent occurs only in the involuntary detention context. In other health care contexts in British Columbia, consent to treatment is required.[180] To the extent that it establishes a different requirement with respect to the capacity to consent to treatment, the *Mental Health Act* in British Columbia, like the mental health statutes in Newfoundland and Labrador, Nova Scotia, and Saskatchewan, creates a different standard of capacity to consent to treatment than the standard otherwise required in other health care contexts. These different standards apply only to persons with mental disabilities who are involuntarily detained.

By creating a different standard of capacity applicable only to those who are involuntarily detained, the laws in these provinces create a distinction based on the enumerated ground of mental disability. As described earlier, "mental disorder" is one of the criteria for involuntary admission in all jurisdictions in Canada. A person must meet the definition of mental disorder in order to be involuntarily detained. Since the different standard of capacity applies only within the context of involuntary detention, it necessarily applies only to persons who have mental disabilities.

In *Starson*[181] and *Fleming*,[182] the Courts affirmed the importance of equally applying the same medical decision-making principles in the involuntary psychiatric context. In *Starson*, the Supreme Court of Canada recognized that the medical decision-making principles in a general health care context should apply equally to persons with mental disabilities who are involuntarily detained.[183] Citing *Fleming*, the Supreme Court in *Starson* stated as follows:

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180 *HCCFA*, *supra* note 96, s 3.

181 *Supra* note 25. Although *Starson* was not a constitutional case, it has had significant implications for the understanding of capacity law within the involuntary psychiatric care context.

182 *Supra* note 46.

183 Nunnelley, "Coercive Care in Civil Mental Health Law", *supra* note 37; Verdun-Jones & Lawrence, *supra* note 73 at 490.

> The right to refuse unwanted medical treatment is fundamental to a person's dignity and autonomy. This right is equally important in the context of treatment for mental illness: see *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (Ont. C.A.), *per* Robins J.A., at p. 88.[184]

The creation of different standards of capacity for involuntarily detained patients in British Columbia, Saskatchewan, Nova Scotia, and Newfoundland and Labrador runs contrary to the *Starson* and *Fleming* decisions. Persons with mental disabilities who are involuntarily detained are subject to different and higher standards of capacity to consent to medical treatment than non-disabled persons or disabled persons who are not involuntarily detained. This distinction results in a deprivation of the right to substantive equality and the right to medical self-determination and fewer substantive and protective safeguards for persons with mental disabilities vis-à-vis persons in other health care contexts.

B. Do Laws that Remove Access to Decision-Making Supports and Tools Create a Distinction Based on an Enumerated Ground?

In British Columbia, the *Representation Agreement Act* specifically prohibits involuntarily detained persons from accessing decision-making supports and tools available under that Act.[185] Similarly, in Alberta, the *Adult Guardianship and Trusteeship Act* prohibits involuntarily detained persons from accessing decision-making supports and tools available under that statute.[186] In Newfoundland and Labrador, the *Advance Health Care Directives Act* does not apply to health care decisions made in the involuntary detention context.[187]

Like the provisions that establish a different standard of capacity, the removal of access to decision-making supports and tools is a distinction that results in a deprivation of the right to medical self-determination and a lack of substantive (decision-making) safeguards for people with mental disabilities vis-à-vis patients in other health care contexts. The discriminatory nature of depriving only people with mental disabilities from

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184 *Starson*, *supra* note 25 at para 75.

185 *Mental Health Act* BC, *supra* note 94, s 31; *RAA*, *supra* note 123, ss 11(1)(a)–(b); *AHCDA*, *supra* note 175, s 2(b)(ii).

186 *AGTR*, *supra* note 174, s 23; *AGTA*, *supra* note 174, s 88(2).

187 *AHCDA*, *supra* note 175, s 2(b)(ii).

accessing decision-making supports and tools has been articulated as follows:

> The exclusion of family members and friends from psychiatric treatment decisions contributes to the isolation of individuals with mental disabilities and discounts the valuable role that personal support networks play in recovery. The prohibition on *Mental Health Act* detainees using planning tools like Representation Agreements means individuals with mental health problems are not permitted to put a legal plan in place to prevent or ameliorate future mental health crises.[188]

C. Are These Provisions an Ameliorative Program Under Section 15(2) of the *Charter*?

Once a distinction has been identified under section 15(1), the state may shield the provisions from further *Charter* scrutiny by demonstrating that they can be protected by section 15(2) if "(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds."[189]

The state will likely argue that the purpose of these involuntary detention and treatment provisions is remedial – to protect persons with mental disabilities who are in need of treatment. However, in applying the section 15(2) test in *R v Music Explosion* Ltd,[190] the Manitoba Court of Appeal found that, "a restriction was not a conferral of special benefits but simply a colourable attempt to discriminate."[191] The Supreme Court, in *R v. Kapp*, affirmed this approach, suggesting that laws designed to restrict or punish behaviour do not qualify for protection under section 15(2).[192]

This principle is applicable to the provisions at issue here. The provisions in Newfoundland and Labrador, Nova Scotia, and Saskatchewan that establish a higher standard of capacity have the effect of restricting the medical decision-making rights of involuntarily detained persons to a greater degree than persons who are not involuntarily detained. Similarly,

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188 Johnston, *supra* note 101 at 85. This section 15(1) argument has been put forward by the Canadians for Disabilities and the Community Legal Assistance Society in their *Charter* challenge of the deemed consent provisions in BC's *Mental Health Act*. See CCD, *supra* note 54; CLAS, "Charter Challenge", *supra* note 54.

189 *Kapp*, *supra* note 165 at para 41.

190 (1990), 68 Man R (2d) 203, 11 WCB (2d) 33 [*Music Explosion*].

191 Jacquelyn Shaw, "One Step Forward, Two Steps Back: a Charter Analysis of s. 39 of Nova Scotia's *Involuntary Psychiatric* Treatment Act" (2009) 4:2 JEMH 1 at 1–11; *Ibid* at 575.

192 *Kapp*, *supra* note 165 at para 54.

the deemed consent provisions in British Columbia restrict the medical decision-making rights of involuntarily detained patients by effectively removing their capacity to consent to or refuse treatment. The provisions in British Columbia and Alberta that prevent involuntarily detained persons from accessing decision-making supports and tools restrict their ability to plan and express their wishes, will and preferences through their supported decision-makers. Each of these provisions restricts or deprives persons with mental disabilities who are involuntarily detained of their rights to medical self-determination. The provisions are not remedial in nature. Rather, they are discriminatory, punitive, and coercive measures that apply only to involuntarily detained persons with mental disabilities. Therefore, following the Courts' guidance in *Music Explosion* and *Kapp*, the provisions at issue cannot be shielded by section 15(2) because they violate the substantive equality rights of persons with mental disabilities.

D. Do the Distinctions Created by These Laws Lead to Disadvantage by Perpetuating Prejudice or Stereotyping?

Once a distinction has been established, the second part of the section 15 test is whether that distinction creates a disadvantage by perpetuating prejudice or stereotyping.

In *Withler*, the Supreme Court explained that section 15(1) should consider "the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping."[193]

Persons with mental disabilities who are involuntarily detained are particularly vulnerable to negative stereotyping. As the Supreme Court articulated in *R v Swain*, "[t]here is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice."[194]

The imposition of a different standard of capacity in Newfoundland and Labrador, Nova Scotia, Saskatchewan, and British Columbia, and the lack of access to decision-making supports and tools in British Columbia, Alberta, and Newfoundland and Labrador result in involuntarily detained

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193 *Withler*, *supra* note 166 at para 39.

194 *R v Swain*, [1991] 1 SCR 933 at 49–50, 193, 4 OR (3d) 383.

persons being stripped of their right to substantive equality and the right medical self-determination.

The provisions at issue reinforce the negative stereotype that having a mental disability necessarily means that a person cannot make decisions about their health care treatment. This is a long-held prejudice, as explained by the Supreme Court in *Starson*:

> The tendency to conflate mental illness with lack of capacity, which occurs to an even greater extent when involuntary commitment is involved, has deep historical roots, and even though changes have occurred in the law over the past twenty years, attitudes and beliefs have been slow to change. For this reason it is particularly important that autonomy and self-determination be given priority when assessing individuals in this group.[195]

In a 2013 review of Nova Scotia's civil mental health legislation, Justice LaForest and Professor Lahey more particularly identified the discriminatory nature of the higher capacity standard in that province:

> The difference appears to be discriminatory using the criteria that the courts use under section 15 to distinguish differences in treatment from *discriminatory* differences in treatment. Specifically, the difference may reinforce and perpetuate stereotypes and prejudices. The stereotype it may reinforce and perpetuate is that lack of capacity and mental health are synonymous. The prejudice it may reinforce and perpetuate is the prejudice that people with mental illness cannot be trusted and respected to make decisions about their own health and medical treatment even when they have the level of capacity that would allow others to make those decisions.[196]

In *Fleming*, the Court of Appeal warned that:

> Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as person of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.[197]

The provisions at issue discriminate against persons with mental disabilities by reinforcing negative historical stereotypes that they cannot make their own decisions about their treatment. In so doing, the provisions treat involuntarily detained persons with mental disabilities as entitled to

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195 *Starson*, *supra* note 25 at para 77.

196 Honourable Justice Gérard V La Forest & William Lahey, "Report of the Independent Panel to Review the Involuntary Psychiatric Treatment Act and Community Treatment Orders" (2013) at 64, online (pdf): <novascotia.ca/dhw/mental-health/reports/IPTA-Review-2013.pdf> [perma.cc/7X8J-C6VR] [emphasis in original].

197 *Fleming*, *supra* note 46 at 20.

less equality, autonomy, and dignity, with respect to their health care decisions, than persons who are not involuntarily detained.

V. CONCLUSION

In this paper, we analyzed involuntary detention and involuntary treatment provisions in select jurisdictions in Canada, through the lens of the *Charter's* sections 7 and 15 rights. We argued that British Columbia's deemed consent provisions and the treatment refusal override provisions in Alberta and New Brunswick violate the section 7 rights to liberty and security of the person, in a manner that does not accord with the principles of fundamental justice. In Part IV, we applied a section 15 *Charter* analysis to highlight the discriminatory and coercive impact of the interference with the rights to substantive equality and medical self-determination in the civil mental health law context. We analyzed how the involuntary admission criteria in British Columbia, Saskatchewan, Newfoundland and Labrador, and Nova Scotia violate section 15 of the *Charter* by imposing a different and more rigorous standard of capacity to consent to treatment that applies only in the context of involuntary detention. Further, we have argued that provisions in British Columbia, Alberta, and Newfoundland and Labrador violate section 15 by prohibiting involuntarily detained persons from accessing decision-making supports and tools that are otherwise available to persons who are not involuntarily detained. We contend that these provisions are not remedial and instead result in undermining the substantive equality rights of persons with mental disabilities experiencing involuntary detention and treatment.

As discussed throughout this paper, at the heart of most of the *Charter* cases that challenge mental health laws is the need to appropriately balance the state's interest in protecting and treating persons with mental disabilities with their fundamental rights to autonomy and medical self-determination. Often, governments and courts have given greater weight to protection and treatment and have used these purposes to justify significant, coercive state interferences with liberty, security of the person, and substantive equality. However, the right to medical self-determination is a fundamental and abiding principle of Canadian legal tradition. It is reflected in Canadian legislation and common law. In *Carter*,[198] the Supreme Court of Canada

198 *Supra* note 136.

summarized the principle of autonomy in the context of medical decisions as follows:

> The law has long protected patient autonomy in medical decision-making. In *Manitoba (Director of Child and Family Services) v. C. (A.)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (S.C.C.), a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 49 O.R. (3d) 481 (Ont. C.A.)).[199]

At its heart, the right to medical self-determination is an expression of the dignity of each human being. In describing the connection between the right to medical self-determination and section 7 of the *Charter*, the Court of Appeal for Ontario found in *Fleming* that "the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as coextensive."[200]

Given the fundamental and abiding importance of autonomy in medical decision-making, we propose that this principle should be reflected in the purpose of all mental health legislation, not just those statues which expressly include such purpose. Non-discrimination and substantive equality demand that autonomy is no less applicable to persons with mental disabilities than persons who are not disabled, even in the context of involuntary detention. In order to give effect to the principle of autonomy, all mental health legislation in Canada ought to be interpreted to include, as one of its purposes, safeguarding medical self-determination to the greatest extent possible. This does not preclude mental health acts from setting out other purposes, including treatment and/or protection, as discussed above. However, where such purposes are expressly stated in the statute or interpreted to be present by a court, they ought to be balanced with the purpose of protecting medical self-determination to the greatest extent possible. This approach is in keeping with the common law and Canadian legal principles articulated above. It is also consistent with Canada's international legal obligations, including those articulated in the

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199 *Ibid* at para 67.

200 *Supra* note 46 at 23.

CRPD. By including autonomy in all mental health statutes, we can achieve greater substantive equality for people with mental disabilities.

Secondly, we propose that all civil mental health and decision-making statutes must recognize the supremacy of prior capable wishes, whether through advanced directives, access to personally appointed substitute decision-makers, or access to other decision-making supports and tools. People with mental disabilities must have access to these supports and tools on an equal basis as others, in accordance with their rights under sections 7 and 15 of the *Charter* and the *CRPD*. As we highlighted in our *Charter* analysis, provinces and territories must ensure that the same legal test of capacity to consent to treatment applies in the mental health context, as in other health care contexts, to ensure substantive equality and prevent further deprivations of liberty.

Lastly, concerted and coordinated efforts must be focused on developing non-coercive, community-based mental health services and supports. This includes the development of community-based supports for decision-making. As the courts have recognized, community-based mental health services and supports result in fewer liberty deprivations and less discrimination against persons with mental disabilities.

Forensic Mental Health Assessments: Optimizing Input to the Courts

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AND SABRINA DEMETRIOFF[**]

ABSTRACT

Growing numbers of individuals involved in the criminal justice system in Canada are diagnosed with a mental disorder. A proportion of these individuals are ordered by the court to undergo a forensic mental health evaluation. In the adult criminal justice system, accused persons are subject to these assessments primarily to determine fitness to stand trial and consider criminal responsibility. Additional evaluations are available in youth court, including recommendations regarding bail or sentencing. To date, there has been limited investigation into the decision-making process that leads to an assessment being ordered, and it is unclear which specific

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components of forensic evaluations are helpful to legal professionals. Published studies have been limited to jurisdictions outside of Canada, have not included youth court, and predate the implementation of therapeutic jurisprudence principles. We argue that feedback from legal personnel can potentially lead to improved provision of care and due process for a marginalized population, and we propose a study to examine these issues further.

I. INTRODUCTION

In Canada, increasing numbers of individuals involved with the criminal justice system have been diagnosed with a mental disorder.[1] Many of these individuals simply proceed through the court process and remain involved solely with the criminal justice system. However, there is a subset of individuals who have been diagnosed with severe and persistent mental illness who receive a court order to undergo a forensic mental health evaluation. In general, forensic mental health assessments are conducted in accordance with the first two stipulations in the *Criminal Code of Canada* under section 672.11 that state:

> A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (a) whether the accused is unfit to stand trial;
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1).[2]

In adult court, accused persons can be ordered to undergo an assessment of fitness to stand trial (in an effort to ensure that they are able to participate in and understand court proceedings and participate in their defence by communicating with and instructing their lawyers) or criminal responsibility (an assessment of whether the individual should be excused from responsibility for their alleged offence(s) due to a mental disorder

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1 Canada, Department of Justice, Research and Statistics Division, *The Mentally Ill: How They Became Enmeshed in the Criminal Justice System and How we Might Get Them Out* (Report), by Hon Richard D Schneider (Ottawa: DOJ, Research and Statistics Division, 2015), online: <www.justice.gc.ca/eng/rp-pr/jr/mental/mental.pdf> [perma.cc/A7T2-FE26].

2 *Criminal Code*, RSC 1985, c C-46, s 672.11 [*Criminal Code*].

which impacted their actions). Occasionally, both of these assessments are ordered simultaneously, which is referred to as a full or dual order. Evaluations of both fitness to stand trial and criminal responsibility can also be ordered in youth court. However, a much wider range of evaluations can also be ordered under the *Youth Criminal Justice Act*, including recommendations for bail or sentencing, release from custody, and opining on whether a youth should be provided with an adult or youth sentence.[3]

Although the *Criminal Code* has stipulated minimum types of assessments to be offered, jurisdictional differences exist with respect to additional types of adult forensic evaluations that can be ordered. Several provincial adult forensic mental health programs in Canada provide presentence reports (e.g. Ontario) and/or provide assessments in response to requests from probation services (e.g. Alberta). Other provinces across Canada have legal mechanisms for accused adults that allow the court to order a mental health assessment that is broader than an assessment of fitness or criminal responsibility. For example, under Ontario's Mental Health Act, "where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from mental disorder, the judge may order the person to attend a psychiatric facility for examination… [and] the senior physician shall report in writing to the judge as to the mental condition of the person"[4]. In other jurisdictions such as Manitoba, no such mechanism to request more general mental health assessment for adult accused persons is available. Thus, it is possible that these provinces and territories may, at times, order assessments of fitness to stand trial and criminal responsibility even when those specific issues are not the primary focus of the court. In particular, studies have shown that lawyers have reported ordering assessments of competency to stand trial or criminal responsibility as an alternative legal strategy when other types of assessment are not available.[5]

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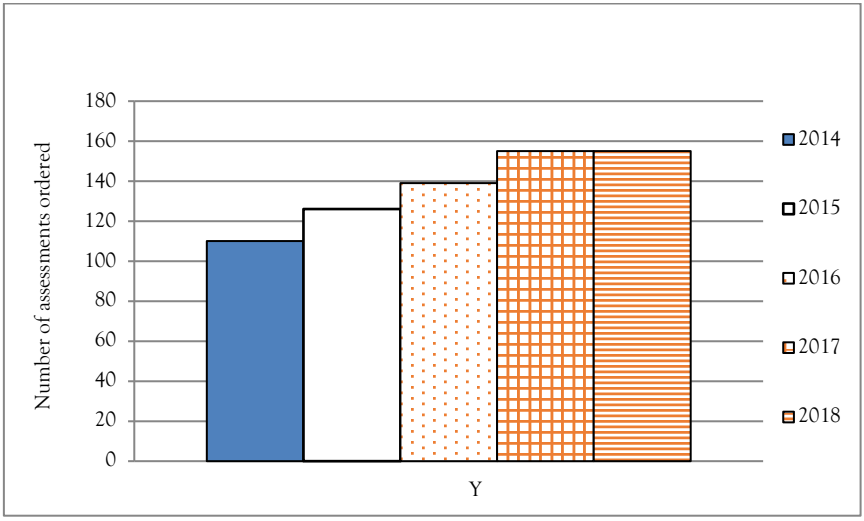
3 *Youth Criminal Justice Act*, SC 2002, c 1, ss 34 (1)–(2) [*YCJA*].

4 *Mental Health Act*, RSO 1990, c M7.

5 Lisa M Berman & Yvonne Hardaway, "Attorneys' Referrals for Competency to Stand Trial Evaluations: Comparisons of Referred and Nonreferred Clients" (1987) 5:3 Behav Sci & L 373; Lauren E Kois et al, "Defense Referral Patterns Associated with Competency to Stand Trial, Mental State at the Time of the Offense, and Combined Evaluations" (2019) 19:4 J Forensic Psychology Research & Practice 293, DOI: <10.1080/24732850.2019.1612215>; Danielle Laberge & Daphneè Morin, "Mental Illness and Criminal Justice Processing: The Strategies and Dilemmas of Defence Lawyers" (2001) 29 Intl J Soc L 149.

As forensic mental health professionals, we (the authors) are frequently involved in conducting the above-mentioned court-ordered assessments. In Manitoba, there is a sole location for the provision of adult forensic mental health assessments which are requested through the courts, namely, the Adult Forensic Psychiatry Program, located in Winnipeg, Manitoba. Our group has noted an approximate 30% increase in court-ordered assessment requests for adult patients in Manitoba between 2014 and 2018 (see Figure 1). We had approximately 150 assessments completed in both 2017 and 2018, and we have received 140 assessment requests from January to mid-October 2019.

Figure 1. Yearly Court-Ordered Assessments to Manitoba Adult Forensic Mental Health Services from 2014 to 2018



Since the mental health assessors are not present when evaluation orders are made in court, it is not always clear from a clinical perspective why certain assessments are requested. For example, the Adult Forensic Psychiatry Program has previously received requests to assess criminal responsibility when the accused person had no diagnosis of mental illness and was clearly intoxicated at the time of the index charges (R v Bouchard-Lebrun[6] specified that the voluntary ingestion of a substance that can cause disruptions in mental health functioning cannot be used to uphold a

6 2011 SCC 58 at para 69.

defence of not criminally responsible by reason of a mental disorder (NCRMD)). Although, ideally, every referred case would include a detailed conversation with the lawyers involved so as to explicitly understand the reason for referral, the small number of clinicians and increased rate of requests by the court for assessments has made it difficult to add that step to the process of evaluation. This is especially the case since the R v Jordan[7] ruling has increased the pressure to complete mental health evaluations as soon as possible in order for the case in its entirety to be completed within the 18-month specified timeframe.

We would like to gain a better understanding of why particular assessments are ordered by the court, as well as ways that communication with the court could be improved. We believe that increased collaboration between forensic mental health professionals and legal professionals can improve the delivery of therapeutic justice to individuals in the courtroom. The following review will describe what is known about defendants who have mental disorders and must navigate the intersection between mental health and justice systems. We will discuss the development of therapeutic jurisprudence principles and propose conducting a survey aimed at understanding how forensic mental health assessments are used in the courtroom. It is hoped that these first steps can begin to improve communication and collaboration between legal and forensic mental health professionals.

A. Assessments of Fitness to Stand Trial and Criminal Responsibility

Before exploring the history of mental health and the justice system, it is important to define the most commonly ordered forensic mental health assessments. As mentioned above, the *Criminal Code* and the *Youth Criminal Justice Act* (YCJA) both include specific sections that provide direction for addressing potential mental health issues in accused persons. However, these directives are specific to certain situations and types of defences that may be used. In the *Criminal Code*, the primary focus is on fitness to stand trial and criminal responsibility. Subsection 16(1) states that "[n]o person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing

7 2016 SCC 27.

that it was wrong",[8] while section 672 deals exclusively with mental disorders. This section states that an assessment can be ordered to provide evidence towards whether an accused is unfit to stand trial or was suffering from a mental disorder that would exempt them from criminal responsibility.[9]

Criteria for fitness to stand trial are outlined in section 2 of the *Criminal Code* as being "unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel"[10] Subsection 672.12(1) of the *Criminal Code* specifies when the assessment issue may be raised, stating "[t]he court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor."[11] Crown attorneys may only raise the issue under specific circumstances: if the accused raises the issue of fitness or puts his/her mental state into question, or if the Crown can show the court that there are reasonable grounds to doubt the accused's fitness to stand trial or criminal responsibility due to mental disorder.[12] The *YCJA* defers to the criteria outlined in the *Criminal Code* for assessing and determining fitness to stand trial and criminal responsibility, stating "[e]xcept to the extent that they are inconsistent with or excluded by this Act, section 16 (defence of mental disorder) and Part XX.1 (mental disorder) of the Criminal Code apply" to youth accused.[13]

There are specific guidelines about length of assessment orders (no longer than 30 days or 60 days in exceptional circumstances) and the existence of *Criminal Code* Review Boards who oversee individuals who are found unfit to stand trial or not criminally responsible. Once an assessment is ordered, it is carried out by, at minimum, a medical professional and often by a team of mental health professionals. These professionals then write a report that gets submitted to the court in order to assist in a decision

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8 *Criminal Code*, *supra* note 2, s 16(1).
9 *Ibid*, ss 672.11(a)–(b).
10 *Ibid*, s 2.
11 *Ibid*, s 672.12(1).
12 *Ibid*, ss 672.12(1)–(3).
13 *YCJA*, *supra* note 3, s 141(1).

regarding fitness to stand trial and/or criminal responsibility. An assessment order can also request that a mental health professional provide evidence to the court to assist in determining:

> [W]hether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child…[,] the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused…[,] whether a finding that the accused is a high-risk accused should be revoked…[,] or… whether an order should be made… for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.[14]

However, in the authors' experience, assessments are rarely, if ever, ordered to inform these issues, and they will not be discussed further in this paper.

II. Increased Contact Between Mental Health and Justice Systems

A. Why This Occurred and the Phenomenon of Transinstitutionalization

Over the years, there has been an increase in contact in the criminal justice system in Canada among those diagnosed with mental illness. The deinstitutionalization movement that was initiated in the 1960s throughout North America led to the widespread discharge of patients from psychiatric facilities into the community over the following decades.[15] The increase in rates of the mentally ill becoming involved in the justice system has been attributed to a lack of community-based treatment options,[16] along with reductions in the number of available local psychiatric beds[17] while long-stay hospital beds continued to close.[18] This resulted in a shifting of the burden of care to various parties, including community agencies, family members, and the criminal justice system. The prevalence of diagnosed serious mental

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14 *Criminal Code*, *supra* note 2, ss 672.11 (c)–(e).

15 Alain Lesage et al, "Downsizing Psychiatric Hospitals: Needs for Care and Services of Current and Discharged Long-Stay Inpatients" (2000) 45:6 Can J Psychiatry 532.

16 Jacques Baillargeon, Stephen Hoge & Joseph Penn, "Addressing the Challenge of Community Reentry Among Released Inmates with Serious Mental Illness" (2010) 46:3 American J Community Psychology 361.

17 H Richard Lamb & Linda Weinberger, "The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons" (2005) 33 J American Academy Psychiatry & L 529.

18 James Gilligan, "The Last Mental Hospital" (2001) 72 Psychiatric Q 45.

illness has been noted to range from approximately 5 to 7% in the community[19] compared with up to 16 to 24% in prisons in the United States.[20] In Canada, mentally ill offenders incarcerated in federal prisons grew as a population by 60% (or 84% when substance abuse was included as a mental disorder) between 1967 and 1999.[21] More recently, a Canadian study examining 1,110 male federal offenders who were entering federal custody found that 40% met criteria for at least one current mental disorder; this rose to over 70% when substance use and antisocial personality disorder diagnoses were included.[22] Some have criticized the movement of deinstitutionalization from mental hospitals to community living as being a punishment for mental illness, arguing that individuals who are diagnosed with mental illness are now remanded to prison more frequently, and are often kept in solitary confinement for much of their period of incarceration.[23]

Most notable of the negative outcomes of deinstitutionalization for individuals diagnosed with mental illness "was the sudden increase in their contact with the criminal justice system."[24] The term 'transinstitutionalization' refers to those individuals who moved from one institution (mental hospital asylum) to another (correctional facility) as community resources did not increase to meet the needs of a vulnerable

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19 Ronald Kessler et al, "The Prevalence and Correlates of Untreated Serious Mental Illness" (2001) 36:6 Part I Health Services Research 987 at 992.

20 Pamela M Diamond et al, "The Prevalence of Mental Illness in Prison" (2001) 29:1 Administration & Policy in Mental Health & Mental Health Services Research 21 at 25–26.

21 Canada, Senate, Standing Senate Committee on Social Affairs, Science and Technology, "Morning Meeting" *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 38-1, No 19 (7 June 2005), online: <sencanada.ca/en/Content/Sen/committee/381/soci/19eva-e> [perma.cc/RH42-SA6E].

22 Correctional Service Canada, *National Prevalence of Mental Disorders Among Incoming Federally-Sentenced Men Offenders* (Report), No R-357, by JN Beaudette, J Power & LA Stewart (Ottawa, CSC, 2015).

23 See generally Keramet Reiter & Thomas Blair, "Punishing Mental Illness: Trans-institutionalization and Solitary Confinement in the United States" in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement* (London, UK: Palgrave Macmillan UK, 2015) 177.

24 Glen Luther & Mansfield Mela with Victoria J Bae, "Literature Review on Therapeutic Justice and Problem Solving Courts" (2013) at 2, online (pdf): *University of Saskatchewan* <www.usask.ca/cfbsjs/documents/Lit%20Review.pdf> [perma.cc/25SC-GMXT].

population.[25] When outpatient mental health services were inadequate, deinstitutionalization created risks for the chronically mentally ill to become poor and homeless[26] which increased their risk of contact with the justice system, either as a victim of crime or as an accused person. Raphael and Stoll found significant transinstitutionalization rates for all men and women in the United States over the 20-year period from 1980 to 2000, with a relatively large rate for men in comparison to women and the largest rate observed for White men.[27] Their study estimated that 4 to 7% of incarceration growth between 1980 and 2000 was attributable to deinstitutionalization.[28] These results "suggest that a sizable portion of the mentally ill behind bars would not have been incarcerated in years past."[29] Although the number of Canadians who have been affected by transinstitutionalization is unclear, the former Correctional Investigator of Canada noted that "federal penitentiaries are fast becoming our nation's largest psychiatric facilities and repositories for the mentally ill. As a society, we are criminalizing, incarcerating and warehousing the mentally disordered in large and alarming numbers."[30] Thus, the overincarceration of mentally ill individuals appears to be a significant issue in Canada as well as the United States.

B. What is Known About Those Who Have Been Diagnosed With a Mental Disorder and Are Justice-Involved

Prisons and jails have been noted by some to be a stop gap of sorts, used to literally capture and house those who are diagnosed with mental illness and who lack adequate community supports. As noted by Sapers, "[t]he needs of mentally ill people are unfortunately not always being met in the community health and social welfare systems. As a result, the mentally ill

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25 Steven Raphael & Michael A Stoll, "Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate" (2013) 42:1 J Leg Stud 187 at 189.

26 See generally Christopher Jencks, *The Homeless* (Cambridge, Mass: Harvard University Press, 1995); E Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis* (New York, NY: John Wiley & Sons, 1997).

27 Raphael & Stoll, *supra* note 25 at 189–90.

28 *Ibid* at 190.

29 *Ibid* at 187.

30 Canada, *Annual Report of the Office of the Correctional Investigator 2009–2010*, Catalogue No PS100-2010E-PDF (Ottawa: CIC, 2010) at 6, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20092010-eng.pdf> [perma.cc/7FZ9-TZPA].

are increasingly becoming deeply entangled in the criminal justice system."[31] The prevalence of all mental disorders is higher in prisoners than in the general population worldwide, and in some countries, more people who have been diagnosed with severe mental illness are in prisons than in psychiatric hospitals.[32] "One in seven prisoners has [a] major [depressive disorder] or psychosis, with little change in rates during the past three decades."[33] Prisoners are "at increased risk of all-cause mortality, suicide, self-harm, violence, and victimization", yet these issues are frequently under-identified and poorly treated.[34] In one study examining the time after release until return to prison in the United States, the median time for offenders with a diagnosed serious mental illness to return to prison was 385 days versus 743 days for non-mentally ill offenders, which is 358 days sooner.[35] Recidivism is a significant issue. Offenders with diagnosed mental illness repeatedly offend, possibly due to inadequate provision of care while they are involved with the justice system. Individuals who are released without adequate support may live in poor neighbourhoods and lack social supports. As well, the impoverished may turn to criminal behavior to satisfy basic needs of shelter and food, rather than engaging in such acts due to a criminal mindset.

In some cases, mentally disordered individuals with criminal charges may not be incarcerated, even though they have frequent contact with the legal system. Incarceration and crime rates do not always consistently rise and fall in synchrony with each other.[36] Problem-solving courts for those with mental disorder or substance use problems may divert the mentally ill away from prisons[37] and prison alternatives (such as restorative justice and

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31 *Ibid.*

32 Seena Fazel et al, "Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions" (2016) 3:9 Lancet Psychiatry 871 at 871–72.

33 *Ibid* at 872. See also Seena Fazel & Katharina Seewald, "Severe Mental Illness in 33,588 Prisoners Worldwide: Systematic Review and Meta-Regression Analysis" (2012) 200:5 British J Psychiatry 364.

34 Fazel et al, *supra* note 32 at 871.

35 Kristin G Cloyes et al, "Time to Prison Return for Offenders with Serious Mental Illness Released from Prison: A Survival Analysis" (2010) 37:2 Crim J & Behav 175 at 175.

36 Correctional Service of Canada, Research Branch, *Comparing Crime and Imprisonment Trends in the United States, England, and Canada from 1981 to 2001* (Research Brief), No B-29, by Roger Boe (Ottawa: CSC, 2004) at 23–24, online: <www.csc-scc.gc.ca/research/b29-eng.shtml> [perma.cc/ZRW5-QCZN].

37 See generally Roy D Schneider, "Mental Health Courts and Diversion Programs: A Global Survey" (2010) 33:4 Intl J L & Psychiatry 201.

community service orders), also decreasing the rates of incarceration.[38] Research that considers a broader group of individuals involved in justice, but not limited to prison populations, is important as the profiles of those in versus out of custody may differ.

In considering the previous literature examining individuals who have participated in a forensic mental health assessment, several factors have been associated with being found unfit to stand trial or NCRMD. A meta-analysis of 68 studies on fitness to stand trial published between 1967 and 2008 was conducted that compared fit and unfit defendants on a number of demographic, psychiatric, and criminological variables.[39] The most robust findings were that defendants diagnosed with a psychotic disorder were approximately eight times more likely to be found unfit than defendants without a psychotic disorder diagnosis, and the likelihood of being found unfit was approximately double for unemployed defendants as compared to employed defendants.[40] The likelihood of being found unfit "was also double for defendants with a previous psychiatric hospitalization compared to those without a hospitalization history."[41]

In Canada, a large study known as the National Trajectory Project examined 1,800 individuals who had been found NCRMD in one of three provinces (British Columbia, Ontario, and Quebec) between 2000 and 2005.[42] The researchers gathered information about diagnoses and demographic variables, and tracked outcomes (e.g. rates of reoffending) up to 2008.[43] They found that individuals who were found NCRMD were most commonly diagnosed with a psychotic disorder, and approximately one-third of individuals had a comorbid substance use disorder.[44] Almost three-quarters of individuals had at least one psychiatric hospitalization prior to

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38 See "Global Prison Trends 2018: The Rehabilitation and Reintegration of Offenders in the Era of Sustainable Development" (2018), online (pdf): *Penal Reform International* <www.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf> [perma.cc/NMT5-T2QK].

39 Gianni Pirelli, William H Gottdiener & Patricia A Zapf, "A Meta-Analytic Review of Competency to Stand Trial Research" (2011) 17:1 Psychol Pub Pol'y & L 1.

40 *Ibid* at 16–17, 31.

41 *Ibid* at 1.

42 Anne Crocker et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada, Part 2: The People Behind the Label" (2015) 60:3 Can J Psychiatry 106.

43 *Ibid* at 106.

44 *Ibid*.

their legal findings.[45] Close to 16% of the sample were female, and the average age was 36.56 years.[46] Almost half of the sample had at least one prior criminal conviction.[47] Only 17% of the sample had reoffended during a three-year follow up period, and those individuals with a severe index offence (i.e., causing or attempting to cause death or a sexual offence) were even less likely to reoffend (6% had committed a new offence during the three-year follow up).[48]

Fewer studies have considered groups of individuals who were referred for court-ordered forensic mental health assessment and compared those who were found NCRMD to those who were not found NCRMD. Results of a recent meta-analysis of 15 of these studies, which included 19,500 cases,[49] indicated that older age, female sex, educational attainment, and unemployment were associated with being found NCRMD and that such individuals more often had psychiatric histories and psychotic disorders.[50] Those that were found NCRMD were less likely to have criminal histories but more likely to have been opined unfit to stand trial in the past.[51] A related study comparing individuals who were referred for an assessment of fitness to stand trial to those who were referred for an assessment of NCRMD found that non-White accused persons, as well as individuals with a diagnosis of a psychotic, organic, or developmental disorder were more likely to be referred for an assessment of fitness to stand trial.[52] Individuals with violent charges were comparatively more likely to be referred for a NCRMD assessment.[53]

Recent research using population-level Canadian administrative data demonstrated that high numbers of individuals with diagnosed mental illness are also navigating the justice system.[54] This study accessed the

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45 *Ibid*.

46 *Ibid* at 108.

47 *Ibid* at 112.

48 Yanick Charette et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada, Part 4: Criminal Recidivism" (2015) 60:3 Can J Psychiatry 127 at 127.

49 See Lauren E Kois & Preeti Chauhan, "Criminal Responsibility: Meta-Analysis and Study Space" (2018) 36:3 Behav Sci & L 276.

50 *Ibid* at iv.

51 *Ibid*.

52 Kois et al, *supra* note 5 at 301, 304.

53 *Ibid* at 304.

54 See Hygiea Casiano et al, "The Intersection Between Criminal Accusations, Victimization, and Mental Disorders: A Canadian Population-Based Study" 2020 65:7

Manitoba Centre for Health Policy data repository which connects multiple databases throughout the province to demonstrate the robust relationship between mental disorder and justice involvement as either an accused person or as an identified victim. For all Manitoba residents aged 18-64 between 2007 and 2012 (N=793,024), diagnosed mental disorders (determined by examining inpatient and outpatient healthcare data) were compared with overall and per person rates of justice involvement in the 2011/2012 fiscal year across mental disorder categories.[55] 24% of the Manitoba population had a diagnosed mental disorder over the five-year timeframe. Urban-dwelling residents with mental disorders often lived in poor neighbourhoods, especially those with psychotic (41.4%) or personality (44.2%) disorders.[56] The relative risk of criminal accusations in a one-year time period, after adjusting for demographics and presence of a substance use disorder, remained two to five times higher in those with mental disorders compared to the general population. Similarly, rates of victimization were also two to five times higher among those with mental disorders.[57] The risk of experiencing victimization in the same year as a criminal accusation was significantly increased among those with mental disorders.[58]

III. The Evolution of Forensic Mental Health Assessments

A. Historical Overview

A forensic mental health assessment (FMHA) is a specialized evaluation conducted for lawyers or the courts by mental health professionals.[59] The forensic clinician is invested with a great responsibility to present the information gathered during an assessment, including diagnosis, treatment, and any other information that the judge requests (e.g. information regarding mitigating factors and/or evaluations of witness credibility).[60]

Can J Psychiatry 492.

55 *Ibid* at 494.

56 *Ibid* at 495.

57 *Ibid* at 496.

58 *Ibid*.

59 Kirk Heilbrun, Stephanie Brooks Holliday & David DeMatteo, *Forensic Mental Health Assessment: A Casebook*, 2nd ed (New York, NY: Oxford University Press, 2002) at 1.

60 Antonio Iudici et al, "The Clinical Assessment in the Legal Field: An Empirical Study

These evaluations serve as tools to inform legal decision-making or assist in the representation of a client, and they have historically been used to address questions in civil, family, or criminal law contexts.[61] The testimony of mental health experts is often considered to be important evidence utilized "by criminal courts in determining issues arising throughout the adjudicative process."[62] As increasing numbers of individuals with a diagnosed mental illness are entering into the criminal justice system, court actors are more frequently tasked with identifying people who require an FMHA.

Both psychiatry and psychology have a lengthy history of involvement in legal issues. This involvement began with theoretical contributions, such as the development of tools to be used as part of the assessment process and research regarding legally relevant issues (e.g. jury decision making and accuracy of eyewitness testimony). It is only over the past few decades that forensic mental health professionals have become involved in providing expert evidence regarding issues such as fitness to stand trial and criminal responsibility. A seminal ruling by the United States Supreme Court resulted in criteria referred to as the Daubert standard.[63] This ruling specified five factors that can be used to determine whether the testimony of an expert witness is based on valid science and can be appropriately applied to the issue in question. These factors include: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.[64] These factors replaced a previously established and less stringent ruling, the Frye standard, [65] which stated only that scientific methods had to be generally accepted as being reliable by members of the scientific community. Despite the Daubert standard being

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of Bias and Limitations in Forensic Expertise" (2015) 6:1831 Frontiers Psychology 1 at 1–2.

61 Heilbrun, Holliday & DeMatteo, *supra* note 59 at 2.

62 Richard E Redding, Marnita Y Floyd & Gary L Hawk, "What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar" (2001) 19:4 Behav Sci & L 583 at 583.

63 *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993).

64 *Ibid* at 593. See also MG Farrell "Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemiology and Legal Process" (1993) 15 Cardozo L Rev 2183.

65 *Frye v United States*, 293 F 1013 (DC Cir 1923).

widely adopted, some states still use the Frye standard to determine expertise.

In Canada, similar legal standards are used to determine whether expert witnesses are appropriately qualified to provide testimony. These standards were established in a case from the early 1990s, *R v Mohan*, and are referred to as the Mohan criteria.[66] These criteria state that expert evidence must be (a) necessary to assist the trier of fact; (b) relevant to the issue; (c) provided by a qualified individual; and (d) there must be no exclusionary rule. A ruling by the Supreme Court of Canada several years later[67] further specified that experts should be allowed to provide an opinion on the ultimate issue before the court (e.g. criminal responsibility of an individual), as long as the judge or jury makes the final decision on the issue. Although it is legally permissible for an expert to provide an opinion on the ultimate issue, this remains a topic of debate among psychological and psychiatric experts who conduct forensic mental health assessments.[68]

B. Forensic Mental Health Assessments in Manitoba

In the adult forensic system in Manitoba, the majority of assessments are requested to assist the court in determining fitness to stand trial based on current mental health issues, and/or criminal responsibility based on the mental state of the individual at the time of the index offence. The most frequently-ordered assessments over the past six years were for fitness to stand trial (56%), followed by criminal responsibility (31%), and full assessments (13%).[69] Other Canadian researchers have reported a similar proportion of full assessments ordered, although they reported that approximately 68% of requests in their sample were for fitness assessments, and 21% were for assessments of criminal responsibility.[70] In contrast, the *YCJA* allows the court to order assessments for a broader range of issues,

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66 *R v Mohan*, [1994] 2 SCR 9 at 10, 20–25, 114 DLR (4th) 419.

67 *R v R (D)*, [1996] 2 SCR 291 at para 39, 136 DLR (4th) 525.

68 See e.g. Ira K Packer, *Evaluation of Criminal Responsibility* (New York, NY: Oxford University Press, 2009)

69 Sabrina Demetrioff & Hygiea Casiano, "Forensic Mental Health Assessments: Characteristics of Individuals found Not Criminally Responsible by Reason of Mental Disorder (NCRMD) Versus Those Found Criminally Responsible" (2020) [unpublished].

70 Maurice M Ohayon et al, "Fitness, Responsibility, and Judicially Ordered Assessments" (1998) 43:5 Can J Psychiatry 491 at 492.

including bail and sentencing considerations.[71] The sections of the *Criminal Code* that address mental disorder and court-ordered assessments of fitness and criminal responsibility apply to youth accused as well as adults, but the *YCJA* specifies additional requirements and considerations when conducting youth assessments (e.g. providing a copy of the assessment report to the parent of the youth accused).[72] An assessment of fitness to stand trial or criminal responsibility may be ordered at any point during court proceedings. It can be initiated by the court (i.e. the judge), the accused, or, provided certain conditions are met, by the prosecution. In order for the prosecutor to apply for an assessment order, the accused must have raised the issue of fitness or of mental capacity for criminal intent, or the prosecutor must be able to satisfy the court that there are reasonable grounds to consider the issue. Roughly 10 to 20% of individuals referred for an assessment of criminal responsibility are deemed eligible for the defence by the forensic mental health team in Manitoba every year.[73]

C. Quality of Forensic Mental Health Assessments

The quality of forensic mental health reports is important for legal professionals, as well as accused persons. In addition, studies have shown that experts themselves are interested in becoming aware of potential biases in their work and improving their evidence to the court.[74] Multiple studies have examined the quality of forensic assessment reports, examining factors such as the inclusion of demographic information, sources of information, ethical considerations, use of psychological assessment measures, and highlighting the relationship between clinical evidence and the evaluator's opinion.[75] A recent study used statistical modeling to examine the accuracy of assessors' judgements regarding competency to stand trial and found that assessors were able to distinguish between competent and non-competent individuals with a high level of ability, although there were some limitations to these findings.[76]

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71 *YCJA*, *supra* note 3, s 34(2).

72 *Ibid*, s 34(7).

73 Demetrioff & Casiano, *supra* note 69.

74 See e.g. Iudici et al, *supra* note 60.

75 Kristen Fuger et al, "Quality of Criminal Responsibility Reports Submitted to the Hawaii Judiciary" (2014) 37 Intl J L & Psychiatry 272 at 273.

76 See Douglas Mossman et al, "Quantifying the Accuracy of Forensic Examiners in the Absence of a 'Gold Standard'" (2010) 34 Law Hum Behav 402.

Comparatively, little is known about how forensic mental health assessments are perceived by the lawyers who request these assessments and the judges who make final rulings on a defendant's case.[77] An early study in the United States surveyed defence lawyers regarding a number of issues related to not guilty by reason of insanity (NGRI) assessments and found that the lawyers were unsatisfied with the state hospital's NGRI assessment in 55% of cases.[78] Concerns included that the evaluators were reluctant to deem defendants "insane", that the evaluation was not comprehensive or that the assessor did not spend sufficient time with the defendant, and that reports contained contradictory statements.[79]

There have also been positive reviews of forensic mental health evaluations by legal professionals. In one study, the concordance between mental health professionals' opinions and court determinations of fitness to stand trial was high and there was a tendency to regard forensic examiners as experts who should make the determination of fitness rather than leave it to the court to make a legal determination.[80] In South Australia, magistrates were generally satisfied with the quality of expert reports and were interested in assessment of mental health history, brain impairment, and opinion regarding clinical diagnosis.[81] Another Australian study surveyed legal representatives (solicitors, barristers, and lawyers) regarding their opinions about using psychologists as experts and found that participants described good reports as being well-formatted with "a clear link between facts and opinions", containing detailed information about client background, diagnosis, likely outcomes, and treatment plan.[82] In contrast, poor reports were described as lacking in these areas, as well as

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77 Amanda J White et al, "Fitness to Stand Trial: Views of Criminal Lawyers and Forensic Mental Health Experts Regarding the Role of Neuropsychological Assessment" (2015) 22:6 Psychiatry Psychol & L 880 at 881.

78 Richard A Pasewark & Paul L Craig, "Insanity Plea: Defense Attorneys' Views" (1980) 8:4 J of Psychiatry & L 413 at 432.

79 *Ibid* at 433.

80 Patricia A Zapf et al, "Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?" (2004) 4:1 J Forensic Psychol Prac 27 at 34, 35.

81 Andrew Day et al, "The Uses of Court-Ordered Psychiatric and Psychological Reports in South Australian Magistrates' Courts" (2000) 7:2 Psychiatry, Psychology & L 254 at 256.

82 Elena Gianvanni & Stefanie Sharman, "Legal Representatives' Opinions Regarding Psychologists Engaging in Expert Witness Services in Australian Courts and Tribunals" (2016) 24:2 Psychiatry, Psychology & L 223 at 228.

lacking objectivity and information about clinical observations.[83] Information from a nearly 20-year old study in the United States surveyed judges and lawyers and found that participants were primarily interested in clinical diagnosis, followed by an analysis of whether the condition met the relevant legal threshold and an ultimate opinion on the legal issue.[84] Notably, to our knowledge, none of the studies examining the opinions of judges and lawyers has included Canadian data.

IV. THERAPEUTIC JURISPRUDENCE

As contact between the criminal justice system and those diagnosed with mental illness increased, the theory of therapeutic jurisprudence was developed. This framework posits that the law itself functions as a kind of therapeutic agent.[85] According to this theory, "[l]egal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces" that may produce either therapeutic or anti-therapeutic consequences.[86] It has become clear that actions taken by legal practitioners often have health consequences for defendants.[87] For example, behavioural contracts developed in the mental health arena have been used in some courts to increase the likelihood of offenders adhering to their conditions of probation.[88] A post-sentencing intake process that identifies needs and refers defendants to available services on a voluntary basis would be another example of the embodiment of such principles.[89] Although the concept of therapeutic jurisprudence can be applied whenever an individual with mental health issues becomes involved in the criminal justice system, the connection between the mental health and criminal justice systems becomes explicit in the context of court-ordered mental health assessments. It is unclear, at this point, how the development of therapeutic jurisprudence

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83 *Ibid* at 229.

84 See Redding, Floyd & Hawk, *supra* note 62.

85 David B Wexler, "An Orientation to Therapeutic Jurisprudence" (1994) 20:2 New Eng J Crim & Civ Confinement 259 at 259.

86 *Ibid*.

87 See William G Schma, "Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts" (2003) 82:1 Michigan Bar J 25.

88 David Wexler, "Therapeutic Jurisprudence: An Overview" (2000) 17 TM Cooley L Rev 125 at 131–32.

89 Pamela Casey & David B Rottman, "Therapeutic Jurisprudence in the Courts" (2000) 18:4 Behav Sci & L 445 at 449.

principles has affected Canadian courts and their use of forensic mental health systems.

The findings in the literature to date highlight the vulnerability of those who have a mental disorder and come into contact with the justice system. Now that it has been established that there is an increasing number of individuals in the community who have both a diagnosed mental illness and justice involvement, the question becomes: what can be done to truly help those who are the most vulnerable, the individuals who are caught at the nexus of the mental health and justice systems? How do the courts use forensic mental health assessments? Are they being appropriately accessed? Are the requests for forensic mental health assessments used as a means of getting help for the defendant, even if criminal responsibility or fitness to stand trial is not at issue? Could another mechanism provide support for these individuals?

V. Proposed Analysis

Despite the paramount need, no concerted mental health strategy exists between the legal and medical sectors. Forensic mental health, with its target population of individuals with mental illness who are justice-involved, represents one of the most complex and challenging areas of mental health. Results from forensic assessments are heavily relied upon in legal proceedings and can be crucial in legal decision-making.[90] Research is needed on how mental health experts can most effectively communicate relevant information to the courts. Although there have been studies in the United States about potential reasons why forensic evaluations are ordered, there are no available Canadian studies for review. Furthermore, previous studies have been limited by their scope in only including adult offenders, and most predate the introduction of the therapeutic jurisprudence model.

In addition, problems exist within the current model of forensic evaluation orders. In the adult system in Manitoba, the assessment order form contains a series of checkboxes that only allows the clerk of the court to check off the type of evaluation requested. There is no room to note further information that ought to be considered, such as concerns for that particular defendant or any additional knowledge that the courts hope to gain from the assessment. There is generally little communication between

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[90] See e.g. Luther, Mela & Bae, *supra* note 24; Julio Arboleda-Flórez, "Forensic Psychiatry: Contemporary Scope, Challenges and Controversies" (2006) 5:2 World Psychiatry 87.

judicial officials and mental health clinicians, so feedback about the reports is rarely given unless verbal testimony is required, even though the importance of feedback from the courts to improve report quality has been identified in the literature.[91] It is unclear whether the scope of evaluations is adequate for vulnerable adults with conditions such as Fetal Alcohol Spectrum Disorder. To date, no studies have been published to contrast how youth and adult court differ in their use of forensic evaluations.

Mental health clinicians are interested in improving the quality of their contribution to the justice system.[92] Our project aims to understand the elements that go into the request for forensic mental health evaluations by legal professionals and to explore the reasons that specific judicial assessment orders are made. In order to better understand the decision-making process that leads to the ordering of forensic mental health assessments, the authors plan to conduct a survey of legal professionals in Manitoba who work in different types of courts, including problem-solving courts (such as drug treatment court, domestic violence court, and mental health court), as well as traditional criminal law courts. The survey respondents will include judges, defence lawyers, and Crown attorneys who work with criminal cases and would like to share their opinions on forensic mental health assessments. It is hoped that the results of this survey will provide forensic mental health professionals with a better understanding of what their legal counterparts are hoping to learn from forensic assessment reports, what factors indicate to legal professionals that a forensic assessment might be helpful or necessary, and how legal professionals decide to request these assessments (in other words, what thought processes go into the requesting of assessments within the existing legislative framework that dictates when and why assessments can be ordered).

An additional goal of the proposed study is to increase communication and collaboration between legal and forensic mental health professionals (some researchers have even suggested approaches that combine legal and mental health input into forensic mental health assessments).[93] To our knowledge, there is no existing data that summarizes these issues in the

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91 See e.g. Richard Robinson & Marvin W Acklin, "Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary" (2010) 33 Intl J L & Psychiatry 131.

92 See e.g. Iudici et al, *supra* note 60 at 1.

93 See e.g. Astrid Birgden & Don Thomson, "The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers" (1999) 6:2 Psychiatry, Psychology & L 207.

Manitoba justice system, and the proposed study would increase knowledge and understanding of legal procedures in our province.

A. Project Activities

The authors propose to create a survey which will be available both online and on paper. Questions will focus on the factors that contribute to the decision to request a forensic assessment, feedback regarding the usefulness of those evaluations in judicial decision making, and suggestions for improvement of the evaluation reports. Survey questions will be developed by the authors, using information based on our knowledge and experience, literature searches, and consultation with legal professionals. Once the survey content is finalized and ethical approval for the study has been obtained, the survey will be administered both in person at a joint Crown and Defence Conference in Manitoba and through an online link. Judges will be canvassed to complete the survey at a conference that occurs the same week as the Crown and Defence Conference. There are 30 judges in Winnipeg and ten in rural Manitoba, as well as approximately 150 Crown attorneys and 115 defence lawyers in Manitoba.

The primary focus of our analyses of the results will be examining how decisions are currently being made regarding the ordering of forensic mental health evaluations, as well as satisfaction with forensic mental health reports. The content of the questionnaire will allow us to contrast processes and reasoning in youth and adult court, along with examining potential differences between rural and urban courts.

It is anticipated that the results will be of great interest to both legal and mental health professionals. In terms of knowledge translation, we plan to develop a workshop based on the survey results to help increase the knowledge of legal professionals regarding the nature and purpose of forensic assessments and foster increased communication between legal and forensic mental health systems. There is potential for the workshop to be delivered via webinar, as well as in person, so that legal professionals in rural communities will have access to this educational opportunity. The workshop and webinar will be delivered by the authors, and we will pursue Continuing Professional Development accreditation. Individuals who are not able to attend the workshop will have the opportunity to access a recorded version.

Our primary goals for the proposed study are to:

1. Understand the factors that contribute to the decision by legal professionals to order a mental health assessment.
2. Improve the quality of reports provided to the courts by gaining a better understanding of what information legal professionals hope to obtain when ordering mental health evaluations.
3. Provide information to the courts about the specific issues that mental health assessments can address and the best situations in which to have them ordered.
4. Increase communication between forensic mental health professionals (psychiatrists and psychologists) and legal professionals (lawyers and judges).

The results of this study will help to advance legal knowledge with the development and subsequent communication of recommendations to guide legal professionals in their requests for mental health assessments. The study can foster excellence within the legal profession by aiding professionals to understand the optimal uses of mental health evaluations and helping them to consider therapeutic jurisprudence when interacting with defendants. In addition, the feedback received from legal professionals will help to improve the quality of forensic reports that the courts receive to assist them with decision-making. If legal professionals develop a clearer understanding of forensic mental health assessments, they can potentially improve their clients' understanding of these issues as well.

This project has the potential to increase appropriate access to resources if it identifies an unmet need for mentally ill individuals involved in the justice system. The results may instigate an evaluation of current legislation around forensic evaluations and encourage law reform to allow for greater access to mental health assessments. The potential exists with this project to advance procedural justice to defendants by increasing communication between the mental health and criminal justice systems. For legal professionals, this project can help them understand the best uses of forensic assessments. In turn, the information obtained from this study can help mental health clinicians to understand the rationale behind requests for evaluation orders so that they can improve the quality of reports. Through increased communication, the project could help to enhance elements of procedural justice, including greater accountability for service providers and being more transparent. Greater procedural justice has been shown to lead to defendants seeing legal decisions as legitimate,

incorporating the court's values and goals as their own, and reducing their recidivism rates.[94] It has been suggested that members of stigmatized groups, such as people who have been diagnosed with a mental illness, might be particularly sensitive to procedural fairness.[95]

In consultation with several judges, this project is timely. There has been some discussion about the potential need for expansion of mental health assessments to make the scope of evaluation requests broader in the adult criminal justice system. Vulnerable populations, such as adults with possible Fetal Alcohol Spectrum Disorder, often have multiple needs that may be identified through a mental health assessment, but the current legislation does not allow access to a forensic mental health assessment unless the situation meets the narrow confines of fitness to stand trial or criminal responsibility evaluations.

VI. CONCLUSIONS

There are numerous benefits that can be derived from our proposed study of legal decision-making regarding the ordering of forensic mental health assessments. Understanding what legal professionals want in a forensic assessment is important for forensic psychiatrists and psychologists who do this work and aids in quality improvement endeavors seen in other areas of health care.[96] The proposed project will help to inform mental health assessors' clinical practice when conducting court-ordered assessments, and follows an evidence-based practice approach. "We can work toward improving report content, writing, exposition, and critical

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94 Heathcote W Wales, Virginia Aldige Hiday & Bradley Ray, "Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism" (2010) 33:4 Intl J L & Psychiatry 265 at 265. See also Sarah Kopelovich et al, "Procedural Justice in Mental Health Courts: Judicial Practices, Participant Perceptions, and Outcomes Related to Mental Health Recovery" (2013) 36:2 Intl J L & Psychiatry 113.

95 Amy C Watson & Beth Angell, "Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness" (2007) 58:6 Psychiatric Services 787 at 789.

96 See e.g. Nils Duits et al, "Quality Improvement of Forensic Mental Health Evaluations and Reports of Youth in the Netherlands" (2012) 35:5/6 Intl J L & Psychiatry 440; Nicolas Combalbert et al, "Forensic Mental Health Assessment in France: Recommendations for Quality Improvement" (2014) 37:6 Intl J L & Psychiatry 628; Robert M Wettstein, "Quality and Quality Improvement in Forensic Mental Health Evaluations" (2005) 33:2 J Am Acad Psychiatry & L Online 158.

thinking,"[97] which, in turn, could help to improve the evidentiary basis for legal decision making. Legal education in Canada is in the process of undergoing reform.[98] In a field where consistent and fair decision-making is essential, therapeutic jurisprudence research makes a valuable contribution.[99] In order to improve services to those with mental disorders who interact with the law, Mulvey and Schubert have five key aspects to consider: "expand[ing] the reach of standard and innovative mental health services, divert[ing] mentally ill individuals early in the criminal justice process, enrich[ing] training of criminal justice personnel, us[ing]... data more effectively, and promot[ing]... interdisciplinary aftercare programs for people with mental illness when they are released from jails and prisons."[100]

Ultimately, the proposed study may facilitate the use of therapeutic jurisprudence principles to aid the clients we serve. A next step of this project would see the expansion of this survey among legal respondents nation-wide. Other future directions include more education about forensic evaluations among our legal counterparts and their ideal role in the court system, along with further identification of need and expansion of supports for those who have both criminal justice involvement and diagnosed mental health issues. This proposed study will be an important first step towards these goals.

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97 Wettstein, *supra* note 96 at 167.

98 Brooke Bloom, "Jumping on The Bandwagon: How Canadian Lawyers Can & Should Get Involved in the Emerging Trend to Implement Therapeutic Jurisprudence Practices in Canadian Courts" (2006) bepress Legal Series 1559 at 3.

99 Carrie J Petrucci et al, "Therapeutic Jurisprudence: An Invitation to Social Scientists" (2003) Handbook of Psychology in Legal Contexts 579.

100 Edward P Mulvey & Carol A Schubert, "Mentally Ill Individuals in Jails and Prisons" (2017) 46:1 Crime & Justice 231 at 231.

Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons

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ABSTRACT

In this article, we unpack how changing drug management policies in Canadian federal prisons create new ways of thinking about responses (policy or otherwise) to drug use and the essence of intoxication. As constructions of 'intoxicants' continue to evolve, we endeavour to shed light on the complexities underpinning interpretations of intoxicants that are present yet 'managed' in prison spaces. We recommend policymakers revisit prison legislation that serves to counter harm reduction practices by pushing for 'drug free' prisoners. Harm reduction principles must also continue to be supported in and through prison policies and initiatives.

Keywords: prison; intoxication; drug use; risk; legislation; corrections and conditional release

I. INTRODUCTION

Drug substances can take many forms, including pills, alcohol, nicotine, or hallucinogenic herbs, and the methods of drug consumption can vary; for instance, drugs can be inhaled, injected, ingested, or snorted. Jozaghi estimates that between 155 and 250 million people worldwide use illegal substances[1] and that in Canada there are more

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1 Ehsan Jozaghi, "'The Biggest Mistake God Ever Made was to Create Junkies': Unsafe Injection Practices, Health Care Discrimination and Overdose Deaths in Montreal,

than 125,000 injection drug users.[2] Illegal drugs have extensive repercussions for drug users and taxpayers; costing Canadians approximately $8.2 billion dollars of which $1.4 billion is oriented toward illegal drug injection.[3]

Correctional Services Canada recognizes that "drugs can and do enter federal correctional institutions"[4]; drug use, particularly in prison, has become "an unfortunate fact around the world."[5] Drug use is central to the prison world,[6] where a number of individuals with histories of substance use, street-involvement, and mental illness are housed.[7] Prisons in Canada hold a number of opiate users and appear to be acute 'concentration points' for the use and attendant risks of powerful new synthetic opioids, like fentanyl.[8] Moreover, the risks associated with drug use (e.g., transmitted infections, overdoses) are most pronounced for marginalized members of society.[9]

Canada" (2013) 2:1 Can Graduate J Sociology & Criminology 21 [Jozaghi, "Biggest Mistake"] See also Ehsan Jozaghi, "Science Versus Politics: The Need for Supervised Injection Facilities in Montreal, Canada" (2012) 23:5 Intl J Drug Policy 420.

2 Jozaghi, "Biggest Mistake", *supra* note 1. See also Benedikt Fischer et al, "Crack across Canada: Comparing Crack Users and Crack Non-users in a Canadian Multi-city Cohort of Illicit Opioid Users" (2006) 101:12 Addiction 1760; Thomas Kerr et al, "Responding to an Explosive HIV Epidemic Driven by Frequently Cocaine Injection: Is There a Role for Safe Injecting Facilities?" (2003) 33:3 J Drug Issues 579.

3 See generally Jurgen Rehm et al, "The Costs of Substance Abuse in Canada 2002: Highlights" (March 2006), online (pdf): *Canadian Center on Substance Abuse* <www.ccsa.ca/sites/default/files/2019-05.pdf> [perma.cc/4H84-DKZ6]; Ronald Wall et al, "Social Costs of Untreated Opioid Dependence" (2000) 77:4 J Urban Health 688; Jozaghi, "Biggest Mistake", *supra* note 1.

4 Correctional Service Canada, *Final report of the study group for the risk management of infectious diseases* (Ottawa: CSC, 1999) at 2.

5 Public Safety Canada, *Corrections Fast Facts 2: Drugs in Prisons* (Ottawa: PSC, 2005), online: <www.publicsafety.gc.ca/lbrr/archives/cff-2-2005%20e-eng.pdf> [perma.cc/93ZC-M4JR]; Emily van der Meulen, "'It Goes on Everywhere': Injection Drug Use in Canadian Federal Prisons" (2017) 52:7 Substance Use & Misuse 884.

6 See generally Ben Crewe, "Prisoner Society in the Era of Hard Drugs" (2005) 7:4 Punishment & Society 457 [Crewe, "Era of Hard Drugs"].

7 See generally Roger C Bland et al, "Psychiatric Disorders in the Population and in Prisoners" (1998) 21:3 Intl J L & Psychiatry 273.

8 Sandra M Bucerius & Kevin Haggerty, "Fentanyl Behind Bars: The Implications of Synthetic Opiates for Prisoners and Correctional Officers" (2019) 71 Intl J Drug Policy 133.

9 See e.g. Annie Dufour et al, "Prevalence and Risk Behaviours for HIV Infection Among Inmates of a Provincial Prison in Quebec City" (1996) 10:9 AIDS 1009; Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016)

Van der Meulen and colleagues contend that there exists a growing global recognition that punitive drug policies and drug law enforcement efforts have not had their intended effect of eliminating, or reducing, drug use.[10] Social, political, and media discourses generally reflect or highlight substance-tied intoxication when said intoxication presents as a social problem (e.g., driving under the influence, public intoxication), treating its effects as accidental, intentional, or incidental.[11] In response, risk management initiatives have been developed and implemented in hopes to create spaces for safer drug use, thus preserving lives.[12] Consistent with the importation perspective,[13] what happens in mainstream society, in time, happens in prison settings. The movement toward risk management tied to intoxicant use is no exception as harm reduction is slowly making its way into federal prisons.[14]

In this paper, we aim to address significant gaps in our thinking about intoxication, the substances that create the state of intoxication, and how the policing of intoxicants is changing forms in Canadian federal prisons, via the introduction of risk management programs tied to drug use against the backdrop of a continued push for drug free prisons. We reflect on the current Canadian socio-political climate of harm reduction and the federal initiatives and preventative measures rolled out by Canada's federal government and correctional service, and then present intoxication and prison drug use as both a health problem and a social construct.[15] Indeed, complexities informing interpretations of intoxicants that are present yet

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62:3 Can Family Physician 215; Céline Poulin et al, "Prevalence of HIV and Hepatitis C Virus Infections Among Inmates of Quebec Provincial Prisons" (2007) 177:3 Can Medical Association J 252; Leiyu Shi & Gregory D Stevens, *Vulnerable Populations in the United States*, 2nd ed (San Francisco, CA: Wiley, 2010); Bucerius & Haggerty, *supra* note 8.

10 Emily van der Meulen, Ann De Shalit & Sandra Ka Hon Chu, "A Legacy of Harm: Punitive Drug Policies and Women's Carceral Experiences in Canada" (2018) 28:2 Women & Crim Justice 81.

11 See generally Angus Bancroft, *Drugs, Intoxication and Society* (Cambridge, UK: Polity, 2009).

12 van der Meulen, *supra* note 5.

13 See generally John Irwin & Donald R Cressey, "Thieves, Convicts, and the Inmate Culture" (1962) 10:2 Soc Problems 142.

14 van der Meulen, *supra* note 5.

15 See generally Susan Boyd, Connie Carter & Donald MacPherson, "Making Drug Use into a Problem: The Politics of Drug Policy in Canada" in W Antony, J Antony & L Samuelson, eds, *Power and Resistance: Critical Thinking about Canadian Social Issues* (Winnipeg: Fernwood, 2017) 344.

'managed' in prison spaces remain a challenge for correctional workers and prisoners alike; thus, we contend, perhaps it is time to revisit legislation that stands in opposition to the values and interpretations underpinning harm reduction practices tied to prisoner drug use.

II. CONSTRUCTING DRUG USE AND INTOXICANTS

Typically, there are two central (mis)perceptions about intoxication that continually re-emerge in society. First, citizens mostly think of the experience of intoxication — getting drunk, getting high, and so on — as happening at largely psychological and physiological levels.[16] The content and the construction of the experience of intoxication itself is less commonly considered. Second, when intoxication is considered, even as a point of study we too often, although not always, turn it into a problem, rather than seeing it as a societal social practice,[17] as much bounded by social rules, norms, and conventions as any other social activity in everyday life (for instance, alcohol in social settings is often a norm in society, but there are also social settings where the same could be said of heroin use. For instance, how about heroin use at a safe injection site?).[18]

Pleasure[19] is used to validate and legitimate select, culturally privileged,

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16 See generally Bancroft, *supra* note 11. See also Angus Bancroft et al, "Working at Pleasure in Young Women's Alcohol Consumption: A Participatory Visual Ethnography" (2014) 19:3 Sociological Research Online 1.

17 Bancroft, *supra* note 11.

18 For examples of discussions concerning drug use shaped by particular contexts, settings, and social activities, see Andrew Woolford, "Tainted Space: Representations of Injection Drug-use and HIV/AIDS in Vancouver's Downtown Eastside" (2001) 129 BC Studies 27; Anke Stallwitz, *The Role of Community-Mindedness in the Self-Regulation of Drug Cultures* (New York, NY: Springer, 2012); Susan Boyd, Dave Murray & Donald MacPherson, "Telling Our Stories: Heroin-Assisted Treatment and SNAP Activism in the Downtown Eastside of Vancouver" (2017) 14:1 Harm Reduction J 36; Andrew Ivsins et al, "From Risky Places to Safe Spaces: Re-assembling Spaces and Places in Vancouver's Downtown Eastside" (2019) 59 Health & Place 102164.

19 Pleasure is here conceived of as a 'good' consumed only in instances where putative benefits outweigh any real or imagined risks; pleasure is thus the utility that describes the difference in these calculations: A Boys et al, "Drug Use and Initiation in Prison: Results from a National Prison Survey in England and Wales" (2002) 97:12 Addiction 1551. Pleasure is not a singular positive state of being, and can both construct and challenge the identities, spaces, and rituals that maintain key group and personal boundaries: Bancroft et al, *supra* note 16. Bancroft and colleagues suggest that pleasure "can involve invoking unpleasurable activities such as extreme, forced intoxication in

modes of consumption and sociability[20] while disregarding or discounting others. Focusing upon alcohol consumption, for example, Bancroft and colleagues suggest that, "[t]he many activities in which people may engage in and identities they may construct around alcohol are reduced to one, that of unbounded, unfettered sociability."[21] In a sense, pleasure can be intimately tied to the permittance or disavowal of intoxication. However, recognizing that pleasure seeking behaviours presuppose choice of which not all social actors may have the similar social privilege to engage (especially when drug use is tied to coping mechanisms and addiction), the policing of intoxication and intoxicants is very much dependent on perception of risk, severity, and security in diverse environments.

Nevertheless, it is the social aspect of intoxicants that requires much attention; all social activity happens somewhere, whether it be sipping a coffee in a café or injecting, ingesting or snorting fentanyl in prison. Even with the same consumer, the effects of the drug may vary according to diet, mood, and time of day.[22] One could also argue that the social aspect creates a social site or space for particular types of activity to occur. As Nugent contends, how intoxication is experienced depends on what is consumed, in what quantities, the social context, and the spatial setting.[23] The social context refers to the meaning bound up with the act of consumption: "There is a wide spectrum covering the individual act of gratification at one

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the pursuit of pleasure, and finding pleasure in risk and transgression": Bancroft et al, *supra* note 16 at 2 [emphasis added]. Yet, pleasure is not always a 'free space' as advertised in society, where identities can be freely constructed and pleasures experienced without limits or cost. Pleasure is an aspect of social organization and subject to social control: see generally Bancroft et al, *supra* note 16. Sociologically speaking, pleasure can be as broad as the limits to which humans delineate, as there are countless ways for social beings to experience pleasure or feel pleased in their society. In essence, while we might have greater liberties in society to engage in various pleasing or pleasurable activities and interactions, in the prison setting such pleasures are often curtailed, their loss being a pain of imprisonment and their restriction another factor underpinning the complex relationship between correctional officer and prisoner: see Gresham M Sykes, *The Society of Captives: A Study of Maximum Security Prison* (Princeton: Princeton University Press, 1958).

20 Bancroft et al, *supra* note 16. See also Pat O'Malley & Mariana Valverde, "Pleasure, Freedom and Drugs: The Uses of 'Pleasure' in Liberal Governance of Drug and Alcohol Consumption" (2004) 38:1 Sociology 25.

21 Bancroft et al, *supra* note 16 at 1.

22 Steven Topik, "Coffee as a Social Drug" (2009) 71 Cultural Critique 81 at 101.

23 Paul Nugent, "Modernity, Tradition, and Intoxication: Comparative Lessons from South Africa and West Africa" (2014) 222 Past & Present 126 at 126.

end, and performative bouts of consumption, at the other end—with many gradations in between."[24] The setting refers to the spatial configuration under which the act of consumption takes place: it may be just anywhere, it may be located in a clandestine location or channeled into approved and controlled spaces such as overdose prevention sites or hospital wards.

Together, the context and the setting shape the overall experience of intoxication. However, the issue of modernity is germane to these dimensions; how and where intoxicants are consumed in prison and general society is intimately bound up with ideas about the wider consequences of consumptive acts and the ways in which intoxication is perceived, regulated, and produced.[25]

For instance, as McIntosh and McKeganey contend, in the minds of many people "addiction to illegal drugs is a one-way road leading inevitably to destitution and ultimately to the death of those who become addicts. This image, however, could hardly be further from the truth."[26] Certainly, drug users are at a risk of a range of adverse health outcomes, yet, not all drug users are addicts and there is a pathway to recovery from addiction.[27] Recall, how one constructs drug use and types of intoxicants, can change depending on the context in which one is socially and spatially situated. Chemical intoxicants, such as hard drugs, have historically lacked a gray area in societal perception or in terms of the law.[28] To self-administer any hard drugs is, as Letcher contends:

> [T]o be branded by mainstream society a 'drug-abuser,' a discursive label that castigates and marks one as a deviant member of society, someone who has forfeited the normal rights of citizenship and become a justified target for the 'war on drugs'. Drug -users/abusers are socially excluded and, if caught and brought to justice, may be spatially excluded in prisons and detention centers.[29]

Such a label carries connotations of the user as societal pollution and threatening or dangerous to others,[30] largely due to "the constructed image

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24 *Ibid.*

25 *Ibid.*

26 James McIntosh & Neil McKeganey, "Addicts' Narratives of Recovery from Drug Use: Constructing a Non-addict Identity" (2000) 50:10 Soc Science & Medicine 1501 at 1501.

27 *Ibid.*

28 *Ibid.* See also Andy Letcher, "Mad Thoughts on Mushrooms: Discourse and Power in the Study of Psychedelic Consciousness" (2007) 18:2 Anthropology Consciousness 74.

29 Letcher, *supra* note 28 at 77.

30 See generally Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and*

of the heroin-injecting addict — as a morally degenerate vector of disease or as 'drug-crazed' criminal — about which most anxieties about drugs are orientated."[31]

On the other hand, however, some intoxicants are socially acceptable and bear little or no stigma in society. For instance, Letcher contends that: "the use of certain other addictive or habit forming substances, caffeine and alcohol for example, have been naturalized to such an extent that it would be laughable even to consider them drugs."[32] For instance, coffee; "one of the most widely consumed beverages and internationally traded commodities in the world in good part because caffeine is the world's most popular drug, a legal drug at that."[33] But coffee's status in society has not always been the case.[34]

Although abounding perceptions of intoxicants exist in society, the practices and methods of managing intoxicants remain of concern. Social aspects, as well as how pleasure is experienced, inure in drug use and consumption, yet the sociality in drug use moves in lockstep with the spatial dimensions of drug use. Said differently, perceptions of risk and security mediate constructions of intoxicants and their use, all informing ongoing challenges for those tasked with policing intoxicants in society more generally and in prison spaces. Regarding the latter, prison drug use, shifting tides of drug policies and management that attempt to grapple with the realities of drug use and dependency, promote a contemporary climate of harm reduction through preventative prison drug use initiatives, fully

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Taboo (London: Routledge, 1994); Kevin Hetherington, *New Age Travellers: Vanloads of Uproarious Humanity* (London, UK: Cassell, 2000).

31 Letcher, *supra* note 28 at 77. See also Mike Jay, *Emperors of Dreams: Drugs in the Nineteenth Century* (Sawtry: Dedalus, 2000); Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (London, UK: Phoenix Press, 2001).

32 Letcher, *supra* note 28 at 77.

33 Topik, *supra* note 22 at 81 [emphasis added].

34 As a social drug, coffee "has followed a circuitous path to legality and to popularity. Coffee's status has owed as much to its social role, viewed as both virtuous and pernicious, as to its pharmacological effects": see Topik, *supra* note 22 at 81 [emphasis added]. Yet, rarely has it been outlawed as an intoxicant (for further details on this history, see *ibid*). Coffee consumption occurs in various settings, and the rituals of consumption (such as the 'wake up and smell the coffee' breakfast or the 'coffee break') have manifested quite different social registers. The social spaces in which it is used is intimately involved in social constructs that perpetually negotiate its permittance in society. As Topik suggests, "[t]he locale, circumstances, and social ceremonies are as meaningful and consequential as coffee's pharmacological effects": see Topik, *supra* note 22 at 102.

informed by socio-political or cultural influence. The consequence is then contradictions in both interpretations of intoxicants and their management in prison spaces; each a challenge for correctional workers.

III. POLICING INTOXICANTS IN SOCIETY: CONTEMPORARY DRUG POLICIES IN CANADA

The pursuit of pleasure might stand as one of the many explanations for the recent increase in the incidence and prevalence of illicit drug use in many parts of the world;[35] however, drug policies do not operate in a vacuum; policies arise from greater economic, political, and social influences. Moreover, Canada is in the midst of an opioid crisis, which calls into question the risks associated with opioid use generally and how government initiatives and preventative measures attempt to combat drug use in society (and prisons). A recent United Nations report found Canadians to be the world's second largest economy of per-capita consumers of opioids.[36] In 2015, Canadian doctors wrote opioid prescriptions to one in every two Canadians.[37] In 2016, there were over 2,800 suspected opioid-related deaths reported in Canada.[38] In 2017, 4,100 opioid-related deaths were reported in the country, most of which were accidental.[39] Health officials have concluded that 4,460 Canadians died from overdoses in 2018, with over 2400 having occurred in Western Canada alone despite increasingly urgent government intervention.[40] The

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35 See generally Cameron Duff, "The Pleasure in Context" (2008) 19:5 Intl J Drug Policy 384.

36 Carly Weeks & Karen Howlett, "Prescription of Opioid Drugs Skyrocketing in Canada", *The Globe and Mail* (18 August 2015), online: <www.theglobeandmail.com/news/national/sales-of-opiod-drug-prescriptionsskyrocketing/article26008639/> [perma.cc/8WMF-YS4S].

37 Karen Howlett, "A Killer High: How Canada got Addicted to Fentanyl", *The Globe and Mail* (8 April 2016), online: <www.theglobeandmail.com/news/> [perma.cc/D6WR-GHZT].

38 See generally Health Canada, *Government of Canada Actions on Opioids 2016 and 2017*, Catalogue No H140236/2017E-PDF (Ottawa: Health Canada, 2017), online: <www.canada.ca/en/health-canada/services/publications/healthy-living/actions-opioids-2016-2017.html> [perma.cc/6352-LTU4] [Health Canada, *Actions on Opioids*].

39 Health Canada, *Opioid-related Harms in Canada* (Ottawa: Health Canada, last modified 17 June 2020), online: <health-infobase.canada.ca/substance-related-harms/opioids/graphs?index=209> [perma.cc/33TA-GMYZ].

40 *Ibid.*

frightening realities of the opioid crisis, we recognize, require drug policies that implement evidence-based practices of harm reduction and prevention.

A remarkable advancement in harm reduction practices was the establishment of North America's first supervised injection facility, *Insite*, which opened on 22 September 2003.[41] Operating on a harm reduction model, *Insite* is a space in the Downtown Eastside of Vancouver, BC, where an individual may inject drugs and connect with a variety of health care services without fear of arrest.[42] As Jozaghi and Reid indicate, "the policy change toward improving access to sterile syringes and the operation of Insite, for example, have been found to contribute to reductions in syringe sharing… [and] drug overdose deaths in the Downtown Eastside."[43] Perhaps for these reasons, there is broad support for programs like *Insite* from health, social service, human rights, legal, prisoner advocacy, and related organizations and associations across Canada.[44]

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41 Ehsan Jozaghi & Andrew A Reid, "A Case Study of the Transformative Effect of Peer Injection Drug Users in the Downtown Eastside of Vancouver, Canada" (2014) 56:5 Can J Corr 563. See also Martin A Andresen & Jozaghi Ehsan, "The Point of Diminishing Returns: An Examination of Expanding Vancouver's Insite" (2012) 49:16 Urban Studies 3531; Ehsan Jozaghi & Martin A Andresen, "Should North America's First and Only Supervised Injection Facility (InSite) be Expanded in British Columbia, Canada?" (2013) 10:1 Harm Reduction J 1.

42 Jozaghi & Reid, *supra* note 41 at 564. See also "Insite: Supervised Consumption Site" (last visited 14 May 2020), online: *Vancouver Coastal Health* <www.vch.ca/locations-services/result?res_id=964> [perma.cc/YK8X-E4Q8]. To date, researchers have demonstrated the effectiveness of the facility and other harm reduction programs in the community (for a concise summary of the research, see Dan Small, "An Appeal to Humanity: Legal Victory in Favour of North America's only Supervised Injection Facility: Insite" (2010) 7:1 Harm Reduction 23). See also Jozaghi, "Biggest Mistake", *supra* note 1; Ehsan Jozaghi, Hugh Lampkin & Martin A Andresen, "Peer-engagement and its Role in Reducing the Risky Behaviour Among Crack and Methamphetamine Smokers of the Downtown Eastside Community of Vancouver, Canada" (2016) 13:1 Harm Reduction J 19.

43 Jozaghi & Reid, *supra* note 41 at 564–65.

44 van der Meulen, *supra* note 5 at 898. As van der Meulen indicates, "[o]ver 240 such organizations [from areas such as health, social services, human rights, legal, and prisoner advocacy, etc.] recently endorsed a statement in support of PNSPs [prison-based needle and syringe programs], calling on the federal government to implement them without delay." The statement further serves to remind Canadians that "prisoners are part of our communities; for too long, they have been mistakenly seen as outsiders. Prisoners are our mothers, fathers, partners, daughters, sons, constituents, family and friends": see "Canada Can't Wait: The Time for Prison-based Needle and Syringe Programs is Now" (last modified 1 June 2016), online: *Canadian HIV/AIDS Legal Network* <www.aidslaw.ca/site/canada-cant-wait/?lang=en> [perma.cc/34FD-9KEQ].

Nonetheless, since 1987, Canada has had successive drug strategies in place that strive to balance public health and public safety objectives through the key pillars of prevention, treatment, enforcement and, at times, harm reduction.[45] Under the National Anti-Drug Strategy (NADS) enacted by the Harper government in 2006, the government removed the harm reduction pillar. Canada's approach to drug policies, especially between 2006 and 2015 when federal Conservative governments were in power, was modeled on a 'tough on crime' and 'law and order' framework, with drug criminalization as a core component.[46] Perhaps this is without surprise given the criminalization of drugs in Canada in particular "has a long history that is strongly connected to social marginalization, racism, and sexism, dating back to at least the 20th century."[47]

In 2016, under the current Liberal Trudeau government, a new drug strategy formally restored harm reduction as a key pillar in Canada, alongside the existing pillars of prevention, treatment and enforcement.[48] The (re)inclusion of harm reduction as a pillar of Canada's drug policy, hopefully, better enables the government to address the current opioid crisis[49] and evidences the government's commitment to harm reduction-focused policies—such as support for properly established and maintained

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Whether using drugs or not, people who are incarcerated have a legal, ethical, and moral right to adequate health care and related supports, including harm reduction programs.

45 Health Canada, The *New Canadian Drugs and Substances Strategy* (Ottawa: Health Canada, last modified 12 December 2016), online: <www.canada.ca/en/health-canada/news/2016/12/new-canadian-drugs-substances-strategy.html> [perma.cc/ACF6-859T] [Health Canada, *New Substances Strategy*].

46 van der Meulen, De Shalit & Ka Hon Chu, *supra* note 10 at 86. For instance, a significant example of heightened criminalization occurred in 2007 when the National Drug Strategy was renamed the National *Anti*-Drug Strategy, signaling an expanded punitive drug control framework and eliminating harm reduction as a core feature of the Federal government's response to drugs. See also Kora DeBeck et al, "Canada's New Federal 'National Anti-Drug Strategy': An Informal Audit of Reported Funding Allocation" (2009) 20:2 Intl J Drug Policy 188.

47 van der Meulen, De Shalit & Ka Hon Chu, *supra* note 10 at 85. See also Catherine Carstairs, "The Racist Roots of Canada's Drug Laws" (2004) 84:1 Beaver: Exploring Canada's History 11; Patricia G Erickson, "Social Regulation of Drugs: The New 'Normal'?" (2015) 5 Radical Criminology 193; Todd Gordon, "Neoliberalism, Racism, and the War on Drugs in Canada" (2006) 33:1 Soc Justice 59; Ehsan Jozaghi, "'A Little Heaven in Hell': The Role of a Supervised Injection Facility in Transforming Place" (2012) 33:8 Urban Geography 1144 [Jozaghi, "Heaven in Hell"].

48 Health Canada, *New Substances Strategy*, *supra* note 45.

49 *Ibid.*

overdose prevention sites and increased access to naloxone. In addition, one could also argue that, in some ways, with the decriminalization of marijuana in 2019 and the associated pardoning of those with prior charges tied to marijuana use,[50] the push for drug decriminalization is gaining momentum in Canadian society.[51] At the 2018 National Caucus meeting for Liberal MPs, one of the top priorities by delegates was the decriminalization of low-level drug possession.[52] However, the current federal Liberal government's conversations about decriminalization at the federal level, despite talk of decriminalization of possession of diverse drugs and greater harm-reduction practices, have not translated into an alternative to criminalization and, in some cases, the resulting incarceration.

IV. Drugs in Prison: Internationally and in Canada

Turning to prisoners, specifically the motives and meanings associated with prison drug use, researchers have conducted several qualitative studies in the United Kingdom.[53] Certainly, Ben Crewe's research stands out for its explicit analysis of prisoner drug use.[54] Using an ethnographic approach to understand 'the prisoner society,' Crewe's focus on the social life of British prison officers strongly supports the notion that "the role of drugs in prison

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50 See Bill C-93, *An Act to provide no-cost, expedited record suspensions for simple possession of cannabis*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 20.

51 Rachel Aiello, "Sex Work, Drugs, and Pharmacare: What Liberals Want in 2019 Platform", *CTV News* (21 April 2018), online: <www.ctvnews.ca/politics/sex-work-drugs-and-pharmacare-what-liberals-want-in-2019-platform> [perma.cc/VNG8-XS6B].

52 *Ibid.* The argued benefits of the decriminalization of drug possession, although beyond the scope of our paper, include reductions of drug use, infection, and rates of overdose among drug users: Boyd, Carter & MacPherson, *supra* note 15. See also Tristin Hopper, "What Would it Look Like if Canada Decriminalized all the Drugs?", *National Post* (2 August 2018), online: <nationalpost.com/news/canada/what-would-it-look-like-if-canada-decriminalized-all-the-drugs> [perma.cc/N6AY-Q455].

53 See e.g. Tony Bullock, "Changing Levels of Drug Use Before, During and After Imprisonment" in Malcolm Ramsay, ed, *Prisoners' Drug Use and Treatment: Seven Research Studies* (London, UK: Home Office Research, Development & Statistics Directorate, 2003) 23; Nina Cope, "Drug Use in Prison: The Experience of Young Offenders" (2000) 7:4 Drugs 355.

54 Crewe, "Era of Hard Drugs", *supra* note 6. See also Ben Crewe, "Prison Drug Dealing and the Ethnographic Lens" (2006) 45:4 Howard J Crim Justice 347 [Crewe, "Prison Drug Dealing"]; Ben Crewe, *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison* (Oxford: Oxford University Press, 2009) [Crewe, *Prisoner Society*].

social life and culture would be hard to overstate."[55] According to Crewe, in prisons in the United Kingdom, drug dealing has become the dominant illegal economy.[56] Drugs, specifically drug trafficking, are a source of income in prison, representing one of the few ways for prisoners to make money that they will need to survive upon release or to simply buy canteen products, such as food or toiletries.[57]

In Canada, drugs are particularly accessible for remand populations,[58] as the turnover rate is high and the average length of stay is less than two weeks.[59] Such constant movement "makes it relatively easy for prisoners to smuggle drugs into prison and smuggle it onto different units (drugs are often smuggled within body cavities)."[60] In addition, prisoners may accrue respect by importing drugs because the practice recognizes their "'nerve', resistance to the system, ambition and connections to organized drug networks outside prison."[61] Moreover, the market in prison for drugs cannot be denied, as scholarly literature indicates that patterns of life-time drug use, injection drug use, and problematic drug use are higher among prisoners than the general population.[62]

Internationally researchers have documented the widespread use of drugs by individuals during incarceration. In Canada too, illicit drugs can be regularly found in prisons, although local specifics and concentrations vary.[63] Canadian researchers have found, in some institutions, relatively

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55 Crewe, *Prisoner Society*, *supra* note 53 at 370.

56 See generally Crewe, "Era of Hard Drugs", *supra* note 6; Crewe, "Prison Drug Dealing", *supra* note 54; Crewe, *Prisoner Society*, *supra* note 54.

57 Bucerius & Haggerty, *supra* note 8 at 136.

58 In Canada, remanded prisoners are held in provincial or territorial prisons, which operated under provincial or territorial correctional systems (not CSC).

59 See generally Statistics Canada, *Adult Correctional Statistics in Canada, 2015/2016*, by Julie Reitano, Catalogue No 85-002-X (Ottawa: Statistics Canada, 1 March 2017).

60 Bucerius & Haggerty, *supra* note 8 at 135.

61 Crewe, "Era of Hard Drugs", *supra* note 6 at 470.

62 See generally Austl, Commonwealth, Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2020* (Catalogue No PHE 170) (Canberra: AIHW, 2013); Boys et al, *supra* note 19; Seena Fazel, Parveen Bains & Helen Doll, "Substance Abuse and Dependence in Prisoners: A Systematic Review" (2006) 101:2 Addiction 181; Torsten Kolind & Karen Duke, "Drugs in Prisons: Exploring Use, Control, Treatment and Policy" (2016) 23:2 Drugs Education Prevention & Policy 89.

63 See generally Kristian Mjârland, "'A Culture of Sharing': Drug Exchange in a Norwegian Prison" (2014) 16:3 Punishment & Society 336; Michael Wheatley, "Drug Misuse in Prison" in Y Jewkes, B Crewe & J Bennett, eds, *Handbook on Prisons* (London, ON: Routledge, 2016) 205.

high rates of in-prison injection drug use.[64] However, research relying on prisoners' self-reports of drug use, particularly when conducted internally given drug use remains illegal in prison, can raise concerns about reliability and validity.[65]

In Britain, Crewe found that drugs like heroin and cannabis were most widely available in prison;[66] conversely, in Canada, we are witnessing a heavy influx of pharmacological drugs like fentanyl and oxycontin.[67] For example, fentanyl, a substance 50 to 100 times the potency of morphine,[68] is becoming more prominent as a substance in opioid-related deaths, accounting for 55% of such deaths in 2016 and up to 72% of deaths in 2017.[69] In many cases, other substances are laced with fentanyl, which is then unknowingly consumed by drug users.[70]

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64 van der Meulen, *supra* note 5 at 884. See also Anne Marie DiCenso, Giselle Dias & Jacqueline Gahagan, "Unlocking our Futures: A National Study on Women, Prisons, HIV and Hepatitis C" (Toronto, ON: Prisoners with HIV/AIDS Support Action Network, 2003); Ralf Jürgens & Glenn Betteridge, "Prisoners who Inject Drugs: Public Health and Human Rights Imperatives" (2005) 8:2 Health & Human Rights 47; Will Small et al, "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison" (2005) 40:6 Substance Use & Misuse 831; Correctional Services Canada, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey (Summary)*, by Dianne Zakaria et al, Report No R-211 (Ottawa: CSC, 2010).

65 van der Meulen, *supra* note 5; Kolind & Duke, *supra* note 62.

66 See generally Crewe, "Era of Hard Drugs", *supra* note 6; Crewe, "Prison Drug Dealing", *supra* note 54; Crewe, *Prisoner Society*, *supra* note 54.

67 See generally Correctional Service Canada, *Overdose Incidents in Federal Custody, 2012/2013–2016/2017*, by Laura McKendy, Stephanie Biro & Leslie Anne Keown, Report No SR-12-02 (Ottawa: CSC, 2018).

68 "WHO Recommends the Most Stringent Level of International Control for Synthetic Opioid Carfentanil" (13 December 2017), online: *World Health Organization* <www.who.int/medicines/news/2017/WHO-recommends-most-stringent-level-int-control/en/> [perma.cc/YWG7-MGPT] [*World Health Organization*].

69 McKendy et al, *supra* note 67 at 1. A key contributor to the escalating levels of opioid addiction and fatalities has been the emergence of the synthetic opioid fentanyl and its analogues, such as carfentanyl (World Health Organization, 2017) which is a staggering 10,000 times more potent than morphine: see *World Health Organization*, *supra* note 68. The rise of drug overdose incidents, specifically those involving opioids, remains a growing concern for Canadian society: see McKendy et al, *supra* note 67 at iii. See also Health Canada, *Actions on Opioids*, *supra* note 38. McKendy and colleagues, in their study of overdose incidents in federal corrections, found that the community opioid crisis may be paralleled in custodial settings: see McKendy et al, *supra* note 67 at iv.

70 Health Canada, *Actions on Opioids*, *supra* note 38.

Bucerius and Haggerty examined the implications of opiates for prisoners and correctional officers. They conducted semi-structured interviews with 587 adult prisoners and 131 COs across prisons in a province in Western Canada. Prisoners, they found, felt that; "(1) the presence of fentanyl leads to an increased number of overdoses; (2) prisons are nonetheless perceived as a… safe place to use drugs; (3) fentanyl is often mixed into other drugs, making it hard for drug users to avoid fentanyl; and (4) fentanyl may be weaponized."[71] For officers, they identified; "(1) increased fears about inadvertent personal exposure or widespread institutional opioid contamination; (2) fear of targeted poisonings; (3) changing attitudes towards opioid-using prisoners; and (4) a declining commitment to correctional careers."[72] In effect, the authors suggest that the presence of fentanyl and its analogues in prison "has significantly influenced how prisoners experience prison and relate to each other and how COs perceive their jobs."[73] Without a doubt, new synthetic opioids, particularly fentanyl and its analogues, are informing prisoner drug use and the ways correctional officers police drugs in prison and manage prisoner drug use and dependency.

Reflecting on Bucerius and Haggerty's finding that prisoners felt prison is a safe place to use drugs, it must be noted that the finding remains significant despite the "the stark increase in overdoses in prisons since the onset of the opioid crisis."[74] The spatial and social dimensions, as well as the secure space in close quarters to staff and prisoners alike if an overdose is to occur, creates the prison as a 'safe' site to consume drugs and become intoxicated. Specifically, prisoners typically use in the presence of another prisoner who can inform nearby officers in the event of an overdose, and correctional officers have naloxone, and are occupationally obligated to constantly monitor prisoners for overdose symptoms throughout a work shift.[75] Given most prisoners use of fentanyl "appears to be unintentional, consumed by users who thought they were ingesting something else, a

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71 Bucerius & Haggerty, *supra* note 8 at 133.

72 *Ibid.*

73 *Ibid.*

74 *Ibid* at 135.

75 See generally Bucerius & Haggerty, *supra* note 8. Naloxone is used to offset or temporarily stop the symptoms tied to opioid overdose (see "OSH Answers Fact Sheets: First Aid: Administering Naloxone (naloxone hydrochloride)" (last modified 14 May 2020), online: *Canadian Centre for Occupational Health and Safety* <www.ccohs.ca/oshanswers/hsprograms/firstaid_naloxone.html> [perma.cc/SD92-SPBK].

situation that significantly increases the chances of accidental fatalities," the increased safety provided by using within the company of prisoners and in close contact to officers is possibly lifesaving.[76] Indeed, risk management is a key component of correctional officer work, yet, the dynamic between correctional officers and prisoners suggests prisoners can still hold socially reciprocal relationships within prisons,[77] and that in the case of a potentially lethal overdose there is a higher likelihood that prisoners will be saved.[78]

Overall, in prison, context and setting shape the intoxication experience, as such federal and community efforts to advance harm reduction principles in prison represent a step toward supporting correctional officers and prisoners alike. However, as we now turn, more could be done to recognize the realities of intoxicants in prison; to advance drug policies and legislation based upon empirical evidence; and to assess, construct, and manage intoxicants in prison in a more meaningful way than what penal populism and conservative rhetoric allow.

V. Revisiting Prison Legislation

The continued introduction of safe injection practices and needle exchange programs in federal prisons is perhaps one way that CSC is putting forth efforts toward safer prisoner drug use, despite, at the same time, continuing to focus on 'drug free prisons' and uphold the *Drug-Free Prisons Act*.[79] In theory, the 'drug free prison' law was described as a means "to combat drug use in penitentiaries and ensure that criminals are held accountable for their drug or alcohol abuse while in prison."[80] In practice,

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76 Bucerius & Haggerty, *supra* note 8 at 135. See also Asraf Amlani et al, "Why the FUSS (Fentanyl Urine Screening Study)? A Cross-sectional Survey to Characterize an Emerging Threat to People who use Drugs in British Columbia, Canada" (2015) 12:1 Harm Reduction J 54. The possibility for lifesaving intervention is particularly noteworthy in the case of routine drug using prisoners who are attempting to address their substance abuse needs (i.e., working toward reducing or ceasing their use of drugs).

77 See generally Crewe, "Era of Hard Drugs", *supra* note 6.

78 See generally Bucerius & Haggerty, *supra* note 8.

79 The 'Drug Free Prison' legislation was passed prior to the Conservative Harper government's defeat in the October 2015 federal election and the succession of the Liberal Trudeau government. See *Drug Free Prisons Act*, SC 2015, c 50.

80 Public Safety Canada, *Harper Government Highlights Royal Assent of the Drug-Free Prisons Act* (New Release) (Ottawa, PSC, 18 June 2015), online: <www.canada.ca/en/news/archive/2015/06/harper-government-highlights-royal-assent-drug-free-prisons-act.html> [perma.cc/6VDH-E9D4].

however, the law "empowers the government to cancel an individual's parole if they test positive for illicit drugs in urinalysis, or if they fail or refuse to provide a urine sample, while stipulating that a condition of an individual's release could include abstention from the use of drugs or alcohol."[81]

CSC, in light of the legislation juxtaposed with the push for harm reduction, is seemingly in a conflicting position; both striving for safe drug use while trying to keep the institutions drug free and enforce zero tolerance. This is a position that rests heavily on correctional staff who must uphold the two conflicting positions (e.g., support harm reduction and zero tolerance). In essence, the legislation, which informs the management and policing of intoxicants in prison, creates potential ambiguity and frustration in the correctional officer role and their duties and responsibilities towards prisoners. Not to ignore the unpredictability and possible confusion it suggests to prisoners, who are seemingly encouraged to use safe injection practices but could be penalized for their drug use given the more public nature of the drug use (i.e., increased staff awareness of their drug possession and use given they either sign up for clean needles or use the overdose prevention site).[82] Moreover, the *Corrections and Conditional Release Act* still provides the means to discipline a prisoner when said prisoner is in possession of, or deals in, contraband (ss. i) and takes an intoxicant into their body (ss. k).[83]

With incarceration, however, individuals do not suddenly master their addictions[84] and the challenges associated with drug use; as such the sale, distribution, and use of drugs and substances in Canadian prisons endures.

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81 van der Meulen, De Shalit & Ka Hon Chu, *supra* note 10 at 90. See also "Bill C-12 Drug Free Prisons Act: Brief to the Standing Committee on Public Safety and National Security" (2014), online: *Canadian Criminal Justice Association (CCJA)* <www.ccja-acjp.ca/pub/en/briefs-articles/bill-c-12-drug-free-prisons-act/> [perma.cc/533Y-QLYJ] [CCJA].

82 Indeed, to our knowledge, there is no discussion to revisit, reconsider, or even abolish the 'Drug Free Prison' legislation.

83 Disciplining a prisoner for drug use is in clear contradiction to encouraging prisoners to sign up for clean needles or to use the overdose prevention site (where available); see *Corrections and Conditional Release Act*, SC 1992, c 20.

84 See generally McIntosh & McKeganey, *supra* note 26. The inability for individuals to master their addictions, in society generally and in prison specifically, remains problematic not just from a theoretical perspective, but asking people to master their addictions can become a health and life threat should they not have the resources and supportive networks in place to do so.

Punishment for addiction and the associated drug use, particularly as enshrined in the *Drug Free Prisons* legislation, goes against the principle that harm reduction and treatment is the optimal recourse for prisoners with addictions. In addition, as the Canadian Criminal Justice Association indicates in their brief towards the Canadian Parliamentary Standing Committee on Public Safety and National Security, "the removal or delay of the possibility of parole for those testing positive for drug use further impedes the [correctional] institution's ability to ban drugs in prison, exacerbates the [prisoner's] preparedness for re-integration, subjects her or him to intensified punishment, and does not ensure the safety of society."[85]

In doing so, perhaps it is time to revisit the legislation, particularly given that (i) problematic substance use and illegal drugs have long presented health and safety challenges in federal institutions[86] and (ii) CSC remains committed to addressing substance misuse in accordance with the principles of the new Canadian Drugs and Substances Strategy.[87]

VI. Promoting Harm Reduction in Prison Policies and Initiatives

The Office of the Correctional Investigator recognized the substantial rise in the number of overdose incidents as a result of problematic opioid use.[88] To counteract this trend, various initiatives were implemented by CSC to strengthen drug detection and identification. For instance, CSC has partnered with other federal and provincial public safety stakeholders on a study seeking to assess the efficacy of new and emerging technologies that would allow for non-intrusive detection of synthetic opioids in parcels, mail, and so on.[89] In addition CSC offers drug-related harm reduction options that include, but are not limited to (i) drug treatment programs,[90]

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85 *CCJA*, *supra* note 81.

86 Canada, *Office of the Correctional Investigator Annual Report 2017-2018*, Catalogue No PS100 (Ottawa: CIC, 29 June 2018) at 3, online <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20172018-eng.pdf> [perma.cc/K2EW-ADY3] [CIC, *17/18*].

87 See generally Health Canada, *New Substances Strategy*, *supra* note 45.

88 *Ibid*. A trend, as we previously noted, that mirrors the trend in the community. See also Correctional Service Canada, *Response to the 45th Annual Report of the Correctional Investigator 2017-2018* (Ottawa: CSC, 2018) at 3, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20172018-eng.pdf> [perma.cc/K2EW-ADY3] [CSC, *Response*].

89 CSC, *Response*, *supra* note 88 at 3.

90 See generally Correctional Service Canada, *The Aboriginal Offender Substance Abuse Pro-*

(ii) naloxone availability and opioid substitution through methadone maintenance treatment,[91] (iii) needle exchange,[92] (iv) overdose prevention sites,[93] and (v) bleach distribution for disinfecting used syringes.[94]

First, drug-related treatment programs offered by CSC include *National Substance Abuse Program* (offered at High and Moderate intensities), *Aboriginal Offender Substance Abuse Program* (offered at High and Moderate intensities), *National Pre-release Substance Abuse Program,* and *National Substance Abuse Maintenance Program.*[95] Programming, however, has been critiqued for reasons that include lack of access, infrequency and inconsistency of programming.[96] Second, in 2017, CSC integrated a *Take-Home Naloxone Initiative* into the discharge planning of prisoners on *Opioid Substitution Therapy* (OST).[97] The Naloxone initiative provides individuals on conditional release with take-home kits on release and upon arrival at their community residence. In addition, CSC ensured Naloxone was made

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gram: Examining the Effects of Successful Completion on Post-release Outcomes, by Dan Kunic & David D Varis, Report No R-217 (Ottawa: CSC, 2009); Correctional Service Canada, *Women Offender Substance Abuse Programming & Community Reintegration*, by Flora I Matheson, Sherri Doherty & Brian A Grant, Report No R-202 (Ottawa: CSC, 2008).

91 CIC, *17/18*, *supra* note 86.

92 Correctional Service of Canada, *Prison Needle Exchange Program* (Ottawa: CSC, last modified 28 August 2019), online: <www.csc-scc.gc.ca/health/002006-2005-en.shtml> [perma.cc/2R5S-AEN7] [CSC, *Prison Needle Exchange*]. See also Canada, *Annual Report of the Office of the Correctional Investigator 2015*-2016, Catalogue No PS100E-PDF (Ottawa: CIC, 30 June 2016), online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf> [perma.cc/A5E7-EFMK] [CIC, *15/16*].

93 Correctional Service Canada, *Overdose Prevention Service* (Ottawa: CSC, last modified 28 August 2019), online: <www.csc-scc.gc.ca/health/002006-2003-en.shtml> [perma.cc/9SS5-RW75] [CSC, *Overdose Prevention*].

94 See generally Correctional Service Canada, *Use of Bleach and the Methadone Maintenance Treatment program as Harm Reduction Measures in Canadian Penitentiaries* (Summary) by Jennie Thompson, Dianne Zakaria & Ashley Jarvis, Report No R-210 (Ottawa: CSC, 2010).

95 For an overview see Correctional Service Canada, *National Substance Abuse Programs* (Ottawa: CSC, last modified 24 April 2014), online: <www.csc-scc.gc.ca/correctional-process/002001-2009-eng.shtml> [perma.cc/VZ9L-W3Y2].

96 For example, see Correctional Service Canada, *Twenty Years Later: Revisiting the Task Force on Federally Sentenced Women*, by Meredith Barrett, Kim Allenby & Kelly Taylor, Research Report No R-222 (Ottawa: CSC, 2010); Emily van der Meulen et al, "On Point: Recommendations for Prison-based Needle and Syringe Programs in Canada" (2016), online (pdf): *Ryerson* <www.ryerson.ca/content/dam/criminology/tank/faculty/PNSP%20Report%20Jan%202016.pdf> [perma.cc/NR4U-XXTH].

97 CIC, *17/18*, *supra* note 86 at 4. From 2016 to 2018, the number of prisoners on OST in federal institutions has increased by approximately 25% (from 868 to 1088).

more accessible to staff, further increasing their ability to deliver the lifesaving measure in a timely manner when necessary.[98]

Third, despite generating much concern among correctional staff,[99] the more recent harm reduction strategy of prison-based needle and syringe [exchange] programs (PNSPs) have served to reduce the transmission of infectious diseases (among other benefits) in select prisons internationally for decades.[100] PNSPs have been implemented at six federal institutions: Grand Valley Institution in Ontario, Atlantic Institution in New Brunswick, Fraser Valley Institution in British Columbia, Edmonton Institution for Women in Alberta, Nova Institution in Nova Scotia and Joliette Institution in Quebec.[101] However, a recent statement by the Canadian HIV/AIDS Legal Network suggests such programs are fundamentally flawed:

> [T]his program is fundamentally flawed — violating prisoners' confidentiality in many ways. Prisoners do not trust it. There is no working program in the world that uses this approach, which operates as a very strong barrier to access. At the same time, the PNEP exists only in a handful of prisons, and remains vulnerable to cancellation. While most major political parties have stated their support for a PNSP, the Conservative Party of Canada has vowed to cancel the program if they come into power. The Correctional Service of Canada also has a history of cancelling or failing to meaningfully provide proven harm reduction measures to prisoners. That is why we need a positive decision in court: to ensure that the right to this evidence-based health program is enshrined in law.[102]

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98 Criticism remains as Naloxone for staff is provided as an injectable rather than a spray, which is considered more difficult to use and requires closer contact to the person overdosing on the opioid. For a review of this critique, see Scott Weiner, "Should you Carry the Opioid Overdose Rescue Drug Naxolone?" (23 April 2019), online (blog): *Harvard Health Blog* <www.health.harvard.edu/blog/should-you-carry-the-opioid-overdose-rescue-drug-naloxone-2018050413773> [perma.cc/FF9V-K4JH].

99 "Prison Needle Exchange Program: Handling Needles: Not Our Job!" (7 June 2019), online: *Union of Canadian Correctional Officers* <www.newswire.ca/news-releases/prison-needle-exchange-program-handling-needles-not-our-job-882785802.html> [perma.cc/3PRD-HKY6].

100 CIC, *15/16*, *supra* note 92. See also Kate Dolan, Scott Rutter & Alex D Wodak, "Prison-based Syringe Exchange Programmes: A Review of International Research and Development" (2003) 98:2 Addiction 153; Rick Lines et al, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2nd ed, (Toronto: Canadian HIV/AIDS Legal Network, 2006); Jozaghi, "Heaven in Hell", *supra* note 47.

101 CSC, *Prison Needle Exchange*, *supra* note 92.

102 "A Public Health Failure: Former Prisoner and HIV Groups Suing the Government of

The last harm-reduction we will present opened, most recently, in June of 2019, an overdose prevention site (OPS) was established in Drumheller Institution in Alberta. CSC opened the OPS to "continue ongoing efforts to help prevent fatal and non-fatal overdoses, reduce the sharing of needles, reduce the transmission of infectious diseases [,] [...] reduce the occurrence of skin infections, and facilitate referrals to other health care services and programs."[103] CSC acknowledges "[t]here is no single effective intervention in managing substance use disorders,"[104] and in recognizing the realities of prison drug use and dependency, rightfully remains committed to providing harm reduction measures that appropriately addresses prisoners' needs.[105]

While prison policies and initiatives vary, it is clear they share a vision of promoting harm reduction within prison spaces. By recognizing the significance of these efforts, we acknowledge how the social and spatial dimensions of prison are necessary components of safe drug use. To forgo the benefits of the prison in terms of it acting as a safe place for drug use and dependency is to disavow the successes of harm reduction efforts and prison preventative measures already taking place across the country; it denies and denigrates the experiences of prisoners and correctional officers managing drug use and dependency in prison.[106] We recognize that the prison can be a site of safe drug use and will likely always be a site of drug consumption; as such, it would serve Canadian governments across the political spectrum to do the same and legislate accordingly.

VII. CONCLUSION

In Canadian society, conversations about how drugs are perceived and understood are shifting; government and correctional policy must be on the same page to deal with prison drug use and dependency. In our paper, we recognize that intoxication exists along a continuum of risk and governance. While the policing of intoxication remains reliant upon perceptions of risk, severity, and security, Duff reminds us, "to focus solely on the harms

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Canada for Failing to Provide Access to Effective Prison Needle and Exchange Programs" (9 December 2019), online: *Canadian HIV/AIDS Legal Network* <www.aidslaw.ca/site/news-release-prison-needle-and-syringe-program/?lang=en> [perma.cc/Z8DP-GYBQ].

103 CSC, *Overdose Prevention*, *supra* note 93.

104 *Ibid*.

105 *Ibid*.

106 See generally Bucerius & Haggerty, *supra* note 8.

associated with this behaviour, as almost all existing drug research does, is to fail to reflect the lived experience of illicit drug use in all its confusing heterogeneity."[107] Within the prison context itself, punitive prison and drug policies and zero tolerance towards drug use has accomplished little to address the realities and complexities of prisoners' or correctional officers' lives. Safe injection practices and needle exchange programs remain instrumental to the prison setting. Many of the changes in federal and correctional policy are in response to the real health and security risks associated with drug use in prison.[108]

In essence, a focus of contemporary prison and drug policies requires us to reconsider intoxication and prison drug use as both a health problem and a social construct.[109] Our purpose was to provide the reader with insight into the very complex nature of intoxication and intoxicants as it relates to prisoner drug use. Directing attention towards how federal prisons construct, assess, and manage the risk posed by intoxicants serve to carve open discussions about responses (policy or otherwise) to drug use. To this end, we recommend that policymakers revisit prison legislation that serves to counter harm reduction practices by pushing for 'drug free' prisoners and that, simultaneously, harm reduction principles continued to be supported in and through prison policies and initiatives — making prison a safer place for prisoners, staff, and civilians.

Taken together, less anti-drug use legislation and more harm reduction practices, demonstrates (even endorses) new ways of thinking about drug use, both in and outside of prison, and the essence of intoxication, while advancing the need for continued support and resources for correctional officers and prisoners alike. Recognizing the social and spatial dimensions of drug use allows us to reconsider the essence of intoxication and the nature of its influence in specific contexts and settings. Notwithstanding such recognition, one thing remains clear: as constructions of 'intoxicants' continue to evolve, support and resources for the wellbeing and needs of prisoners and correctional staff must continue and keep apace.

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107 Duff, *supra* note 35 at 385.

108 Bucerius & Haggerty, *supra* note 8 at 137

109 See generally Boyd, Carter & MacPherson, *supra* note 15.

Mr. Big and the New Common Law Confessions Rule: Five Years in Review

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ABSTRACT

The Supreme Court of Canada released its decision of *R v Hart* in July of 2014. The decision provided a two-prong framework for assessing the admissibility of confessions obtained through the undercover police tactic known as "Mr. Big". The goal of the framework was to address reliability concerns, to protect suspects from state abuse, and to reduce the risk of wrongful convictions. The first prong of the test created a new common law evidentiary rule, under which Mr. Big obtained confessions are now presumptively inadmissible. The second prong revamped the existing abuse of process doctrine.

In this article, the authors review the last five years of judicial application of the new *Hart* framework. In total, all 61 cases that applied *Hart* were analyzed qualitatively and quantitatively, looking at whether the goals of the *Hart* framework have been met, what effect the framework has had on the admissibility of Mr. Big obtained confessions, and what, if any, shortcomings the framework has. The authors argue that the flexibility and discretion built into the *Hart* framework have resulted in an inconsistent application of the two-prong test. In the end, the framework has had a negligible impact on the number of confessions that are admitted.

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Keywords: undercover policing; Mr. Big technique; confessions; judicial discretion; admissibility; reliability; probative value; abuse of process; false confessions

I. INTRODUCTION

R v Hart,[1] a case where the use of a Mr. Big obtained confession was challenged, provided the Supreme Court of Canada (SCC) with the opportunity to acknowledge that there are many issues raised by Mr. Big operations. These include the operations' lack of regulation and concerns around permitting the use of potentially unreliable evidence obtained through such techniques. The majority decided to regulate the admissibility of confessions resulting from these stings by creating a two-prong test ("the *Hart* test"). For the first time in decades, the SCC created a new common law evidentiary rule as the first prong of the test. The second prong was an attempt to revamp the abuse of process doctrine.

This paper draws upon a 5-year review of judges' applications of the *Hart* test in subsequent cases. The *Hart* test had a mixed reception at the time it was created; some commentators believed that it did not go far enough in regulating the admissibility of evidence obtained through questionable police tactics.[2] Others believed that it struck an appropriate balance between the state's interest in catching criminals, society's need to prevent wrongful convictions, and the desire to protect suspects from state abuse.[3] In this article, we conduct an analysis on the new admissibility

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1 2014 SCC 52 [*Hart*].

2 Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016) 63 Crim LQ 151; H Archibald Kaiser, "Hart: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 CR (7th) 304; H Archibald Kaiser, "Mack: Mr. Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014) 13 CR (7th) 251; Jason MacLean & Frances E Chapman, "Au Revoir, Monsieur Big? – Confessions, Coercion, and the Courts" (2015) 23 CR (7th) 184; Kirk Luther & Brent Snook, "Putting the Mr. Big Technique Back On Trial: A Re-Examination of Probative Value and Abuse of Process Through a Scientific Lens" (2016) 18:2 J Forensic Practice 131; Chris Hunt & Micah Rankin, "R v Hart: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCJL 321; Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015) 71 SCLR (2d) 415 at 416.

3 David Tanovich, "R v Hart: A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 CR (7th) 298; Lisa Dufraimont, "R v Hart: Standing Up to Mr. Big" (2014) 12 CR (7th) 294; Lisa Dufraimont, "Hart and Mack: New Restraints

framework and its subsequent application, with the aim of answering the following questions:

> Do the goals of the *Hart* framework (including the new common law evidentiary rule) appear to be met?
> What was the effect of the framework on the admissibility of Mr. Big obtained confessions in court?
> What, if any, appear to be the shortcomings of the new framework?

First, we will describe the methodology that was employed to conduct our analysis. Next, we will provide an overview of Mr. Big police investigations in section II of this paper. Specifically, we will describe what Mr. Big undercover operations entail, as well as how evidence obtained as a result of them was dealt with pre-*Hart*. We will then proceed by discussing the *Hart* test, focusing on a more detailed review of its content and goals. In section III, we will take a deep dive into how the *Hart* test was applied by courts between August 2014 and August 2019, through a qualitative and quantitative analysis of cases. Finally, in section IV, we will interpret our findings against the goals set out in *Hart*.

A. Methodology

In evaluating the outcomes of the *Hart* test, our review included the Canadian cases decided between August 2014 and August 2019 where the *Hart* test was applied. The majority of these cases applied the framework to a confession obtained by the Royal Canadian Mounted Police (RCMP) in a Mr. Big type operation. In a small number of cases, judges applied the *Hart* framework to cases where a confession was obtained through other undercover tactics employed by the RCMP. Since the purpose of this analysis is to review the functionality and effects of the framework in its application, we have included these cases in our analysis. However, the vast majority of the discussion in this paper is focused on Mr. Big operations.

To search for cases, we used WestlawNext Canada, noting up the *Hart* decision. The cases were sorted by date, starting with the oldest cases first. All of the cases discussing *Hart* were afforded an initial, cursory scan to determine whether the *Hart* test was applied or whether *Hart* was mentioned but not applied for any number of reasons. For example, some judges mentioned *Hart* outside the context of undercover operations, in relation to the more general analysis of the probative value versus prejudicial

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on Mr. Big and a New Approach to Unreliable Prosecution Evidence" (2015) 71 SCLR (2d) 475 at 485 [Dufraimont, "Hart and Mack"].

effect of evidence proffered by the Crown in a particular case.[4] In other cases, judges used the framework because it "confirmed that the principle against self-incrimination, as enshrined in s. 7 of the *Charter*, is not restricted to statements obtained through traditional police interviews."[5] Only the cases where the test was actually applied (regardless of what type of undercover police investigation was used) were flagged as relevant to our analysis and, therefore, given a more in depth review.

In order to assess whether the subsequent application of the *Hart* test met its stated goals, we reviewed whether and how the relevant factors put forward in *Hart* were considered for each prong of the test. Specifically, the factors we tracked were: the personal characteristics of the suspect (age, mental health, addictions, social, and economical status), the length of the operation, the relationship between the target and the handler, the incentives used, the presence of violence or threats, and the presence and strength of various types of confirmatory evidence. We also assessed the level of scrutiny that judges applied to these factors.

For the quantitative analysis, we coded the factors by attributing each one with a value and variables. As an example of coding, *Hart* mentions a number of characterises (such as youthfulness, financial situation, addictions, education, social alienation, and level of sophistication) that the individual may present and which need to be considered in order to assess both the prejudicial effect versus probative value and whether the tactics used amounted to abuse of process. Each of these characteristics was attributed a value, and the variable could be 'yes' (if the trial judge identified that as present), 'no' (if the trial judge did not identify it as being present), or 'ND' (if it was not discussed in the decision). Using SPSS software, we generated basic statistics indicating the frequency of each factor. We also used SPSS to create combinations of these factors and to establish their frequency. For instance, we combined values that indicated a target was financially destitute with values that indicated the target received significant financial incentives and values indicating there was no corroborative evidence present.

This quantitative analysis was used to get a sense of the frequency with which the factors and combinations of factors listed in *Hart* negatively impacted the reliability of a confession (i.e. that increased the prejudice and decreased the probative value) or increased the likelihood of abuse of

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4 See e.g. *R v Clyke*, 2019 NSSC 137 at paras 21–22.

5 *R v Ball*, 2018 ONSC 4556 at para 63.

process being identified in the cases to which the *Hart* framework was applied. We also analyzed whether there appeared to be any correlation between the presence of the various factors and combinations of factors and the admission or exclusion of the confession (i.e. if the combination made it more likely that the evidence would be excluded). In other words, we used statistical data to determine when confessions were excluded and to create a numerical picture of the factors that may influence the different ways in which judges applied the *Hart* framework.

Through our qualitative analysis, we sought to identify patterns in how each factor was used to justify the exclusion or admission of evidence. This required the use of in-text coding of the judges' language in trial decisions. We then separated the citations into categories for each of the *Hart* factors. This helped piece together a visual narrative of how courts understand and apply the *Hart* test, as well as how and to what extent various circumstances and characteristics of individual targets may factor into the judgement.

Our assessments and conclusions must be read in light of the limitations of the sources available to us and of the cases that we reviewed. First, we only had access to cases that made it to trial; we were generally unable to include cases where the individual pled guilty after confessing[6] or where the RCMP started but did not continue the operation. Second, we had difficulty finding comparators for most of the variables discussed in our analysis. We were not able to compare the factors considered post-*Hart* with the factors considered pre-*Hart*. This was because there was no regulation of Mr. Big confessions prior to *Hart* and because the factors were not consistently applied. Furthermore, the pre-*Hart* case information available is even more scarce than the information available today. Thus, we had to limit ourselves to assessing how the *Hart* framework was applied by judges, comparing that against the test's set goals, as opposed to the pre-*Hart* treatment of confessions. Third, the number of cases where confessions were excluded is notably smaller than the number of cases in which confessions were admitted. This is analyzed more fully later in this paper. Nonetheless, due to the small number of cases where evidence was excluded, our statistical analyses were limited.[7]

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6 Though there were three cases where the accused pled guilty mid-trial after the admissibility of the confession was considered. We included those cases as well.

7 For instance, we were able to run the frequencies of various factors considered and of combinations of factors, but we were unable to assess statistical relevance.

Finally, our conclusions are the result of our interpretation of certain patterns identified. The circumstances of the cases reviewed are very different and not all of the details are available in the reported decisions. This means that a conclusive analysis is impossible. In addition, the *Hart* test incorporates a significant amount of judicial discretion by design, and trial judges are entitled to deference once they have considered and applied all of the relevant factors.[8] Thus, the findings of this review should not be interpreted as reflections on the correctness of the individual judges' decisions to admit or exclude evidence. Rather, the purpose of this review is to assess how judicial discretion is being exercised and the extent to which the relevant factors from *Hart* are discussed.

In an attempt to mitigate some of these limitations, to assess the broader impact of the admissibility framework on Mr. Big operations, and to generate more context for our analysis, we submitted a request under the *Access to Information Act* to the RCMP.[9] We received a response letter[10] indicating that the RCMP does not collect any of the data that we requested and they were, therefore, unable to provide us with any information. This response is striking. While some of our requests were more detailed and would require time to gather the information, other aspects of our requests were straightforward. Considering the large amount of money that goes into these operations,[11] it seems reasonable to assume that, at the very least, the

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8 *Hart*, *supra* note 1 at para 110.

9 The request contained the following questions: *The information sought from across Canada for two periods of time: 1991-July 2014 and July 2014 - 2019. How many Mr. Big operations have taken been started and completed? How many cases made it to trial based on Mr. Big collected evidence? How many cases for which a Mr. Big operation was employed did not go to trial? What were the main reasons? How many Mr. Big operations resulted in conviction after a trial (excluding guilty pleas)? How many Mr. Big targets have pled guilty? How many cases for which a Mr. Big operation was employed made it to trial and resulted in an acquittal or a stay? How many Mr. Big operations were started and then abandoned before the target made a confession? What are the main reasons? What is the average cost of a Mr. Big operation, what is the cost of the most expensive and of the cheapest operation? What is the average length of the surveillance period before contact is made with the target? What is the average, longest and shortest time for a Mr. Big operation? In how many cases did RCMP start surveillance in a cold case for a Mr. Big operation but desisted without going any further? What are the main reasons?*

10 Letter in Response to Access to Information Request from the Access to Information and Privacy Branch, Royal Canadian Mounted Police (2 July 2019) A-2019-03433 [RCMP, Letter in Response].

11 See generally *R v Mildenberger*, 2015 SKQB 27 [*Mildenberger*] ("Operation Fiftig" was a 6-month long operation with a total cost of $311,815.88); *R v Buckley*, 2018 NSSC 1 [*Buckley*] ("Operation Hackman" was a six-month long operation with a forecasted

RCMP would maintain a record of the number of times Mr. Big was employed as an investigative tactic and the cost of these operations. It is simply inconceivable that large sums of money would be approved to conduct and continue Mr. Big investigations without any corresponding record keeping of these costs.

In *Hart*, the SCC specifically condemned the lack of monitoring of these operations.[12] Yet, five years after *Hart,* the RCMP has not improved their record keeping on even the most basic information regarding these operations.

II. CONTEXT

A. Mr. Big Undercover Operations and their Pre-*Hart* Regulation

Mr. Big operations involve the police creating a fictitious criminal organization for the purpose of luring a specific suspect into it. Generally, the police target a single suspect in an unsolved case, with the ultimate goal of getting that suspect to confess to the crime. The people involved in the fictitious criminal organization are all either undercover officers or their agents.[13]

These operations are planned out in advance in a meticulous and targeted manner. The suspect is often watched, and sometimes even wiretapped, for an extended period of time. The police use their surveillance to learn the suspect's habits, hobbies, and routines. The police use the considerable time spent watching their suspect to create a tailored approach for convincing the target to befriend them or work for them.

The police do not target just anyone. The targeted suspects are often socially isolated and alienated from those around them. Many of them are unemployed and have either non-existent or tense family relationships. The operation works best if the suspect is predisposed to being influenced by outside pressures, whether due to having a low IQ, having experienced

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budget of $300,000. The actual cost is not reported in the decision). It is note worthy that in many cases, the costs of these operations are not mentioned in the written decisions. The RCMP does not release the numbers either.

12 *Hart*, *supra* note 1 at para 80.

13 Timothy E Moore, Peter Copeland & Regina A Schuller, "Deceit, Betrayal, and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009) 55:3 Crim LQ 348 at 348.

social stigma, or having experienced a lifetime of racial discrimination, mental illness, poverty, or other vulnerabilities.[14]

Once the suspect is 'hooked' (connected to the organization), the person is quickly befriended by undercover officers and hired to do various jobs for their fictitious criminal organization. The undercover officers begin to confide in the suspect, attempting to form a deeper bond. While many suspects later describe the bond as friendship, some have also said the undercover officers felt like family.[15] The suspect's involvement in the organization will progressively intensify. The suspect will begin receiving jobs that appear to be illegal, and increasingly so.

The climax of a Mr. Big investigation is the introduction of the target to the boss of the organization (the 'Mr. Big' character), either as a reward for the work the suspect has done or as an interview for a better position within the organization. Mr. Big will bring up the crime under investigation and will demand that the suspect tell him the truth about it. If the suspect denies involvement, Mr. Big employs a variety of tactics to elicit a confession. He may offer to make the suspect's legal problems disappear. He may also go as far as to create an oppressive and fear-inducing environment or suggest that the individual will have to leave the organization if he refuses to confess.

The use of Mr. Big obtained evidence in court existed in a legal vacuum until 2014.[16] Confessions obtained through these stings were routinely admitted at trial under the party admission exception to the exclusionary hearsay rule.[17] Despite the use of violence, derogatory language, and simulated crime by police agents in these Mr. Big operations, the confessions obtained still managed to slip through the cracks of any exclusionary rule in existence at the time. None of the following exclusionary rules applied: the common law confessions rules (because the suspect did not know that he was talking to a person in authority), section 7 of the *Charter* (because the suspect was not in police detention), hearsay

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14 Kouri T Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (Halifax: Fernwood Publishing, 2010) at 50–51 (the authors have determined that from 89 cases, 11 suspects were Indigenous and 29 were from very poor social backgrounds. Others (though numbers were not available) had very poor education or reduced cognitive capacity).

15 *Hart*, *supra* note 1 (the Supreme Court noted that the fictitious criminal organization was "essentially his new family" at para 227).

16 *Ibid* at para 79.

17 *Ibid* at para 63.

(because it fell under the party admission exception), or the law of entrapment (because the suspect was not charged with an offence committed during his involvement with the fictitious organization).[18] Yet, it was not a product of chance that Mr. Big operations somehow managed to circumvent the letter of all of these laws. Rather, it was by design.[19]

B. The *Hart* Framework: Content and Goals

In 2014, Justice Moldaver, writing for the majority in *Hart*, acknowledged that Mr. Big operations run significant risks for both the administration of justice[20] and for the suspect.[21] In light of these dangers, routinely admitting confessions resulting from these stings is legally and ethically problematic.

Justice Moldaver identified three dangers associated with Mr. Big confessions that needed to be mitigated by any framework that regulated their admission. First, when powerful inducements or veiled threats are used to obtain a confession, the risk that the confession is unreliable increases, potentially leading to a wrongful conviction.[22] Second, because the confessions are obtained in the context of the suspect's involvement in what they believe to be criminal activity, there is a high risk of prejudice towards the accused when this evidence is brought before a trier of fact, especially a jury.[23] The more violent and brutal the scenarios are, the more likely that the evidence provided will include bad character evidence. Bad character evidence creates the risk of a jury deciding that the confession was true and should be believed based on the rationale that someone involved with a criminal organization is capable of also committing the offence they confessed to. Justice Moldaver warned that the combination of powerful inducements or threats used to obtain a confession and the bad character evidence put before juries significantly increases the risk of a wrongful conviction.[24] Third, these operations may become abusive and coercive.

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18 See Lisa Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" (2012) 57 SCLR (2d) 241 at 258–62; Coughlan, *supra* note 2 at 417–18.

19 Coughlan, *supra* note 2 at 438.

20 *Supra* note 1 at paras 10, 83.

21 *Ibid* at paras 79, 83.

22 *Ibid* para 6.

23 *Ibid* at paras 74, 145.

24 *Ibid* at para 8.

Police tactics that overbear the will of the accused should not be permitted in obtaining a confession.[25]

For the first prong of the test, the SCC created a new common law confession rule. Under this new rule, all Mr. Big confessions are now presumptively inadmissible.[26] The onus is on the Crown to show at the admissibility stage that, on a balance of probabilities, the probative value of the evidence is higher than its prejudicial effect.[27] Justice Moldaver provides a set of criteria that should be considered by the trial judge in assessing whether the Crown has discharged its burden.

Probative value is determined by the strength of the particular guarantees of reliability; these may derive either from the confession itself or from the circumstances surrounding the confession.[28] Circumstances that should be considered for the purpose of assessing reliability include: the length of the operation, the number of interactions between police agents and the target, the nature of the relations established, the type of inducements used, the presence of threats, the conduct of the police, and the personality of the target (including age, sophistication, and mental health).[29] Other markers of reliability which increase the probative value of the confession include the level of detail of the confession, whether the confession led to any new evidence, and if the target identified elements of the crime which were not made public (so-called 'holdback evidence'). Corroborative evidence is not necessarily required but, where it does exist, it significantly increases the reliability of a confession.[30]

When considering the prejudicial effect of a Mr. Big confession, the judge must be attentive to the moral prejudice that may exist (that is, if the operation portrays the accused as a violent man or having a violent past, he could be seen as a 'bad person') or reasoning prejudice that may confuse the jury (depending on the amount of time needed to detail the operation and controversy over certain events or conversations).[31] The trial judge will decide whether this threshold reliability has been met and the court of appeal must defer to the trial judge's decision on this matter.[32]

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25 *Ibid* at para 11.
26 *Ibid* at para 85.
27 *Ibid.*
28 *Ibid* at para 102.
29 *Ibid.*
30 *Ibid* at para 206.
31 *Ibid* at para 106.
32 *Ibid* at para 110.

If the first prong is met, the judge is then required to consider the second prong. The second prong is essentially a restatement of the abuse of process doctrine: that the police cannot overcome the will of the accused and use coercion to obtain a confession.[33] During the second prong, the burden shifts to the accused to provide evidence of abuse of process. In their assessment, the judge will need to consider if violence or threats of violence were used against the target. If so, it will generally render the operation abusive and the confession should be excluded.[34] However, there are other aspects that should be considered in order to assess if the target was oppressed, specifically whether the police have preyed on a person with vulnerabilities (including mental health issues, addictions, or youthfulness).[35]

The SCC had the opportunity to demonstrate how the majority's test applies in a companion case, *R v Mack*.[36] In assessing the first prong, the important role of confirmatory evidence was highlighted by the Court.[37] Information on holdback evidence or that leads to the discovery of real evidence play a significant role in outweighing heavy prejudice against the accused. In addition, *Mack* also emphasized the role that threats and violence play in increasing prejudice and decreasing probative value. As there were no direct threats and violence present in this case, the Court deemed that the prejudicial value against Mack was low.[38] For the second prong, the SCC found that there was no abuse of process because no overwhelming inducements or threats of violence were used in the operation.[39] Interestingly, the SCC found that there were, in fact, veiled threats of violence through references to previous acts of violence committed by other members of the organization, but they ultimately found that this form of intimidation did not amount to coercion.[40]

Following the *Hart* and *Mack* decisions, some critics were skeptical of how this new framework would play out in practice given that the very

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33 *Ibid* at para 115.

34 *Ibid* at para 11.

35 *Ibid* at para 117.

36 2014 SCC 58 [*Mack*]. The case was jurisprudentially important for the guidelines on jury instruction with regard to Mr. Big evidence. However, jury instructions will not be discussed in this paper, which instead focuses on issues of admissibility.

37 *Ibid* at para 34.

38 *Ibid* at para 35.

39 *Ibid* at para 36.

40 *Ibid.*

foundations of these operations are coercion, deceit, and veiled threats.[41] They were also concerned that the creators of Mr. Big operations would adapt to the new framework, finding creative ways to again elude the black letter law. There were additional concerns that the criteria provided by the *Hart* framework would be watered down as it was applied in future cases.[42]

Nonetheless, *Hart* also received praise, with some scholars expressing hope that the new framework would have a chilling effect on Mr. Big operations which will decrease in both number and intensity.[43] Some scholars praised the framework for providing new tools to be used in the fight against wrongful convictions,[44] for being a more culturally sensitive approach that considers an individual's vulnerabilities,[45] for better preserving *Charter* values,[46] for encouraging courts to be more vigorous in assessing these confessions,[47] and for reinvigorating the abuse of process doctrine and providing stronger protections against state abuse.[48]

For the remainder of this article, we will assess if, based on the information available, any of these predictions have proven true in the past 5 years and if the goals set by *Hart* (to prevent the use of unreliable evidence, the prejudice to the accused, and police misconduct during the operation) appear to be met through the subsequent applications of this framework.

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41 MacLean & Chapman, *supra* note 2 at 188–89; Luther & Snook, *supra* note 2 at 133–38.

42 Iftene, *supra* note 2 at 166–68; Kaiser, *supra* note 2 at 307–08; Hunt & Rankin, *supra* note 2 at 333–35; MacLean & Chapman, *supra* note 2 at 188–89; Luther and Snook, *supra* note 2 at 133–38; Coughlan, *supra* note 2 at 416–18; Stephen Porter, Katherine Rose & Tianna Dilley, "Enhanced Interrogations: The Expanding Roles of Psychology in Police Investigations in Canada" (2016) 57:1 Can Psychol 35 at 37; Christina J Connors, Marc W Patry & Steven M Smith, "The Mr. Big Technique on Trial by Jury" (2018) 25:1 Psychology Crime & L 1 at 18, 21 DOI: <10.1080/1068316X.2018.1483507>.

43 Dufraimont, "Hart and Mack", *supra* note 3 at 486–89; Adrianna Poloz, "Motive to Lie? A Critical Look at the 'Mr. Big' Investigative Technique" (2015) 19:2 Can Crim L Rev 231 at 237–39.

44 Nikos Harris, "Less-Travelled Exclusionary Path: Sections 7 and 24(1) of the *Charter* and *R v Hart*" (2014) 7 CR (7th) 287 at 287; Tanovich, *supra* note 3 at 299.

45 Tanovich, *supra* note 3 at 298.

46 *Hart*, *supra* note 1 at paras 121, 168; Adrien Iafrate, "Unleashing the Paper Tiger: How the Abuse of Process Doctrine Can Overcome Charter Limitations" (2017) 64:1/2 Crim LQ 147.

47 Dufraimont, "Hart and Mack", *supra* note 3 at 499.

48 Lisa Dufraimont, "R v Nuttall and R v Derbyshire: Abuse of Process and Undercover Operation" (2016) 31 CR (7th) 315 at 315, 317.

III. The Application of the *Hart* Framework August 2014–August 2019

A. Overview

Between 2014 and 2019, there were 61 cases in which the *Hart* test was applied to determine the admissibility of confessions obtained through RCMP undercover operations (see the Appendix of this article). Two of these cases were not a result of a Mr. Big operation[49] and 59 were. The confession was admitted by the trial judge in 51 cases. In three cases, the evidence was excluded based on the new common law confession rule (lack of reliability)[50] and it was excluded in four cases due to abuse of process.[51] In three cases, it was unclear whether the confession was or would have been excluded because the accused pled guilty after or during the admissibility voir dire.[52]

In all but two cases[53] where the confession was admitted, the accused was found guilty. There were three cases where the confession was excluded and the following outcomes resulted: the case was dismissed, the Crown withdrew its case, and the accused was acquitted due to a lack of Crown evidence.[54] In two of the cases where the confession was thrown out, the accused was found guilty at trial, but a stay was entered on appeal.[55] In the other two cases the outcome of the case is unknown, as the trial decision was not reported.[56]

As illustrated in the Appendix, numerous cases were never appealed or, when they were appealed, the trial verdict was upheld. In addition to the

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49 *R v Giles*, 2015 BCSC 1744 [*Giles*]; *R v Derbyshire*, 2016 NSCA 67 [*Derbyshire*].

50 *Buckley, supra* note 11 at paras 100–01; *Smith v Ontario*, 2016 ONSC 7222 at para 31 [*Smith*]; *R v South*, 2018 ONSC 604 at para 75 [*South*].

51 *R v Nuttall*, 2016 BCSC 1404 at paras 2, 7 [*Nuttall*]; *R v M(S)*, 2015 ONCJ 537 at paras 71–73 [M(S)]; *R v Laflamme*, 2015 QCCA 1517 at paras 87–88 [*Laflamme*]; *Derbyshire*, *supra* note 49 at para 153.

52 *R v Gill*, 2017 BCSC 1026; *R v Duncan*, 2015 BCSC 2688 [*Duncan*]; *R v Pernosky*, 2018 BCSC 1252 [*Pernosky*]. However, we can speculate that the confession in these cases was either admitted or was likely to be admitted, otherwise it is unlikely that the accused would have decided to change his plea.

53 *R v Streiling*, 2015 BCSC 1044 at para 73 [*Streiling*]; *R v Tingle*, 2016 SKQB 212 at paras 404–05 [*Tingle*].

54 *Buckley*, *supra* note 11; *Smith*, *supra* note 50; *Derbyshire*, *supra* note 49 at para 6, respectively.

55 *Laflamme*, *supra* note 51; *Nuttall*, *supra* note 51.

56 *M(S)*, *supra* note 51; *South*, *supra* note 50.

two cases where a stay was entered on appeal, in seven cases a retrial was ordered by the Court of Appeal.[57] In two cases[58], the accused persons pled guilty to lesser offences after being granted retrials.[59] In two other cases, the retrials resulted in the accused persons being found guilty again.[60] The remaining three retrials have not yet been heard or reported.[61]

Between 1990 and 2008, Mr. Big was allegedly used a total of 350 times, with the majority of cases prosecuted resulting in a conviction.[62] If this number is accurate, it means that prior to *Hart*, there were 14 cases on average, per year (including those that made it and did not make it to trial). Since *Hart,* there have been 11 cases per year that have made it to trial. Note that this number does not account for some of the unreported cases where the accused pled guilty, unreported cases that did not result in trial for any other reason, or cases which were ongoing at the time of our review.

Therefore, *Hart* does not appear to have had any impact on either the number of cases brought to trial or the number of cases where the evidence

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57 It is important to note that the case was sent back for retrial for reasons unrelated to the application of the *Hart* framework in all but one case: *R v Ledesma*, 2019 ABQB 88 [*Ledesma*] (the Court of Appeal found that the trial judge did not analyse prejudice adequately. Upon retrial Mr. Ledesma was found guilty again). The rest of the cases were sent back due to insufficient jury instruction (*R v Beliveau*, 2016 QCCA 2133 para 44 [*Beliveau*]; *R v Perreault*, 2015 QCCA 694 at para 99 [*Perreault*]; *R v Larue*, 2019 SCC 25 [*Larue*]; *R v Bernard*, 2019 QCCA 1227 at para 59 [*Bernard*]; *R v Jeanvenne*, 2016 ONCA 101 [*Jeanvenne*]) or an error in limiting the cross examination of a police officer (*R v Worme*, 2016 ABCA 174 [*Worme*]).

58 *Beliveau*, *supra* note 57; *Worme*, *supra* note 57.

59 See Maxime Massé, "Murder of Alain Bernard: Alain Béliveau pleads guilty" (22 November 2017), online: *LaVoixel'Est* <www.lavoixdelest.ca/actualites/granby/meurtre-dalain-bernard-alain-beliveau-plaide-coupable-3d5ab2560aa0e9f6335e5cc7a693eae2> [perma.cc/TF2A-5CTP]; Ryan White, "Sheldon Worme pleads guilty to second-degree murder in vicious attack on Daniel Levesque" (5 September 2018), online: *CTV News* <calgary.ctvnews.ca/sheldon-worme-pleads-guilty-to-second-degree-murder-in-vicious-attack-on-daniel-levesque-1.4081585> [perma.cc/8KGM-3QT6].

60 *Ledesma*, *supra* note 57; *Perreault*, *supra* note 57. See Julia Page, "Alain Perreault found guilty of 1st-degree murder" (29 September 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/alain-perreault-verdict-2016-1.3779617> [perma.cc/25MY-P53Y].

61 *Larue*, *supra* note 57; *Bernard*, *supra* note 57; *Jeanvenne*, *supra* note 57.

62 Royal Canadian Mounted Police, *Undercover Operations* (British Columbia: RCMP, last modified 1 May 2015), online: *Royal Canadian Mounted Police* <bc.rcmpgrc.gc.ca/> [perma.cc/6Z2S-HM7J]; Keenan & Brockman, *supra* note 14 at 31.

was excluded based on either of the framework's prongs.[63] The fact that most operations (all but eight)[64] were completed or started pre-*Hart* indicates that the *Hart* factors would not have been considered when designing the operations. It is interesting to note that, despite the fact that the confessions considered by judges since 2014 originated from operations designed pre-*Hart* (and which, as discussed below, continued to include the problematic features criticized in *Hart*), these confessions were still mostly admitted when judges applied the *Hart* framework.

B. Application of the Two Prongs by Numbers and Narratives

1. Reliability of the Evidence

The first prong described by Justice Moldaver in *Hart* is the new common law confession rule. Under the first prong, a trial judge must assess the reliability of the evidence by weighing the probative value against the potential prejudice to eliminate the possibility of false confessions and minimize the prejudice towards the accused.[65] In searching for markers of reliability in a Mr. Big confession under the first prong, the following should be considered: the length of the operation, the nature of the relations established, the type of inducements used, the presence of threats, the conduct of the police,[66] the personality of the target (including age, sophistication, and mental health), and the presence or absence of confirmatory evidence.[67] The SCC clarified that:

> In listing these factors, I do not mean to suggest that trial judges are to consider them mechanically and check a box when they apply. That is not the purpose of the exercise. Instead, trial judges must examine all the circumstances leading to and surrounding the making of the confession — with these factors in mind — and

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63 Because all but eight cases were premised on stings that took place entirely or at least started pre-*Hart*, it is not possible to assess whether *Hart* had any impact on the structure and content of the Mr. Big operations themselves.

64 *R v Amin*, 2019 ONSC 3059 [*Amin*]; *Buckley*, *supra* note 11; *R v Burkhard*, 2019 ONSC 1218 [*Burkhard*]; *R v Caissie*, 2018 SKQB 279 [*Caissie*]; *R v Darling*, 2018 BCSC 1327; *R v Lee*, 2018 ONSC 308 [*Lee*]; *Pernosky*, *supra* note 52; *R v Potter*, 2019 NLSC 8 [*Potter*].

65 *Hart*, *supra* note 1 at paras 94–110.

66 The conduct of the police is generally discussed in the reviewed cases in the context of the other factors (under categories such as use of threats or incentives); hence, we were not able to factor it into our analysis separately.

67 *Hart*, *supra* note 1 at paras 102–04.

> assess whether and to what extent the reliability of the confession is called into doubt.[68]

Under this prong, three cases were excluded.[69] In all three cases, not only was there no confirmatory evidence, but the confessions contradicted other evidence that the police had. In *South*, the target (not South) had significant difficulty providing reliable information on the identity of the accused: that the confession was "so unreliable that no reasonable factfinder could accept it as true."[70] In *Buckley*, the target recited the details from his disclosure materials and, when probed on other details, he contradicted the forensic evidence that he did not have access to.[71]

i. Threats and/or Exposure to Violence

Threats and/or exposure to violence were used in 8% of the cases.[72] With two exceptions,[73] all of the confessions from Mr. Big stings involving threats and exposure to violence were admitted. However, in both cases where the confessions were excluded, it was based on the second prong (abuse of process), not due to a reliability issue.

In fact, threats and violence were not generally discussed in connection with reliability. Yet, both threats and violence were deemed in *Hart* to have bearing on the common law confession rule. The presence of coercion makes a confession less reliable and thus decreases its probative value. In addition, the risk of prejudice to the accused is higher if he or she was involved in violent scenarios because the jury may be influenced by a history of violence (that is, it would be bad character evidence).[74]

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68 *Ibid* at para 104 [emphasis added].

69 *Smith*, *supra* note 50; *Buckley*, *supra* note 11 at paras 100–01; *South*, *supra* note 50 at para 114. All three were Mr. Big cases and all three failed on reliability. However, in *South*, the *Hart* framework was loosely applied. The confession was excluded not based on the new common law confessions rule but based on the application of *KGB*.

70 *Supra* note 50 at paras 5–8, 113. The judge clearly stated that the lack of confirmatory evidence was a big issue. However, he went on to say that even had it passed this prong, it would have failed at abuse of process because the scenarios incorporated a combination of threats and strong inducements.

71 *Supra* note 11 at para 55.

72 *R v RK*, 2016 BCSC 552 at paras 12, 44 [*RK*]; *Tingle*, *supra* note 53 at paras 28–31; *Potter*, *supra* note 64 at paras 20, 137; *R v Balbar*, 2014 BCSC 2285 at para 195 [*Balbar*]; *R v Randle*, 2016 BCCA 125 at paras 42–43 [*Randle*], *Laflamme*, *supra* note 51 at para 56; *Derbyshire*, *supra* note 49 at paras 59, 61.

73 *Laflamme*, *supra* note 51; *Derbyshire*, *supra* note 49.

74 *Hart*, *supra* note 1 at para 106.

Justice Moldaver said in *Hart* that confirmatory evidence can go a long way in increasing the probative value of a confession.[75] However, this explanation for why confessions obtained in violent scenarios were admitted only holds up in *Potter*, where the confession contained a lot of holdback information and details that went beyond the mundane aspects of the crime.[76] In *Balbar*, there was some confirmatory evidence (that is, information provided by the accused that was not publicly available) but it contained numerous inconsistencies.[77] In *RK*, *Randle*, and *Tingle*, there was no confirmatory evidence of any kind.[78]

Another issue raising concerns about the narrative employed around violence was the tendency to use the accused's willingness to partake in the criminal organization and their criminal past as evidence to increase probative value. A history of crime or violence is generally considered to be prejudicial; when used at trial, it may amount to bad character evidence and should be excluded.[79] It is true that the willingness to engage in violent scenarios or past history is used at the admissibility stage to establish the likelihood that the individual voluntarily engaged in that type of criminal organization. Thus, it is not used as true propensity evidence in the sense that the accused has likely committed the offence due to their record. However, if the Mr. Big scenario is admitted to trial, that can also be considered bad character evidence and should, at the very least, be edited or a warning to the jury should be given. Not only did the judges find that the use of violence did not increase the prejudice or decrease the probative value of the confession, but in the cases of *Balbar*, *Potter*, *RK*, and *Randle*, the target's openness with the crime boss was highlighted as evidence of the target not feeling personally threatened by the violent scenarios they were exposed to and the unedited scenarios made it into the trial. For example:[80]

> Given the nature of the murder being investigated, it is understandable that police would want to create an atmosphere in which [the target] would feel comfortable discussing violence involving the use of firearms.[81]

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75 *Ibid* at para 105.

76 *Potter*, *supra* note 64 at paras 126–27.

77 *Supra* note 72 at para 366.

78 *RK*, *supra* note 72; *Randle*, *supra* note 72; *Tingle*, *supra* note 53.

79 The issues with bad character and its relation to prejudice is explained in *Hart*, *supra* note 1 at paras 73–74.

80 *Balbar*, *supra* note 72 at paras 57, 206, 354, 362; *Potter*, *supra* note 64 at paras 196, 220; *RK*, *supra* note 72 at paras 52, 79; *Randle*, *supra* note 72.

81 *RK*, *supra* note 72 at para 708.

> Mr. Balbar was more than willing to participate in activities involving crime and threatened and feigned violence directed towards others.[82]
> Mr. Potter spoke to Cpl. R. of his own volition and he was ready, willing and even eager to do whatever he could to endear himself to Cpl. R. so he could work with him.[83]

There is no mention of the possibility that these targets spoke to the crime boss precisely because of fear. If arguments such as "confessing after exposure to violence is an indication of comfort" or "someone previously involved in crime would not be intimidated by violence" are found by judges to increase probative value of a confession, it is unclear if anything short of physically beating the confession out of the target would count as coercion. We suggest that this type of analysis does not represent the spirit of the *Hart* framework and it raises further issues regarding abuse of process. This is discussed more in the next chapter.

ii. Vulnerabilities

Hart held that, in assessing the probative value of a confession, particular attention ought to be paid where the target has identifiable vulnerabilities.[84] Vulnerabilities of the target may negatively influence the reliability of the confession, given that the operation itself revolves around manipulation and vulnerable targets may be easier to coerce into wrongly confessing in certain circumstances.

In 67% of all of the cases and 54% of the cases where the evidence was admitted, the trial judge identified the presence of at least one vulnerability (this distribution is shown in Table 1). In 16% of all of the cases, the judge specifically noted that the target had no identifiable vulnerability. In all of these latter cases, the confession was admitted.

In 17% of the cases, the presence or absence of vulnerabilities was not mentioned at all in the decision. In light of the prominent role that these play in Mr. Big stings and the SCC's direction that the presence of vulnerabilities should be incorporated into the analysis, we question how thorough the analyses conducted in some of these cases have been.

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82 *Balbar*, *supra* note 72 at paras 383.
83 *Potter*, *supra* note 64 at para 237.
84 *Supra* note 1 at paras 102–03.

Table 1: Distribution of Cases Where Vulnerabilities Were Identified Based on Types of Vulnerabilities

Vulnerability identified	% (n)
History of abuse	8% (5)
Unstable housing	8% (5)
Lack of sophistication	20% (12)
Mental health illnesses other than addiction	15% (9)
Addiction	20% (12)
Youth (under 25)	23% (14)
No family or social ties	26% (16)
Significant financial difficulties	31% (19)
Total	67% (41)

* In some cases, more than one variable applies

Upon reviewing the cases where vulnerabilities were identified, several patterns regarding the manner in which judges incorporated these traits as markers of reliability in their analyses were apparent.

First, certain types of vulnerability appear to be given less consideration than others. For instance, despite the fact that *Hart* mentioned youthfulness as one of the vulnerabilities that ought to be given special consideration in an analysis,[85] young age (where the individual is in their late teens or early 20s) is often not addressed in a nuanced or consistent manner by judges. In some instances, young age is mentioned in the decision simply as part of the description of the accused person (essentially just 'background information')[86] or discussed in some contexts but not in relation to the probative value versus prejudicial effect analysis. For example, the accused was 15 years old at the time of the commission of the alleged offence in *R v M(S)*.[87] His youthfulness was discussed in depth in relation to the law of statements made to police by young persons under the *Youth Criminal Justice Act* (YCJA), but the impact of his youthfulness on the reliability of the confession was not analyzed.

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85 *Ibid* at para 103.

86 *Lee*, *supra* note 64 at para 125; *R v Omar*, 2016 ONSC 4065 at para 7 [*Omar*]; *RK*, *supra* note 72 at para 15.

87 *Supra* note 51 at para 3. It should be noted that the confession in this case was excluded based on abuse of process, not reliability.

There was also at least one instance where the youthfulness of the accused was not even mentioned in the decision, let alone factored into the probative value analysis. For example, in *R v Tang*[88] the accused was only 22 years old at the time of the alleged commission of the offence. We identified his age through news articles published during his trial.[89] There are several decisions we reviewed where age is not mentioned; it is possible then that youthfulness has been disregarded in more instances than we were able to identify.

We also noted a pattern that showed that age was often minimized by judges through qualifiers like the young person having 'street smarts'[90] or the appearance of maturity.[91] For instance, in *Lee*, the judge commented that "[w]hile he may not have been well-educated, he was street smart. He was young, but he was not naïve."[92] Mr. Lee was 23 years old with a grade 9 education. His mother had died of cancer when he was 15 years old. His father was an abusive alcoholic. Mr. Lee was poor and sold drugs to support himself. Despite the police creating scenarios which involved financial inducements and tasking Mr. Lee with collecting items needed to dispose of a body, the confession to Mr. Big was admitted "with some modest editing."[93]

Once again, there appeared to be a trend to use past violent or criminal behavior to minimize vulnerabilities and increase the probative value of the confession. For example, in *R v Subramaniam*, despite the accused person being only 19 years of age and the judge recognizing that "youthfulness is an element that must be seriously taken into consideration",[94] his youthfulness is juxtaposed with his criminal record: "Subramaniam cannot be described as a weak individual. The record shows that he is already evolving in the criminal world at the time of the events."[95]

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88 2015 BCSC 1643 [*Tang*].

89 See e.g. "Richmond man found guilty of 2nd-degree murder in mother's death" *CTV News Vancouver* (12 November 2015), online: *CTV News Vancouver* <bc.ctvnews.ca/richmond-man-found-guilty-of-2nd-degree-murder> [perma.cc/XC8L-QRP3].

90 See e.g. *R v Knight*, 2018 ONSC 1846 at para 45 [*Knight*]; *R v M(M)*, 2015 ABQB 692 at paras 80, 112, 119, 123, 169-170 [M(M)]; *Lee, supra* note 64 at paras 145, 150, 287, 303, 334.

91 See e.g. *RK*, *supra* note 72 at paras 65, 314, 536.

92 *Supra* note 64 at para 145.

93 *Ibid* at para 123.

94 2015 QCCS 6366 at para 34 [*Subramaniam*].

95 *Ibid* at para 35.

Second, addictions and mental illnesses tended to be given only a cursory mention if there was no concrete evidence that the police directly took advantage of them. Mr. Balbar had severe addictions and low intellectual abilities. The judge commented:

> On this basis, I am unable to find that Mr. Balbar had a sufficiently low level of intellectual capacity or adaptive functioning so as to warrant a finding that he was too vulnerable a person to be a target in Project Eventail. To the contrary, the evidence of how Mr. Balbar actually behaved during the Mr. Big operation and the very limited evidence about his background and lifestyle portrays a person who may be of limited intelligence, yet, for whatever reason, possesses considerable "street smarts" and an eclectic store of knowledge and skills, the full extent of which remains unknown.[96]

Third, the financial situation of the target generally did not impact any analyses. Even in cases where the target's financial situation was bad, they were on social assistance, had a long history of unemployment and social isolation, and large financial incentives were provided, there was still no impact on the probative value of the confession because the target was not "destitute".[97]

Finally, it is worth noting that in many cases, regardless of the vulnerabilities identified, these were often just noted and not fully engaged with. They were, thus, used by judges as a checklist, which Justice Moldaver specifically warned against in *Hart*.[98] In a number of cases where a target's vulnerabilities were discussed by judges more thoroughly, the conclusion

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96 *Balbar*, *supra* note 72 para 337.

97 *R v Johnston*, 2016 BCCA 3 at para 58 [*Johnston*]; *Beliveau*, *supra* note 57 at para 13; *Randle*, *supra* note 72 at para 83; *R v Allgood*, 2015 SKCA 88 [*Allgood*].

98 *R v Bahia and Baranec*, 2016 BCSC 2686 at paras 4–5; *Buckley*, *supra* note 11 at para 60; *R v Carlick*, 2018 YKCA 5 at para 62 [*Carlick*]; *R v Charlie*, 2017 BCSC 2187 [*Charlie*]; *Giles*, *supra* note 49 at para 296; *R v Handlen*, 2018 BCSC 1330 at paras 156, 645, 654 [*Handlen*]; *Jeanvenne*, *supra* note 57 at para 27; *R v Johnson*, 2016 QCCS 2093 at paras 58, 66, 694, 698 [*Johnson*]; *R v Keene*, 2014 ONSC 7190 at para 148 [*Keene*]; *Laflamme*, *supra* note 51 at para 31; *Lee*, *supra* note 64 at para 364; M(M), *supra* note 90 at paras 168–69, 181; M(S), *supra* note 51 at para 75; *R v Magoon*, 2018 SCC 14 [*Magoon*]; *R v MacDonald*, 2018 ONSC 952 at para 18 [*MacDonald*]; *R v Niemi*, 2017 ONCA 720 at para 3 [*Niemi*]; *Nuttall*, *supra* note 51 at para 49; *Pernosky*, *supra* note 52 at para 39; *Potter*, *supra* note 64 at paras 183–84; *RK*, *supra* note 72 at para 538; *Randle*, *supra* note 72 at para 83; *R v Shaw*, 2017 NLTD(G) 87 at para 58 [*Shaw*]; *South*, *supra* note 50 at para 84; *Subramaniam*, supra note 94 at paras 13, 36; *R v West*, 2015 BCCA 379 at para 100 [*West*]; *R v Wilson*, 2015 BCCA 270 [*Wilson*]; *R v Zvolensky*, 2017 ONCA 273 [*Zvolensky*]; *Smith*, *supra* note 50.

was that the police did not prey on the target's vulnerabilities, despite recognizing that they had vulnerabilities that the police were aware of.[99]

We suggest that, based on the multitude of cases in which the targets had identifiable vulnerabilities, as well as the superficial and inconsistent manner in which judges sometimes factored them into their analysis, courts may frequently struggle with understanding the impact of the presence of vulnerabilities on the reliability of confessions. These concerns are amplified in cases where significant incentives were used and where there was a complete lack of confirmatory evidence. This is discussed more fully in the next sections.

iii. Incentives

Mr. Big operations revolve around the idea of incentives. Incentives are what motivate an individual to join the organization and eventually confess that they committed a serious offence. Thus, it is not a question of whether there were incentives provided in Mr. Big operations; that is a given. The question is how strong those incentives were. In *Hart*, Justice Moldaver expressed concerns about some incentives being so strong that they could lead individuals into false confessions.[100] Thus, the stronger the incentive offered in exchange for the confession, the lower the probative value.[101]

The strength of an incentive cannot be assessed in isolation. It is directly linked to the personality of the accused. For instance, money and jobs are much stronger incentives for someone in dire economic circumstances than for someone who has financial stability. Similarly, alcohol is a weak incentive unless someone has an addiction and lacks the money necessary to feed it. People with lower levels of sophistication or mental disabilities may be more easily enticed by seemingly weaker incentives. Justice Moldaver emphasized that incentives need to be considered contextually, in conjunction with the presence or absence of vulnerabilities and confirmatory evidence.[102] Justice Moldaver's approach should, theoretically, allow for a balanced analysis that meets the goals of the *Hart* framework. It raises red flags that there was no reference to the presence or absence of

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99 *Amin*, *supra* note 64 at paras 39, 44–45; *Balbar*, *supra* note 72 at para 337; *Ledesma*, *supra* note 57 at para 7; *R v Moir*, 2016 BCSC 1720 at paras 499, 545 [*Moir*]; *Omar*, *supra* note 86 at paras 23–27; *Perreault*, *supra* note 57 at paras 87–89; *R v Wruck*, 2016 ABQB 370 at paras 21–22 [*Wruck*].

100 *Hart*, *supra* note 1 at paras 69, 140, 165.

101 *Ibid* at para 69.

102 *Ibid* at paras 102–03, 117, 194.

incentives in 20% of the cases. In 5% of the cases, the judge noted that the incentives used were mild (usually involving some type of promise). In 75% of the cases, the judge identified at least one stronger incentive that was utilized. This distribution is shown in Table 2.

Table 2: Distribution of Cases Where Incentives Were Used, Based on Types of Incentives

Incentive used	% (n)
Money/attractive lifestyle	66% (40)
Meaningful friendships/family-like relationships	44% (27)
Good employment	5% (3)
Promise that their legal issues will disappear	20% (12)
Total	75% (46)

* In some cases, more than one variable applies

Numerically, the presence of strong incentives did not appear to make a difference on whether the confession was admitted. In 67% of the cases where evidence was admitted, identifiable incentives were used. While this statistic is of concern, it is not problematic on its own, as the strength of an incentive should be analyzed contextually. Nonetheless, upon a qualitative analysis, we were once again able to discern some problematic trends in how incentives are factored into the decision.

First, contrary to the suggestion in *Hart*, large sums of money never appeared to be considered by judges to be strong enough incentives to decrease probative value, even when used for a target who was unemployed or destitute.[103] For example, the target in *Allgood* was introduced to a lifestyle of expensive restaurants and hotels.[104] He was paid $8,500 over four months and all of his expenses were covered by the organization. He was also promised a $25,000 payout. Prior to the operation, Mr. Allgood was unemployed with no job prospects. In *R v Zvolensky*,[105] the undercover officer promised to significantly fund the purchase of a business that he and

[103] See e.g. *Amin*, *supra* note 64; *Balbar*, *supra* note 72 at para 183; *Beliveau*, *supra* note 57 at paras 40, 64; *Jeanvenne*, *supra* note 57 at paras 15, 27; *Johnston*, *supra* note 98 at paras 58, 66; *Randle*, *supra* note 72 at para 83; *Niemi*, *supra* note 98 at paras 4, 36; *Nuttall*, *supra* note 51 at para 49; *Perreault*, *supra* note 57 at paras 14, 38.

[104] *Supra* note 97 at para 11.

[105] *Supra* note 98 at paras 41, 44.

the target would run together (including telling the target that he had $500,000 to invest in the business). Mr. Zvolensky was told that he would become the manager. The undercover officer even bought Mr. Zvolensky expensive clothes "so he would look like a businessman."[106]

The strong bonds that developed between the target and operatives never contributed to a finding of a lack of reliability in the confession, despite the fact that the relationship could factor in as an incentive to confess (fear that they may lose that relationship if they did not confess to what the operative wants to hear). *Hart* listed the creation of strong bonds as a distinct factor that should be considered in any analysis, as it may be easier to persuade someone to confess in the context of a close relationship.[107]

In half of the cases reviewed, the judges noted that those relationships were central to the case. For instance, the target in *Allgood* stated that he felt he was treated like a family member, in addition to receiving significant amounts of money.[108] Similarly, in the cases of *Hales* and *Niemi*, the targets stated that they felt the undercover officers were like brothers to them.[109] In *M(M)*, the undercover operative and target developed a strong mentor/mentee relationship.[110] In *Moir*, the target was enticed by "a sense of importance, collegiality, friendship, and respect."[111] In *Perreault*, the court noted: "[t]he scenarios were also designed to forge a bond between the appellant and the primary police operative, whom he considered his best friend and whom he trusted completely."[112] In *Subramaniam*, the 19 year-old target had a history of addictions and fell in love with the operative.[113] In *M(S)*, the father of the target was employed as an agent of the state. The target was young and desperate to have a relationship with his father who had not been part of his life until that point.[114] In all of these cases, the judges did not even consider these foundational relationships as incentives

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106 *Ibid* at para 41.

107 *Supra* note 1 at para 102.

108 *Supra* note 97 at para 11.

109 *R v Hales*, 2014 SKQB 411 at paras 54, 112 [*Hales*]; *R v Niemi*, 2012 ONSC 6385 at para 56 aff'd *Niemi*, *supra* note 98.

110 *Supra* note 90 at para 79.

111 *Supra* note 99 at para 365.

112 *Supra* note 57 at para 14.

113 *Supra* note 94 at para 33.

114 *M(S)*, *supra* note 51 at para 7. As previously mentioned, the confession was excluded in *M(S)* due to a finding of abuse of process.

that may have persuaded the target to confess.

Finally, the promise that the organization could make the target's legal issues disappear was commonly employed. Such promises were generally brushed away by judges and, while mentioned, their impacts on the targets were not discussed.[115] This is surprising, given that the targets were often made to believe that their arrest was imminent and that they were often provided with the opportunity to witness other people's alleged problems being solved by the organization. The lack of emphasis on this issue may be due to the fact that the promise is not made by someone the suspect knows to be a person in authority and hence, someone who is legally able to make the suspect's issues disappear. Yet, when faced with an imminent arrest (even for a crime the suspect did not commit), a promise to make it go away seems equally persuasive when the person making it has the perceived power, whether legal or otherwise, to do so. Once again, this was all the more problematic in cases where no confirmatory evidence (discussed below) was present.

iv. Length of the Operation

The operation in *Hart* lasted four months and involved 63 scenarios. The SCC described it as "lengthy"[116] and factored that into their analysis. A longer operation, thus, may be indicative of an increased potential for coercion, but it also runs the risk of increasing both the moral prejudice against the accused (because the accused voluntarily stayed involved in a criminal organization for a long time) and the reasoning prejudice (a long, convoluted operation may confuse the jury).[117]

In many of the post-*Hart* cases, the duration of the operations was longer than four months and often included a similar, or an even greater, number of scenarios[118] (Table 3). The longest operation, *R v Ader*,[119] lasted

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115 *Beliveau*, *supra* note 57; *Keene*, *supra* note 98 at paras 71, 98; *R v Klaus*, 2017 ABQB 721 at para 75 [*Klaus*]; *Knight*, *supra* note 90 at paras 122, 125; *Ledesma*, *supra* note 57; *Lee*, *supra* note 64 at para 415; *Magoon*, 2015 ABQB 35 at para 44; *RK*, *supra* note 72 at paras 440–41; *Carlick*, *supra* note 98 at para 24; *South*, *supra* note 50 at para 88; *Tang*, *supra* note 88 at para 78.

116 *Hart*, *supra* note 1 at paras 12, 133.

117 *Ibid* at para 106.

118 See e.g. *Pernosky*, *supra* note 52; *Larue*, *supra* note 57; *R v Kelly*, 2017 ONCA 621 [*Kelly*]; *Carlick*, *supra* note 98 at para 62; *Shaw*, *supra* note 98 at para 34; *Magoon*, *supra* note 98; *M(M)*, *supra* note 90 at para 9; *Johnson*, *supra* note 98 at para 635; *MacDonald*, *supra* note 98; *Handlen*, *supra* note 98 at para 110; *Keene*, *supra* note 98 at para 99.

119 2017 ONSC 4643 at para 4 [*Ader*].

eight years.

Table 3: Distribution of Cases Based on the Length of the Operation

Length of Operation	% (n)
< 3 months	9.8 (6)
3–5 months	37.7 (23)
6–11 months	31.1 (19)
12 months or more	4.9 (3)
ND	16.4 (10)
Total	100 (61)

The length of the operation was never discussed in any of the cases involving lengthy operations; rather it was only mentioned as background information on the case. In 16% of the cases, information on the length was altogether absent. While it may be understandable that the length of the operation had less of an impact on the confession's reliability in cases where there was strong confirmatory evidence (as an example),[120] it is concerning (and contrary to the guidance from *Hart*) that judges do not even discuss this as a factor worthy of consideration.

It was more likely that judges would engage with the length when the operation was somewhat short;[121] however, the manner in which length was factored into the decision was not consistent. In some cases, the short length was cited as a factor that reduced the prejudice.[122] In other cases, such as *Potter*, the judge found that the four month operation was rushed because the operative wanted to expose Mr. Potter to criminal activity that simulated the crime they were investigating.[123] The officer mentioned that he would usually plan a Mr. Big operation to be longer in duration and would involve "40 to 60 scenarios, allowing more time for him and the target to be at ease

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120 *Ibid*. In *Ader*, for instance, his confession to Mr. Big included strong confirmatory evidence, including details of his role in the kidnapping and references to 'holdback' details that would have only been known by someone who was involved in the commission of the offence.

121 However, in the case of a number shorter operations, length was still not discussed as a relevant factor: *M(S)*, *supra* note 51 (two months); *Worme*, *supra* note 57 at para 7 (2 months); *Niemi*, *supra* note 98 at para 14 (2.5 months); *West*, *supra* note 98 (3 months).

122 *Tang*, *supra* note 88 at para 59 (less than a month); *Knight*, *supra* note 90 at para 5 (3 months and 9 days).

123 *Supra* note 64 at para 134.

with each other."[124] Thus, what was deemed as a short length and fewer interactions had a negative impact on the probative value of the confession.

While entirely speculative at this stage, it is possible that the courts' approach to length is indicative of an emerging trend that is perhaps an unintended, collateral consequence of *Hart*. Given that *Hart* placed an increased value on confirmatory evidence, obtaining confirmation may require longer operations. As a result, courts may be willing to overlook length in the hopes of encouraging the police to invest more time in seeking confirmation for the confessions they obtain.

v. Presence of Confirmatory Evidence

Hart seems to suggest that strong confirmatory evidence[125] may often overcome heavy prejudice and limit the negative impact of identifiable vulnerabilities and incentives on the target. Justice Moldaver noted that:

> Confirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.[126]

In 70% of the cases, there was some confirmatory evidence in the form of either a detailed confession that included holdback information (44%),[127] a confession that led to some real evidence (10%),[128] independently obtained evidence for confirmation (5%),[129] or forensics confirming details given by the target in the confession (11%).[130] In some cases, there were

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124 *Ibid* at para 136.

125 What we are referring to as confirmatory evidence (based on our case review and on *Hart*) includes: holdback information, independently obtained evidence, and forensic confirmation of details in the confession.

126 *Hart*, *supra* note 1 at para 105.

127 See e.g. *Ader*, *supra* note 119; *Balbar*, *supra* note 72 at para 192; *Beliveau*, *supra* note 57; *Hales*, *supra* note 109 at para 141; *Keene*, *supra* note 98 at paras 83–84; *Klaus*, *supra* note 115 at para 115; *M(M)*, *supra* note 90; *MacDonald*, *supra* note 98 at para 18; *Mildenberger*, *supra* note 11 at para 79; *Moir*, *supra* note 99 at paras 41, 77–79; *Potter*, *supra* note 64 at paras 129–31; *Tang*, *supra* note 88 at para 54; *Subramaniam*, *supra* note 94 at para 82; *Shaw*, *supra* note 99; *Shyback*, 2017 ABQB 332 at paras 18–20 [*Shyback*]; *Wilson*, *supra* note 98 at para 2; *West*, *supra* note 98 at para 88–89.

128 *Carlick*, *supra* note 98 at paras 60–61; *Handlen*, *supra* note 98; *Keene*, *supra* note 98; *Omar*, *supra* note 86 at paras 49–55.

129 *Burkhard*, *supra* note 64 at para 96; *Omar*, *supra* note 86 at paras 53–55; *Perreault*, *supra* note 57; *Zvolensky*, *supra* note 98 at para 86.

130 *Burkhard*, *supra* note 64 at paras 91–92; *Omar*, *supra* note 86 at para 49; *Streiling*, *supra*

multiple types of confirmatory evidence. Whenever the judge listed confirmatory evidence of any kind, the importance of such evidence in increasing the confession's reliability was always highlighted. In all but one case,[131] the confession was admitted where confirmatory evidence was present, regardless of the type or quality.

It appears that courts have taken the position that confirmatory evidence (regardless of quality) is a sufficient condition for proving reliability, but not a necessary one. For instance, confessions were admitted in cases where the target was identified as vulnerable and/or where strong incentives were used and where the "confirmatory" evidence was deemed inconsistent or its accuracy could not be confirmed.[132] There were also cases where some confirmatory evidence was mentioned, but it was not engaged with or it was not provided with meaning in the context of the other factors.[133]

Moreover, in 30% of the cases, the judges either did not discuss confirmatory evidence at all or specifically mentioned that it did not exist.[134] It is of concern that in 18% of the cases, the evidence was admitted, despite the fact that the target had at least one identifiable vulnerability and there was no confirmatory evidence.[135] In at least five of the cases where the evidence was admitted, the target had a vulnerability (including financial, social alienation, addiction, mental illness, or a combination of these), at least one incentive was used (including money, promises to make the legal issues go away, friendship, or a combination of these), there was no

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note 53.

131 *Derbyshire*, *supra* note 49. There was significant confirmatory evidence, but the confession was excluded as having been obtained through abuse of process. Notably, *Derbyshire* is not a Mr. Big case.

132 *Balbar*, *supra* note 72 at paras 337, 366; *R v Bradshaw*, 2017 SCC 35 at paras 88–89; *Carlick*, *supra* note 98 at para 59; *Jeanvenne*, *supra* note 57 at paras 47–53; *Subramaniam*, *supra* note 94 at paras 86, 89; *Wruck*, *supra* note 99 at paras 37–38.

133 See e.g. *M(M)*, *supra* note 90 at paras 127–28, 136, 146; *Shyback*, *supra* note 127 at paras 18–20.

134 *Bernard*, *supra* note 57; *R v Campeau*, 2015 ABCA 210; *Duncan*, *supra* note 52; *Giles*, *supra* note 49; *M(S)*, *supra* note 51; *Niemi*, *supra* note 98; *Charlie*, *supra* note 98; *Caissie*, *supra* note 64 at paras 245–46; *Johnston*, *supra* note 97; *Larue*, *supra* note 57; *Ledesma*, *supra* note 57; *R v Skiffington*, 2019 BCSC 178; *Tingle*, *supra* note 53; *Randle*, *supra* note 72.

135 See e.g. *Randle*, *supra* note 72 at paras 78, 81; *Niemi*, *supra* note 98 at para 36; *Allgood*, *supra* note 97 at para 58; *Amin*, *supra* note 64 at para 38; *Johnston*, *supra* note 97 at paras 21, 58; *Ledesma*, *supra* note 57; *MacDonald*, *supra* note 98 at paras 4, 10, 23.

confirmatory evidence, and the target was under 25 years of age.[136] In two of these cases, in addition to the presence of these factors and the lack of confirmation, threats were used and the targets were involved in violent scenarios.[137] A similar combination of factors was identified in four other cases where the confession was excluded.[138] Yet, with the notable exception of *Buckley*, the exclusion in these other cases was still not due to the Crown's inability to establish reliability. Rather, the confession was excluded due to an abuse of process.[139]

In the cases where there was no confirmatory evidence, the judges never engaged with its absence in the analysis. In other words, the absence of confirmatory evidence was ignored when assessing reliability, while the presence of vulnerabilities and incentives was minimized, as described in the previous sections.

While the sample is too small to claim statistical significance, it is suggestive that the creation of the new common law evidentiary rule does not appear to have influenced the admissibility of confessions. This is not only because very few confessions have been excluded, but because it is unclear what would constitute unreliable or reliable evidence based on the applications of the *Hart* test. It is not just that there are some discrepancies in the weight judges place on each factor; that would be understandable given that judicial discretion is permitted in this matter.[140] The bigger issues are that, 61 cases after *Hart*, there is still no trace of a pattern in how the various factors are balanced, some of these factors are not always considered, and oftentimes, even when they are considered, the judge's analysis looks like a checklist as opposed to a nuanced balancing. If any pattern is to be

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136 *Worme*, *supra* note 57; *Magoon*, *supra* note 98; *Omar*, *supra* note 86 at paras 7, 23; *RK*, *supra* note 72; *Charlie*, *supra* note 98; *Randle*, *supra* note 72. In these cases, the judge also did not identify abuse of process.

137 *RK*, *supra* note 72; *Randle*, *supra* note 72 at para 4.

138 *Buckley*, *supra* note 11 at paras 100–01; *Laflamme*, *supra* note 51 at paras 31, 44, 48, 65; *South*, *supra* note 50; *M(S)*, *supra* note 51 at paras 74–76.

139 It may be helpful to recall that, based on the *Hart* framework, the judge will assess the abuse of process only once the Crown has established, on a balance of probabilities, the reliability of the evidence.

140 There are, however, examples of extreme situations where the evidence was admitted and yet there were absolutely no factors that could reasonably be argued to increase probative value. For instance, in some of the cases discussed above, the confessions were admitted despite not being corroborated in any way and obtained through a number of incentives (including threats) from an unsophisticated individual struggling with significant financial difficulties and legal problems.

identified, it appears that the three cases where the common law confession rule lead to the exclusion of the confession were at odds with what otherwise appears to be a consistent approach: courts tend to overwhelmingly find that the probative value of the confession is higher than the prejudice and that Mr. Big obtained confessions are reliable, regardless of variations in the operation's scenarios.

2. Abuse of Process

Based on the *Hart* framework, even when the evidence is deemed reliable, reliability will not justify the use of any investigative tactics.[141] Rather, there are inherent limits to police power to manipulate for the purpose of obtaining a confession.[142] These limits exist in order to guard against state power that society finds unacceptable and which threatens the integrity of the justice system. Thus, the judge will have to consider if the tactics employed threaten the fairness of the trial for the second prong. If the confession was coerced through threats or exposure to violence, abuse of process will almost always be present and the confession ought to be excluded.[143] Also, if the police preyed on the target's vulnerabilities, it is possible that the practice was abusive and, thus, the confession ought to be excluded.[144] Other factors may also be considered to assess abuse of process.[145]

i. The Role of Violence and Threats

In *Derbyshire*, abuse of process was found based on the extreme level of violence involved. Ms. Derbyshire was kidnapped and threated into confessing. The Court of Appeal judge upheld the trial judge's finding that Ms. Derbyshire "made admissions because of fear created by the threatening conduct of police officers. Whatever the respondent's prior or current role in illegal activities, it does not give to the police carte blanche to coerce confessions"[146] Yet, it is important to note that this was not a Mr. Big scenario. This undercover operation was based on direct coercion, which is rare in a Mr. Big scenario. In a second case where abuse was found based on violence, *Laflamme*, the target was told that if he did not confess, his

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141 *Hart*, *supra* note 1 at para 112.
142 *Ibid*.
143 *Ibid* at paras 115–16.
144 *Ibid* at para 117.
145 *Ibid* at para 118.
146 *Derbyshire*, *supra* note 49 at para 142.

friend would be killed: "[h]e put his head on the chopping block for you."[147] That, together with extensive and extremely violent scenarios, led the judge to find that the behaviour of the police was unacceptable and coercive.[148]

In 8% of the cases, despite the presence of threats or violence, the judges found that there was no abuse of process because these were not overt. In *Randle*,[149] the accused was exposed to what appeared to be a kidnapping and murder of a police informant. The accused's confession was admitted, and he was convicted. The Court of Appeal, in reviewing the Mr. Big evidence, stated:

> The officers created an air of intimidation by referring to violent acts committed by members of the organization but did not threaten the appellant with violence if he would not confess. None of the undercover officers' conduct was said to approach abuse of the nature that would render the accused's statement inadmissible".[150]

In *Balbar*, the judge acknowledged the extensive threats and violence used in the scenarios, yet stated:

> While the Court is, of course, reluctant to be seen to condone any sort of violence, threatened violence, racism or misogyny, it must be remembered that in terms of violence and threatened violence, it is all staged, feigned and designed for a very specific purpose. The words spoken and the activities of the police officers are directed at creating an atmosphere considered appropriate for their investigation...Mr. Balbar was more than willing to participate in activities involving crime and threatened and feigned violence directed towards others. His prior criminal record and other evidence indicate that Mr. Balbar had a familiarity with crime and a lifestyle associated with illegal drugs and property offences. He was not personally threatened.[151]

In *Potter*,[152] one of the scenarios involved undercover officers enlisting Mr. Potter's help to dispose of an alleged human corpse (it was, in fact, a pig corpse). The officers told Mr. Potter that things had gone wrong when they went to collect money from a debtor and that they needed his help to dispose of the evidence.[153] In that case, the judge found no issue with the

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147 *Supra* note 51 at para 87.

148 *Ibid* at paras 84–87. It should be noted that, despite excluding the evidence, Laflamme was found guilty by the trial jury. On appeal, the court overturned the decision and entered a stay of proceedings.

149 *Supra* note 72 at para 4.

150 *Ibid* at para 67 [emphasis added].

151 *Supra* note 72 at paras 382–83 [emphasis added].

152 *Supra* note 64 at paras 54–55.

153 *Ibid* at para 52.

conduct of the police and did not analyze how the violent scene which Mr. Potter was exposed to may impact the reliability of the confession.[154] Instead the judge stated: "Mr. Potter spoke to Cpl. R. of his own volition and he was ready, willing and even eager to do whatever he could to endear himself to Cpl. R. so he could work with him."[155]

In *RK*,[156] the Mr. Big confession was also admitted even though the accused was subjected to two violent scenarios (scenarios 25 and 40). In scenario 25, the officer slapped an individual in the face, who had allegedly wronged him, in front of the target, and then "punched him in the stomach, slapped him a second time and kicked his hat that had fallen on the ground."[157] Although this was simulated violence, the accused believed that it was genuine. In scenario 40, the undercover officer simulated another assault, completed with fake blood coming from the person's mouth. The officer also told the victim (in front of the accused): "you fucken see me coming or you see her coming that means you're fucken dead, and I will kill you, I will fucken kill you, you don't talk to the fucken cops."[158] The judge noted that "these scenarios had a legitimate purpose"[159] and that "[g]iven the nature of the murder being investigated, it is understandable that police would want to create an atmosphere in which [the target]...would feel comfortable discussing violence involving the use of firearms."[160]

Indeed, the SCC has been clear that the creation of an air of intimidation in and of itself is not the issue; rather it is when that intimidation coerces the accused to provide incriminatory evidence.[161] However, the coercive intimidation can arise from direct or indirect threats and exposure to violence. While there is no bright light from where the operations become abusive,[162] the simple fact that the individual was "not personally threatened" is an insufficient argument. The SCC was clear that implied threats are threats just the same.[163]

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154 *Ibid* at paras 226-37.
155 *Ibid* at para 237.
156 *Supra* note 72 at paras 180–88, 289–306.
157 *Ibid* at para 181.
158 *Ibid* at para 296.
159 *Ibid* at para 706.
160 *Ibid* at para 708 [footnotes omitted].
161 *Hart*, *supra* note 1 at para 115.
162 *Ibid.*
163 *Ibid* at paras 194, 213.

In addition, the argument that the individual confessed after exposure to violence, which shows that he was not coerced, is used to justify abuse of process (just as it was used to justify reliability).[164] This argument was also advanced by the Crown in *Derbyshire*, but it was promptly rejected by the trial judge.[165] Yet, in *Derbyshire*, the threats were direct and personal. In all other cases, the judges accepted the argument that confessing after exposure to violence shows a lack of coercion, as the threats were not direct or personal.[166] That is simply not the test for abuse of process.[167] Also, none of the Mr. Big cases where threats or violence were used discussed the SCC statements that where threats and violence are present, there is almost always coercion[168] and that, in general, violence and threats of any kind are unacceptable.[169]

Due to the discretion built into the test, it is not possible to assess whether in the cases where threats or violence were noted, the judge was wrong in finding that there was no coercion and thus, no abuse of process. However, there are serious concerns regarding the arguments advanced to reject abuse of process.

ii. Other Ways to Overbear the Will of the Accused

In the other two cases where the confessions were excluded based on abuse of process, there were no threats or violence involved, but the judge found that the accused was exploited and the police did not act in good faith. In *Nuttall*, the target was impoverished, socially isolated, and looking for spiritual meaning. He was given "true" friends, gifts, religious guidance, and extensive travels.[170] It appears that what crossed the line for this particular judge was the manipulation of religion and the accused's spiritual needs in order to obtain the confession. This manipulation is not unique to this case. What is unique is that, unlike most Mr. Big operations, Nuttall

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164 *RK*, *supra* note 72 at para 756; *Potter*, *supra* note 64 at para 225; *Balbar*, *supra* note 72 at para 202; *Randle*, *supra* note 72 at para 67.

165 *Derbyshire*, *supra* note 49 at para 61.

166 *RK*, *supra* note 72 at para 709; *Potter*, *supra* note 64 at para 228; *Balbar*, *supra* note 72 at para 354; *Randle*, *supra* note 72 at paras 67, 72.

167 *Hart*, *supra* note 1 at para 118; *Derbyshire*, *supra* note 49 at para 106.

168 *Hart*, *supra* note 1 at paras 116–17.

169 *Ibid* at para 117.

170 *Nuttall*, *supra* note 51 at para 792. It should be noted that, while the confession was thrown out based on abuse of process, the accused was found guilty at trial. On appeal, the court overturned the decision and entered a stay of proceedings.

was not set up to confess to murder. Rather, he was suspected of terrorist involvement and this organization was set up as an organization with terrorist ties. There was a clear entrapment component that was discussed in this case, which is absent from the traditional Mr. Big operations. It is possible that this aspect also rendered the judge more inclined to find abuse of process.

The second case, *M(S)*, was also a twist on the typical Mr. Big operation.[171] The target was 15 years old and he was not attracted into a criminal organization with strangers.[172] Rather, the police employed M(S)'s father, who had been absent from his life, and had him re-enter his son's life to prey on his vulnerabilities and obtain a confession.[173] The use of a parent in these circumstances was a main contributor to the finding that the fairness of the justice system was tampered with.[174]

Thus, in no typical Mr. Big operation was the police conduct found to reach the level of manipulation that would rise to abuse of process, despite the fact that in 56% of the cases, the target presented significant vulnerabilities and was provided with strong incentives. This may be because a substantive analysis of police conduct, in the context of considering abuse of process, was absent from many of the cases reviewed.

For instance, in *Caissie* and *Omar* (both of which included extensive vulnerabilities, strong incentives, and lengthy operations), the judges stated that there was no abuse of process because there were no threats or violence involved.[175] No further analysis was performed on the other circumstances.

In other cases, the judges argued that traits deemed as "vulnerabilities" in *Hart* did not count as true vulnerabilities for the purpose of abuse of process in that case. As such, the issue of overbearing the targets' wills did not arise:

> The background and life experience of Mr. Balbar are not shown on the evidence to establish any particular vulnerabilities. There is no evidence that the police preyed upon Mr. Balbar's apparent addiction to methamphetamines. In fact, there is evidence to the contrary. With regards to a particular vulnerability due to limited

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171 *Supra* note 51.

172 *Ibid* at paras 2–7.

173 *Ibid*.

174 *Ibid* at para 75.

175 *Caissie*, *supra* note 64 at para 437; *Omar*, *supra* note 86 at para 72. This is all the more interesting since, as discussed above, in the 8% of the cases where threats or violent scenarios were employed, the judges also concluded that there was no evidence of abuse of process without any other analysis than the one used to assess reliability.

> intellectual functioning, had Mr. Balbar's behaviour and reliable psychological testing borne out a low level of intellectual functioning, then targeting him in the Mr. Big operation might well have constituted an abuse of process. However, the totality of the evidence before the Court does not support such a finding.[176]

In *Amin*, the judge went as far as to praise the officers in how they dealt with the accused who was mentally ill and suffering from addictions:

> [T]he officers went out of their way to evaluate Mr. Amin's vulnerability as a target. They were fully aware of Mr. Amin's mental health issues and never, at any stage, sought to exploit them. Even though Mr. Amin drank alcohol during his interactions with the officers, there was no evidence of any kind of intoxication. Nor did the officers encourage Mr. Amin to drink or supply him directly with alcoholic beverages...There was no conduct constituting an abuse of process in this case.[177]

Sometimes, the same argument used to mitigate the impact of vulnerabilities, incentives, and threats on the probative value was also used to argue that the willpower of the accused was not overborne and hence, there was no abuse of process. These arguments included: that the accused, though young or unsophisticated, had "street smarts",[178] that despite their mental illness they were not someone that could be "easily manipulated",[179] or that although they were in financial distress, they were not destitute[180] (so the police were not preying on their need). Other times, the judges simply noted that despite the vulnerabilities identified, there was no evidence that the police preyed on them.[181]

The discussion of abuse of process tends to be brief and dismissive. This may very well be because, unlike for the first prong where the state has the

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176 *Balbar*, *supra* note 72 at para 381.

177 *Supra* note 64 at para 39. Additional cases in which a similar line of argument was presented include *MacDonald*, *supra* note 98; *Pernosky*, *supra* note 52 at para 39; *Potter*, *supra* note 64 at para 70; *Subramaniam*, *supra* note 94 at paras 30–31; *Shaw*, *supra* note 98 at para 20.

178 *M(M)*, *supra* note 90 at paras 80, 112, 119, 123, 169–70; *Lee*, *supra* note 64 at paras 145, 150, 287, 303, 334.

179 *Balbar*, *supra* note 72 at paras 381–83; *Amin*, *supra* note 64 at para 39; *MacDonald*, *supra* note 98 at para 19; *Pernosky*, *supra* note 52 at paras 22, 34; *Potter*, *supra* note 64 at paras 193–98; *Shaw*, *supra* note 98 at para 61.

180 *Beliveau*, *supra* note 57 at paras 40, 64; *Johnston*, *supra* note 97 at para 58; *Randle*, *supra* note 72 at para 83; *Allgood*, *supra* note 97 at para 58.

181 *Amin*, *supra* note 64 at paras 39, 44–45; *Balbar*, *supra* note 72 at paras 381–83; *Ledesma*, *supra* note 57; *Moir*, *supra* note 99 at paras 499, 544; *Omar*, *supra* note 86 at paras 23–27; *Perreault*, *supra* note 57 at paras 39–41; *Wruck*, *supra* note 99 at paras 21–22; *Giles*, *supra* note 49 at para 296.

burden of proving, on a balance of probabilities, that the evidence is reliable, the onus for the second prong is on the accused to establish that an abuse of process occurred.[182] Thus, if the accused fails to do so, the judge would arguably be justified in saying "there is no evidence that abuse of process occurred." Yet, we believe this raises two distinct issues.

The first issue is that, when the burden shifts to the accused, the evidence does not need to emanate from the accused, as it can also arise from other circumstances of the case. Thus, as an example, it is incongruous that after an extensive discussion on how an individual with addictions was provided with alcohol, the court would conclude that there is no evidence that the police took advantage of the addiction,[183] without any further analysis. It is unclear what other evidence the accused would need to prove that his addiction was exploited. Perhaps this speaks to the high evidentiary demands placed on the accused or the high standard required to prove abuse of process. Despite the fact that the standard for proving abuse of process is on a balance of probabilities (thus not particularly high), a remedy for abuse of process is granted only in the clearest of cases. This does appear to, in fact, elevate the standard beyond a balance of probabilities.

The second issue is that the evidence that the accused is required to produce may not be fully in the possession of the accused[184] or it may not be feasible for the accused to produce it. Showing abuse of process often requires the accused to testify. Given the high rates of mental illness, addictions, lack of education, and unsophistication among the targets, they may not make great witnesses. This results in the accused being put in a position where it may be unrealistic for them to be able to demonstrate abuse of process.

It is peculiar that in all but one case[185] where abuse of process was found,

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182 *Hart*, *supra* note 1 at para 113.

183 *Subramaniam*, *supra* note 94 at paras 30–31.

184 We had the opportunity to review the disclosure materials in *Buckley*, *supra* note 11. The file is voluminous and essential information is lost among irrelevant documents. At the same time, parts of the file are redacted to protect the identity of the operatives and the covert nature of the operations. Many of the targets do not always have adequate representation, given their financial circumstances and the significant amount of work required to engage with undercover disclosure files. This may raise additional barriers in successfully raising arguments that abuse of process occurred. It should be noted that for his part, Mr. Buckley had the good fortune of receiving excellent representation from his lawyer, who managed to get the confession excluded on the first prong.

185 *Derbyshire*, *supra* note 49 had confirmatory evidence. However, the circumstances were

there was no confirmatory evidence. Confirmatory evidence should have no impact on abuse of process. A strong confession obtained through oppressive techniques should still be excluded.[186] Yet, it seems that courts are only willing to throw out a confession accompanied by some confirmatory evidence when the most extreme level of violence is used.[187]

It is difficult to draw conclusions on how successful the *Hart* framework has been in revamping the abuse of process doctrine. We are, however, concerned that some courts appear to be conflating the analyses for the two prongs. We also question whether the abuse of process prong can play a significant role, given that the burden is on the accused to show abuse of process. Courts also seem to be reluctant to exclude a confession on the grounds that it was obtained in circumstances that fall short of direct threats of violence, extreme violence, or circumstances atypical for Mr. Big operations (such as entrapment). Yet, as recognized in *Hart*, and as further discussed in the next chapter, police oppression that overcomes the will of the accused may also occur in other ways. There is no evidence that the abuse of process prong provides protection against police misconduct in those cases.

IV. Evaluation of the Application of *Hart*

It is possible that the *Hart* framework has been watered down beyond its original intent.[188] However, the *Hart* framework itself may also have some weaknesses. *Hart* is an attempt to regulate an operation created with the intent to evade the black letter law, even though its structure theoretically upsets so many rules and principles.[189] By creating a rule whose application is difficult to successfully appeal,[190] the use of confessions resulting from

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significantly different from a Mr. Big case where the individual is attracted into a criminal organization. In this sting, the level of violence used was extreme: Ms. Derbyshire was kidnapped by undercover officers and threatened until she confessed and provided confirmatory evidence.

186 *Hart*, *supra* note 1 at para 214.

187 However, the reverse is not true. That is to say, the lack of confirmatory evidence did not always lead to a finding of abuse of process, regardless of their circumstances. Thus, while the lack of confirmatory evidence was not a sufficient condition, it appears to be a necessary one.

188 Iftene, *supra* note 2 at 167–68. Arguably, this was predictable in light of the direction the SCC has taken in applying the confessions rule and section 7 of the *Charter*.

189 See e.g. Coughlan, *supra* note 2 at 419; Kaiser, *supra* note 2 at 307.

190 That is not to say that the *Hart* framework can never be useful on appeal. In fact, in *R*

problematic operations remain unpredictable and largely unchecked. Working from our case review, we now turn to what we perceive to be some of the most concerning trends under the *Hart* framework.

A. Vulnerabilities Remain a Staple of Mr. Big Targets While They Play a Minimal Role in the Admissibility Analyses

In *Hart*, Justice Moldaver noted that coercion may exist even in the absence of threats or violence if the will of the target was overborne.[191] This is more likely to happen where the individual has a vulnerability that the state took advantage of. These vulnerabilities include mental illnesses, youthfulness, addictions, and socio-economic disadvantage.[192]

The presence of vulnerabilities does not immediately determine that coercion was involved. Clearly, the fact that someone has a mental illness or that they are young does not mean that they are incapable of deciding for themselves whether or not they wish to talk about something. Yet, out of the admitted confessions, 56% were obtained from people with an identifiable vulnerability.[193] The overrepresentation of vulnerable individuals among Mr. Big targets is in itself unsettling. However, of even more concern is that the factors that the SCC[194] warned could increase vulnerability and susceptibility to persuasion in the context of police interrogations are specifically targeted by police: addictions,[195] intellectual

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v Yakimchuk, 2017 ABCA 101 it was the appeal court that applied the *Hart* framework at first instance, while in *Laflamme*, *supra* note 51, it was the appeal court that found abuse of process and entered a stay. But while the framework can work on appeal, in practice, that happens very sparingly.

191 *Supra* note 1 at para 113.

192 *Ibid* at paras 117, 213. Similarly, in *R v Otis*, [2000] RJQ 2828, 2000 CarswellQue 3702 [*Otis*], the Court recognized that certain people are more susceptible to persuasion than others. It cautioned that special attention needs to be paid to personal characteristics when the accused is under police interrogation in order to determine if their section 7 rights have been infringed.

193 It should be mentioned that this number reflects only the situations where the trial judge specifically identified a vulnerability that could, in some way, be documented. It is likely that the number of targets that actually had various vulnerabilities is much higher and that the trial judge did not or could not acknowledge them.

194 *Hart*, *supra* note 1 at para 117; *Otis*, *supra* note 193.

195 *Subramaniam*, *supra* note 94 at para 30; *Balbar*, *supra* note 72 at para 270; *Johnson*, *supra* note 97 at para 76.

deficits,[196] youthfulness,[197] health,[198] and financial or psychological stress.[199] Psychologists are being brought in to help the police design operations based on the characteristics of the accused in order to achieve maximum success (that is, obtaining a confession).[200]

Despite their continued prevalence and role in these operations, vulnerabilities were significantly downplayed in the cases we reviewed. In the previous chapter, we illustrated some of the narratives employed by judges to justify why vulnerabilities are of marginal relevance. The approach taken by courts to vulnerabilities raises at least two distinctive issues. First, it shows a disregard for how vulnerabilities interact with coercion and, by extension, with the reliability of evidence and abuse of process.

Second, quite apart from the issues of reliability and abuse of process, this approach is also problematic when viewed through disability and race lenses.[201] If the advice provided by Justice Moldaver that the police refrain from targeting vulnerable people would have been applied, it is likely that Mr. Big operations would eventually be phased out. That is not because non-vulnerable people do not commit crimes; rather, it is because non-vulnerable people are less likely to fall for what is now a widely publicized undercover technique, rooted in the manipulation of vulnerabilities. Unfortunately, the data suggests that in subsequent applications of *Hart*, judges may have sanctioned the continuing exploitation of vulnerable traits and set a very high bar for when police conduct is considered impermissibly exploitative.

In addition, all of the information on vulnerabilities is based on the trial judges' appraisals, since no systematic data is collected by the designers of these operations.[202] Given the nature of these operations, the judicial

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196 *Hart*, *supra* note 1 at paras 117, 232; *Balbar*, *supra* note 72 at paras 381–83; *Nuttall*, *supra* note 51 at paras 224, 226, 260, 412.

197 *Subramaniam*, *supra* note 94 at paras 34–40; *M(M)*, *supra* note 90 at paras 169–70; *Buckley*, *supra* note 11 at para 77–78; *M(S)*, *supra* note 51 at para 7; *Moir*, *supra* note 99 at para 280; *Omar*, *supra* note 86 at para 59; *RK*, *supra* note 72 at para 15; *South*, *supra* note 50 at para 84.

198 *Johnson*, *supra* note 97 at paras 156, 158.

199 *Laflamme*, *supra* note 51 at para 31; *Lee*, *supra* note 64 at para 115; *Nuttall*, *supra* note 51 at para 792.

200 Porter, Rose & Dilley, *supra* note 42.

201 Due to space constraints, the development of this argument will have to be left for a different occasion. We did, however, feel it was impossible to flag this collateral, yet very important issue raised by these operations.

202 RCMP, Letter in Response, *supra* note 10.

resistance to exclude what is deemed to be reliable evidence, and the manner in which vulnerabilities are minimized when identified by a judge, there is a distinct concern that the presence of vulnerabilities is underreported, under-identified, and downplayed beyond what we are able to ascertain based on a review of court cases. In addition, we are concerned by the fact that information regarding the race and ethnicity of the targets is not collected by the RCMP and, therefore, is not available. Finally, the RCMP's failure to collect information regarding their total number of operations and scenarios removes any kind of oversight of the operations that do not make it to trial. There is simply no way of knowing how many operations were so extreme that the Crown declined to prosecute or how many times such tactics were employed on people who refused to confess. It is also possible that in these under-scrutinized stings, vulnerable and racialized targets are overrepresented. Without oversight, accountability for the consequences of such operations is not even theoretically possible.

While it is known that marginalized groups and individuals are overrepresented at all levels of the criminal justice system, an investigative tool that has historically been built overwhelmingly on these characteristics should raise heightened concerns for human rights and disability rights scholars and activists. Not only is there no evidence that the *Hart* framework has led to more culturally sensitive approaches as some hoped, but it may have also provided legitimacy to an under-scrutinized investigative tool that may have disproportionate effects on marginalized groups.

B. The *Hart* Framework and Its Application Are Out of Sync with Evidence-Based Psychological and Sociological Studies on Coercion and Oppression

Statements that justify the lack of abuse of process by the absence of direct threats and violence are at odds with socio-psychological evidence-based research that illustrates the large variety of effective coercion tactics. The non-violent methods employed in Mr. Big, called "soft pressure tactics" by forensic psychologists, are "qualitatively different but as effective as harsh pressure tactics" (i.e. threats and violence).[203] Soft pressure is created by using social influence techniques (such as reciprocity, consistency, creating a persona that the target likes and identifies with, providing social validation, using authority, and offering the target a commodity that is

[203] Luther & Snook, *supra* note 2 at 133.

scarce to them) and has been studied and validated as successful in causing people to acquiesce to a request or change their behaviour based on real or imagined group pressure.[204] By consulting with trained psychologists,[205] each Mr. Big operation tailors these tools for the specific target, often guaranteeing that a confession will be obtained. Thus, in order to work, these operations are laden with compliance-gaining techniques. Other psychologists have suggested that they are the same tools, listed in the Biderman's Chart[206] of coercion, used to gain compliance in other contexts (e.g. in prisons or in the case of battered victims).[207]

It is unclear whether the failure to assess the coerciveness of soft tactic techniques, especially when coupled with vulnerabilities, is a by-product of a lack of knowledge or a resistance to exclude evidence that is so compelling. While it is an incorrect application of the abuse of process doctrine, the tendency to resist excluding reliable evidence, irrespective of police conduct, has been scientifically proven.

For instance, a 2012 study[208] asked judges to appraise culpability in certain cases. In one group, the confessions were obtained through high pressure techniques and there was some weak corroborative evidence; in the other group, the same techniques were used, but there was no corroborative evidence.[209] The conviction rate increased fourfold in the first group compared to the second, even where the judges agreed that some coercion may have been involved.[210] The study concluded that coercion and guilt are overwhelmingly perceived as independent by judges.[211] A number of other studies have concluded that regular police interrogations (even where high pressure techniques were employed) were deemed to be less coercive where the confession led to some confirmatory evidence.[212] Sometimes when

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204 *Ibid.*

205 For the ethical issues in using psychologists in Mr. Big operations see Porter, Rose & Dilley, *supra* note 42.

206 Amnesty International, *Report on Torture*, 2nd ed (London, UK: Duckworth, 1975).

207 Luther & Snook, *supra* note 2 at 138.

208 Saul M Kassin, Daniel Bogart & Jacqueline Kerner, "Confessions that Corrupt: Evidence from the DNA Exoneration Files" (2012) 23:1 Psychological Science 41.

209 *Ibid.*

210 *Ibid.*

211 *Ibid.*

212 Netta Shaked-Schroer, Mark Constanzo & Dale E Berger, "Overlooking Coerciveness: The Impact of Interrogation Techniques and Guilt Corroboration on Jurors' Judgements of Coerciveness" (2015) 20:1 Leg & Criminological Psychology 68 at 76–78; Rachel Greenspan & Nicholas Scurich, "The Interdependence of Perceived

confirmation was available, the trier of fact did not even consider whether the confession was coerced.[213] In Mr. Big scenarios, the risk of (inadvertently) overlooking oppression due to perceive heightened reliability may be even higher than for other types of confessions because of the difficulties judges have in recognizing coercion when soft pressure techniques are used. An unconscious bias may also exist against the suspect who, more often than not, may be of dubious character, has confessed to a serious crime, and may have a lack of sophistication that prevents them from articulating an explanation.

While difficult to ascertain due to the small sample size, it is possible that the approaches taken by judges in the cases reviewed are an illustration of the trend identified in these studies. If so, there is a realistic possibility that the second prong of the *Hart* framework, as applied, may not adequately guard against overpowering the will of the individual.

C. Unreliable Confessions May Continue to be Admitted

Psychological studies show that false confessions are linked to vulnerability, suggestibility, and compliance.[214] Disposition factors such as low IQs, decreased mental capabilities, youthfulness, and certain personality traits significantly increase the risk that individuals will falsely confess when pressed.[215] While this is likely true for all confessions, the risk of a false confession may be heightened in Mr. Big scenarios because, unlike during police interrogations, the vulnerable suspect feels safe and is brought to believe that a confession will only have positive consequences.[216]

This is likely part of the reason why Justice Moldaver strongly recommended that the presence or absence of confirmatory evidence, as well as the level of detail of the confession, be considered by the judge assessing the probative value of the statement.[217] However, Justice Moldaver also stated that reliability may arise from other sources than confirmatory evidence.[218] It is possible that what Justice Moldaver had in mind were situations where the individual confesses in the absence of an identifiable

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Confession Voluntariness and Case Evidence" (2016) 40:6 L & Human Behavior 650 at 651.

213 Shaked-Schroer, Constanzo & Berger, *supra* note 212 at 77.

214 Connors, Patry & Smith, *supra* note 42 at 3.

215 *Ibid.*

216 *Ibid.*

217 *Hart*, *supra* note 1 at paras 101, 105.

218 *Ibid* at para 105.

reason to lie (including inducements). While that may very well be the case in other contexts, this will likely only happen in exceptional circumstances in a Mr. Big scenario. These confessions are rarely organic; they are frequently elicited. In the Mr. Big context, elicitation means that the suspect is directly asked to confess after months of manipulation and after being made to believe that the confession will have no negative consequences. Not only that, but the target is made to believe that a confession will have positive ones (i.e. consolidate the individual's position within the organization,[219] make money and enjoy a lifestyle they never previously had access to,[220] and their legal problems will go away).[221] It is difficult to imagine what kind of sources, strong confirmatory evidence aside, could guarantee the reliability of a confession obtained in such circumstances.[222]

In 21% of the reviewed cases, the evidence was admitted in the absence of any confirmatory evidence (including holdback information) and despite the fact that, in most of these cases, the judge identified both the presence of vulnerabilities and the use of inducements. In addition, the presence or absence of confirmatory evidence was not discussed in nearly 10% of the cases. Thus, at least in these cases, the reliability of the confession may be called into question. We suggest that there may be more.

In almost 70% of the cases, there was some form of confirmatory evidence identified by the trial judges that may have weighted heavily in the decision to admit the confessions. In all but one of these cases, the confession was admitted.[223] While confirmation, especially independent confirmation, does increase reliability, it is not infallible. Issues with relying on any confirmatory evidence to avoid wrongful convictions have been well documented.[224]

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219 *Johnson*, *supra* note 97 at para 632; *Tingle*, *supra* note 53 at paras 26, 39.

220 *Balbar*, *supra* note 72 at paras 202–03; *Kelly*, *supra* note 118 at para 23; *M(M)*, *supra* note 90 at paras 86–87; *Niemi*, *supra* note 98 at para 4.

221 *Buckley*, *supra* note 11 at para 39; *Carlick*, *supra* note 98 at para 24; *Klaus*, *supra* note 115 at para 76; *Knight*, *supra* note 90 at paras 122, 125; *South*, *supra* note 50 at para 25.

222 See e.g. *Hart*, *supra* note 1 at paras 237–38. Justice Karaskatanis makes a similar point in her dissent.

223 *Derbyshire*, *supra* note 49.

224 See e.g. Timothy Moore, "False Premise: How the Veracity of Confessions Affects Confirmatory Evidence" (2015) 35:5 Lawyers Daily 14 at 14; Nikos Harris, "Justice for All: The Implications of Hart and Hay For Vetrovec Witnesses" (2015) 22 CR (7th) 105 [Harris, "Justice for All"]; Kaiser, *supra* note 2 at 305; Coughlan, *supra* note 2 at 436–37.

The independence and materiality of the confirmatory evidence (i.e. evidence that corroborates the confession, is not derived from the confession, and is relevant to a material issue of the confession) are seen as necessary guarantees for the prevention of wrongful convictions. In other words, the mere presence of some confirmatory evidence alongside a confession is not equated with a safe basis for a conviction. It is not enough that the corroboration restores the judge's faith in the reliability of the confession; it must also convince a judge beyond a reasonable doubt that the accused committed the offence.[225]

As discussed above, only 5% of the cases reviewed contained independent evidence for corroboration. The other types of evidence were either holdback information (44%), real evidence derived from the confession (10%), or forensic evidence that confirmed the details offered in the confession (11%). All of the confessions where some confirmation existed (even when containing inconsistencies),[226] were found to be reliable.

Unfortunately, overreliance on such evidence for boosting reliability can be problematic. Psychologists suggest that a confession has the potential to taint how the surrounding evidence is interpreted[227] and thus, this evidence is not as confirmatory as it is thought to be.[228] This theory is called confirmation bias: the process by which people preferentially seek out and interpret information in a manner that confirms their bias.[229] The forensic confirmation bias occurs in a situation where the person's pre-existing beliefs or expectations affects the "collection, perception and interpretation of evidence during the course of a criminal case."[230] In other words, the initial piece of evidence leads to a 'verdict' which leads to subsequent

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225 Harris, "Justice for All", *supra* note 224; Nikos Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005) 31 CR (6th) 216; *R v Khela*, 2009 SCC 4 at paras 42–43.

226 See e.g. *Balbar*, *supra* note 72; *Jeanvenne*, *supra* note 57 at paras 48–49.

227 Timothy Moore, *Mr. Big Undercover Operations: Who is Deceiving Whom?* (Gledon College, York University, 2019) [unpublished]; Steve D Charman, "Forensic Confirmation of Bias: A Problem of Evidence Integration, Not Just Evidence Evaluation" (2013) 2:1 J Applied Research in Memory & Cognition 56 at 56; Greenspan & Scurich, *supra* note 212; Shaked-Schroer, Constanzo & Berger, *supra* note 212; Kassin, Bogart & Kerner, *supra* note 208; Jeff Kukucha & Saul M Kassin, "Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation of Bias" (2014) 38:3 L & Human Behavior 256.

228 Moore, *supra* note 224 at 14.

229 Greenspan & Scurich, *supra* note 212 at 651; Kukucha & Kassin, *supra* note 227 at 256.

230 Greenspan & Scurich, *supra* note 212 at 651.

evidence being evaluated in a manner that supports that verdict. Thus, ambiguity and uncertainty are sometimes eschewed by artificially imposing consistency between various pieces of evidence[231] (such as details in a confession and some forensic finding) or by downplaying the value of the forensic evidence that is not consistent with the confession.[232]

One study demonstrated that experts who had previously read a confession were more likely to erroneously conclude that the forensic evidence from the accused, such as handwriting, fingerprinting, and even DNA, was from the same person as the perpetrator.[233] In addition, an archival analysis of the DNA exonerations from the Innocence Project[234] has shown that exonerees had often been convicted based on confessions containing correct and graphic details of the crime. Most often, the false confession had been accompanied by some confirmatory evidence such as invalid or improper forensic science, eyewitness identification, and/or the testimony of an informant.[235] Confessions influenced the guilty verdict even when the individual was coerced into confessing, had a psychiatric illness or was under stress, and even when the confession was second hand information from an informant.[236]

All this is not to say that corroboration, scientific or otherwise, is without probative value. Rather, the problem lies with the failure to recognize that any subjective judgements (such as an evaluation of the meaning of scientific evidence or assessing how levels of detail match the crime scene) are subject to error and tend to be presented to the trier of fact as more conclusive than they actually are.[237] None of the cases contain any discussion showing that the judge had even turned their mind to the possibility of confirmation bias or to the fact that the prosecutor was attributing too strong of a meaning to some pieces of evidence. In other words, we are concerned that it appears that courts have adopted the idea

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231 *Ibid.*

232 Moore, *supra note* 224 at 15.

233 Kukucha & Kassin, *supra* note 227 at 265.

234 Kassin, Bogart & Kerner, *supra* note 208.

235 *Ibid* at 43.

236 *Ibid* at 41. See also Saul Kassin, Itiel E Dror & Jeff Kukucka, "The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions" (2013) J Applied Research in Memory & Cognition 42.

237 See e.g. Gary Edmond et al, "Forensic Science Evidence and the Limits of Cross-Examination" (2019) 42:3 Melbourne UL Rev 858; Emma Cunliffe, "Failed Forensics: How a Bungled Investigation Facilitated Stanley's Acquittal", Can B Rev [forthcoming in 2020].

that confirmatory evidence is powerful in an absolute way: confessions are always to be admitted where there is some confirmation, but confirmation is not needed for admission. This unnuanced approach is particularly dangerous when the confession is obtained from a questionable operation that did not receive prior judicial authorization,[238] which benefitted from little to no other oversight, and yet has a reputation of being "highly effective" in obtaining confessions that lead to convictions.[239]

V. CONCLUSION

The two prongs of the *Hart* test have been inconsistently applied by the courts over the last 5 years. The new common law confessions rule does not appear to have had a significant impact on the admissibility of evidence, even in circumstances in which reliability is in question. The impact of the abuse of process prong also appears negligible and there is a concern that some judges may be inclined to overlook oppressive techniques that overbear the will of the target where the confession appears to be reliable. It is also unclear if judges have a clear understanding of the interactions between vulnerabilities and incentives, on one hand, and abuse of process and reliability, on the other. Given the small number of operations that started post-*Hart* and which resulted in a trial at the time of writing, we could not assess the impact that *Hart* had on the Mr. Big operations themselves (whether they decreased in number post-*Hart* and whether their structure has changed). Yet, the fact that the framework had negligible effects on confessions obtained during operations designed before its time is a concern. The outcomes of the applications of *Hart* thus far raise the question of whether there is any incentive for the RCMP to change the manner in which they conduct these operations.

The potential concerns and failures we have identified in our review could be a by-product of the framework itself, as much as of its subsequent applications. A less flexible framework and a stricter requirement for the oversight of each operation might be advisable. It is appropriate, and

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238 For issues with the lack of prior judicial authorization for Mr. Big operations, see Joan Brockman, "The Use of Undercover Operators by Professional Organizations when Gathering Evidence to Enforce Their Monopolies: 'Reprehensible' Tactics and 'Outright Deception'?" (2015) 38:1 Man LJ 243.

239 In the words of Archie Kaiser, *supra* note 2 at 307: "[it is] because of its…efficacy, rather than its procedural elegance and constitutional fidelity, [that] Mr. Big has survived to live another day."

perhaps essential, to generally allow judges some flexibility and discretion in how they consider the various factors and tailor their findings to the circumstances. Nonetheless, we question whether a flexible framework like *Hart* is, in fact, appropriate for confessions obtained during operations that do not benefit from robust oversight, for which, by the RCMP's own admission, basic data is not tracked, do not require judicial pre-authorization, rely heavily on soft coercion techniques in which judges have no expertise (and which are inherently difficult to understand and evaluate), and are designed by expert psychologists (and still applied mostly to vulnerable targets).

However, beyond the issues of the framework used and its application, there is also a question of whether Mr. Big operations could ever be fully brought under the rule of law.[240] What makes these operations efficient in obtaining confessions is also what makes them legally and ethically problematic: that is, the exploitation of individual vulnerabilities, monitoring the individual and creating scenarios tailored for their personality that ensure they will not resist, and the use of inducements that break the will of the accused. Should judges adequately scrutinize these Mr. Big operations, it would be rare for the operations to avoid frustrating at least one of the three main concerns raised by the SCC in *Hart* (that is, reliability of the confessions, prejudice to the accused, and oppressiveness of the operations). If that is the case, it begs the question of why Mr. Big continues to be a legally authorized method of police investigation.

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[240] On this, see Adelina Iftene, "Mr. Big: The Undercover Breach of the Rights Against Self-Incrimination" in C. Hunt, ed, *Perspectives on the Law of Privilege*, (Toronto: Thomson Reuters, 2019) at 39–60.

Appendix

Case Name	Evidence Admit/ Exclude?	Trial Outcome G: Guilty NG: Not Guilty	Appeal Status	Notes
R v Ader 2017 ONSC 4643 (voir dire on admissiblity of confession) 2017 ONSC 7052 (trial)	Admit	G	Not Appealed	
R v Allgood 2014 SKQB 29 (trial) 2015 SKCA 88 (appeal) [2015] SCCA No. 423 (leave to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Amin 2019 ONSC 3059 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Bahia and Baranec 2016 BCSC	Admit	G	Not Appealed	

2686 (application for mistrial) No written trial decision, as jury trial				
R v Balbar 2014 BCSC 2285 (voir dire on admissiblity of confession) No written trial decision, as jury trial	Admit	G	Appealed. Accused abandoned appeal	
R c Beliveau 2016 QCCA 2133 (appeal)	Admit	G	Appealed. Sent for retrial (insufficient jury instructions)	Pled guilty to a lesser charge after being granted a retrial
R c Bernard 2015 QCCS 4903 (voir dire on admissibility of confession) No written trial decision (jury) 2019 QCCA 1227 (appeal)	Admit	G	Appealed. Sent for retrial (insufficient jury instructions)	Retrial decision not available yet

R v Bradshaw 2012 BCSC 202 (trial) 2015 BCCA 19 (appeal) 2017 SCC 35 (SCC appeal)	Admit	G	Appealed. Verdict Upheld	
R v Buckley 2018 NSSC 1 (voir dire on admissibility of confession) 2018 NSSC 2 (voir dire on admissiblity of cautioned statement)	Excluded because of reliability	NG	Not Appealed	Case dismissed due to lack of Crown evidence
R v Burkhard 2019 ONSC 1218 (voir dire on admissibility) No written trial decision (jury)	Admit	G	Not Appealed	
R v Caissie 2018 SKQB 279 (voir dire on admissibility) 2019 SKQB 3 (trial)	Admit	G	Appealed	Appeal decision not yet available.

R v Campeau 2010 (no reported decision: jury trial) 2015 ABCA 210 (appeal) 2016 CarswellAlta 490 (leave to appeal to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Carlick 2012 (no reported decision: jury trial) 2018 YKCA 5 (appeal)	Admit	G	Leave to appeal denied	
R v Charlie 2017 BCSC 2187 (application for directed verdict in jury trial)	Admit	G	Not Appealed	

R v Derbyshire 2014 NSSC 371 (application to exclude confession) 2016 NSCA 67 (appeal) 2016 CarswellNS 1123 (leave to SCC denied)	Exclude because of an abuse of process	NG	Appealed. Verdict Upheld	The 2014 case is a retrial from a pre-*Hart* appeal.
R v Duncan 2015 BCSC 2688 (bail hearing)	/	G	Not Appealed	Pled guilty at trial
R v Giles 2015 BCSC 1744 (voir dire on admissibility of confession) 2017 BCSC 73 (application for stay of proceedings - denied)	Admit	G	Not Appealed	
R v Gill 2017 BCSC 1026 (application for disclosure of third-party records)	/	G	Not Appealed	Pled Guilty at trial

R v Hales 2014 SKQB 411 (trial) 2015 CarswellSask 759 (appeal)	Admit	G	Appealed. Verdict Upheld	
R v Handlen 2018 BCSC 1330 (voir dire on admissibility of confession) 2019 BCSC 267 (sentencing)	Admit	G	Not Appealed	
R v Jeanvenne 2010 ONCA 706 (appeal based on denial of severance) 2016 ONCA 101 (appeal)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Retrial decision not available
R c Johnson 2016 QCCS 2093 (trial)	Admit	G	Not Appealed	
R v Johnston 2014 BCCA 144 (appeal - April 2014, pre-Hart) 2016 BCCA 3 (appeal, in light of *Hart*)	Admit	G	Appealed. Verdict Upheld	

R v Keene 2014 ONSC 7190 (voir dire on admissibility of confession) 2015 CarswellOnt 12484 (sentencing)	Admit	G	Not Appealed	
R v Kelly 2017 ONCA 621 (appeal) 2017 CarswellOnt 21191 (leave to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Klaus 2017 ABQB 721 (voir dire on the admissibility of confession) 2018 ABQB 6 (trial)	Admit	G	Appealed. Verdict Upheld.	
R v Knight 2018 ONSC 1846 (voir dire on admissibility of confessions)	Admit	G	Not Appealed	

R c Laflamme Trial (2010) 2015 QCCA 1517 (appeal) 2015 CarswellQue 11754 (leave to SCC denied)	Exclude because of an abuse of process	G	Stay granted on appeal	
R v Larue 2018 YKCA 9 (appeal) 2019 SCC 25 (SCC dismissed the appeal)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Retrial decision not yet available
R v Ledesma 2014 ABQB 788 (voir dire on admissibility of confession) 2017 ABCA 131 (appeal)	Admit	G	Appealed. Sent for Retrial (misapplication of the *Hart* framework - prejudice)	Found guilty at retrial
R v Lee 2018 ONSC 308 (application by Crown to admit accused's confession)	Admit	G	Not Appealed	

R v M(M) 2012 ABPC 73 (trial) 2015 ABQB 692 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v M(S) 2015 ONCJ 537 (voir dire on admissibility of confession)	Exclude because of an abuse of process	Unknown – not reported (trial of young person)		
R v MacDonald 2018 ONSC 952 (trial) 2018 ONSC 1103 (sentencing)	Admit	G	Not Appealed	
R v Magoon 2015 ABQB 251 (trial) 2016 ABCA 412 (appeal) 2018 SCC 14	Admit	G	Appealed. Verdict Upheld	

R v McDonald 2015 BCSC 256 (voir dire) 2018 BCCA 42 (appeal) 2018 CarswellBC 1130 (appeal to SCC - leave denied)	Admit	G	Appealed. Verdict Upheld	
R v Mildenberger 2015 SKQB 27 (ruling on admissibility of confessions)	Admit	G	Not Appealed	
R v Moir 2010 (first trial) 2016 BCSC 1720 (voir dire)	Admit	G	Appealed. Verdict Upheld	
R v Niemi Trial (jury - convicted) 2017 ONCA 720 (appeal)	Admit	G	Appealed. Verdict Upheld	

R v Nuttall 2015 BCSC 943 (application for directed verdict) 2016 BCSC 1404 (application for stay)	Exclude (abuse of process)	G	Stay granted on appeal	
R v Omar 2016 ONSC 4065 (voir dire) 2017 ONSC 1833 (sentencing)	Admit	G	Not Appealed	
R v Pernosky Voir dire incomplete: pled guilty part way through **2018 BCSC 1252** (sentencing)	/	G	Not Appealed	Pled guilty during the voir dire.
R c Perreault Jury trial 2015 QCCA 694 (appeal) 2015 CarswellQue 7580 (leave to SCC denied)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Found guilty at retrial

R v Potter 2019 NLSC 8 (voir dire) 2019 NLSC 50 (application for directed verdict)	Admit	G	Not Appealed	
R v RK 2016 BCSC 552 (voir dire) 2017 BCSC 1510 (Crown application for young offender to be sentenced as adult)	Admit	G	Not Appealed	
R v Randle 2014 BCSC 1990 (trial) 2016 BCCA 125 (appeal)	Admit	G	Appealed. Verdict Upheld	
R v Shaw 2017 NLTD(G) 87 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Shyback 2017 ABQB 332 (trial)	Admit	G	Not Appealed	

R v Skiffington 2001 convicted at trial by jury 2004 BCCA 291 (appeal - denied) 2013 CarswellBC 3325 (appealed denial of appeal to SCC) 2019 BCSC 178 (bail hearing - granted, pending investigation into police conduct)	Admit	G	Leave to appeal denied	At the time of writing there is an investigation underway into the police conduct.
R v South 2018 ONSC 604 (voir dire)	Exclude because of reliability	Unknown outcome (jury trial not reported)		
R v Streiling 2015 BCSC 597 (voir dire) 2015 BCSC 1044 (trial)	Admit	NG	Not Appealed	
R c Subramaniam 2015 QCCS 6366 (voir dire on admissibility of confession) 2019 QCCA 1744 (appeal)	Admit	G	Appealed. Verdict Upheld	

R v Tang 2015 BCSC 1643 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Tingle 2016 SKQB 212 (trial)	Admit	NG	Not Appealed	
R v West 2013 BCSC 132 (trial) 2015 BCCA 379 (appeal)	Admit	G	Verdict Upheld	
R v Wilson 2015 BCCA 270 (application to extend time to appeal - denied) 2015 CarswellBC 3200 (leave to appeal to SCC denied)	Admit	G	Leave to appeal denied	
R v Worme Jury trial (not reported) 2016 ABCA 174 (appeal) 2016 CarswellAlta 1932 (leave to appeal to SCC denied)	Admit	G	Appealed. Sent for Retrial (error in limiting the cross examination of a police officer)	Plead guilty to a lesser offence at retrial

R v Wruck 2016 ABQB 370 (voir dire on admissibility of confession) 2017 ABCA 155 (application to be released pending appeal - denied) No appeal reported	Admit	G	Appealed.	No appeal decision reported
R v Yakimchuk Trial decision not reported 2017 ABCA 101 (appeal)	Admit	G	Appealed. Verdict upheld	
R v Zvolensky 2017 ONCA 273 (appeal) 2017 CarswellOnt 17685 (leave to SCC denied)	Admit	G	Appealed. Verdict upheld	
Smith v Ontario 2016 ONSC 7222	Excluded because of reliability	NG	Not Appealed	The Crown withdrew its case due to lack of evidence

Judicial Constructions of Responsibility in Revenge Porn: Judicial Discourse in Non-Consensual Intimate Image Distribution Cases – A Feminist Analysis

ALICIA DUECK-READ [*]

ABSTRACT

Women are increasingly enmeshed within virtual, digital worlds of communication. In the context of sexual relationships, these communications frequently include sharing nude or partially nude photos. Alongside this emergence of consensual image exchanges, so too has non-consensual distribution increased. This phenomenon, often labeled as "revenge porn", has procured significant popular and legal attention, cumulating in the passing of Bill C-13 and the enactment of section 162.1 of the *Criminal Code*. This article examines the phenomenon of non-consensual intimate image distribution (NCIID) and provides a discourse analysis of judicial decision-making on section 162.1 cases. I will ask whether judges adjudicating cases under section 162.1 draw upon privacy frameworks and/or the rape myths common to sexual assault trials.

I. INTRODUCTION

> [T]he profound emotional and psychological impact upon her clearly has been devastating, and seems likely to be permanent. In that regard, it should be recognized and emphasized again that her torment is not over. Nor does it seem likely to end.[1]

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[*] The views expressed in the text are from a personal perspective and do not represent those of the Department of Justice or the Government of Canada.

[1] *R v JTB*, 2018 ONSC 2422 at para 97.

Responding to the disturbing incident of non-consensual intimate image distribution and attempted assault in *R v JTB*, Justice Leach of the Ontario Superior Court wrote the words above, labelling the complainant's harm as profound, long-lasting, and never-ending. The seriousness with which the offence is treated seemingly flies in the face of scholar and activist concerns that complainants' harms would not be taken seriously in the judicial treatment of non-consensual intimate image distribution (NCIID).[2] Both before and after the creation of the criminal offence of NCIID under section 162.1 of the *Criminal Code*, literature on NCIID and other forms of online sexualized violence suggested that there was a discursive tendency for rape myths and discriminatory stereotypes common to sexual assault to inform the treatment of NCIID within popular culture,[3] media,[4] every day understandings,[5] and among law enforceme-

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2 Within the course of this article, I use the term non-consensual intimate image distribution (NCIID) to refer to the distribution of nude, semi-nude, and sexually explicit images –photographs or videos – without consent. Initially, these photos or videos may have been taken consensually in the context of an intimate relationship or taken unknowingly and/or without consent within or outside of the context of a relationship.

3 Jordan Fairbairn, "Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age" in Jane Bailey and Valerie Steeves, eds, *eGirls*, *eCitizens* (Ottawa: University of Ottawa Press, 2015) 229 at 239; Lara Karaian, "Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers' Digital Sexual Expression" (2014) 18:3 Theoretical Criminology 282 at 284; Hayley Crooks, "An Intersectional Feminist Review of the Literature on Gendered Cyberbullying: Digital Girls" (2016) 8:2 Jeunesse: Young People, Texts, Cultures 62; Murray Lee & Thomas Crofts, "Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People" (2015) 55:3 Brit J Crim 454; Nicola Henry & Anastasia Powell, "Beyond the 'Sext': Technology Facilitated Sexual Violence and Harassment Against Adult Women" (2015) 48:1 Austl & NZ J Crim 104 at 105 [Henry & Powell, "Beyond the 'Sext'"].

4 Fairbairn, *supra* note 3 at 239; Amy Adele Hasinoff, "Sexting and Privacy Violations: A Case Study of Sympathy and Blame" (2017) 11:2 Intl J Cyber Criminology 202 at 203.

5 Alexa Dodge, "Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph" (2016) 12:1 Crime, Media, Culture: An Intl J 65 at 68 [Dodge, "Digitizing Rape Culture"]; Anastasia Powell, "Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault" (2010) 43:1 Austl & NZ J Crim 76 at 80; Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49:2 Wake Forest L Rev 345 at 348; Shaheen Shariff & Ashley DeMartini, "Defining the Legal Lines: eGirls and Intimate Images" in Jane Bailey and Valerie Steeves, eds, *eGirls*, *eCitizens*, (Ottawa: University of Ottawa Press, 2015) 281 at 294–95; Henry & Powell, "Beyond the 'Sext'", *supra* note 3 at 105.

nt.[6] This article endeavors to answer whether these rape stereotypes and myths can also be found in judicial decision-making on section 162.1.

Rape myths are commonly understood to be beliefs or attributes held to justify and deny male aggression against women.[7] Such discriminatory stereotypes may hold women responsible for their own sexual victimization and affirm male sexual entitlement.[8] Such myths also serve to construct normative gender ideals of what it means to be a woman or a man. Scholars have long held that such myths have held a strong sway within judicial decision-making in sexual assault trials and that judges, without an understanding of the context of gendered violence, have not taken incidents of sexual assault seriously enough.[9] It is pertinent to note that such myths do not always inform judicial decision-making and that there are a variety of systemic issues within the criminal justice system, and society at large, which may result in traumatic experiences for sexual assault survivors navi-

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6 Alexa Dodge & Dale Spencer, "Online Sexual Violence, Child Pornography or Something Else Entirely? Police Responses to Non-Consensual Intimate Image Sharing Among Youth" (2017) 20:10 Soc & Leg Stud 1 at 10; West Coast LEAF, "*#CyberMisogyny: Using and Strengthening Canadian Legal Responses to Gendered Hate and Harassment Online*, (2014) at 12 online: West Coast LEAF <www.westcoastleaf.org> [perma.cc/2ZDJ-LZSX] [West Coast LEAF, "#CyberMisogyny"]; Fairbairn, *supra* note 3 at 239.

7 Corina Schulze, Sarah Koon-Magnin & Valerie Bryan, *Gender Identity, Sexual Orientation, and Sexual Assault: Challenge the Myths* (Boulder, CO: Lynne Rienner Publishers, 2019) at 91.

8 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018) at 191–92, 204.

9 See e.g. Susan Ehrlich, "Perpetuating and Resisting: Rape Myths in Trial Discourse" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 389; Rosemary Cairns-Way & Donna Martinson, "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97:2 Can Bar Rev 367 at 369–73; Kate Puddister & Danielle McNabb, "#MeToo: In Canada, Rape Myths Continue to Prevent Justice for Sexual Assault Survivors" (5 March 2019), online: *The Conversation* <theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568> [perma.cc/ZYQ3-8M7B]; Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743; Lise Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship" in Dorothy Chunn, Susan Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver, BC: UBC Press, 2007) 127 at 134 [Gotell, "Discursive Disappearance"].

gating the criminal justice system and low rates of convictions.[10]

Furthermore, it should be highlighted that the legal landscape has not remained unchanged in relation to the judicial treatment of sexual assault. In 2017, the Canadian Judicial Council (CJC) implemented mandatory judicial training following public outcry over the mishandling of several sexual assault trials.[11] The CJC's decision was, in part, a response to Bill C-337, the *Judicial Accountability through Sexual Assault Law Training Act*, which was introduced into Parliament a few months before. Bill C-337 was a political response to Justice Robin Camp's conduct during a sexual assault trial in 2014, in which he notoriously told a complainant that "pain and sex sometimes go together" and questioned why she did not keep her "knees together".[12] While Bill C-337 did not become law, it sparked an important conversation on the judiciary and sexual assault.[13] Likewise, the trial of Jian Ghomeshi profoundly shaped the public narrative on sexual assault, calling attention to the inadequacy of legal reforms in protecting women.[14] Thus, discriminatory myths in judicial decision-making on sexual assault must be placed within the broader socio-legal context. Likewise, my conclusions within this article on judicial decision-making must be placed within the context of public discourses on NCIID and the broader criminal justice system.

This article examines 14 recent decisions on section 162.1, 12 of which are sentencing decisions. These cases were selected randomly from a list of 61 decisions citing section 162.1, which were decided between the introduction of the section in 2015 and September 2019.[15] From these

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10 Dana Phillips, "Let's Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2017) 54:4 Osgoode Hall LJ 1133 at 1145–46.

11 Canada, Department of Justice, *Judicial Training in Sexual Assault Law and Social Context* (Ottawa: DOJ, last modified 10 March 2020), online: <www.justice.gc.ca/eng/csj-sjc/pl/jt-fj/index.html> [perma.cc/4BMC-PMCN]; Cairns-Way & Martinson, *supra* note 9.

12 Cairns-Way & Martinson, *supra* note 9 at 370; Alison Crawford, "Justice Robin Camp Resigns After Judicial Council Recommends Removal", *CBC News* (9 March 2017), online: <www.cbc.ca/news/politics/justice-robin-camp-judicial-council-1.4017233> [perma.cc/UX4U-M4ER].

13 Cairns-Way & Martinson, *supra* note 9 at 396.

14 Phillips, *supra* note 10 at 1136, 1148.

15 The search was conducted in WestlawNext Canada on September 4, 2019, utilizing the function within Westlaw which cross-references cases with the relevant *Criminal Code* section. See also Richard Jochelson et al, "Intimate Images and the Law", in Richard

cases, 14 decisions were chosen at random to be included in this study. The cases were then examined and coded to identify themes which are commonly considered to be rape myths and discriminatory stereotypes. As the cases I surveyed represent a small sample of the decisions on section 162.1, this article is necessarily an incomplete snapshot of judicial discourse. Further study is needed to provide a more complete picture of the state of judicial discourse, as well as disparities in treatment which may exist between levels of court and provinces. Furthermore, it should be noted that some of the cases included in this study involved charges for NCIID as well as other offences committed at the same time, such as extortion. While it was beyond the scope of this article to unpack how the presence of other charges influenced the way in which the NCIID offence was discussed by judges, this is also an area ripe for further study.

This article makes a modest contribution to the literature by providing a preliminary analysis of judicial discourse in an isolated number of section 162.1 cases. While there is a range of literature which examines the composition of the offence[16] and that unpacks judicial discourse in relation to technology,[17] this work is unique for its examination of the inter-relationship between judicial discourse and rape myths.

I have utilized a critical discourse analysis to offer a systemic scrutiny of the structures and strategies of talk and text that communicate meaning within judicial decisions.[18] Discourse analysis provides a means of analyzing the social relationships and "structural relationships of dominance, discrimination, power and control as manifested in language."[19] However,

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Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bedford, ON: Demeter Press, 2019).

16 Moira Aikenhead, "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30:1 CJWL 117 [Aikenhead, "Non-Consensual Disclosure"]; Moira Aikenhead, "A 'Reasonable' Expectation of Sexual Privacy in the Digital Age" (2018) 41:2 Dal LJ 273 [Aikenhead, "A 'Reasonable' Expectation"].

17 Alexa Dodge, "Nudes are Forever: Judicial Interpretations of Digital Technology's Impact on 'Revenge Porn'" (2019) 34:1 CJLS 121 [Dodge, "Nudes are Forever"].

18 Teun A van Dijk, "Editor's Introduction: The Study of Discourses: An Introduction: The Emergency of a New Cross-Discipline" in Teun van Dijk, ed, *Discourse Studies* (London, UK: Sage, 2007) 1 at 5–6.

19 Ruth Wodak, "What CDA Is About: A Summary of Its History, Important Concepts and Its Development" in Ruth Wodak & Michael Meyer, eds, *Methods of Critical Discourse Analysis*, 1st ed (London, UK: SAGE Publications, 2001) 1 at 3. See also Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, 2nd ed (Oxon, UK: Routledge, 2013) at 3.

discourse is not only descriptive of reality, but also is a means through which meaning is made. Thus, discourses are pervasive and performative in that they "enact what it names."[20] In looking at judicial discourse, I aim to examine the power dynamics inherent in decision-making so as to allow us to consider how the structures of law and society impact our treatment of NCIID.[21] In her analysis of sexual assault, Lise Gotell posited that judicial discourses create gendered subjectivities, privileging some subject positions and devaluing others.[22] I aim to unpack legal discourses in the context of NCIID to both understand their power to describe reality and also make meaning through constructing normative sexual subjects and gender norms.[23]

II. THE CONTEXT OF SECTION 162.1

Section 162.1 was spurred, in large part, in response to the high-profile suicides of two Canadian teens, Rehtaeh Parsons and Amanda Todd.[24] Framed in the context of discussions on cyber-bullying,[25] the section makes it an offence to knowingly, without consent, publish, sell, transmit, distribute, advertise, or make available an intimate image. The section reads:

> 162.1 **(1)** Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty
>
> (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
>
> (b) of an offence punishable on summary conviction.

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20 Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York, NY: Routledge, 1993) at 187. See also Clare Macmartin, "Judicial Constructions of the Seriousness of Child Sexual Abuse" (2004) 36:1 Can J Behavioural Science 66 at 69.

21 Apeksha Vora, "Into the Shadows: Examining Judicial Language in Revenge Porn Cases" (2017) 18:1 Geo J Gender & L 229 at 244.

22 Gotell, "Discursive Disappearance", *supra* note 9 at 134.

23 Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R v JA" (2012) 24:2 CJWL 359 at 362, 387.

24 Mylynn Felt, "The Incessant Image: How Dominant News Coverage Shaped Canadian Cyberbullying Law" (2015) 66 UNBLJ 137 at 147; Aikenhead, "Non-Consensual Disclosure", *supra* note 16 at 119.

25 Felt, *supra* note 24 at 137; Jane Bailey, "Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliament Debates on 'Cyberbullying'?" (2014) 37:2 Dal LJ 661.

> (2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,
>
> (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
>
> (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
>
> (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.[26]

The responses to section 162.1 were mixed, with some praising the Bill for filling in a grey area in the law and through criminalization, recognizing, and legitimizing victim experiences. Furthermore, some argued that through criminalization, the law assigned an important moral blameworthiness to NCIID.[27] Given the increasingly common occurrence of NCIID,[28] the absence of a specific criminal offence to deal with NCIID was becoming a

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26 *Criminal Code*, RSC 1985, c C-46, s 162.1 [*Code*].

27 Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3:3 Laws 529 at 530; Dodge & Spencer, *supra* note 6 at 4. Other concerns raised included that Bill C-13, the precursor to section 162.1, was too focused on criminal, punitive measures rather than efforts to examine and ameliorate border systemics attitudes such as rape culture and slut shaming which allowed for the distribution in the first place: Hannah Choo, "Why we are Still Searching for Solutions to Cyberbullying: An Analysis of the North American Responses to Cyberbullying Under the Theory of Systemic Desensitization" (2015) 66 UNBLJ 52 at 72-73; Shariff & DeMartini, *supra* note 5 at 281–94; Dodge, "Digitizing Rape Culture", *supra* note 5 at 76. Others have noted that the criminalization of NCIID may deter youth from reporting incidences which occur: Patricia I Coburn, Deborah A Connolly & Ronald Roesch, "Cyberbullying: Is Federal Criminal Legislation the Solution?" (2015) 57:4 Can J Corr 566 at 571.

28 Carolyn A Uhl et al, "An Examination of Non-Consensual Pornography Websites" (2018) 28:1 Feminism & Psychology 50 at 51; Kathryn Branch et al, "Revenge Porn Victimization of College Students in the United States: An Exploratory Analysis" (2017) 11:1 Intl J Cyber Criminology 128 at 138; Shari Madigan et al, "Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-analysis" (2018) 172:4 JAMA Pediatrics 327 at 327; Asia A Eaton, Holly Jacobs & Yanet Ruvalcaba, "2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report" (June 2017) at 16, online (pdf): *Cyber Civil Rights Initiative* <www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [perma.cc/52JL-LBB6]; Amanda Lenhart, Michele Ybarra & Myeshia Price-Feeney, "Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of 'Revenge Porn'" (December 2016), online (pdf): *Centre for Innovative Public Health Research: Data and Society Research Institute*, <datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf> [perma.cc/HH5K-EJTY].

concern for many activists.[29] While Canadian statistics are sparse,[30] some US studies estimate that between four to 12.8% of adults may have been victims of, or threatened with, NCIID.[31]

One concern regarding section 162.1 was that the requirement for the complainant to hold a reasonable expectation of privacy at the time that the image was created and distributed might lead judges to focus their attention on whether or not the expectation of privacy was unreasonable and lead to victim blaming, as opposed to understanding the offence as gender-based violence.[32] The section also raised concerns about the way in which privacy is conceived. Moira Aikenhead notes that both the voyeurism offence and section 162.1 in the *Code* "are gendered crimes, and if they are not taken seriously by governments, courts, and the general public, they pose a serious threat to women's and girls' equality rights. As such, it is worrisome that the legally amorphous concepts of "reasonableness" and "privacy" are central to each offence."[33] The decision on voyeurism in *R v Jarvis*[34] is likely to have a significant, potentially positive, impact on the interpretation of section 162.1, as the provisions are so similar to each other.[35] While *Jarvis* treated privacy as a positive right which may lead to a more positive, equality

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29 West Coast LEAF, "#CyberMisogyny", *supra* note 6.

30 Richard Jochelson et al, "Intimate Images and the Law" in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective*, (Bradford, ON: Demeter Press, 2019) 101 at 107; Vera-Lynn Kubinec, "More than 1,300 Manitobans Seek Help After Intimate Images Shared", *CBC News* (27 April 2018), online: <www.cbc.ca/news/canada/manitoba/revenge-porn-help-online-1.4637615> [perma.cc/YC4M-Z7V4]; Manitoba, News Release, "Province Announces New Law in Force Helps Victims of Revenge Porn, Unwanted Distribution of Sexual Pictures" (18 January 2016) online: <news.gov.mb.ca/news/index.html?item=37330> [perma.cc/H22R-B5UL]; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Canada, Provinces, Territories and Census Metropolitan Areas*, Table 35-10-0177-01 (Ottawa: Statistic Canada, 2018), online: <www.150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=35100177001&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.257> [perma.cc/N56K-V5QK].

31 Some studies of youth have estimated that the incidence of NCIID among youth is higher than adults. One study found that one in eight youth have either forwarded or had an intimate sext forwarded without consent. See Eaton, Jacobs & Ruvalcaba, *supra* note 28 at 11, 16; Lenhart, Ybarra & Price-Feeney, *supra* note 28 at 4.

32 Aikenhead, "Non-Consensual Disclosure", *supra* note 16 at 133.

33 Aikenhead, "A 'Reasonable' Expectation", *supra* note 16 at 274.

34 *R v Jarvis*, 2019 SCC 10.

35 Aikenhead, "A 'Reasonable' Expectation", *supra* note 16 at 278.

grounded interpretation of privacy being used in section 162.1, Aikenhead notes that the failure of the Court to recognize the gendered nature of the offence is a missed opportunity.[36]

Objective standards, such as reasonableness, have been long critiqued by feminist scholars in relation to violent crimes against women.[37] Privacy, more generally, has also been subject to heavy critiques for its tendency to emphasize the importance of intimacy, body, home, and sex.[38] Aikenhead posits that privacy must be treated as a positive right which:

> Would ensure that judicial determination of whether a REOP [reasonable expectation of privacy] exists will not turn exclusively on the degree to which a person exercises control over their body or intimate images, which, as demonstrated above, may be increasingly difficult in the digital age. Appearing in public, consenting to be photographed in a sexualized context, or sharing sexualized photographs with some limited audience will not result in an automatic waiver of all privacy expectations when privacy is understood as a positive right.[39]

Thus, in order to unpack discriminatory myths in the judicial treatment of NCIID, I will also look at how privacy is framed within decisions.

III. FINDINGS

A. Framing as "Revenge Porn" and an "Abuse of Trust"

Within the context of sexual assault, scholars have noted the existence of the myth that sexual assault is only committed by strangers, rather than people known to the complainant,[40] and a differential in the treatment of sexual assault committed by strangers compared with known perpetrators.[41] All of the cases that I examined dealt with perpetrators who committed acts of NCIID against current or former female partners. Therefore, any distinctions between acts of NCIID perpetrated by a stranger versus known

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36 *Ibid.*

37 *Ibid* at 282.

38 *Ibid.*

39 *Ibid* at 289.

40 Elizabeth A Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 483 at 533.

41 Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 613 at 627.

perpetrators was not a notable factor. However, it is important to note how NCIID committed by former or current partners is framed within discourses of revenge and abuse of trust.

The use of the phrase "revenge porn" to frame the offence of NCIID has been criticized for the reason that the term revenge "validates a victim-blaming narrative in which a woman becomes an object whose consent was unnecessary or unwarranted given the presumed betrayal in the situation."[42] Women thereby become the gatekeepers of sexuality, punished for taking the photo in the first place and reducing the extent to which they are seen as victims.[43] Furthermore, framing the image as pornography may serve to conflate images which may be captured and distributed with consent within commercial pornography with those distributed non-consensually.[44] As McGlynn and colleagues note, "the language of porn risks eroticizing the harms of image-based sexual abuse."[45] This is in line with porn studies scholars who have noted that the inclusion of abusive behaviour under the label of pornography minimizes or even endorses abuse.[46] Pornography is most commonly defined in scholarly work as material deemed sexual in the context, which has the primary intention to sexually arouse the user.[47] What is deemed as pornography is often dependent on a judgement about what is sensible or reasonable in light of the context.[48] In other words, the label of pornography may be a stand-in to deem certain types of sex bad or abnormal, such as sex which may be queer, non-monogamous, and pleasure focused.[49] Thus, when images distributed without consent are labelled as pornography, it may be a means to deem the images as unacceptable.

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42 Jochelson et al, *supra* note 30 at 104; Uhl et al, *supra* note 28 at 51.

43 Nicola Henry & Anastasia Powell, "Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law" (2016) 25:4 Soc & Leg Stud 397 at 398 [Henry & Powell, "Sexual Violence"].

44 *Ibid* at 401.

45 Clare McGlynn, Erika Rackley & Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25:1 Fem Leg Stud 25 at 38–39. See also Henry & Powell, "Sexual Violence", *supra* note 43 at 400–01.

46 Sarah Ashton, Karalyn McDonald & Maggie Kirkman, "What Does 'Pornography' Mean in the Digital Age? Revisiting a Definition for Social Science Researchers" (2019) 6:2 Porn Studies 144 at 162.

47 *Ibid* at 157.

48 *Ibid* at 152.

49 Clarissa Smith & Feona Attwood, "Anti/Pro/Critical Porn Studies" (2014) 1:1/2 Porn Studies 7 at 12; Clarissa Smith & Feona Attwood, "Emotional Truths and Thrilling Slide Shows: The Resurgence of Antiporn Feminism" in Tristan Taormino et al, eds,

A number of cases framed the perpetrator's motive as that of revenge or retribution for wrongs committed by the complainant. In *R v MR*, the Court highlighted the motive of the offender as a relevant and admissible circumstantial issue to establish the offender's identity, noting a series of betrayals on the part of the complainant, including her denial to a school administrator that her and the perpetrator were in a relationship.[50] In *R v Greene*, the Court noted that the perpetrator was motivated by revenge and explicitly drew reference to the frame of revenge porn:

> Mr. Greene reacted to the breakup of his relationship with his former girlfriend (X) in a manner which is common to too many men: he threatened her. However, Mr. Greene went much further. He released a video of X, without her consent, in which X is shown having sexual intercourse with another man. This has come to be commonly referred to as "revenge porn". It provides men who are unable to accept the end of a relationship with a new and frightening manner of harming and humiliating their former female partners.[51]

While the Court in *Greene* makes mention of revenge as a motive and labels the NCIID as revenge porn, it simultaneously calls out the distribution as a "manner of harming and humiliating", thus countering somewhat the problematics of the revenge framework.[52] Several other cases explicitly noted that while revenge may have been a factor, particularly articulated by the accused in relation to why he committed the offence, it was not an excuse or justification for the behavior. In *R v AC*, the Court noted that the conduct in the case was known colloquially as "revenge porn".[53] However, the Court also went on to opine that while the accused explained that his behavior resulted from the victim's unfaithfulness and physical abuse, that information was irrelevant: "whether C.S. was unfaithful or physically abusive is irrelevant, and does not justify uploading private images of her for the world to see."[54]

Similarly, in *R v JTB*, the Court quoted *R v Denkers*, noting that:

> This victim, and others like her, are entitled to break off romantic relationships. When they do so they are entitled to live their lives normally and safely. They are entitled to live their lives free of harassment by and fear of their

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The Feminist Porn Book: The Politics of Producing Pleasure, (New York, NY: Feminist Press at CUNY, 2013) 41 at 45 [Smith & Attwood, "Emotional Truths"].

50 *R v MR*, 2017 ONCJ 558 at para 143 [*MR*].

51 *R v Greene*, 2018 CanLII 25580 (NL PC) at para 1, 146 WCB (2d) [*Greene*].

52 *Ibid*.

53 *R v AC*, 2017 ONCJ 317 at para 18 [*AC 1*].

54 *Ibid* at para 48.

> former lovers. The law must do what it can to protect persons in those circumstances.[55]

In addition, several cases referenced revenge porn in relation to the parliamentary intent behind the section. In these cases, revenge porn was found in direct quotes from parliamentary debates.[56]

One problematic framing took place in *R v Haines-Matthews*,[57] in which a sexually explicit video was distributed without consent. The fact that a video, rather than pictures, was distributed, it was deemed by the Court to be an aggravating factor because "[s]uch a recording tends to take on the appearance of a pornographic film which, in my view, exacerbates the harm caused."[58] No other cases that I examined delineated between intimate images and photos in this way to deem a video as an aggravating factor.

Thus, while cases referenced revenge as a motive for the accused's actions, overall, the victim blaming undercurrents of these frameworks were destabilized through explicit denunciation of the relevance of revenge for determining moral blameworthiness. At the same time, the evocation of pornography to justify film distribution as an aggravating factor in *Haines-Matthews*[59] problematically eroticizes the harm and can be viewed, potentially, as a means to ascribe a derogatory label to the initial video which was taken consensually.

Another interesting framing, resulting from the close relationship between the complainant and accused in cases, was that the close relationship provided a ground for the Court to deem the behavior more serious than it would be had there not been a prior relationship, seemingly reversing the paradigm found in cases of sexual assault. Under subparagraph 718.2(a)(iii) of the *Code*, breach of trust is a statutorily mandated aggravating factor.[60] Breach of trust as an aggravating factor was drawn on with frequency in a number of the cases that I reviewed and given a liberal interpretation.[61]

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55 *Supra* note 1 at para 40; *R v Denkers*, 1994 CanLII 2660 (ON CA) at 5–6, 69 OAC 391.

56 *R v MR*, 2017 ONCJ 943 (CanLII) [*MR Sentencing*]; *AC 1*, *supra* note 53 at para 18.

57 2018 ABPC 264 at para 20 [*Haines-Matthews*].

58 *Ibid* at para 20 [emphasis added].

59 *Ibid*.

60 *Code*, *supra* note 26, s 718.2(a)(iii).

61 See e.g. *R v AC*, 2017 ONCJ 129 (CanLII) at para 83 [*AC 2*]; *MR Sentencing*, *supra* note 56; *R v JS*, 2018 ONCJ 82 (CanLII) [*JS*].

In *AC*, the intimate videos were taken consensually within the context of a four-year dating relationship and after the relationship dissolved, were posted online:

> Strictly speaking, the conduct here does not fall squarely within the statutorily aggravating breach of trust described in s.718.2(a)(iii) because when the offender committed the offence he was no longer in a position of trust. Nonetheless, it does constitute a breach of C.S.'s trust that I find to be an aggravating factor. The *Criminal Code's* list of sentencing factors does not purport to be exhaustive. The images were created consensually in the context of a romantic relationship. C.S. believed that the images would not be shared beyond that relationship. It is no surprise that C.S. said "I will never trust anyone again."[62]

Likewise, in *Greene*, the Court drew on subparagraph 718.2(a)(iii) in sentencing, although the offence took place after the relationship had ended.[63] Drawing on words from the Sentencing Council, the Court noted that:

> [C]ourts should recognize that the "domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them."[64]

Similarly, in *R v NN*,[65] the Court did not know if the complainant and accused were common-law or not. The only information the judge had was that the dating relationship had been going on for one and a half years, yet the judge attributed breach of trust as an aggravating factor:

> Certainly someone who for a year and a half is in an intimate relationship with an individual, it may be bordering on a common-law relationship. I don't know if that [s.718.1(a)(ii)] applies in this case, but the breach of trust that exists in respect of the intimate images that were provided by L.C. to N.N., I don't think there can be any doubt.[66]

In the disturbing case of *JTB*,[67] the accused impersonated his wife online in an attempt to solicit a stranger to sexually assault her under the guise of acting out the victim's supposed rape fantasy. The accused distributed 42 intimate photos of the complainant, along with identifying

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62 *AC 1*, *supra* note 53 at paras 4–5, 44.
63 *Supra* note 51 at para 36.
64 *Ibid* at para 34.
65 *R v NN*, 2019 ONCJ 512 at para 341 [*NN*].
66 *Ibid*.
67 *Supra* note 1 at para 11.

information, including her name and workplace, and degrading hashtags.[68] At the time of the offence, the accused and the victim were spouses, although separated.[69] The Court deemed the close nature of the relationship to be an aggravating factor in accordance with subparagraph 718.2(a)(ii) and went on to note that:

> Even without that statutory provision, however, Mr B. was tormenting his former romantic partner, simply because he could not tolerate the fact she no longer wanted to be with him. If Mr B. had not still been formally married to Ms B., I think that would have represented an aggravating factor in any event.[70]

The Court proceeded to explain how the accused's trusted position allowed him to take the images in the first place and effectively impersonate Ms. B in an attempt to solicit a stranger to rape her.[71]

These cases show that relationships between the complainant and perpetrator result in offences being seen as more serious than they would otherwise be deemed. In other words, the close relationship between the complainant and the accused is not being used to excuse or explain the act of non-consensual distribution. Rather, judges are perceiving the abuse of trust to be an aggravating factor. This correlates with scholarship which found that members of the public tend to attribute less blame to the victim in a hypothetical scenario when an intimate image was shared consensually in an established relationship compared with when such an image was initially provided early in a relationship.[72] This tendency to attribute less blame to the victim was due to the perception that, in the context of an existing relationship, there was a more serious breach of trust by the perpetrator.[73] This seemingly conflicts with some myths and trends in the context of cases of sexual assault wherein an assault by a partner is less likely to be recognized as an assault compared with an assault committed by a stranger.[74] Furthermore, while revenge is acknowledged as a motive and the frame of revenge pornography is used in some cases, in general, judges do not appear to accept narratives which use such frames in order to attribute

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68 *Ibid*.

69 *Ibid*.

70 *Ibid* at para 97.

71 *Ibid*.

72 Tegan S Starr & Tiffany Lavis, "Perceptions of Revenge Pornography and Victim Blame" (2018) 12:2 Intl J Cyber Criminology 427 at 434.

73 *Ibid*.

74 Sheehy, *supra* note 40 at 533; Johnson, *supra* note 41 at 627.

blame and responsibility to female victims or to deem the initial act of sharing an image as immoral.

B. The Perfect Victim

Another discriminatory stereotype which has informed cases of sexual assault includes the construction of the perfect victim. The perfect victim is someone of undisputed high moral character, engaging in low risk behavior, who is a virgin, and who is suddenly attacked and violently forced into a sexual act.[75] Women who fall out of the perfect victim frame thereby become responsible for their own victimization. Gillian Balfour and Janice Du Mont note that "[w]omen have been long cast as responsible for their victimization because of their conduct and dress, and as lustful liars who deceive the courts as to their consent to sex."[76] Indeed, within campaigns against NCIID, Karaian argued that white, heterosexual femininity was privileged and the campaigns focused on the behavior of the victim, rather than the perpetrator.[77] Thereby, these anti-NCIID campaigns promoted women's digital abstinence or risk management.[78] Victim blaming tendencies, whereby women are called out for engaging in consensually sharing the image in the first place, have been noted in police[79] and media responses to NCIID.[80] Several scholars have pointed to the construction of the idealized victim in NCIID, noting that:

> The idealized victim... is not a woman who has engaged in overt sexual expression outside of the bounds of acceptable femininity, such as voluntarily sending sexually explicit pictures. Such a victim is often blamed for inviting her own victimization.[81]

Within the cases reviewed, there was a general absence of overt examples of the idealized perfect victim, although there were some

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75 Schulze, Koon-Magnin & Bryan, *supra* note 7 at 90.

76 Gillian Balfour & Janice Du Mont, "Confronting Restorative Justice in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 701 at 716.

77 Karaian, *supra* note 3 at 291.

78 *Ibid* at 284; Samantha Bates, "Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors" (2017) 12:1 Feminist Criminology 22 at 25.

79 Dodge & Spencer, *supra* note 6 at 15; Hasinoff, *supra* note 4 at 203.

80 Fairbairn, *supra* note 3 at 239; Hasinoff, *supra* note 4 at 203.

81 Jochelson et al, *supra* note 30 at 160–61; Hasinoff, *supra* note 4 at 211–12; Shariff & DeMartini, *supra* note 5 at 286; Dodge, "Digitizing Rape Culture", *supra* note 5 at 74; Staff & Lavis, *supra* note 73 at 428.

exceptions. The riskiness of the victim's behavior was commented upon in *NN*. The judge noted that "certainly there is a risk that when someone provides such images… that those images may find their way out into the public, and that is a cautionary tale,… to every member of our community."[82] The judge went on, however, to explicitly note that the risk did not lessen the culpability of the offender.[83]

It is notable that the complainant's initiation of the initial consensual intimate image sharing was commented upon in two different cases. In *R v Agoston*,[84] Agoston's co-worker sent two naked photos of Agoston to the complainant using Agoston's phone. Agoston claimed that while he knew that his co-worker was texting with the complainant using his phone, he did not know that any sexually explicit photos had been sent.[85] Agoston also denied that one of the two photos were of him.[86] The complainant, believing that the photos were of Agoston, responded by sending two sexually explicit photos of herself.[87] After the images were received by Agoston, he showed them to his co-workers, although did not share them online.[88] The judge determined that "[t]here was no planning or deliberation on the part of Mr. Agoston to obtain the images in question. Indeed, it is acknowledged that he did not solicit the images."[89]

Notably, the judge went on to ascribe a lack of planning to Agoston's distribution of the images, finding that "[t]here is nothing before me to suggest that this offence constituted something other than a momentary lapse in judgment."[90] Although it is not explicitly delineated, it is conceivable that the fact that the accused received the images, allegedly without solicitation on his part, played into the judge's decision to also attribute a lack of forethought to the accused concerning distribution. If we read Agoston's receipt of the images as a form of non-consensual harassment by the complainant, we may wonder what motivations underpinned Agoston's choice to subsequently share the images without consent. Perhaps it was for the purpose of shaming or humiliating the

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82 *NN*, *supra* note 65 at para 347.
83 *Ibid*.
84 2017 ONSC 3425 (CanLII) at para 3 [*Agoston*].
85 *Ibid* at para 6.
86 *Ibid* at para 4.
87 *Ibid* at paras 3-5.
88 *Ibid* at paras 7, 17.
89 *Ibid* at para 21 [emphasis added].
90 *Ibid* at para 45.

sender.[91] In this context, the judge's decision to ascribe less responsibility to Agoston is perhaps understandable in some respects, although it is also arguable that revenge should never be an acceptable reason to excuse responsibility for later distributing an image without consent. However, if we presume that the complainant genuinely believed the person texting her was Agoston and responded to him in the context of that consensual exchange of images, it is highly problematic that Agoston's later distribution of the images would be deemed unintentional or accidental. While another factor in this case that may have played into the lack of forethought ascribed to Agoston was that the images were not distributed online, the complainant, by consensually sharing her intimate images in response to images received, was seemingly made responsible for her later victimization.

In evaluating the credibility of both the complainant's and accused's testimony, the Court in *MR*[92] examined the argument made by the accused that the complainant had sent him intimate photos without his solicitation. The accused argued that not only had the complainant sent photos without his prompting, but that he had actually told the complainant to refrain from doing so.[93] When the accused failed to provide any proof that the photos were unwelcome, the Court rejected his argument, noting that:

> If this was truly happening without his consent and participation, I think there would have been a more fundamental conflict in their relationship, centered around her unwillingness to cease sending forbidden material to him.[94]

Given this decision, the Court did not further comment upon how an unsolicited image may have impacted an assessment of culpability following the later non-consensual distribution. These cases demonstrate how courts wrestle with questions of whether the initial receipt of the image was consensual and that the determination of this issue may shape how subsequent non-consensual distribution is viewed.

While in the cases I examined there were no explicit condemnations of a victim's resistance or lack of resistance, the behavior of the victim was commented upon in several instances. In *JS*,[95] the victim discovered hidden

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91 Andrea Waling & Tinonee Pym, "'C'mon, No One Wants a Dick Pic': Exploring the Cultural Framings of the 'Dick Pic' in Contemporary Online Publics" (2019) 28:1 J Gender Studies 70 at 75–76.

92 *Supra* note 50.

93 *Ibid* at paras 69–70.

94 *Ibid* at para 72.

95 *Supra* note 61 at para 30.

cameras and intimate images posted online and directed the offender to stop, "[s]he demanded that he fix it. He said that he would and, instead, continued to post videos of their sexual activity on a variety of online platforms."[96] The judge went on later to state again that "[s]he made it known that these recordings were only for his private viewing."[97]

In *MR*,[98] the judge provided an explanation as to why the complainant had not brought the issue of photo distribution to the attention of the perpetrator immediately by direct confrontation. The judge noted that:

> Considered within the context of a rocky relationship, and her perception that it was touch and go as to whether the relationship would endure, I do not find it incredible that she failed to immediately confront the defendant as the source of photos being distributed, particularly when, as I will address in a moment, she could not find any evidence on Reddit immediately after being notified by the defendant.[99]

While this failure to resist was made in the context of the judge's assessment of the credibility of the victim's story, it shows how the appropriateness of a victim's resistance or lack of resistance calls the attention of the Court. We also see that, in some cases, the Court commented upon the riskiness of engaging in consensual intimate image sharing as well as commenting upon situations in which the complainant was the initiator of sharing intimate images. However, in general, there was an absence of courts engaging in constructing the perfect victim.

C. Accidents and Uncontrollable Sexual Desire

Another discriminatory stereotype identified in sexual assault cases is that perpetrators did not mean to assault the victim, that the incident happened by accident or unintentionally, or that alcohol or uncontrollable male sex drive are to blame.[100] In such a frame, men are inevitable perpetrators and victims are held responsible to avoid violence through the practice of certain activities.[101] Researchers examining sexting practices have similarly noted the way in which young men are conceived of as "natural

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96 *Ibid* at para 1.

97 *Ibid* at para 4.

98 *Supra* note 50.

99 *Ibid* at para 65.

100 Schulze, Koon-Magnin & Bryan, *supra* note 7 at 91; Clare MacMartin & Linda A Wood, "Sexual Motives and Sentencing: Judicial Discourse in Cases of Child Sexual Abuse" (2005) 24:2 J Language & Soc Psychology 139 at 139–40.

101 Fairbairn, *supra* note 3 at 239.

violators of trust deployed to bolster heterosexual masculinity," wherein women are perceived to be at risk of shame.[102] The notion that male sexuality is inherently dangerous, misogynistic, and predatory is a notion rooted in idealized discourses of masculinity and heteronormativity.[103]

In the cases that I reviewed, a high degree of intentionality was generally attributed to the actions of perpetrators and the offence was rarely framed as an accident. As discussed, revenge as a motive was perceived as an aggravating factor in several cases.[104] It is perhaps not surprising that revenge and intentionality were linked together as an aggravating factor in *AC*,[105] the judge noting that "[t]he offender deliberately set out to violate C.S.'s privacy in a most obscene and far-reaching way. He did so, motivated by revenge, with the intent to degrade and humiliate her."[106]

In *MR*, the Court noted that the actions of the accused showed premeditation and steps to avoid detection, as the accused used an anonymizing email service to distribute the intimate images on two separate occasions, at least a month apart.[107] The Court opined that the accused was "totally responsible for his conduct."[108] The Court went on to note that:

> The distribution of intimate images is addressed by a single count, but the conduct occurred twice. Once in October and once in November, after arrest and release on conditions. I cannot quantify how aggravating that factor is. This gentleman thumbed his nose at the police and the court conditions, and focused, singularly, on causing harm to the complainant, and in particular, her father.[109]

Thus, intentionality was linked together along with an intent to cause harm to the known complainant, drawing on revenge and breach of trust narratives. This is similarly reflected in *JS*, in which the Court attributed a high degree of intention to the offender after the perpetrator posted videos of his and the complainant's sexual activity online, even after the complainant had confronted the perpetrator regarding his conduct:

> The inferred impact on victims is substantial and the moral responsibility of the offender will generally be high. The act involves a flagrant intrusion into the

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102 Waling & Pym, *supra* note 91 at 72.

103 *Ibid*.

104 See e.g. *AC 2*, *supra* note 61 at para 81; *MR*, *supra* note 50; *Greene*, *supra* note 51; *AC 1*, *supra* note 53; *JTB*, *supra* note 1.

105 *AC 1*, *supra* note 53.

106 *Ibid* at para 62.

107 *MR Sentencing*, *supra* note 56 at para 5.

108 *Ibid* at para 14.

109 *Ibid* at para 17.

> privacy and personal dignity of the victim. The accompanied intent will often involve a desire to degrade, humiliate and maintain the illusion of some control over the victim.
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> I am mindful that J.S. is a first time offender and has been struggling with addiction and mental health issues. However, this was not an offence driven by impulse. Rather, it was a repeated and calculated course of action apparently designed to diminish and degrade the vulnerable victim. The consequences have been significant and lasting.[110]

In *JTB*,[111] the Court noted that the accused's conduct, creating online profiles to entice strangers to sexually assault his spouse, demonstrated intentionality, planning, and forethought. The planning undertaken was a significant aggravating factor:

> In my view, all of the crimes committed by Mr B. exhibited a remarkable degree of cold and calculated planning and forethought, distinguishing them considerably from crimes of opportunity, spontaneous or impulsive misconduct, or momentary lapses in moral judgment. That is perhaps most obvious in relation to his elaborate creation of website postings and sustained text messaging repeatedly publishing intimate images of Ms B. to lure and deceive persons such as Mr Y., and his careful and prolonged manipulation of Mr Y. to orchestrate the attack and sexual assault on Ms B.[112]

In *Haines-Matthews*,[113] the complainant consented to taking intimate photos and videos on the condition that they would not be distributed. The accused subsequently sent the photos of him and the complainant to his ex-girlfriend and also posted the video and photos onto Facebook and Instagram.[114] The Court noted that "[a]t any point in the not insignificant time it took to execute the plan, the offender could have stopped what he was doing. He chose not to do so."[115]

In *R v Borden*,[116] the perpetrator came into possession of intimate images of her ex-partner's new partner and shared the photos online. The Court attributed to her a high degree of responsibility:

> In this case, Ms. Borden posted several photographs of Ms. X on-line. She was attempting to humiliate Ms. X and would have known that a significant number

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110 *Supra* note 61 at at paras 34, 37.
111 *Supra* note 1 at para 97.
112 *Ibid*.
113 *Supra* note 57 at para 5.
114 *Ibid* at paras 14–15.
115 *Ibid* at para 52.
116 2019 CarswellNfld 141 at para 1, 154 WCB (2d) 715 [*Borden*].

> of individuals were likely to see what she had posted. This was not a mistake or an error in judgment. This was a willful and purposeful act.[117]

Alongside the attribution of intentionality to the accused, a related theme was the Court perceiving that technology made it easier for the offence to be committed. In *NN*, the Court noted the ease with which offences can be committed due to technological advances:

> [I]t is certainly an offence that is starting to occur with more regularity than it did prior to the invention of cell phones that take instant pictures or SLR cameras that don't need film, and so there's certainly more opportunity for these types of images now to be taken between consenting adults... it may be that these types of offences can be committed with more ease today because of the technological advances.[118]

Although the Court determined that technology made the offence easier to commit, it nevertheless found that the accused had a high moral culpability "because he was the only person who could have published those images. They were given to him and him alone, and it was given to him in trust, in an intimate relationship."[119] Thus, while technology may have reduced the intentionality of the accused, the breach of trust was so significant as to counter any reduction in the accused's moral culpability.

Alexa Dodge echoes this finding, noting that judges are perceiving NCIID as easier to commit, yet perceiving the resulting harm to the victims as extremely high, thereby justifying harsher sentences:

> I find that the majority of judges perceive digital/online technology as making NCIID easier to commit—with the simple "click of a mouse"—and as increasing the amount of harm caused by this act—as digital nude/sexual photos are seen as lasting "forever" and thus as resulting in ongoing and immeasurable harm to victims. I assert that these perceptions have substantive impacts on legal rationales and sentencing decisions, with the affordances of digital/online technology regularly being treated as justifying harsher sentences to denounce and deter this act.[120]

Dodge argues that a techno panic has influenced legal discourse to make the harms of NCIID seem novel and in need of enhanced reactions.[121] This techno panic has been highlighted as a specifically gendered phenomenon surrounding media representation of girls and technology. Several scholars point to the development of narratives around sexting which portray girls

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117 *Ibid* at para 46.
118 *Supra* note 65 at para 348.
119 *Ibid* at para 347.
120 Dodge, "Nudes are Forever", *supra* note 17 at 122–23.
121 *Ibid* at 130.

as either being in constant danger from online predators or loose cannons when it comes to technology.[122] Women's sexual agency in such a narrative is associated with vulnerability, whereas men are deemed to be lacking in intimate connections.[123] Furthermore, scholars have pointed to how contemporary debates on sexting have been framed in relation to heteronormative understandings of sexuality and cisgender ideals of gender.[124] Unsurprisingly, same-sex attracted women and men are not generally included in discussions of sexting or presumed to be vulnerable to sexualization.[125]

Dodge also discusses the notion that technology itself has become implicitly "leaky" or "promiscuous" such that individuals have little ability to resist its power:

> He [the defendant] describes the technology as extremely easy to use, thus allowing him to share the images with-out actually *thinking* about it—it was just the "thoughtless push of a button." We might call this the "just one click" defense. This defense deflects blame from the offender by relying on a perspective of technological determinism that sees new technologies as "causal agents" that act on individuals in ways they have "little power to resist".[126]

It is this leakiness which has been used by police and others to undergird narratives which focus on nonconsensual distribution as the inevitable outcome of sending images in the first place.[127] These types of narratives play into victim blaming and responsiblization myths.

This leakiness was not as apparent in the cases that I examined, although was present to some extent. For example, the close nature of the relationship, the perpetrator's uncontrollable anger, and limited electronic distribution was used to attribute less intentionality to the accused. In *R v PSD*,[128] the complainant returned after a night out with friends to find Mr. D, the accused, in her driveway. They left together in a car and at some point, Mr. D took pictures of the complainant, without consent, while she was only partially clothed and sent the photos to two of his friends.[129] While

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122 Crooks, *supra* note 3 at 47; Lee & Crofts, *supra* note 3.

123 Waling & Pym, *supra* note 91 at 79.

124 Kath Albury & Paul Byron, "Queering Sexting and Sexualisation" (2014) 153:1 Media Intl Australia 138 at 138.

125 *Ibid* at 140, 145.

126 Dodge, "Nudes are Forever", *supra* note 17 at 131–32.

127 *Ibid*.

128 2016 BCPC 400 at para 5 [*PSD*].

129 *Ibid*.

recognizing the harm caused by the transmission of the images, the judge determined that Mr. D's decision to take the pictures was a rash decision and forwarding them to his friends "shows some planning but nothing beyond that transmission has occurred."[130] In coming to the determination that Mr. D's actions were rash, the Court emphasized the tumultuous nature of the relationship: "Mr. D.'s behavior came at a time when he was very frustrated and angered by seemingly mixed signals — a putting off of communication by Ms. S. without a certain end to the relationship."[131] The Court went on to say that:

> In the end, I conclude that, while the gravity of the offence in general is significant, the circumstances of this particular case are less egregious than, for example, a case involving significant planning and forethought and resulting in a transmission of identifiable intimate images widely distributed on the internet. The sentence must be proportionate to those considerations.[132]

Likewise, in *Agoston*,[133] as discussed, the accused allegedly did not solicit the pictures in question, but after receiving them from the complainant showed them with two friends. The Court attributed to the accused a lack of planning, both in terms of obtaining the images and in terms of showing the images to his friends.[134] Once again, in coming to this determination, the Court highlighted the limited distribution as an important factor.[135] Alexa Dodge notes that courts are weighing the level of digital dissemination when justifying sentencing decisions and determining the gravity of the offence.[136] These two cases suggest that some courts may be associating limited distribution with a lack of intentionality on the part of the accused.

D. Gendered Violence and Victim Impact

Many scholars would argue that NCIID should be seen as a part of a continuum of gendered, sexualized violence.[137] While women are the primary victims of online sexualized violence, generally, some studies indicate that men may experience some forms of online sexualized violence

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130 *Ibid* at paras 12–13.

131 *Ibid* at para 12.

132 *Ibid* at para 15.

133 *Supra* note 84 at paras 3–7.

134 *Ibid* at para 17.

135 *Ibid*.

136 Dodge, "Nudes are Forever", *supra* note 17 at 132.

137 McGlynn, Rackley & Houghton, *supra* note 45 at 26; Dodge & Spencer, *supra* note 6; Powell, *supra* note 5 at 76; West Coast LEAF, "#CyberMisogyny", *supra* note 6.

at rates comparable to women.[138] Notably, the harassment which is directed at men and boys often includes denigration on the basis of actual or perceived sexual or gender identity.[139] Furthermore research also shows that those who have experienced NCIID are more likely to be racialized,[140] have disabilities,[141] or identify as LGBTQ2S*.[142] Therefore, it is helpful to think of NCIID as a gendered phenomenon which also interplays with other marginalized identities.[143]

Yet, some would contend that categorizing NCIID as sexual violence still involves "working against a strong social current of resistance."[144] In an analysis of Canadian and US media coverage of NCIID between 2011 and 2014, the word 'violence' was only used once in reference to NCIID. Rather, NCIID was more commonly described with words labelling it as an experience of 'harassment', 'humiliation', and 'cyberbullying'.[145] As Powell notes:

> There is arguably a false distinction currently operating in law, policy and public debates between unauthorized sexual imagery as distinct from sexual violence. One is seen as merely a distasteful violation of privacy... and the other a criminal violation of bodily integrity.[146]

Similarly, the tendency to ignore sexual assault as a gendered, violent crime was noted in analyses of sexual assault cases. Lise Gotell, in her discussion of sexual violence more generally, notes that "[t]he judicial focus

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138 Henry & Powell, "Sexual Violence", *supra* note 43 at 399; Nicola Henry & Anastasia Powell, "Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence" (2015) 21:6 Violence Against Women 758 at 759 [Henry & Powell, "Technology-Facilitated"]; Eaton, Jacobs & Ruvalcaba, *supra* note 28 at 12.

139 Anastasia Powell & Nicole Henry, *Sexual Violence in a Digital Age* (London, UK: Palgrave MacMillan, 2017) at 5 [Powell & Henry, *Digital Age*].

140 Branch et al, *supra* note 28 at 138.

141 Emma Bond & Katie Tyrrell, "Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales" (2018) J Interpersonal Violence 1 at 3, DOI: <10.1177/0886260518760011>.

142 *Ibid*. See also Henry and Powell, "Technology-Facilitated", *supra* note 138 at 198; Citizen Lab, Munk School of Global Affairs, "Submission of the Citizen Lab (Munk School of Global Affairs, University of Toronto) to the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Dubravka Simonovic" (2 November 2017) at 2, online (pdf): <citizenlab.ca/wp-content/uploads/2017/11/Final-UNSRVAG-CitizenLab.pdf> [perma.cc/UH9R-39EL].

143 Powell & Henry, *Digital Age*, *supra* note 139 at 6.

144 Fairbairn, *supra* note 3 at 235.

145 *Ibid*.

146 Powell, *supra* note 5 at 80.

on privacy encourages a legal analysis that is both degendered and decontextualized."[147] In Gillian Balfour and Janice Du Mont's 2012 study of conditional sentencing decision of sexual assault, they argue that the legal narrative surrounding conditional sentences reflected the failure of the courts to denounce rape as a gendered, violent crime and show the invisibility of raped women and the harms experienced.[148] They posited that this tendency was a further manifestation of the role of gendered rape myths.[149]

While not highlighted in most cases, the gendered violence of NCIID was explicitly acknowledged in *R v McFarlane*.[150] In this case, the accused surreptitiously filmed his sister's friend, the complainant, while undressing and showering. Five years later, the accused distributed these images to a limited number of people in an attempt to extort additional sexually explicit material or activity from the complainant.[151] The Manitoba Court of Appeal recognized the gendered, violent nature of the accused's actions, noting that:

> [S]extortion is a form of sexual violence even though it occurs through the medium of the internet. As with physical abuse, a victim's freedom of choice over his or her sexual integrity is violated. The long-term psychological harm to a victim, as was seen here, closely resembles what happens in a case of physical sexual assault.[152]

While less explicit, the Manitoba Provincial Court recognized the violence and power dynamics inherent within NCIID in *R v BS*, with a question: "What sentence is appropriate when intimate images are weaponized against a woman who ends a dating relationship?"[153] The Court went on to note that the offender's behavior was driven by "his need for control and power."[154]

In *Greene*, a more explicit acknowledgement was made in relation to the gendered nature of NCIID by framing the offence within the context of the history of domestic violence against women:

> Our legal system has failed to recognize the extent of the violence that women who end relationships with their former male partners face. It has failed to

147 Gotell, "Discursive Disappearance", *supra* note 9 at 141.
148 Balfour & Du Mont, *supra* note 76 at 712–13, 720–21.
149 *Ibid* at 720–21.
150 2018 MBCA 48 [*McFarlane*].
151 *Ibid* at paras 3–4.
152 *Ibid* at para 19.
153 2019 MBPC 26 at para 1 [*BS*].
154 *Ibid* at para 14.

> acknowledge the reality that this violence can be deadly. This is not a novel suggestion. Over twenty years ago in its 1995 report, *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia*, the Law Reform Commission of Nova Scotia, described "violence against women by their spouses" as constituting "a life threatening situation which is not treated seriously by the legal system."[155]

The judge went on to note that the danger former male partners pose to women who have ended a relationship "is based upon male control."[156]

While it is promising that three cases recognized the gendered, violent nature of NCIID, it is somewhat problematic that this was the exception, rather than the norm. It was not uncommon to find cases which referenced NCIID in relation to cyberbullying. This is hardly surprising given the fact that the legislation was brought about within the frame of cyberbullying.[157] Indeed, when referencing the parliamentary intent behind the Bill, cases made reference to the section being there to address the social problem of cyberbullying[158] and revenge by former partners.[159]

In *AC*, the Court notes that:

> The bill was part of the federal government's initiative against cyberbullying. It was introduced after two high profile incidents of young women taking their own lives after intimate images of them had been shared without their consent. Then Minister of Justice, the Hon. Peter MacKay, described the impetus behind Bill C-13 this way:
>
> > We are all aware of the issues of bullying and cyberbullying and how they have become priorities for many governments around the world. Cyberbullying is the use of the Internet to perpetrate what is commonly known as bullying, but it is of particular interest and concern of late. This interest is due in no small part to the number of teen suicides over the past few years in which cyberbullying was alleged to have played a part.
> >
> > We have heard of cases involving Rehtaeh Parsons in my province of Nova Scotia, Amanda Todd on the west coast, a young man named Todd Loik in Saskatchewan recently, and countless others. It is clearly a case of the worst form of harassment, intimidation and humiliation of young people, which resulted in a feeling of hopelessness, that there was no other way out, and they took their lives.[160]

Scholars have critiqued framing NCIID within the cyberbullying or harassment lenses, noting that the term covers a broad range of behaviour

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155 *Supra* note 51 at para 2.

156 *Ibid* at para 33.

157 Felt, *supra* note 24 at 146.

158 *MR Sentencing*, *supra* note 56; *AC 1*, *supra* note 53; *PSD*, *supra* note 128.

159 *MR Sentencing*, *supra* note 56; *AC 1*, *supra* note 53.

160 *AC 1*, *supra* note 53 at para 17.

and may be unhelpful in discussing NCIID.[161] In its traditional definition, cyberbullying is an act of reciprocal conflict in an online environment which does not capture the imbalance in power often present in situations of NCIID.[162] Furthermore, studies and understandings of cyberbullying often do not receive the intersectional analysis necessary nor recognize the gendered nature of NCIID.[163] So, while we see numerous cases which recognize the gendered, violent nature of NCIID, many others simply place the offence within a cyberbullying frame without a more intersectional understanding.

Scholars of NCIID have expressed fear that the harms perpetuated by NCIID would be ignored for their real-world impacts on women's lives or that the harms would be conceived as breaches of privacy or embarrassment, rather than recognizing NCIID as an attack on human dignity.[164] As noted by Alexa Dodge, the fear that harms arising from NCIID would be considered less real or less seriously has not been borne out.[165] Rather, "Canadian legal interpretations have regularly reasoned that the harm of NCIID is considerable and requires serious legal responses."[166] This is shown in studies of NCIID sentencing decisions, in which the seriousness of the offence has been recognized through relying on the primary sentencing objectives of denunciation and deterrence with incarceration as the norm.[167] The seriousness with which NCIID has been treated is also evident within how privacy is conceived and how the impact on victims has been viewed.

Privacy, as it has traditionally been understood, has garnered skepticism from feminists. As noted by Moira Aikenhead, "[p]rivacy, when understood as a negative right to exclude others, remains a deeply masculine, classed,

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161 Bailey, *supra* note 25.

162 Coburn, Connolly & Roesch, *supra* note 27.

163 Crooks, *supra* note 3 at 63, 71; West Coast LEAF, "Submission to the Standing Committee on Justice and Human Rights on Bill C-13: An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act, and the Mutual Legal Assistance in Criminal Matters Act" (2014) at 1, online (pdf): <www.westcoastleaf.org/wp-content/uploads/2014/11/2014-05-13-SUBMISSION-Standing-Committee-on-JHR-on-Bill-C-13.pdf> [perma.cc/6TUZ-BFKN].

164 Henry & Powell, "Technology-Facilitated", *supra* note 138 at 244.

165 Dodge, "Nudes are Forever", *supra* note 17 at 138.

166 *Ibid*.

167 Jochelson et al, *supra* note 30 at 124; *PSD*, *supra* note 128 at para 10; *McFarlane*, *supra* note 150 at para 22; *Greene*, *supra* note 51 at para 36; *AC 2*, *supra* note 61 at para 77; *AC 1*, *supra* note 53 at para 28; *JS, supra* note 61 at para 20.

and individualized ideal."[168] Some conceptions of privacy have also tended to view disclosures related to women's bodies or sexuality as harmful. Historically, when the privacy of women was acknowledged, it was aimed "at protecting a particular version of raced and classed feminine 'modesty', designed to shield women (and their male partners) from embarrassment and humiliation associated with sexuality."[169] If NCIID is understood within this type of framework, it could lead to scrutinizing women for their behavior whereby certain actions on the part of the woman diminishes the reasonableness of her privacy expectations.[170]

Several cases framed the privacy interests undergirding the NCIID offence as a positive right, focused around sexual integrity. In *Borden*,[171] the Newfoundland and Labrador Provincial Court recognized NCIID as a sexual offence which should focus on protecting the personal autonomy and sexual integrity of the individual rather than sexual propriety. The Court quotes Elaine Craig, noting that the legal system should give:

> [G]reater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety).[172]

In *AC*, the Court noted that the provisions were in place to protect privacy and articulated privacy as a positive right, noting that:

> [P]rivacy is about a person's ability to control access to something, whether it is private information or a private image. As in this case, someone like C.S. may agree to have private photographs or videos taken that will not be seen by anyone apart from a romantic partner. Where someone shares an intimate image without consent, he violates the depicted person's privacy because he has gone beyond that limited, consensual use. The more people to whom the image is exposed, the greater the invasion of privacy and the greater the harm caused to the victim.[173]

The Court's recognition that consent to being filmed or photographed in one context does not mean that there was consent to the distribution of those videos accords with a more contextualized, positive conception of privacy. Likewise, in *JS*, the Court echoes this positive conception of privacy:

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168 Aikenhead, "A 'Reasonable' Expectation", *supra* note 16 at 282–83.

169 *Ibid* at 283.

170 *Ibid.*

171 *Supra* note 116 at para 45.

172 *Ibid*; Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity*, (Vancouver, BC: UBC Press, 2012) at para 127.

173 *AC 1*, *supra* note 53 at para 20.

> The fact that the victim may have consensually participated in recording sexual activity in no way impacts or diminishes the moral responsibility of the offender. To conclude otherwise engages retrograde thinking surrounding the interplay of sex, privacy, consent and control.[174]

In another case, the Court referenced privacy more generally and that the act of conveying personal information to a large, unintended audience was a violation of privacy:

> The core of the defendant's criminal blameworthiness is his wish to humiliate and harm the complainant…The complainant's privacy was manifestly compromised by this conduct. Private photos she meant only for her husband to be, were sent to a wide variety of friends and family around the world…The gravamen of the distribution of intimate images was the conveyance of highly personal intimate photos to a broad cross-section of the complainant's friends and family around the world.[175]

In short, I found an absence of explicit references to narratives on privacy which conflated consensual image sharing with non-consensual distribution. Rather, courts seemed to recognize that consent in one context could be distinguished from consent to distribute electronically and that the failure to abide by the parameters of consent constituted a breach of privacy.

The seriousness within which the offence is being considered is also apparent in how impacts on victims were generally framed as being profound. The main themes regarding impact on the victim included perceiving the harm as unknowable or not possible to quantify and unpunishable. In *MR*, the Court noted that despite the presence of a victim impact statement, the impact on the victim was "not ascertainable" and "incalculable".[176] The Court went on to opine that "because of particular cultural and religious beliefs, the impact of this conduct on the complainant…is simply not ascertainable. The complainant has suffered an unquantifiable result."[177] The Court held that "[t]his is reprehensible conduct on the part of this defendant, and it had a real, and immeasurable impact on the complainant and her family."[178]

In *AC*, the accused posted several videos of the complainant on various revenge porn websites, along with identifying information. The Court articulated the impossibility to quantify the impact, noting that "[i]t is

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174 *Supra* note 61 at para 35.

175 *MR Sentencing*, *supra* note 56 at para 17.

176 *Ibid* at paras 11, 20.

177 *Ibid* at para 11 [emphasis added].

178 *Ibid* at para 13 [emphasis added].

difficult to imagine a more significant breach of C.S.' privacy than occurred here."[179] The Court went on to note that "[i]t is difficult to overstate the seriousness of this offence."[180] Furthermore, the Court labelled the act as unpunishable. Similarly, in a different *AC* case, the Court wrote that "no sentence can undo or even begin to remedy the harm done to the victim."[181]

In addition to harm being unknowable and unpunishable, harm to victims was also framed as being limitless, both geographically and temporally. For example, in *AC*, the Court opined that "[t]hose private images were available for anyone with an internet connection."[182] Likewise, "the offender did not simply send a few images to a small group of people… He shared the images with the world."[183] In *Agoston*, the Court noted that distribution on the internet, "can result in the image being forever available."[184] Likewise, in *JTB*, following the publishing of intimate images and identifying information about the complainant, the Court noted that:

> [I]t should be recognized and emphasized again that her torment is not over. Nor does it seem likely to end. Her intimate images and personal information remain online and available to strangers, along with indications that she would welcome a sexual assault. She correspondingly is obliged to live in a state of constant humiliation, exposure and understandable anxiety related to the realistic possibility of further sexual violence by strangers unknown and unknowable.[185]

Further, the Court noted that the images distributed via the internet may be "forever available."[186]

Not only is the harm geographically and temporally limitless, but there is also no way to control the harm. In *JTB*,[187] the Court noted that the accused's online posts would result in an uncontrollable and possibly unending harm. Speaking generally, in relation to the principles of sentencing, the Court opined that:

> [E]ven if the particular offender setting such events in motion is incarcerated, distant, restrained and/or completely rehabilitated, a former partner and victim in the position of Ms B. simply cannot know, and never *will* know with certainty,

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179 *AC 1*, *supra* note 53 at para 55 [emphasis added].
180 *Ibid* at para 62 [emphasis added].
181 *AC 2*, *supra* note 61 at para 75 [emphasis added].
182 *AC 1*, *supra* note 53 at para 1 [emphasis added].
183 *Ibid at* para 49 [emphasis added].
184 *Supra* note 84 at para 16 [emphasis added].
185 S*upra* note 1 at para 97 [emphasis added].
186 *Ibid* at para 37.
187 *Ibid*.

> whether the serious threat to her privacy, personal integrity and safety created by the offender is contained or at an end.[188]

In *AC*, the Court noted that the harm to the victim was uncontrollable after the accused uploaded videos of her to several internet sites:

> Uploading intimate images into the public domain clearly has lasting effects on victims. There is a popular saying that "the internet never forgets"...[t]here is no way to know how many people have access to the images. Every time someone views one of these images, C.S.'s privacy and dignity are violated. C.S. must live with the knowledge that strangers anywhere in the world may view her private images whenever they choose to. She has lost control over a very private part of her life forever. She faces the potential violation of her privacy, by total strangers, in perpetuity.[189]

Further, in a different *AC* case, the Court held that because the accused still had access to the intimate images of the complainant, she continued to live in fear of ongoing harm: "I also note that this does nothing to allay C.A.'s concerns that Mr. A.C. still has access to her image and that he might share this with even more people in the future."[190]

In *Haines-Matthews*, the loss of control was highlighted as an important factor underpinning the introduction of the offence:

> One of the significant aspects of the harm which Parliament has sought to curtail arises from the fact that, in this day and age, most often, as it was in the case at bar, the intimate images are distributed electronically, and once the electronic images are transmitted, there is very little, if any, control over who may access them, where they may end up, or how long they will be accessible on some internet site. That aspect of the harm caused by the offending behaviour is unaffected, and unabated, by the motivation of the offender.[191]

Another common theme was that the harm was perceived as very serious. Cases made reference to the impact on the victim as significant,[192] devastating,[193] traumatic,[194] or substantial.[195]

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188 *Ibid* at para 91 [emphasis in original].

189 *AC 1*, *supra* note 53 at para 65 [emphasis added].

190 *AC 2*, *supra* note 61 at para 87.

191 *Supra* note 57 at para 48 [emphasis added].

192 *Borden*, *supra* note 116 at para 53.

193 *AC 1*, *supra* note 53 at paras 14, 23, 63; *MR* sentencing, *supra* note 56 at paras 13, 20; *JTB*, *supra* note 1 at para 97.

194 *AC 2*, *supra* note 61 at para 84.

195 *JTB*, *supra* note 1 at para 37.

References were also made to the risk victims faced of embarrassment[196] or psychological harm.[197] The risk of suicide was also mentioned.[198] Given the context in which the offence arose, the perception of extreme impact is no surprise. Parliamentary debates on Bill C-13, the precursor to section 162.1 of the *Code*, focused primarily on examples of extreme situations which cumulated in suicides.[199]

Thus, harm to the victims of NCIID is being framed by courts as unknowable, unpunishable, unending, uncontrollable, and profound. The use of strong language by the Court — for example, using words such as devastating — further undergirds the message that there is something particularly unique and damaging about the harm resulting from NCIID. Alexa Dodge similarly notes that digital technology is being seen within popular and judicial understandings as something which is bringing about the "end of forgetting."[200] This is based on a notion of "digital images as difficult — or impossible — to control or delete."[201] Dodge goes on to argue that this understanding of technology may be overly simplistic and has resulted in legal responses which have perhaps, at times, overreached in their assessments of harm:

> While the anxiety of being unaware of an image's future may persist, it is important to note that digital memory is not always as functionally everlasting as it may feel (Karaian 2016; Hand 2016) and that the particular future of an image will also be dependent on factors such as whether it is able to be removed from search engine results. Regardless, it is clear that various understandings of digital memory have significant impacts on cases of NCIID. While the increased harm of NCIID due to the affordances of digital memory is often treated as self-evident in both legal and governmental responses, a more nuanced understanding of the role of digital technology demonstrates the need to assess the impact of digital technology on a case-by-case basis.[202]

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196 *Agoston*, *supra* note 84 at para 15; *JTB*, *supra* note 1 at para 37.

197 *Agoston*, *supra* note 84 at para 15; *JTB*, *supra* note 1 at paras 37, 97; *McFarlane*, *supra* note 150 at para 11.

198 *JTB*, supra note 1 at para 37; *PSD*, *supra* note 128; *JS*, *supra* note 61 at para 30.

199 Felt, *supra* note 24 at 137; Bailey, *supra* note 25.

200 Dodge, "Nudes are Forever", *supra* note 17 at 136.

201 *Ibid*.

202 *Ibid* at 138.

IV. CONCLUSION

This article sought to look at judicial discourse on section 162.1 of the *Code* to understand whether rape myths and discriminatory stereotypes common to sexual assault inform the treatment of NCIID within judicial decision making. While scholars and activists, before and after the creation of section 162.1, suggested that there was a discursive tendency for such stereotypes to inform the treatment of NCIID, this theory has not been held up within the cases that I examined.

While literature has lamented the differential treatment of strangers compared with known perpetrators in sexual assault, in most of the cases that I examined, judges are perceiving the abuse of trust arising from a close relationship to be an aggravating factor in sentencing. While revenge is acknowledged as a motive and the frame of revenge pornography is used in some cases, in general, judges do not appear to accept narratives which use such frames in order to attribute blame and responsibility to female victims.

Similarly, I found scant evidence of the existence of the construction of the perfect victim in the NCIID cases that I examined. In one case, the appropriateness of the victim's resistance was commented upon and in another case, the Court commented upon the riskiness of engaging in consensual intimate image sharing. In two cases, the fact that the complainant was the initiator of the intimate image sharing in the first instance was commented upon and may have informed the judicial understanding of the accused's intentionality in distributing the image. However, in general, there is an absence of courts engaging in the construction of the perfect victim.

Another discriminatory stereotype identified in sexual assault cases is that perpetrators do not act intentionally or their actions can be explained by other factors. Once again, a high degree of intentionality was generally attributed to the actions of perpetrators and the offence was rarely framed as an accident. This intentionality was sometimes linked together along with revenge and breach of trust narratives.

A related theme was the Court perceiving that technology made it easier for the offence to be committed. In one case that I examined, while technology may have reduced the intentionality of the accused by making the offence easier to commit, the breach of trust brought about was so significant as to counter any reduction in the accused's moral culpability. Overall, the leakiness of technology was not particularly apparent in the

cases that I examined. However, there may be evidence that courts are associating limited distribution with a lack of intentionality on the part of the accused.

While many scholars feared that NCIID would not be considered seriously by courts, I found that, in general, this did not hold true. The gendered, violent nature of NCIID was recognized in several cases. At the same time, several other cases drew upon frames of cyberbullying which may undermine an appreciation for the violent, gendered nature of NCIID. Another concern from scholars was that the harms perpetuated by NCIID would be ignored for their real-world impacts on women's lives or that the harms would be conceived as breaches of privacy, rather than recognizing NCIID as an attack on human dignity. Overall, I found an absence of narratives on privacy which conflated consensual image sharing with non-consensual distribution. Rather, courts seemed to recognize that consent to capture the image in one context could be distinguished from consent to distribute electronically and that the failure to abide by the parameters of consent constituted a breach of privacy. Furthermore, the seriousness within which the offence is being considered by courts is also apparent in how impacts on victims were generally framed as being profound, as well as unknowable, unpunishable, unending, and uncontrollable. In general, judicial decision-making appears to be informed by an understanding of privacy and bodily integrity which avoids discriminatory stereotypes.

Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations

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ABSTRACT

Since 2002, both Parliament and the Court have repeatedly cited the dangers that online affordances pose to young people, the anonymity and protections that they grant offenders, and the complexities that they bring to the law. This project explores the underlying logics and implementation of section 172.1 of the *Criminal Code* ("Luring a Child") and critiques the current practice of governing child luring through proactive investigations by police. Proactive child luring investigations rely on using a state-created imaginary victim and have historically been granted large and undefined scopes through both law and Parliamentary bills. Investigations of this nature have been used to police marginalized sexualities and sex work communities and have inflicted substantial harms upon those who are wrongly caught up in investigations. We question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases. We note that while prosecutions brought forward through the proactive investigation process have significantly increased,

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they rarely uncover any instances of harmful behaviour, 'real' victimization, or any criminal activity aside from the initial conversation.

I. INTRODUCTION

Regulating, policing, and denunciating sexual offences against youth are part of the fabric of most societies and are alive and well in the Canadian context. In the past few decades, both Parliament and the Court have repeatedly cited the dangers that online affordances pose to young people, the anonymity and protections that they grant offenders, and the complexities that they bring to the law. This project will consider section 172.1 of the *Criminal Code* ("Luring a Child") as a site of this complexity and critique the current practice of governing child luring through proactive investigations. We will begin by outlining the development of the law through a discussion of Parliamentary bills that formed and expanded upon section 172.1, arguing that both the scope of behaviour captured and the severity of sentencing have increased. Perhaps the most dramatic change to the legislation occurred in 2019. The Supreme Court of Canada released a ruling regarding the constitutionality of section 172.1 brought forward in *R v Morrison*, declaring a section of the law to be of no effect.[1] While this may address some of the critiques brought forward in this project, we are predominantly concerned with the ability to police, surveil, and govern behaviour without a victim, something section 172.1 still allows.

Proactive child luring investigations have yet to receive academic critique, despite relying on a unique legal ontology that allows the state to imagine and construct offences absent a 'victim.' A proactive investigation relies upon the anonymity of online spaces; police officers pose as youth online — often young women — and act as 'bait' for potential predators. Often these discussions are initiated by the officers. In many of the cases we have found, officers are responding to posts seeking casual sexual relationships and, more troubling, at times these posts have no clear solicitation of youth underage. Policing in this online context allows us to read the state's construction of the "digital girl" as both highly sexualized and commoditized.[2] Police present young people as willing communicants

1 2019 SCC 15 [*Morrison* 2019].

2 Jane Bailey & Valerie Steeves, "Will the Real Digital Girl Please Stand Up?: Examining the Gap Between Policy Dialogue and Girls' Accounts of their Digital Existence" in J Macgregor Wise & Hille Koskela, eds, *New Visualities New Technologies: The New Ecstasy*

who are compliant, even enthusiastic, about an in-person meeting. However, when young women exercise sexual agency online, they are met with regulation at best and criminalization at worst.[3] We suggest that the state is not concerned with harm to an individual but rather harm to a community ideology.[4] Policing and law in this context exemplifies a tension between how state-imagined youth and real youth are able to behave online.

Police present underage communicants as hyper-sexual through their aggressive pursuit of potential predators while the state continually fails to acknowledge a young person's sexual autonomy and capacity to consent until they are 14, 16, or 18 years of age. Shifts toward the acceptance — or even the acknowledgement of — sexual agency, such as the decision in *R v Sharpe*,[5] are often responded to by Parliament through anxiety governance and new legislation that places further restrictions on youth while avoiding meaningful discussions of victimization and exploitation aside from the inflexible structure of age of consent. This ideology, far from being concerned with protecting youth, reflects and enforces community-based standards of acceptable sexuality. It also provides pathways for the justice system to ignore the complexities of coercive or otherwise harmful sexual experiences when experienced by persons over the legal age of consent.

We also demonstrate that proactive investigations have been strategically deployed by police in ways that target marginalized sexualities through an analysis of two criminal cases, *R v Gowdy*[6] and *R v Pengelley*.[7]

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of Communication (Farnham, UK: Routledge, 2012) 41 at 56. In these spaces, police are saturating the online chat rooms with digital girls. This demonstrates a "market demand" for young women and girls who behave in particular ways online and thus, this hyper-sexualized performance is readily available, easily accessible, and 'provided' by police to a market of would-be assailants. The commodification of young women in this way and the consumption of now readily available conversation also warrants some critique.

3 *Ibid*. Young people's sexual agency is often missing from legal conversations regarding sex, which has frequently been acknowledged by scholars like Karaian in Canada, and Baker in the United States. See Lara Karaian, "Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers' Digital Sexual Expression" (2014) 18:3 Theoretical Criminology 282; Carrie N Baker, *Fighting the US Youth Sex Trade: Gender, Race, and Politics* (Cambridge: Cambridge University Press, 2018).

4 Richard Jochelson & Kirsten Johnson Kramar, *Sex and the Supreme Court: Obscenity and Indecency Law in Canada* (Halifax: Fernwood Publishing, 2011).

5 2001 SCC 2 [*Sharpe*].

6 2014 ONCJ 592 [*Gowdy* 2014].

7 2009 CanLII 19936 (ON SC) [*Pengelley*].

Marginalized sexuality in these cases is seen through belonging to the LGBT community and through participation in BDSM communities, respectively. In these cases, the police officers initiated communication without any grounds to suspect either Mr. Gowdy or Mr. Pengelley; here, they relied upon a *bona fide* investigation and cast the entirety of the internet as a possible site of criminal activity. Although they rationalized their suspicions for the Court, we argue that these men were likely approached because their sexuality fell outside what officers considered acceptable within their respective communities. Further, the ensuing investigation and aggressive pursuit of these men falls dramatically outside the intentions of a proactive investigation. We suggest that, from the information available in these cases, these men had minimal interest in the communicants created by the officers and no interest in luring children whatsoever.

With this in mind, we question the legitimacy of proactive investigations as a redress to child sexual exploitation online and note that while prosecutions brought forward through proactive investigations have been significantly increasing, they fail to uncover any instances of harmful behaviour, "real" victimization, or any criminal activity aside from the initial conversation. We discuss these findings at the end of the paper and make subsequent recommendations for proactive investigations that would better address harm and protect children online.

II. ENTRAPMENT

Although proactive investigative tactics involve the ongoing, exclusive communication with a police officer rather than an underage victim, it is rare for a court to hear a defence of entrapment. Rather than defending an accused from criminal responsibility, an entrapment defence is intended to uphold and control investigative procedures and safeguard against abuses of process. In this sense, the true purpose of an entrapment defence is to deter police conduct that is deemed unacceptable. In some cases, a court may even find that police conduct forms the foundation of the criminality before the court. It is our position that proactive child luring investigations will, in many instances, demonstrate egregious police involvement akin to entrapment. Despite this, there are very few Canadian criminal cases, and even fewer child luring cases, where entrapment is used as a defence. This is likely due to how the doctrine of entrapment works: an accused must first be found guilty, and then entrapment is assessed on a balance of

probabilities with the burden of proof resting on the accused.[8] Although proactive investigation tactics for child luring cases require the construction of the victim and an active co-creation of evidence between the accused and police, we see it as highly unlikely for the courts to accept an entrapment defence.[9] This is predominantly informed through the precedent set by the Court and for the high importance placed by the state in protecting children from harm.

In Canada's leading case on the doctrine of entrapment, the SCC found that:

> [T]here is entrapment when, (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.[10]

From *Mack*, the Supreme Court of Canada establishes two branches to the doctrine of entrapment: (1) when, absent reasonable suspicion or a legitimate investigation, the accused is presented with an opportunity to offend, or (2) police induce the commission of an offence. In only two luring cases, *R v Gerlach*[11] and *R v Chiang*,[12] did the accused suggest that actual inducement occurred. While proactive investigative tactics are, at times, quite aggressive, our suggestion is that the first branch of entrapment could be used to remedy the more egregious policing practices justified under section 172.1. While there must exist a reasonable suspicion either in the person targeted or in the location to justify a proactive investigation, we believe that investigations in practice have moved beyond a *bona fide* inquiry and into random virtue testing. More troubling, we see many investigations moving into a new realm entirely: into the policing of acceptable sexuality. Here, we suggest the courts attend to the spaces online where police conduct their investigations. As we have argued elsewhere, by capturing the entirety

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8 Brent Kettles, "The Entrapment Defence in Internet Child Luring Cases" (2011) 16:1 Can Crim L Rev 89.

9 *Ibid.*

10 *R v Mack*, [1988] 2 SCR 903 at 964–65, 1988 CanLII 24.

11 2014 ONCJ 646.

12 2010 BCSC 1770.

of the internet as a 'targeted location' suitable to a *bona fide* inquiry, the law feeds into social anxiety surrounding children and the internet.[13]

When ruling on luring cases, the courts frequently portray the internet as a space rife with criminal activity and an acceptable location to target for a proactive investigation. In *R v Levigne*,[14] an online profile, irrespective of its specific location, was described as "both a shield for the predator and a sword for the police."[15] We argue that it is unlikely for all profiles to be effective tools for predation, as there are many spaces and forums where children are unlikely to be found. While the doctrine of entrapment has yet to be used successfully,[16] it may pose a challenge should the courts begin to question how particular spaces online are targeted and subject to suspicion by police. There is a need to question the legitimacy of an untethered conception of 'risk' online; there is further need to question whether this conception embodies a valid form of social governance. It is critical that the law recognize that the very real product of proactive policing investigations is the creation of a victim, the co-creation of evidence by the police and accused, and the construction of harm. This project argues that, rather than preventing harm or curbing risks of harm, police officers are engaging in random virtue testing within their communities. Further, in many cases, this virtue testing extends beyond the law's intention to protect children and results in the policing of acceptable sexuality through the strategic use of victim construction and selection of space. We suggest that Canada has seen a significant expansion of these cases and has accordingly expanded the scope of the legislation. In this sense, the state is making more space for co-created evidence and legitimizing its use by affording it more legal weight.

III. PROACTIVE INVESTIGATION BILLS

Child luring legislation has seen significant Parliamentary attention and change since its inception; many of these changes serve to further entrench anxieties around youth sexuality and sexual exploitation. The legislation was

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13 Lauren Menzie & Taryn Hepburn, "Technologies of Regulating Sexual Offences against Youth" in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bradford, ON: Demeter Press, 2019) 114.

14 2010 SCC 25 [*Levigne*].

15 *Ibid* at para 25.

16 The doctrine of entrapment was only once used successfully in *R v Bayat*, and the decision was ultimately overturned on appeal. See *R v Bayat*, 2010 ONSC 5606, rev'd 2011 ONCA 778.

born in 2002 through Bill C-15A responding, in part, to the decision that had been reached the previous year in *Sharpe*.[17] Heightened social concern post-*Sharpe* over the dangers of technology for Canadian youth contributed to the introduction of the offence of luring a child and to raising the age of consent,[18] demonstrating the pervasive anxiety around youth sexuality and the risk of sexual exploitation of children in a digital age.[19]

Responding to public anxiety, Bill C-15A purported to address threats posed by the internet, particularly the threat of sexual exploitation of youth; the bill proposed to amend the *Criminal Code* by "(a) adding offences and other measures that provide additional protection to children from sexual exploitation, including sexual exploitation involving use of the Internet."[20] It then introduced a new section, section 172.1, "Luring a Child," which specifically penalized the use of a computer to communicate with a person who is, or is believed to be, under 18 years.[21] It later included amendments to identify instances of exploitation for youth under 16 or 14 years of age, depending on the connected offence. As part of the legislation, it was specified that the courts could not entertain a defence of mistaken belief that the communicant was of legal age "unless the accused took reasonable steps to ascertain the age of the person."[22] At no point did this legislation

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17 Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess, 37th Parl, 2002, cl A(3) (assented to 4 June 2002), SC 2002, c 13; *Sharpe*, *supra* note 5. The *Sharpe* decision was concerned with the tensions between freedom of expression and the censorship of child pornography, where Robin Sharpe argued that his written child pornography, BOYABUSE, had artistic merit (some scholars agree: see Shannon Bell, "Sharpe's Perverse Aesthetic" (2002) 12:1 Const Forum Const 30).

18 Janine Benedet, "Children in Pornography after Sharpe" (2002) 43:2 C de D 327; Lyne Casavant & James R Robertson, *The Evolution of Pornography Law in Canada* (Ottawa: Parliamentary Information and Research Service, 2007); Lise Gotell, "Inverting Image and Reality: R. v. Sharpe and the Moral Panic around Child Pornography Art/Morality/Child Pornography: Perspectives on Regina v. Sharpe" (2001) 12 Const Forum Const 9; Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet*, reissue ed (New York, NY: New York University Press, 2003).

19 Janine Benedet, "The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law" (2010) 13:4 New Crim L Rev 665 [Benedet, "Age of Innocence"]; Tyler Carson, "Legislating Sexual Morality: Youth Sexuality and Canada's Rising Age of Consent Laws" (2013) Hard Wire 25; Tatiana Savoia Landini, "Vulnerability and its Potential Perils on the Criminalization of Online Luring in Canada and Court Cases Tried in Ontario (2002-2014)" (2018) 8:2 Contemporânea 543.

20 Bill C-15A, *supra* note 17 at para 3.

21 *Ibid*, cl A(3).

22 *Ibid*.

clarify what could be seen as a "reasonable step." By amending the legislation to attend specifically to the age of the communicant and, more importantly, by redefining the age at which youth may be considered agentic, Parliament is indicating that the age of consent itself can be considered a solution to prevent youth victimization. Instead of examining youth harm, victimization, or sexual exploitation as a wrong in and of itself, this legislation frames the wrong in terms of a definite age. This line suggests that there is a fundamental difference between a 15-year-old and a 16-year-old that makes the latter more agentic and thus, less likely to be subject to victimization than the former. In doing so, a nuanced and critical understanding of the exploitation and victimization of young people is closed off.

In 2007, Bill C-277 made the first amendment to the section and started a pattern of two bills passing within a year that increase the penalties and scope of section 172.1.[23] The sole objective of Bill C-277 was to increase the penalties for offenders: the maximum available sentence doubled from a term of no more than five years to a term of no more than ten years. This exemplifies the growing concern surrounding youth exploitation and online predators,[24] despite empirical data suggesting a significant decline in the number of teenagers receiving solicitations online from 2000 to 2006.[25] Adler notes that this crime is actually quite rare, and this is supported from our analysis of Canadian luring cases, where there had only been 122 cases across the country in the past nine years (2011-2019). The second bill came in 2008, as the Harper government quickly passed Bill C-2, termed the 'Tackling Violent Crime Act.'[26] This Bill expanded the range of the offence by adding more relevant sections and subsections to be captured under section 172.1,[27] which intended to provide "more effective sentencing and

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23 Bill C-277, *An Act to amend the Criminal Code (luring a child)*, 1st Sess, 39th Parl, 2007, cl 1 (assented to 22 June 2007), SC 2007, c 20.

24 Steven Roberts, *An Analysis of the Representation of Internet Child Luring and the Fear of Cyberspace in Four Canadian Newspapers* (MA Thesis, Ontario Tech University, 2011) [unpublished], online: <ir.library.dc-uoit.ca/xmlui/bitstream/handle/10155/186/Roberts_Steven.pdf?sequence=3> [perma.cc/S7U8-HYTZ].

25 Amy Adler, "To Catch a Predator" (2011) 21:2 Colum J Gender & L 130.

26 Bill C-2, *Tackling Violent Crime Act: An Act to amend the Criminal Code and to make consequential amendments to other Acts*, 2nd Sess, 39th Parl, 2008, cl 14 (assented to 28 February 2008), SC 2008, c 6.

27 When section 172.1 was first included in the *Criminal Code*, there were a small number of relevant offences that could be linked to an offender's communication. These were separate charges that were tied to the intention of the initial communication; by

monitoring of dangerous and high-risk offenders."[28] Considering the strategies employed during proactive investigations and the minimal harm that is curbed through these investigatory techniques, designating offenders "dangerous" and "high-risk" contributes further to an anxious reading both of youth sexuality and online affordances.[29] This expansion legitimizes investigations initiated and, in many ways, wholly constructed by police and demonstrates an increased policing power granted through Parliament despite evidence illustrating that this kind of crime is very rare.

After the introduction of mandatory minimums in 2010's Bill C-10,[30] child luring legislation was altered in response to the Supreme Court of Canada's decision in *R v Bedford* by Bill C-36 in 2014.[31] Despite the 'Protection of Communities and Exploited Persons Act' being a response to sex work laws, the opportunity was taken to expand yet again on section 172.1, expanding the behaviours captured by the section. As was the case in 2007 and 2008, this legislation was promptly followed by Bill C-26 in 2015,[32] which increased the punishment for offences. Though the rates of instances of child luring remained relatively stable throughout this period,

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expanding these sections, Parliament gave the courts greater power to construct and imagine the intentions of offenders.

28 Bill C-2, *supra* note 26, Summary (c).

29 Joseph Fischel, "Per Se or Power? Age and Sexual Consent" (2016) 22:2 Yale JL & Feminism 279; Andrea Slane, "Luring Lolita: The Age of Consent and the Burden of Responsibility for Online Luring" (2011) 1:4 Global Studies Childhood 354 [Slane, "Luring Lolita"].

30 Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2010, s 2, cls 10- 38 (assented to 13 March 2012), SC 2012, c 1.

31 The Court struck down three pieces of legislation, arguing that they affected the ability of sex workers to moderate risk, acting to decriminalize adult prostitution by allowing open communication, bawdy houses, and living off the avails of prostitution (See *Canada (AG) v Bedford*, 2013 SCC 72). The Harper government acted to prevent this decriminalization with Bill C-36 in 2014. This Bill criminalized the purchase of sex work. See Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014, cl 9 (assented to 6 November 2014), SC 2014, c 25.

32 Bill C-26, *An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015, cl 10, 11 (assented to 18 June 2015), SC 2015, c 23.

child luring legislation continued to expand both relevant offences and sentences. This discrepancy suggests that the increasing regulation and punishment do not reflect the current atmosphere of online child exploitation, making the use of proactive investigations under this legislative scheme troubling. Employing mandatory minimums when there is no victim and the conversation has been predominantly driven by police is difficult to justify. Section 172.1, subsections 3 and 4 were recently challenged before the Court. These subsections are as follows:

> Presumption re: age
> (3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> No defence
> (4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.[33]

Subsection 172.1(3) forms a legal presumption that an accused would have believed an online communicant is under the legal age if they had represented themselves as such. Although there is room for a defence if an accused can provide contrary evidence, it would then fail to satisfy the requirements of subsection 172.1(4). When there is no defence available without taking reasonable steps, any contrary evidence that supports an accused's belief that they are communicating with someone above the age of consent will always fail to be accepted by the courts. It is also problematic the ways in which the reasonable steps requirement errs dangerously close to endorsing predatory behaviour. Without ever clarifying what the courts should see as a reasonable step, the state has, in some sense, given justification for pressing an online communicant for photos, video chats, or in person meet-ups.[34] Asking questions about school and home life may be seen as an attempt to determine or confirm a communicants age; it may also be seen as grooming behaviour.[35] Reading these provisions together, the law is placing an evidentiary burden on the accused. The accused must both be able to prove that there is "evidence to the contrary" within the meaning of

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33 *Criminal Code*, RSC 1985, c C-46, ss 172.1(3), (4).

34 *R v Morrison*, 2015 ONCJ 599 [*Morrison* 2015]; *Pengelley*, *supra* note 7.

35 *Morrison* 2015, *supra* note 34; *R v Legare*, 2009 SCC 56.

subsection (3) and that they have satisfied this through taking "reasonable steps" under subsection (4). Having evidence to the contrary, without taking into consideration what the courts see as reasonable steps, will be insufficient grounds for a defence.[36] In this sense, the courts again establish that there is significant risk and dangers from online sexual communication. By requiring that an accused take reasonable steps, nearly all of which resemble conventional luring behaviours, the courts stress the instability and uncertainty that comes from talking online. Some work has argued that this construction of 'risky' spaces recasts sexual violence as predominantly committed by advantageous strangers.[37] This casting glosses over both the complexities of sexual violence and the primary sources of sexual violence: the people with whom we are closest. Through these subsections, the court creates precarity in all communications that take place online, particularly in an atmosphere rife with proactive investigations.[38]

Douglas Morrison sought to find both these subsections inoperable, as he believed they infringed upon his right to be presumed innocent and violated the principles of fundamental justice under sections 11(d) and 7 of the *Charter*, respectively.[39] He also argued that the prescription of a mandatory minimum sentence violated his right not to be subjected to cruel and unusual punishment, under section 12 of the *Charter*.[40] At both trial and appellate levels, the judgements rendered recognized that these sections, particularly when read together, violated section 11(d) of the *Charter*, with some disagreement as to whether both subsection (3) and (4), or just subsection (3) should be struck from the offence.[41] In 2019, the Supreme Court released a decision that agreed, in part, with Morrison's submissions, arguing that the presumption regarding an online communicant's age should be declared inoperable under section 11(d) of the *Charter*. While this finding may influence the probability of a conviction resulting from a proactive investigation, it will not fundamentally change the way these investigations are conducted. In many proactive investigations, the intention is to deploy and articulate a particular type of

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36 *Levigne*, *supra* note 14.

37 Fischel, supra note 29.

38 Kettles, *supra* note 8; Landini, *supra* note 19; Statistics Canada, *Child Luring Through the Internet*, by Jennifer Loughlin & Andrea Taylor-Butts, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2009); Bailey & Steeves, *supra* note 2.

39 *Morrison* 2019, *supra* note 1 at paras 5–7.

40 *Ibid* at para 8.

41 *Morrison* 2015, *supra* note 34; *R v Morrison*, 2017 ONCA 582 [*Morrison* 2017].

victimized youth in line with the interests of the state. The communicant is portrayed by police as naive, curious, interested in trying various sexual activities, highly agentic and independent, and, depending on their age, often somewhat experienced.[42] Indeed, police investigations have most recently mobilized consensual sex work to stretch the bounds of proactive child luring investigations and further cast the young women they portray as autonomous, willing, even enthusiastic participants in a sexual exchange.

These cases arise from a new investigatory process named 'Project Raphael': officers maintain active profiles on adult sex work websites, and only after a prolonged communication and discussion of costs and services will they disclose their age as younger than posted or previously communicated. Not only does this investigation target persons who are seeking consensual sex with an adult, it also articulates a hyper-sexualized character through the online communicant. By situating the communication on escort sites, police officers remove any need to lure or groom a victim, indeed, the focus of the exchange <u>is</u> sex, specifically, sex offered by an agentic, entrepreneurial young woman who sets the terms and price of the encounter. This disparate treatment of youth through policy and police construction both gives the state a means to govern and control the boundaries of acceptable sexuality while still promulgating its investment to sexualize and uncomplicate the sexualization of young women.

Morrison's submission that these sections violated his principles of fundamental justice are tied to the stigma and severe punishment resulting from these offences when the offence is solely tied to an objective fault.[43] Indeed, the designation of a sex offender status in cases where an accused is communicating only with an adult police officer is strange, particularly when there is no tangible harm. Like many others charged under section 172.1, Morrison was targeted through a proactive investigation, which further complicates the issue as he had no history of offending, communicating with children, and no other offences that arose from the investigation. There are significant consequences from this section and that these investigations have the capacity to <u>do</u> significant harm to those accused rather than prevent harm to youth. This is demonstrated through two case studies, *R v Gowdy* 2014 and *R v Pengelley* 2009, where we argue

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42 See Bailey & Steeves, *supra* note 2 for a discussion of the paradoxes and perceptions of young women online.

43 *Morrison* 2019, *supra* note 1 at para 7.

proactive investigations targeted two marginalized sexual communities with the intent to enforce community-based standards of acceptable sexuality.

IV. *R v Gowdy* (2014): Court of Appeal for Ontario

Kris Gowdy served as a youth pastor in Durham, ON, a small, tight-knit community of roughly 2,500 people. He attracted the attention of local police when he posted an advertisement on Craigslist, seeking "under 35, jocks, college guys, skaters [and] young married [guys]."[44] A detective found the terms "under 35", "skaters", and the word "young" that preceded "married [guys]" to be concerning and believed there was a possibility that Gowdy was directing his ad at persons under the legal age of consent. He created a fictitious online persona, 'Brad' who was 15 years of age, and responded to Gowdy's ad. Throughout their communication, Gowdy asked 'Brad' several times if he was of legal age to receive fellatio, the agreed upon sex act put forward in Gowdy's ad.[45] 'Brad' never responded to this specifically, but continued to engage with Gowdy and make plans to meet up.

Gowdy was arrested at the scene of intended assignation, and upon a vehicle search incident to arrest, officers found medical documentation in Gowdy's car that confirmed that he was HIV-positive.[46] In addition to the charge of luring a child, Gowdy was charged under section 273(2) of the *Criminal Code* for attempted aggravated sexual assault.[47] The Durham Regional Police media relations unit was asked after Gowdy's arrest and interviewed to issue a news release that disclosed Gowdy's charges, professional work history, HIV status, social media presence, and Church affiliation and to include his photograph.[48] When Detective Norton of the Durham police department was asked why he made this choice, knowingly violating Gowdy's right to privacy, he said: "I made a decision to put out a press release to advance the investigation… to make — ensure that the

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44 *Gowdy* 2014, *supra* note 6 at para 1.

45 *Ibid* at para 3.

46 *Ibid* at para 4.

47 The charge of attempted aggravated sexual assault was withdrawn just before Kris Gowdy's trial began.

48 *Gowdy* 2014, *supra* note 6 at para 14; *R v Gowdy*, 2016 ONCA 989; Joshua David Michael Shaw, "Contagion and the Public Body: A Re-Ordering of Private and Public Spheres in R v Gowdy" (2018) 39 Windsor Rev Legal Soc Issues 127.

community was safe."[49]

Shaw sees this unlawful disclosure as exemplifying both the hegemonic exegesis of law and the construction of a positive HIV-status through biopolitical governmentality, where the "healthy community" needs to be protected from the "diseased object."[50] Despite the fact that the Court agreed that disclosure was unlawful, in Gowdy's case, they refused a stay of proceedings; Justice Block ultimately found that Gowdy's sexuality and HIV-positive status would have no stigma attached to it greater than the stigma from the perfectly lawful charge of child luring.[51] The Court then, is not responsible for remedying the damage done to Gowdy's reputation within his Church and community, as this is damage that he himself did by virtue of who he was. While we wholeheartedly agree with Shaw's reading of the police press release, we would push this further and critique the initial contact and subsequent pursuit of Kris Gowdy by law enforcement as similarly relying upon hegemony and the perceived integrity of a community. The decision to respond to Gowdy's Craigslist ad is untenable if the state was truly interested in preventing harm to underage youth. We argue that local police intentionally looked past terms that salvaged the intention of Gowdy's post, "married [guys]", "under 35", "college guys", and relied upon a risk-averse logic that responded to Gowdy's sexuality in a small town rather than any perceived threat to youth.

Gowdy's case exemplifies one instance where proactive child luring investigations have been used to police sexuality. While a great deal of work has recognized and catalogued Canada's long history of discrimination against LGBTQ groups, there has been less engagement with how the state actively polices kink.[52] Similar to LGBTQ groups, individuals who choose to practice consensual kink can be (and have been) caught in the reach of the law.[53] The *Pengelley* case demonstrates the state's continued interest in governing and policing consensual kink. The choice to actively police an adult-only kink site under the guise of preventing the sexual victimization of youth is a clear overextension of the law, demonstrating how the rationale

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49 *Gowdy* 2014, *supra* note 6 at para 18.

50 Shaw, *supra* note 48 at 131.

51 *Gowdy* 2014, *supra* note 6 at paras 37–41, 49.

52 Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010); Jochelson & Kramar, *supra* note 4.

53 Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014).

of a proactive luring investigation provides the state with new legal tools to govern sexual expression.

V. *R v Pengelley* (2009): Ontario Superior Court of Justice

Nicholas Pengelley first met 'Stephania Cacciatore'[54] in an adult-only fantasy chat room that he frequented.[55] The chat room was described by the Court as "hard core", "part of kinky land", and "for adult discussions about, and the sharing of, sexual fantasies."[56] It was also found by the Court to not be "a dating site or a place designed to be used to meet others in the physical world... it is not a troubled teen's area of the internet."[57] Officer Deangelis' choice then, to create the character profile for 'Stephania', list her age as 18 (a requirement of the site), and strike up a conversation in this adult chat room seems, at best, misguided. When prompted by the Court, Deangelis could offer no explanation for why he spent time as 'Stephania' in the chat room, why he suspected predators might be in this chat room, or why one could reasonably expect to find a 12-year-old girl accessing this chat room.

Precedent states that police officers are allowed to treat the entirety of the internet with suspicion to conduct *bona fide* investigations of online predators.[58] However, in light of the law's history of criminalizing BDSM consensual kink,[59] the intentions behind conducting an investigation of luring on such a niche space should be taken with a grain of salt. Deangelis' investigation of Pengelley certainly fell beyond the scope of what should be reasonable for a proactive investigation of online child luring and was further complicated by his interactions after making contact. Pengelley was sent a photo taken by Deangelis of a 32-year-old woman, who had been posed and staged to look younger. Immediately after sending this photo, Deangelis sent Pengelley a message saying that they had lied about the age on their profile: 'Stephania' was actually 12, not 18. Read by a reasonable person in a kink-friendly space, it was much more likely that 'Stephania' was

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54 'Cacciatore', given as Stephania's legal last name, means "hot" in Italian. Here, the choice to use sexualized names online could be seen as a baiting strategy by police, but it could also convey an artificial or inauthentic online persona.

55 *Pengelley*, *supra* note 7 at paras 2, 27.

56 *Ibid* at para 30.

57 *Ibid* at para 31.

58 *Levigne*, *supra* note 14.

59 Khan, *supra* note 53.

an adult woman with an age-play kink and not an underage girl. After Pengelley told the accused he had no interest in meeting or having sex in real life, supported both by the nature of the chat room and his past conversations, Deangelis added him as a friend to keep chat lines open. Deangelis also communicated as 'Stephania' during all hours of the day, including school days, and initiated the majority of the conversations. Towards the end, Deangelis contacted Pengelley repeatedly, getting no response back; Pengelley testified that, at this point, he had lost interest in 'Stephania' entirely.[60]

While Pengelley was not convicted, Justice Dawson stated that he found a great deal of the conversation troubling.[61] Pengelley's chats are described as "lurid", "explicit", "graphically sexual", and his past conversations in the chat room were seized and analyzed before the Court. What ultimately spared Pengelley from conviction was not Deangelis' conduct or the nature of the chat room, but the fact that Pengelley requested to see 'Stephania' via webcam, taking what the Court viewed in this case as a reasonable step.[62] In many cases, however, that same conduct is viewed as evidence of the accused's intention to lure and exploit. Unlike Gowdy's case, the police involved were not reprimanded for their conduct during the proactive investigation, despite the fact that it blatantly contradicts the aims to protect children from harm. Officer Deangelis could provide no reasons why a predator or a child might be present in the space he conducted this investigation, and the case offers no explanation for why Pengelley was investigated further after explicitly saying he had no interest in meeting 'Stephania' or why he was arrested after losing interest. The practice of proactive investigations to target all online space as risky or otherwise dangerous to youth has the potential to bring significant consequences to those in marginalized sexual communities, and the law offers little protection for those unlucky enough to be the target of investigation.

VI. IMAGINING OFFENCES AND HARM

In both *Pengelley* and *Gowdy*, the state is responding to an imagined harm that might befall a real child. Section 172.1 is intended as precautionary legislation, designed to prevent harm before it occurs and

60 *Pengelley*, *supra* note 7 at para 48.
61 *Ibid* at paras 47, 49.
62 *Ibid* at para 56.

respond proactively to risky behaviours. Here, we would suggest that this section could be read as pre-criminal, where the state believes it can predict offences at the expense of due process.[63] Jochelson and Kramar argue that, with respect to sexual offences, the way that the Canadian state understands harm has changed.[64] We have moved from understanding 'harm' as against a person to 'harm' as offending a community morality; sexuality governance is not limited to behaviours that harm, but rather behaviours that go against the community.[65] Here, the luring offence is intended as a tool that allows the state to intervene prior to the commission of a subsequent sexual offence.[66] The crime is preparatory and inchoate, but it needs to be resituated within our current social context "rife with cultural anxieties about both online communication and youth sexuality."[67] What 'offends' a community will vary in the eyes of the officers investigating and in the courts adjudicating. Child luring law has been defined predominantly in common law and, therefore, an individual officer's assessment of what is 'risky' is placed before a court. The assessment is then before the court to make a similar assessment which is maintained across Canada and thus, will vary depending on the nature of the community. The result is legislation that lacks clarity in scope, in the nature of the prohibited acts, and in the underlying harm.[68]

We argue that there is a misguided understanding of the dominant characteristic in a luring offence, in line with Andrea Slane's work.[69] In Shannon Bell's analysis of the *Sharpe* decision, she identifies an important tension from legal assessments of child pornography that can be understood within the context of proactive investigations.[70] Bell is attentive to the ways that assessments of child pornography happen outside of their intended audience and context by persons who are concerned only with finding pornography. Court system experts, without having the contextual nuance

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63 Richard Jochelson, James Gacek & Lauren Menzie, *Criminal law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (New York, NY: Routledge, 2018).

64 Jochelson & Kramar, *supra* note 4.

65 *Ibid*; Jochelson, Gacek & Menzie, *supra* note 63.

66 Slane, "Luring Lolita", *supra* note 29.

67 *Ibid* at 354.

68 *Ibid.*

69 *Ibid*; Andrea Slane, "From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law" (2010) 48:3/4 Osgoode Hall LJ 543 [Slane, "Scanning to Sexting"].

70 Bell, *supra* note 17.

that comes from familiarity with genre, could only classify Robin Sharpe's writing as child pornography.[71] We would suggest, here too, that in proactive luring investigations the dominant characteristic of the offence becomes the represented age of the communicant and not the content of the communication, the behaviour of the officer, the potential for exploitation, and the intentions of the accused. The Court sees luring by seeing age; in doing so, the represented age of an undercover officer is often enough for conviction alone. Slane is similarly critical of luring cases involving real youth that hinge on an age of consent; young people who are exploited online occupy a tenuous status as victims where, once they reach the age of sexual consent, they become blamed by the law for their victimization.[72] Youth who fall below this age are consequently denied sexual agency and the potential for online intimacy.[73]

In constructing and imagining an online, potential luring victim, officers play into and reproduce tropes about young people online. A proactive luring investigation contributes to crime statistics representing rates of youth victimization and further fuels the widespread cultural anxiety about the vulnerability and recklessness of young people online.[74] This perpetuates the rising concern with youth victimization, where incidents are entirely manufactured through proactive investigations such as in *Gowdy*, but are then presented to the public as a real, quantifiable risk.[75] This 'imaginary' victimization functions as a means of control, to cast youth as vulnerable and ill-equipped in an increasingly digitized world. Finkelhor has termed this phenomenon 'juvenoia', where youth sexuality exists on a binary of acceptability driven predominantly by age.[76] Here, we can ignore the complexities of youth sexual violence and label an exchange assaultive without considering any substantive nuance. Blame then is either relegated to an offender for having 'underage' sex or to a young person above the age

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71 *Ibid* at 33.

72 Slane, "Luring Lolita", *supra* note 29 at 360.

73 *Ibid.*

74 *Ibid*; Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada, 2012*, by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2014); David Finkelhor, *The Internet, Youth Safety and the Problem of 'Juvenoia'* (Durham, NC: University of New Hampshire, Crimes Against Children Research Center, 2011).

75 Adler, *supra* note 25.

76 Finkelhor, *supra* note 74.

of consent for being reckless. This becomes a socio-legal tool to ignore the complexities of our sexualization and commodification of children.[77]

Here, the law (re)partitions sexual morality on Manichean lines, where harm is relocated to discrete bodies.[78] Policing proactively allows us to sustain the conception of the 'sex offender' as a morally blameworthy person who creates the risk of exploitation, rather than a turn to critique our society that presents conflicting and paradoxical notions of youth sexuality.[79] The imaginary victim and the state's faith in its ability to imagine offences becomes a tool to uncomplicate the nature of youth sexuality, age difference, and online intimacy.[80] It further becomes a tool to govern and expose sexuality that is unacceptable within a community under the guise of preventing harm.

By pathologizing those accused through proactive investigations, the law can claim to redress and curb harms associated with child sexual exploitation through taking sex offenders 'off the streets.' The very construct of a sex offender suggests significant risk to reoffend and suggests that these offences are bound up in a particular type of person who exemplifies an 'evil' not seen throughout society.[81] Inherent in this legislation is that these people pose a risk and that, absent state intervention, would go on to sexually abuse and exploit youth through the means of online communication.[82] Harm is not a self-evident category within the law.[83] However, we question the ability of our current proactive investigation processes to respond to the tangible social harms that they claim to be preventing.

We identified four possible sources of harm that could be seen through luring cases: (1) whether a real person was victimized ("Real Victim"); (2) whether there was a history of violent or sexual offending ("History of Offending")[84]; (3) whether there was any identified communication, of any

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77 Bailey & Steeves, *supra* note 2.

78 Fischel, *supra* note 29 at 281.

79 Bailey & Steeves, *supra* note 2; Finkelhor, *supra* note 74.

80 Slane, "Luring Lolita', *supra* note 29.

81 Fischel, *supra* note 29; Andrew Koppelman, "Reading Lolita at Guantanamo or, This Page Cannot be Displayed" (2007) 57:2 Syracuse L Rev 209.

82 Gregor Urbas, "Protecting Children from Online Predators: The use of Covert Investigation Techniques by Law Enforcement" (2010) 26:4 J Contemporary Crim Justice 410.

83 Khan, *supra* note 53.

84 Categorizing offenders as 'pathological' or seeing past offenders as posing a risk to reoffend absent other evidence is something that should be, and has been, critiqued

kind, with underaged youth ("Communication"); and (4) whether any other charges were discovered as a result of the investigation, thus indirectly identifying a possible source of harm ("Other Charges").[85] We then analyzed all available trial court cases where an accused was charged under section 172.1 of the *Criminal Code*. We identified whether this accusation was made through a proactive investigation or through another means of discovery and whether it resulted in a conviction.

Below, we present our findings with respect to proactive policing investigations. The absence of harm and risks of harm is evident within the table. However, when police restrict the scope of the investigation to online spaces that present a greater degree of reasonable suspicion or to a person that they believe poses a risk to the community, we can see a greater likelihood that a proactive investigation will capture more harmful, or otherwise risky, behaviours. These cases, where we believe investigations align closer to a true *bona fide* inquiry, are marked in grey. What can be seen from the results is that there are effective ways for proactive luring investigations to respond to and prevent the reoccurrence of harm but, as it stands, this policing practice does little to prevent tangible harm from occurring.

A. Proactive Investigations

	Real Victim	History of Offending	Communication	Other Charges	Conviction
R v RA, 2019	1	0	1	1	Y
R v Weiland, 2019	0	0	0	1	N
R v Vander Leeuw, 2019	0	0	1	1	Y
R v CDR, 2019	0	0	0	0	Y

(Joseph J Fischel, "Transcendent homosexuals and dangerous sex offenders: Sexual harm and freedom in the justice imaginary" (2010) 17 Duke J Gender L & Pol'y 277). However, for the purpose of identifying any potential source of harm, we chose to use this as a category to suggest that a proactive investigation might effectively catch incidences of recidivism, as this is a common rationale for their use.

85 We did not distinguish additional charges laid by the presence of harm. In fact, in one of the cases we analyzed, the only other charge laid was accessing an open wifi connection.

R v King, 2019	0	0	0	0	Y
R v Olynick, 2019	0	0	0	0	Y
R v Parks, 2018	0	0	0	0	Y
R v Haniffa, 2018	0	0	0	0	Y
R v Freeman, 2018	0	0	0	1*	Y
R v Randall, 2018	0	0	0	0	Y
R v Chheda, 2018	0	0	0	0	Y
R v Barnes, 2018	0	0	0	0	Y
R v Birley, 2018	0	0	0	0	N
R v Thakre, 2018	0	0	0	0	Y
R v Jaffer, 2018	0	0	0	0	Y
R v Allen, 2018	0	0	0	1**	Y
R v Wheeler, 2017	0	0	0	0	Y
R v Gucciardi, 2017	0	0	0	0	Y
R v Drury, 2017	0	0	0	0	Y
R v Gardner, 2017	0	1	1	0	Y
R v Harris, 2017	0	0	0	0	Y
R v Mills, 2017	0	0	0	0	Y
R v Gowdy, 2016	0	0	0	0	Y
R v KBR, 2016	0	0	1	0	Y
R v Cooper, 2016	0	0	0	0	Y
R v Ghotra, 2016	0	0	0	0	Y
R v Rodwell,	0	0	0	1	Y

2016					
R v Lambe, 2015	0	0	0	0	Y
R v Froese, 2015	0	0	0	0	Y
R v Slade, 2015	0	1	1	1	Y
R v Morrisson, 2015	0	0	0	0	A***
R v Brown, 2014	0	1	0	1	Y
R v RY, 2014	0	0	1	1	Y
R v Stiltz, 2013	0	0	0	0	Y
R v Walther, 2013	0	0	0	1	Y
R v Doxtator, 2013	0	0	0	1	Y
R v White, 2013	0	0	1	1	Y
R v Dobson, 2013	0	0	0	0	Y
R v Thaiyagarajah, 2012	1	1	1	1	Y
R v Cooke, 2012	0	0	0	0	Y
R v McCall, 2011	0	0	0	0	Y
R v Holland, 2011	0	0	0	0	Y
R v Somogyi, 2010	0	0	1	1	Y
R v Sargent, 2010	1	0	1	1	Y
R v RJS, 2010	0	0	1	1****	Y
R v Pengelley, 2010	0	0	0	0	N
R v MacIntyre, 2009	0	0	0	0	Y

R v Nichol, 2009	0	1	1	0	Y
R v Moodie, 2009	0	1	1	1	Y
R v Armstrong, 2009	0	1	1	1	Y
R v Bergeron, 2009	0	0	0	1	Y
R v Read, 2008	0	0	0	0	Y
R v Villeneuve, 2008	0	0	0	0	Y
R v Arrojado, 2008	0	0	0	0	Y
R v Gurr, 2007	0	0	1	1	Y
R v Dhandhukia, 2007	0	0	0	0	Y
R v Randall, 2006	0	0	0	0	Y
R v Folino, 2005	0	0	0	0	Y
R v Jepson, 2004	0	0	0	0	Y
R v Harvey, 2004	0	0	1	1	Y
R v Blanchard, 2003	0	0	0	0	Y

* charged with "child pornography" because of a sexual conversation online with the police officer

** charged with "making pornography available" while talking to the police officer

*** conviction dismissed at the SCC; new trial ordered

**** charged with accessing an open wifi connection

B. No Proactive Investigation

	Real Victim	History of Offending	Communication	Other Charges	Conviction
R v Fawcett, 2019	0	0	0	0	Y
R v Koenig, 2019	1	0	1	1	Y
R v EL, 2019	1	0	0	1	N
R v Jat, 2019	1	0	1	1	Y
R v Drumonde, 2019	1	0	1	0	Y
R v Crawley, 2018	1	1	1	1	Y
R v Clarke, 2018	1	1	1	1	Y
R v BS, 2018	1	1	1	1	Y
R v Hathaway, 2018	1	0	1	0	Y
R v Geikie, 2018	1	0	1	1	Y
R v Brown, 2018	1	0	1	1	Y
R v WG, 2018	1	0	1	1	Y
R v Blinn, 2018	1	0	1	1	Y
R v Patterson, 2018	1	1	1	1	N
R v Pantherbone, 2018	1	0	1	1	Y
R v Dawe, 2018	1	0	1	0	Y
R v Lauzon, 2018	1	1	1	1	Y
R v Di Clemente, 2018	1	0	1	0	N
R v Shaw, 2018	1	0	1	0	Y
R v JE, 2018	1	0	0	0	Y
R v Carter, 2018	1	1	1	1	Y
R v SB, 2017	1	1	1	1	Y
R v TR, 2017	1	1	1	1	Y
R v Thompson,	1	0	1	0	Y

2017					
R v Chicoine, 2017	1	0	1	1	Y
R v Otokiti, 2017	1	0	1	1	N
R v JC, 2017	1	0	1	1	Y
R v Boriskewich, 2017	1	1	1	1	Y
R v Cutter, 2017	1	0	1	1	Y
R v McColeman, 2017	1	0	1	1	Y
R v Gashikanyi, 2017	1	0	1	1	Y
R v AAG, 2017	1	1	1	1	Y
R v CL, 2017	1	0	1	1	Y
R v Hussein, 2017	1	0	1	1	Y
R v Dominaux, 2017	1	0	1	1	Y
R v Hood, 2016	1	0	1	1	Y
R v AJD, 2016	1	0	1	1	Y
R v BS, 2016	1	0	1	1	Y
R v Janho, 2016	1	0	1	0	Y
R v AH, 2016	1	0	1	0	Y
R v Giovannini, 2016	1	1	1	1	Y
R v McLean, 2016	1	0	1	1	Y
R v Hajar, 2016	1	0	1	1	Y
R v Vergara-Olaya, 2016	1	0	1	1	Y
R v Olson, 2016	1	0	1	1	Y
R v Scott, 2016	1	1	1	1	Y
R v RW, 2016	1	0	1	1	Y
R v Webster, 2016	1	0	1	1	Y

R v MC, 2016	1	1	1	0	Y
R v Brown, 2015	1	0	1	1	Y
R v Hammermeister, 2015	1	0	1	1	Y
R v Rafiq, 2015	1	0	1	0	Y
R v Reynard, 2015	1	1	1	1	Y
R v Marcipont, 2015	1	0	1	0	Y
R v Ambrus, 2015	1	0	1	1	Y
R v Miller, 2015	1	0	1	1	Y
R v MGP, 2015	1	0	1	1	Y
R v SH, 2015	1	0	1	1	Y
R v EN, 2015	1	0*	1	1	Y
R v Callahan-Smith, 2015	1	1	1	1	Y
R v KN, 2014	1	0	1	1	Y
R v JJS, 2014	1	1	1	1	Y
R v Smith, 2014	1	0	1	1	Y
R v B, 2014	1	0	1	1	Y
R v SS, 2014	1	0	1	0	Y
R v Vincent, 2014	1	0	1	1	Y
R v KO, 2014	1	0	1	1	Y
R v MJAH, 2014	1	0	1	1	Y
R v Moreira, 2014	1	0	1	1	Y
R v Snook, 2013	1	0	1	1	Y
R v Lamb, 2013	1	1	1	1	Y
R v Stewart, 2013	1	1	1	1	Y
R v Mills, 2013	1	1	1	1	Y
R v Mackie,	1	0	1	1	Y

2013					
R v Craig, 2013	1	0	1	0	Y
R v Danielson, 2013	1	0	1	0	Y
R v Nightingale, 2013	1	0	1	1	Y
R v Garofalo, 2012	1	0	1	0	Y
R v Rice, 2012	1	1	1	1	Y
R v Paradee, 2012	1	0	1	1	Y
R v Caza, 2012	0	1	0	1	N
R v Cockell, 2012	1	0	1	1	Y
R v Matticks, 2012	1	0	1	1	Y
R v Snow, 2011	1	0	1	0	Y
R v Porteous, 2011	1	0	1	1	Y
R v JJH, 2011	1	0	1	0	Y
R v Bridgeman, 2011	1	1	1	1	Y
R v Aimee, 2010	1	0	1	1	Y
R v Young, 2010	1	0	1	1	Y
R v Harris, 2010	1	0	1	0	Y
R v Dragos, 2010	1	0	1	0	Y
R v Rouse, 2010	1	0	1	0	Y
R v Porter, 2010	1	0	1	0	Y
R v Gibbon, 2009	1	0	1	0	Y
R v Bono, 2008	1	1	1	1	Y
R v Lithgow, 2007	1	0	1	1	Y
R v Innes, 2007	1	0	1	1	Y
R v Haddon, 2007	1	0	1	1	Y

R v Fong, 2007	1	1	1	1	N**
R v Horeczy, 2006	1	0	1	0	Y
R v Legare, 2006	1	0	1	0	N***
R v Brown, 2006	1	0	1	0	Y
R v CJ, 2005	1	0	1	1	Y
R v Okipnak, 2005	1	0	1	1	Y
R v Carratt, 2005	1	1	1	0	Y

* Case references a "troubled past" without directly discussing a criminal record.

** Convicted for sexual assault, but not for communicating for the purpose of sex. Victim was underage and assaulted multiple times by Fong.

*** Overturned and convicted after appeal.

C. Summary of Findings

Our findings illustrate that the majority of proactive investigations fail to address any tangible harm posed by the accused. It is then difficult to say with certainty that this is behaviour that would have occurred independent of law enforcement intervention; in fact, the evidence demonstrates that police contact likely induced the offence.[86] The nature of offences through a proactive investigation means that police are able to strategically co-create evidence likely to result in a conviction. Proactive investigations have taken place on BDSM-themed, adult-only chat rooms, as well as on adult escort sites, falling significantly outside where a predator could reasonably be said to look for victims. However, there were some investigations that seemed to be well-founded and thought out by police; in a few cases, proactive investigations were used to check-up on a probation order, were part of a sting of pedophilic chat rooms, or involved taking over a real person's account to investigate a complaint of possible luring. The state's faith in its ability to imagine consequential harm has not been demonstrated by the policing strategies employed. We argue that this then becomes about enforcing community held ideas of acceptable sexuality, which involve the

[86] Kettles, *supra* note 8; Urbas, *supra* note 82.

surveillance and policing of marginalized sexual communities as in *Gowdy*, *Pengelley*, and others. We then move to make recommendations for regulating proactive investigations to avoid morality-based policing that ignores the real risks of exploitation faced by youth online.[87]

VII. RECOMMENDATIONS

This investigation has shown that there is a clear disconnect between the stated intentions of a proactive investigation under section 172.1 and its results. This disconnect is obscured through an observable moral panic surrounding youth, sexuality, and online intimacy. Moral panics are a phenomenon characterized by intense or heightened concern about a "deviant" or "folk devil" who poses a threat to "normal" society members.[88] The phenomenon generally regards youth, sexuality, and the internet as pervasive and high-risk people, behaviour, and space, despite evidence demonstrating that the perceived risk is largely imagined.[89] The state elects to rely on a statutory age of consent rather than engage constructively with (non)consensual youth sexuality and the potential for exploitation; in this sense, we have seen significant governance and criminalization of youth for behaviours like 'sexting' that many scholars have argued are a part of healthy and consensual sexual exploration.[90] On a legislative front, Parliament

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87 Slane, "Luring Lolita", *supra* note 29.

88 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, Routledge Classics (New York, NY: Routledge, 2011); Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Oxford: Wiley-Blackwell, 2009).

89 Ian Butler, "Child Protection and Moral Panic" in Viviene E Cree, Gary Clapton & Mark Smith, eds, *Revisiting Moral Panics* (Chicago: Policy Press, 2015) 73; Roberto Hugh Potter & Lyndy A Potter, "The Internet, Cyberporn, and Sexual Exploitation of Children: Media Moral Panics and Urban Myths for Middle-Class Parents?" (2001) 5:3 Sexuality & Culture 31; Joanne Westwood, "Unearthing Melodrama: Moral Panic Theory and the Enduring Characterisation of Child Trafficking" in Viviene E Cree, Gary Clapton & Mark Smith, eds, *Revisiting Moral Panics* (Chicago: Policy Press, 2015) 83.

90 Benedet, "Age of Innocence", *supra* note 19; Carol L Dauda, "Childhood, Age of Consent and Moral Regulation in Canada and the UK" (2010) 16:3 Contemporary Politics 227; Alexa Dodge & Dale C Spencer, "Online Sexual Violence, Child Pornography or Something Else Entirely?: Police Responses to Non-Consensual Intimate Image Sharing among Youth" (2018) 27:5 Soc & Leg Stud 636; Slane, "Scanning to Sexting", *supra* note 69; Andrea Slane, "Legal Conceptions of Harm

needs to refocus the law to engage in a contextual analysis of the nature and circumstances of online sexual relationships to make determinations as to whether they are exploitative.[91] The use of imaginary victims and imagining offences only serves to present a fallacy where exploitation is clear and identifiable and youth are vulnerable, reckless, and lack agency.

We suggest that imaginary victims created through proactive investigations only serve to muddy our socio-legal construction of youth sexuality and exploitation. To this end, we propose that they be used only as an investigative tool and not as evidence to move forward with prosecution. For offenders that would communicate with an undercover officer and violate a peace bond or the conditions of their sex offender designation, this could result in charges laid under a separate section.[92] The offence of luring a child should then be rewritten to only account for instances where an offender is communicating with someone under the age of consent, not where they simply believe they might be. This limits the number of cases that could be brought before the court, and prosecution is restricted to cases with a clearly demonstrated risk of harm. Further, police officers should undergo sensitivity training and education with respect to marginalized sexual communities. We argue that *Gowdy* and *Pengelley* exemplify a deliberate targeting of marginalized sexual communities and the strategic governance of acceptable sexuality.[93]

However, to fully remedy the issues with section 172.1, Parliament needs to turn away from governance at the age of consent and find an effective way to legislate through the basis of exploitation. While this project is a far cry from our current legislative potential, by doing away with our socio-legal dichotomy of youth and consent, we can form better legislative responses to the online sexual abuse of youth.[94]

Related to Sexual Images Online in the United States and Canada" (2015) 36:4 Child & Youth Services 288.

91 Slane, "Luring Lolita", *supra* note 29.

92 Jochelson, Gacek & Menzie, *supra* note 63.

93 Jochelson & Kramar, *supra* note 4. Further, there is a societal conflation of unacceptable sexuality with an immoral character.

94 Bailey & Steeves, *supra* note 2; Slane, "Luring Lolita", *supra* note 29.

Victim Impact Statements at Canadian Corporate Sentencing

ERIN SHELEY*

ABSTRACT

The recent SNC-Lavalin scandal and its political fallout have drawn public attention to an existing culture of impunity enjoyed by corporate criminal wrongdoers, despite the 2004 changes to the *Criminal Code of Canada* that intended to make corporate prosecutions easier. In this article, I argue that the conceptual problems with corporate criminal liability may lie in the criminal justice system's general misapprehension of the nature of corporate crime; especially of the distinct nature of the harm experienced by white collar victims. I further argue that, therefore, part of the solution to under-enforcement may be evidentiary: the Crown and courts should, where applicable, allow and particularly, encourage the victims of corporate crime to testify at sentencing hearings, on the occasions that corporations do go to trial. This will increase public awareness of the harms suffered by corporate victims and may thus increase support for greater enforcement generally, through both prosecutions and plea bargains. Finally, I consider the challenges to a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement in Canada. I compare the Canadian context to that of the United States — where deferred prosecutions agreements have long been in use and long caused such problems — to suggest how these problems may be avoided given the differences between the two countries' substantive law on corporate crime.

* Assistant Professor, California Western School of Law. Many thanks to the participants in the Robson Crim symposium for their comments on this paper, both before and after the symposium. Portions of Part III of this paper, on the evidentiary function of victim impact statements, will also appear in "Victim Impact Statements and Corporate Sex Crimes," forthcoming in a symposium volume of the *Oklahoma Law Review*. Thanks to the participants in that symposium as well for their comments, which have improved both papers.

Keywords: white collar crime; enforcement; mens rea; corporations; victims; sentencing; victimology; financial crime; environmental crime; *Criminal Code* of Canada

I. INTRODUCTION

In 2007, Hamilton couple Norman and Georgette Hawe, now in their 80s, placed $450,000, the sum of both of their life savings, into an investment plan managed by an entity called Golden Gate Funds.[1] They were told that their money would be invested in a portfolio of mortgages, but Golden Gate diverted it for other purposes instead. The Hawes lost their savings and instead of retiring in comfort, they were forced to sell their home. "I started working when I was 21 years old," Norman Hawe told the *Globe and Mail* in 2013, "I did a job for this guy from Hamilton here, and he owed me $400. And he wouldn't pay me. ... So, you know what I did? I went up and I stuck a knife in his four tires. And this, I lost $450,000, and I haven't done anything."[2] The inaction Hawe refers to is actually the government's. The Golden Gate case never came before a criminal court, but it did come before the Ontario Securities Commission (OSC), which can only impose monetary penalties. In 2009, Golden Gate's owner, Ernest Anderson, settled with the OSC, acknowledged his misrepresentations to investors, and agreed to a $4.7 million fine, which he never paid.

The Hawes' story may not exactly echo down the corridors of power, but it does reveal a certain background lack of attention to white-collar misconduct that set the stage for what has become one of the greatest political scandals in Canadian history. A former federal Attorney General, Jody Wilson-Raybould, contends that she was pressured by Justin Trudeau's Office of the Prime Minister to offer construction giant SNC-Lavalin a remediation agreement that would allow it to avoid criminal conviction under section 380 of the *Criminal Code*[3] and the *Corruption of Foreign Public Officials Act* (*CFPOA*),[4] in connection with its alleged payment of $48

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1 Jeff Gray & Janet McFarland, "Crime Without Punishment: Canada's Investment Fraud Problem", *The Globe and Mail* (24 August 2013), online: <www.theglobeandmail.com/report-on-business> [perma.cc/SSZ2-WE7J].

2 *Ibid.*

3 *Criminal Code*, RSC 1985, c C-46, s 380 [*Criminal Code*].

4 *Corruption of Foreign Public Officials Act*, SC 1998, c 34.

million in bribes to Libyan government officials.[5] While SNC-Lavalin ended up unsuccessful in its attempt to secure an agreement, its extensive lobbying efforts have been cited as the impetus for Parliament adopting the remediation agreement mechanism in the first place,[6] in the 2018 amendments to the *Criminal Code*.[7]

While the political aspects of the SNC-Lavalin affair have struck a particularly sharp note of outrage in the public at large, the company's misconduct arose in the same context that saw the Hawes' lost retirement savings go unpunished: the Crown's under-enforcement of white-collar crime and, in particular, its reluctance to bring criminal charges against corporations. Indeed, SNC-Lavalin is unique insofar as it was charged. Since the introduction, in 2004, of statutory corporate criminal liability under sections 22.1 and 22.2 of the *Criminal Code*, very few corporations have faced criminal charges.[8] While this suggests that corporate giants like SNC-Lavalin have reason to believe they may engage in large-scale corruption with impunity, it also means that smaller victims of corporate crime receive little or no protection from the criminal justice system.[9] And, there is at least some reason to believe that such victims exist: according to a 2012 survey by the British Columbia Securities Commission, 17% of Canadians over age 50 believe they have been the victim of investment fraud at some point in their lives and 29% of active investors so believe.[10] Furthermore, the Crown has brought only a handful of charges against corporate employers (none of them major industry players) under the new *Criminal Code* provisions, specifically intended to address criminal negligence in workplace

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5 See "What the SNC-Lavalin Scandal Reveals About Corporate Influence on Canadian Democracy", *CBC Radio* (15 February 2019), online: <www.cbc.ca/radio/day6/episode-429-snc-lavalin-s-lobbying-> [perma.cc/7758-W6S5].

6 *Ibid.*

7 *Criminal Code*, *supra* note 3, Part XXII.1, "Remediation Agreements".

8 See Norm Keith, *Corporate Crime, Accountability, and Social Responsibility in Canada*, 2nd ed (Markham: LexisNexis Canada, 2016); Lincoln Caylor & Nathan Sheehan, "Canadian Corporate Criminal Liability" (18 March 2019), online: *Mondaq* <www.mondaq.com/canada/Criminal-Law> [perma.cc/J67G-QX9X].

9 White collar offenses are, of course, frequently prosecuted administratively — by the Securities Commissions as in the Golden Gate case and by other relevant bodies such as provincial Occupational Health and Safety agencies. For example, Alberta Occupational Health and Safety investigated 23 workplace fatalities in 2012 and 27 in 2011. See Wayne Renke, Book Review of *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* by Steven Bittle, (2014) 51:3 Alta L Rev 677.

10 See Gray & MacFarland, *supra* note 1.

conditions, despite the numerous workplace deaths that have occurred since their addition.[11] And, since the adoption of the *CFPOA* in 1999, only four companies have been convicted for corruption, compared to the nearly 200 convicted during the same time in the U.S. under the parallel *Foreign Corrupt Practices Act* (*FCPA*).[12] Even scaling for the respective sizes of the jurisdictions, it is unlikely that this disparity reflects an underlying difference in actual levels of corruption. Given the global interconnectedness of the economy, Canadian corporations are competing in the same markets as their American counterparts and thus, they are subject to the same pressures that encourage corrupt business practices.

This article does not attempt to solve the entire problem of white-collar criminal under-enforcement or even to debate the merits of Parliament's decision to introduce remediation agreements into this legal landscape. Instead, it argues that victim testimony at sentencing has an important role to play against the conceptual hurdles that may deter corporate prosecution. Because a corporation cannot go to jail, it may not seem, from a retributive standpoint, to be an attractive target for scarce prosecutorial resources. I argue that the conceptual problems with corporate criminal liability lie in the criminal justice system's general misapprehension of the nature of corporate crime; especially of the distinct nature of the harm experienced by corporate victims. Prosecutors should, in making charging decisions, attend to this harm through interaction with corporate victims. And, both prosecutors and courts should, where applicable, encourage the victims of corporate crime to testify at sentencing hearings on the rare occasions when corporations do go to trial. To the extent that the media circulates these victim stories, they will raise public awareness of the human costs of white-collar crime which will create a stronger public mandate for white collar enforcement generally.

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11 See Canadian Centre for Occupational Health and Safety, "Westray Bill (Bill C-45)-Overview" (last modified 5 May 2020), online: <www.ccohs.ca/oshanswers/legisl/billc45.html> [perma.cc/6Q8R-Z8ER]; Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* (Vancouver: UBC Press, 2012) at 31–34, citing *R v Metron Construction Corporation*, 2012 ONCJ 506; *R v Scrocca*, 2010 QCCQ 8218. See also *R v Transpavé Inc*, 2008 QCCQ 1598; *R v Pétroles Global Inc*, 2012 QCCQ 5749.

12 See Joanna Harrington, "SNC-Lavalin Case Shows Why We Should Review Canada's Corruption Laws" (26 February 2019), online: *The Conversation* <theconversation.com/snc-lavalin-case> [perma.cc/3358-DQJ5]; US, Securities and Exchange Commission, *SEC Enforcement Actions: FCPA Cases* (Washington, DC: SEC, last modified 9 January 2020), online: <www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [perma.cc/338G-JF6L].

I proceed in four parts. In Part II, I give an overview of the common law and statutory basis for corporate criminal liability in Canada — including its historical origins in public outcry over harm to victims — and the major scholarly questions it raises. In Part III, I collect evidence suggesting that some of the harm suffered by victims of corporate crime is psychological and it arises directly from the corporate nature of the criminal — above and beyond the direct physical and economic harms that may also be properly attributed to individual human employees. In Part IV, I describe the evidentiary and constitutional bases on which the Crown may lead victim impact evidence during sentencing and argue that such evidence is highly probative of the nature of corporate criminal harm. I suggest that such evidence enhances the expressive function of the criminal law by resolving its conceptual disconnect around the idea of corporate criminal liability that contributes to under-enforcement. Specifically, victim impact statements given in one trial, if disseminated by the media, may serve to increase public understanding of corporate harm as criminal and contribute to a mandate for future enforcement. Finally, in Part V, I consider the problems for a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement to Canada. I compare the Canadian context to that of the United States — where deferred prosecution agreements (DPAs) have long been in use and long caused such problems — to make suggestions for how best to avoid them, given the differences between the two countries' substantive law on corporate crime.

II. Corporate Criminal Liability in Canada: An Overview

Corporate criminal liability has common law origins in Canada[13] and was formally recognized by the Supreme Court of Canada (SCC) in 1985 in *R v Canadian Dredge and Dock Co.*[14] In that case, the Court adopted the English "identification theory" of corporate criminal *mens rea*, which allows

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13 See *R v Fane Robinson Ltd*, [1941] 3 DLR 409, 76 CCC 196 (Alta SC (AD)), Ford JA for the majority; *R v JJ Beamish Construction Co Ltd et al*, [1966] 2 OR 867, 59 DLR (2d) 6 (Ont SC), Jessup J, as he then was; *R v St Lawrence Corp Ltd*, [1969] 2 OR 305, 5 DLR (3d) 263 (Ont CA), Schroeder J for the Court; *R v Parker Car Wash Systems Ltd* (1977), 35 CCC (2d) 37, 1 BLR 213 (Ont SC), Hughes J; *R v PG Marketplace Ltd* (1979), 51 CCC (2d) 185, 4 WCB 98 (BCCA), Nemetz CJ for the majority.

14 [1985] 1 SCR 662, 19 DLR (4th) 314.

a corporation to be criminally liable only where the government can identify a so-called "directing mind" of the company — an individual "officer or managerial-level employee"— who possesses the requisite degree of *mens rea* required for the given criminal offence.[15] The identification theory "produces the element of *mens rea* in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind" and therefore "establishes the 'identity' between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee."[16] This rule differs sharply from the principle of *respondeat superior* which the United States Supreme Court imported from tort law to define the due process limits to corporate criminal liability in the controversial 1909 *New York Central & Hudson River Railroad v United States* case.[17] Under *respondeat superior*, the crime of any employee exposes the corporate employer to criminal liability and poses the risk of criminalizing corporations for the actions of rogue, low-level employees, even when they act against corporate policy.

Respondeat superior has been widely criticized, in the U.S. and abroad for running afoul of the principle that criminal punishment should track with actual culpability; its potential for punishing non-guilty entities — even non-negligent entities — is clear.[18] Canada has, therefore, rejected the doctrine, as summarized in the Government Response to the Fifteenth Report on the Standing Committee on Justice and Human Rights, Corporate Liability:

> The Government [of Canada] shares the concerns expressed by many witnesses that vicarious liability as applied in the United States is contrary to the principles that underlie Canada's criminal law. While its rigours are somewhat attenuated by the United States Sentencing Guidelines which allow for reductions in the prescribed fine in accordance with the corporation's culpability score, many would argue that under Canadian law it would be wrong in principle to impose the stigma of a criminal conviction on a corporation when its actions are not morally blameworthy.[19]

If *respondeat superior* runs the risk of over-criminalization, however, the identification theory carries the opposite risk. Under the rule of *Canadian*

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15 *Ibid* at 682.

16 *Ibid.*

17 212 US 481 at 493–95 (1909).

18 See e.g. John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) 46:4 Am Crim L Rev 1329 at 1339.

19 Canada, Department of Justice, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights* (Ottawa: DOJ, November 2002), online: <www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/hear-aud.html> [perma.cc/PE3D-NTKD].

Dredge and Dock, a corporation may be prosecuted only on proof that a member of the board of directors, an officer, or a senior manager has the *mens rea* to commit a particular offence. This would necessarily make it very difficult for the Crown to bring charges in cases where (a) a generally lax corporate culture emboldens lower level employees to commit crimes in the course of employment or (b) systemic breakdowns in internal controls lead to grossly negligent conduct that jeopardizes the public.

It did not take long for both to occur spectacularly enough to raise public awareness of the shortcomings of identification theory. On May 9, 1992, during the last hours of their four-day shift, 26 miners perished in a methane explosion at the Westray Mine in Plymouth, Nova Scotia.[20] The mine had opened only eight months previously, after Toronto company, Curraugh Resources, Inc. won both federal and provincial money for the project, which was touted as destined to revitalize the economically-depressed Pictou County. Political pressure from both Ottawa and Halifax may explain why the mine was permitted to operate despite a letter from the MLA, Bernie Boudreau, to Nova Scotia Labour Minister Leroy Legere, alerting him to the fact that the mine was using potentially dangerous methods unapproved for coal mining.[21] Curraugh had obtained a special permit to use such methods to tunnel prior to reaching the coal seam but not actually to mine coal, and Legere was unaware that Curraugh continued to use them three months into the mine's operations.[22] Furthermore, mine workers complained of cutbacks in safety training and equipment and management's negligent attitude toward safety inspections. When miner Carl Guptill complained about these conditions to Labour Ministry inspectors they did not investigate, and Guptill was fired.[23]

After the disaster, the Nova Scotia government mounted an inquiry conducted by Justice K Peter Richard, who concluded that the explosion resulted from "incompetence… mismanagement… bureaucratic bungling…

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20 Martin O'Malley, "Westray Remembered: Explosion Killed 26 N.S. Coal Miners in 1992", *CBC News* (8 May 2012), online: <www.cbc.ca/news/canada/nova-scotia/westray-remembered-explosion-killed-26-n-s-coal-miners-in-1992-1.1240122> [perma.cc/4H7E-XG8Z].

21 *Ibid.*

22 *Ibid.*

23 Caroline O'Conell & Albert J Mills, "The Westray Mine Explosion" in Emmanuel Raufflet & Alfred J Mills, eds, *The Dark Side: Critical Cases on the Downside of Business* (London, UK: Routledge, 2017) 162.

deceit… ruthlessness… and… cynical indifference."[24] Specifically, Justice Richard found that:

> [T]he Westray operation defied the fundamental rules and principles of safe mining practice… it clearly rejected industry standards, provincial regulations, codes of safe practice, and common sense… Management failed to adopt and effectively promote a safety ethic underground. Instead, management, through its actions and attitudes, sent a different message — Westray was to produce coal at the expense of worker safety.[25]

Despite its misconduct, Curraugh Resources (which went bankrupt in 1993) was never criminally charged.[26] The Crown did attempt to prosecute mine managers Gerald Phillips and Roger Parry for criminal negligence and manslaughter, but the charges were eventually dropped due to insufficiency of evidence.[27] The identification theory effectively blocked criminal justice for the victims of a large-scale, systemic breakdown that resulted in mass loss of life. Whatever evidence might have existed that "directing minds" at Curraugh were inappropriately pressuring the operators of Westray Mine to begin production, it could not, apparently, be proven that any such person had all of the requisite mental elements to state a case for homicide.

One way of stating the problem in the language of causation is that the company was, collectively, guilty of gross negligence: no one in the company took the requisite steps to mitigate the risks to its miners, created by its operations. These omissions caused the deaths. Had an individual's culpable omissions caused human death, they would have been on the hook for negligent homicide. But, because Curraugh was a corporation, there was no way to charge it for the collective omissions of all of its employees taken together.

The Westray explosion prompted widespread public outrage. After 12 years of lobbying, Parliament finally passed Bill C-45 (known as the "Westray Bill") in 2003.[28] The Bill amended the Canadian *Criminal Code* in two ways.

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24 Justice K Peter Richard, "Executive Summary: Report of the Westray Mine Public Inquiry" (November 1997) at 3, online (pdf): <ece.uwaterloo.ca/~dwharder/epel/Lecture_materials/Westray.Mine.Public.Inquiry.pdf > [perma.cc/G5J2-VSHB].

25 *Ibid* at 23.

26 Michael McDonald, "Ceremony Marks the 25th Anniversary of Westray Mine Disaster in Nova Scotia", *The Toronto Star* (9 May 2017), online: <www.thestar.com/news/canada/2017/05/09/ceremony-marks-25th-anniversary-of-westray-mine-disaster-in-nova-scotia.html> [perma.cc/94ZT-QN6S].

27 *Ibid.*

28 Bill C- 45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, 2nd Sess, 37th Parl, 2003 (as passed by the House of Commons 7 November 2003).

First, it added section 217.1, creating a duty for workplace supervisors to take reasonable steps to prevent bodily harm to their subordinates, the omission to perform which would trigger liability in criminal negligence.[29] More dramatically, it statutorily superseded the identification theory of *Canadian Dredge*, expanding the circumstances under which entities may be criminally liable for the crimes of their employees.[30] Section 22.1 applies to crimes premised on criminal negligence and section 22.2 applies to crimes premised on subjective *mens rea*/fault.[31] Under Section 22.1 an entity is liable for criminal negligence if:

> (a) acting within the scope of their authority
>
> (i) one of its representatives is a party to the offence, or
>
> (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
>
> (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.[32]

Under section 22.2 an entity is liable for a fault-based offence when:

> 22.2 ... with the intent at least in part to benefit the organization, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence;
>
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organization is or is about to be a party to offence, does not take all reasonable measures to stop them from being a party to the offence.[33]

These new *Criminal Code* provisions expand liability beyond that allowed by the identification theory, as they allow the criminal conduct or negligence of any level of employee to create corporate liability under certain

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29 *Ibid*.
30 *Ibid*.
31 *Criminal Code*, *supra* note 3, ss 22.1, 22.2.
32 *Ibid*, s 22.1.
33 *Ibid*, s 22.2.

circumstances, so long as there is also some sort of failure of oversight at the senior-officer level. Nonetheless, these provisions are somewhat complicated in the number of moving evidentiary parts that a prosecutor must juggle to prove them.

In the first place, it took some time for courts to sort out who, exactly, counts as a senior officer; recent cases have held that the category includes both regional managers and independent agents who manage an important aspect of a corporation's activities.[34] These rulings have confirmed the fact that the new provisions do indeed expand the scope of corporate criminal liability beyond the actions of the board and the c-suite; a senior officer need not have policy-making authority, merely operational authority.[35] However, compared to the rigors of the *respondeat superior* standard, the *Criminal Code* provisions appear to allow an affirmative defence based on "reasonable measures taken by senior officers" with respect to the business units under their supervision.[36] At the time of Bill C-45's passage, some scholars were optimistic that it improved upon the common law by allowing a court to "view corporate decision-making on a collective, rather than an individual basis," when "because of the fragmentation in decision-making in modern corporations" it is "hard to point to a single individual and say that his or her decisions show a marked departure from the standard of care."[37]

Despite the promise of these new *Criminal Code* provisions on paper, critics of corporate criminal under-enforcement note that they have failed to change what is, in essence, a problem of prosecutorial culture. Steven Bittle argues that prosecutors continue to treat corporations differently from street offenders.[38] While the government pursues street crime using a punitive, deterrence-based approach, it prefers a "compliance" model for corporate criminals, focusing on education and voluntary remediation first, with prosecution as a last resort.[39] Bittle argues that, given their profit incentives to do so, corporations will attempt to circumvent compliance-

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34 See *R v Pétroles Global Inc*, 2013 QCCS 4262; *R v Metron Construction Corp*, 2013 ONCA 541.

35 See Todd Archibald, Ken Jull & Kent Roach, "Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer" (2014) 60:3 Crim LQ 386 at 390.

36 *Ibid* at 388.

37 Darcy L MacPherson, "Extending Corporate Criminal Liability: Some Thoughts on Bill C-45" (2003) 30:3 Man LJ 253 at 283.

38 See Bittle, *supra* note 11 at 46, 51.

39 *Ibid.*

based enforcement through falsification and deceit.[40] While Bittle's critique of corporate motives may prove a bit too much — assuming, as it does, universally bad motivations on the part of business entities — his description of the under-enforcement problem rings true. If the democratically enacted *Criminal Code* provides for corporate criminal liability, it is undemocratic for the Crown to largely ignore it relative to the crimes of individuals.

III. The Perceptual Harms of Corporate Crime

Part of my argument in this paper is that the lack of corporate criminal enforcement flows from a fundamental, theoretical incoherence in the justification for corporate criminal liability. It has been well documented, particularly in the context of sexual assault, that prosecutors charge more frequently when they understand the nature of the harm at issue in a particular class of offence.[41] Furthermore, while the criminal law does not, itself, appear to create new moral norms among the public at large, it appears to strengthen existing norms and, thus, contributes to an increased public mandate for enforcement.[42] The combined effect of these two phenomena means that optimal enforcement depends on a clear understanding, among prosecutors and the public at large, of what the nature of a particular criminal harm is.

The existence of corporate criminal liability faces a number of conceptual attacks, as a corporation can feel neither remorse nor the shame of criminal stigma, nor can it be incarcerated.[43] Utilitarian scholars have further suggested that criminally punishing corporations results in a net loss to society by over-deterring beyond the existing disincentives created by civil

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40 *Ibid* at 51, 152.

41 See e.g. Jeffrey W Spears & Cassia C Spohn, "The Genuine Victim and Prosecutors' Charging Decisions in Sexual Assault Cases" (1996) 20:2 American J Crim Justice 183 at 192–96; Darryl K Brown, "Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute" (2018) 103:2 Minn L Rev 843 at 857–59.

42 Michael C Harper, "Comment on the Tort/Crime Distinction: A Generation Later" (1996) 76:1/2 BUL Rev 23 at 25.

43 See e.g. Hasnas, *supra* note 18 at 1339; William S Laufer, "Corporate Bodies and Guilty Minds" (1994) 43:2 Emory LJ 647 at 655; Gerhard OW Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19:1 U Pitt L Rev 21 at 41–46.

and regulatory liability.[44] In the Canadian context, with Westray looming so large as a backdrop, Norm Keith warns that "the history of accountability of corporations has often been directed by crisis and 'moral panic' more than by reasoned, logical application of legal responsibility."[45] Keith further contends that the impersonal, "faceless" attributes of a corporation make it particularly susceptible to moral panic through manipulations by the media and public officials searching for scapegoats.[46]

On the other side, proponents of corporate criminal liability argue, essentially, that corporations do really bad things: they engage in harmful conduct with ill effects on health, environment, worker safety, and so forth.[47] Yet, this does not adequately address the critics' arguments. After all, if such bad things can be causally attributed to individual human employees, then those employees can be prosecuted alone; if not, perhaps such bad things cannot, consistent with principles of justice, be criminally punished because they cannot be attributed to a particular offender. I argue, instead, for a different justification, premised on the fact that when a corporation commits a crime, it imposes a distinct set of harms on its victims and, by proxy, on society — above and beyond the substantive harms caused by the offence — that flow from the nature of the corporate entity itself.[48] A focus on victims can help prosecutors better understand these harms and victim impact statements can transmit them to the public.

The *Criminal Code* has long recognized harm to victims as a sentencing factor in both individual and corporate prosecutions. Section 718.1 of the *Criminal Code* states that a criminal sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; a factor in this proportionality calculus is the harm caused to a victim arising from the commission of the offence.[49] Scholars note some of the unique

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44 See e.g. Daniel R Fischel & Alan O Sykes, "Corporate Crime" (1996) 25:2 J Leg Stud 319; VS Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109:7 Harv L Rev 1477.

45 Norm Keith, "Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility" (2010) 11:3 Bus L Intl 247 at 247.

46 *Ibid* at 260.

47 See e.g. Pamela H Bucy, "Corporate Criminal Liability: When Does it Make Sense?" (2009) 46:4 Am Crim L Rev 1437.

48 See Erin Sheley, "Perceptual Harm and the Corporate Criminal" (2012) 81:1 U Cin L Rev 225 at 228.

49 *Criminal Code*, *supra* note 3, s 718.1; Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 84–92.

aspects to the relationship between a victim and a corporate offender. As a point in favor of Bill C-45, Archibald, Jull, and Roach note that:

> From the victim's perspective (or in a case such as Westray, the families of victims), if it can be shown that criminal activity occurred, it matters not which level of management authorized it.... [t]his dichotomy [between policy-makers and operators] is viewed as a way of isolating the board of directors and the corporation.[50]

On the other hand, Norm Keith points out the potential difficulties in identifying the victims of a particular corporate offence, which might be obvious in cases of fraud against a particular group of shareholders, but harder to determine in cases of mass bacterial infections resulting from corporate action assisted by a provincial government's failure to meet clean water regulatory requirements.[51]

Just as sentencing courts focus on the degree of harm caused by particular corporations, prosecutors should charge more corporations in the first place due to the kinds of harms corporations cause their victims. In addition to the obvious material harms — which may vary as between economic, environmental, physical, etc. depending on the offence — there is a separate class of harms common to those types of corporate crime with discernible victims. I call these "perceptual harms".[52] Perceptual harms amount to the empirically demonstrated sense of helplessness a victim feels when faced with a perpetrator that is temporally enduring, powerful, and materially complex.[53] When a corporate offender continues to exist after it commits a crime, it can shatter a victim's "belief in a just world":[54] a psychological heuristic crucial to a person's wellbeing. This is a unique sort

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50 Todd Archibald, Kenneth Jull & Kent Roach, "The Changed Face of Corporate Criminal Liability" (2004) 48:3 Crim LQ 367 at 393.

51 Norm Keith, "Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility" (2010) 56:3 Crim LQ 294 at 315 [Keith, "Sentencing the Corporate Offender"].

52 See Sheley, *supra* note 48.

53 *Ibid* at 259–63.

54 See e.g. Jozef Dzuka & Claudia Dalbert, "The Belief in a Just World and Subjective Well-Being in Old Age" (2006) 10:5 Aging & Mental Health 439 at 442. See Melvin J Lerner & Carolyn H Simmons, "Observer's Reaction to the 'Innocent Victim': Compassion or Rejection?" (1966) 4:2 J Personality & Soc Psychology 203; Melvin J Lerner, "The Justice Motive: Some Hypotheses as to its Origins and Forms" (1977) 45:1 J Personality 1; Melvin J Lerner, Dale T Miller & John G Holmes, "Deserving and the Emergence of Forms of Justice" (1976) 9 Advances in Experimental Soc Psychology 133.

of harm flowing from the corporate structure itself.[55]

As an example, consider the long-term sociological and psychological costs of a corporate environmental crime.[56] The psychological literature has documented a particular sort of harm in victims of the major oil spills of the last several decades: evidence suggests the psychological harm experienced by victims to be exacerbated by the corporate nature of the responsible entities and issues related to assignation of blame. In addition to the immediate physical losses suffered by the victims of technological disaster, the victims' communities also suffer a long-term social deterioration described as "the corrosive community".[57] The literature attributes part of this corrosive effect to the members of a community struggling over where to place blame, authorities being evasive and unresponsive, and victims becoming suspicious and cynical.[58]

Psychologist Deborah du Nann Winter, whose expertise centers on the psychological effects of environmental damage, has observed from her studies of victims of the Deepwater Horizon oil spill that the primary emotional reaction among these victims is "anger… around the oil companies' failure to abide by regulations" as well as "helplessness" (which she explains by noting the phenomenon of "learned helplessness," which is the tendency of organisms to become non-responsive in the face of situations over which they have no control).[59] Again, the structural relationship between the corporation and the background legal authority that supports it can be directly linked to the psychological damage experienced by victims. I now turn to the evidentiary mechanism by which prosecutors who understand the nature of the perceptual harm experienced

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55 See Sheley, *supra* note 48.

56 See William R Freudenburg, "Contamination, Corrosion, and the Social Order: An Overview" (1997) 45:3 Current Sociology 19; William R Freudenburg & Timothy R Jones, "Attitudes and Stress in the Presence of Technological Risks: A Test of the Supreme Court Hypothesis" (1991) 69:4 Soc Forces 1143; Krzysztof Kaniasty & Fran H Norris, "A Test of the Support Deterioration Model in the Context of Natural Disaster" (1993) 64:3 J Personality & Soc Psychology 395; J Stephen Kroll-Smith & Stephen Couch, "Symbols, Ecology, and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster" (1993) 5 Research in Soc Problems & Public Policy 47.

57 See Freudenburg, *supra*, at 56.

58 See Freudenburg & Jones, *supra* note 56.

59 Susan Koger, "Coping with the Deepwater Horizon Disaster: An Ecopsychology Interview with Deborah Du Nann Winter" (2010) 2:4 Ecopsychology 205 at 205.

by corporate victims may use that knowledge to increase and mobilize existing public support for white-collar prosecutions.

IV. The Evidentiary Role of Victim Impact Statements

The crime victim's rights as a stakeholder in the Canadian criminal justice system have long been recognized[60] and, as mentioned previously, sentencing courts must consider the degree of harm to victims in applying the proportionality principle expressed in section 718.1 of the Criminal Code.[61] In 1988, the federal and provincial ministers responsible for criminal justice endorsed the *Canadian Statement of Basic Principles of Justice for Victims of Crime*, "in recognition that all persons have the full protection of rights guaranteed by the [*Charter*]" and "the rights of victims and offenders need to be balanced."[62] They have recently been the focus of greater attention with the passage of the *Canadian Victims Bill of Rights* in 2015.[63] The Bill provides the victim with a range of rights, including to be apprised of the status of the investigation of and proceedings against their offender and certain rights of privacy and security. It also provides that "[e]very victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered."[64] The right to present a victim impact statement had existed long before the Bill of Rights; it became statutory with earlier amendments to the *Criminal Code* in 1988[65] and enhanced with additional amendments in 1999. Currently, subsection 722(1) of the Criminal Code provides:

> When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional

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60 See Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999); Leslie Sebba, *Third Parties, Victims and the Criminal Justice System* (Columbus, Ohio: Ohio State University Press, 1996); Alan N Young, *Justice for All: The Past, Present and Future of Victims in Canada* (Toronto: Osgoode Hall Law School, 1997).

61 *Criminal Code*, *supra* note 3, s 718.1.

62 Canada, Department of Justice, *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003* (Ottawa: DOJ, last modified 7 January 2015), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html> [perma.cc/XH7Y-9MA6].

63 *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

64 *Ibid*, s 15.

65 *Criminal Code*, *supra* note 3.

> harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.[66]

Prosecutors should pay closer attention to the particular impacts of corporate crime on its victims and use that understanding to promote the role of the victim in corporate prosecutions. Specifically, where prosecutors can identify victims, they should encourage them to read victim impact statements (VIS) during corporate sentencing proceedings as frequently as they do in cases of violent crime. This would begin to break down the conceptual barrier between corporate and individual crime, which may obscure the criminal nature of corporate conduct and also better link the project of criminalizing corporations to some version of the harm principle,[67] as opposed to goals of prosecutorial economy.

This argument raises initial questions, based on what we know so far about how VIS operate in the criminal justice system. While there does not appear to be recent empirical data on this question, it seems that only a distinct minority of victims avail themselves of the opportunity to make such statements.[68] A 1990 study found that victims' rate of refusal to give a statement was twice as high in cases of property crime as opposed to other sorts of crime.[69] Furthermore, a study of the effect of victim impact statements on actual sentencing outcomes in Calgary found no discernible impact on actual sentence.[70] Reviewing this rather inconclusive data, Julian Roberts concluded that "[w]e cannot exclude the possibility that VIS have had limited impact on victims' satisfaction in large measure because of the way in which they have been conceptualized, operationalized and administered" and on that basis called for "a clearer and consensual vision of the nature and function of a VIS."[71]

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66 *Ibid*, s 722(1).

67 See *R v Labaye*, 2005 SCC 80.

68 Canada, Research Development Directorate, *Victim Impact Statements in Canada*, vol 7, by Carolina Giliberti (Ottawa: DOJ, 1990) (reporting that victims completed statements in 23% of trials) at 12.

69 *Ibid* at table 1.

70 Canada, Research Development Directorate, *Victim Impact Statements in Canada, Evaluation of the Calgary Project (Background Paper)*, vol 2, by Judith Muir (Ottawa: DOJ, 1990) at 95.

71 Julian V Roberts, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2003) 47:3 Crim LQ 365 at 395–96. See also Ashley Smith, "Victim Impact Statements: Redefining Victim" (2011) 57:2/3 Crim LQ 346 (arguing for a redefinition of the term "victim" in the CCC to limit the number of

Perhaps the biggest challenge to making good use of VIS is that prior research suggests courts are uncertain as to precisely what end they are supposed to "consider" them when making sentencing determinations.[72] More recently, Marie Manikis has conducted a review of appellate court decisions to attempt to answer this question.[73] She finds that some courts recognize that VIS provide information about the harm which serves as either an aggravating or mitigating factor in sentencing.[74] Other courts, however, suggest that VIS are supposed to serve a purely expressive purpose and should not affect sentencing outcomes at all.[75]

Other scholars fear that VIS increase the systemic injustice of criminal law. Susan Bandes fears that they mobilize negative emotions against the defendant: they "evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger."[76] She argues that they shift the focus away from the defendant's moral culpability and toward "a thirst for undifferentiated vengeance."[77] She also believes that the narratives developed during the guilt phase of the trial are already stacked against the defendant by the time that sentencing takes place.[78] Martha Minow opposes victim evidence for fear that it will encourage dueling victim narratives between the victim and defendant; she urges that the system adopt normative standards for evaluating "historical" harm experienced by oppressed groups, as opposed to individuals.[79] Jennifer Culbert sees VIS as inappropriately establishing the suffering of the victim as an

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people qualifying to give VIS and thereby impose greater order on the sentencing proceeding).

72 Roberts, *supra* note 71 at 370–71.

73 Manikis, "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims" (2015) 65:2 UTLJ 85.

74 *Ibid* at 95, citing *R v Cook*, 2009 QCCA 2423; *R v G(K)*, 2010 ONCA 177; *Steeves v R*, 2010 NBCA 57; *R v Revet*, 2010 SKCA 71.

75 *Ibid* at 97, citing *R v M(W)*, 2010 BCCA 370; *Doucet v R*, 2013 QCCA 1778; *R v Karim*, 2014 ABCA 88; *R v Alexander*, 2014 ONCA 22.

76 Susan Bandes, "Empathy, Narrative, and Victim Impact Statements" (1996) 63:2 U Chicago L Rev 361 at 395.

77 *Ibid* at 398. See also Steven G Gey, "Justice Scalia's Death Penalty" (1992) 20:1 Fla St UL Rev 67 at 123; Martha C Nussbaum, "Equity and Mercy" (1993) 22:2 Philosophy & Public Affairs 83 at 89–90.

78 Bandes, *supra* note 76 at 400.

79 Martha Minow, "Surviving Victim Talk" (1992) 40:6 UCLA L Rev 1411 at 1438.

incontrovertible basis for deciding punishment in an otherwise pluralistic and morally relativistic society.[80]

While these are all valid and important concerns, such arguments rely heavily on a bi-lateral view of sentencing in which the victim's only function is to oppose the interests of the defendant. Indeed, many popular arguments in favour of VIS rely on similar, but symmetrically opposite, grounds: we should prioritize the victim's individual needs over the defendant's by allowing VIS.[81] Manikis proposes that we create a balance between presumably victim-focused expressive goals (which she characterizes primarily as allowing for the release of emotion) and the instrumental goal of informing the sentencing court about actual harm.[82] She would allow the victim to speak broadly, even to make "emotional outbursts" for expressive purposes, but would require the court to "discard the part unrelated to harm when crafting and deciding the severity of a sentence."[83]

I have argued elsewhere that the current debate on the victim's participation in the criminal sentencing process ignores how the complexity of a victim narrative effectively conveys to the sentencing body the community's experience of harm, without which the criminal justice system loses its legitimacy as a penal authority.[84] This full account of public harm is crucial to the retributive function of sentencing and if it is excluded, the system risks perceptions of illegitimacy.[85] The narrative features of VIS work to make a victim's harm accessible to a listener and, because these victim stories also circulate through society outside of the courtroom, they shape

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80 Jennifer Culbert, "The Sacred Name of Pain: The Role of Victim Impact Statements in Death Penalty Sentencing Decisions" in Austin Sarat, ed, *Pain, Death and the Law* (Ann Arbor, Mich: University of Michigan Press, 2004) 103.

81 See e.g. Jonathan Simon, "Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech" (2004) 82:4 NCL Rev 1377 at 1383 (arguing that the state's tendency, in recent years, to fetishize the "crime victim" has been a justification for conservative criminal legislation); Kenji Yoshino, "The City and the Poet" (2005) 114:8 Yale LJ 1835 at 1884 (arguing that VIS do not serve the ends of "fairness," which he defines explicitly as allowing the defendant to assume the "narrative posture… of a Scheherazade, telling stories to the state so she may live… untrammeled by other voices").

82 Manikis, *supra* note 73 at 109–13.

83 *Ibid* at 113.

84 Erin Sheley, "Reverberations of the Victim's Voice: Victim Impact Statements and the Cultural Project of Punishment" (2012) 87:3 Ind LJ 1247 at 1277.

85 *Ibid.*

social norms about culpability.[86] If the sentencing process cannot accommodate victim stories it risks illegitimacy in the eyes of a society guided by these norms.[87] It also risks allowing undifferentiated stereotypes, developed by political and media actors, to take the place of individuated victim accounts in the mind of a fact-finder.[88] This argument, of course, relates to the retributive function of VIS within a criminal trial and the importance of what such statements convey to the sentencing body itself — what Manikis would refer to as their "instrumental" function.

But VIS also have an external or expressive function, which the rise of social media has compounded by transmitting unmediated trial narratives through public spaces that they have not penetrated in the past.[89] This "expressive" function is more complex than simply serving, as Manikis conceives of it, as a therapeutic opportunity for victims to release emotion. There is also a public expressive function to the criminal justice system. The traditional media has long distorted public perceptions about crime and punishment, thereby undermining the expressive function of criminal justice.[90] The traditional Marxist critique of the media asserts that those in power manipulate the press to harness support for policies that criminalize those with the least power in society.[91] However, the "left realist" school of criminology points out that the whole of public concern about crime is hardly the product of false consciousness. There are quite rational reasons to fear crime and many people, in fact, fear it due to direct interaction with actual victims.[92] Unmediated victim narratives have, therefore, always been an important source of information about actual criminal harm, particularly harm to victims ignored by the prevailing media account.

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86 *Ibid* at 1277–84.

87 *Ibid* at 1285.

88 *Ibid.*

89 See Erin Sheley, "Victim Impact Statements and Expressive Punishment in the Age of Social Media" (2017) 52 Wake Forest L Rev 157 at 158 [Sheley, "Expressive Punishment"].

90 *Ibid* at 159.

91 Yvonne Jewkes, *Media and Crime*, 3rd ed (London, UK: Sage Publications, 2015) at 24.

92 See e.g. Jock Young, "The Tasks Facing a Realist Criminology" (1987) 11:4 Contemporary Crises 337 at 337 (arguing that perceptions of crime are largely "constructed out of the material experiences of people rather than fantasies impressed upon them by the media or agencies of the State"); Adam Crawford et al, *Second Islington Crime Survey* (London, UK: Middlesex Polytechnic Centre for Criminology, 1990) (arguing that "in inner city areas, mass media coverage of crime tends to reinforce what people already know").

So-called "viral" victim narratives about police violence attendant to the Black Lives Matter movement, as well as the uniquely impactful victim impact statement delivered by Jane Doe in the Stanford rape case, illustrate how the expressive function of punishment has become even more critical in light of "new" media.[93] One could argue, of course, that victim narratives can be disseminated without being first expressed during a formal sentencing hearing — the police violence videos are a good example of this. Yet, to the extent that institutions of justice support these narratives by providing a forum for their expression and dissemination, the institutions themselves are participating in what Anthony Duff describes as the "communicative" purpose of punishment.[94] Punishment sends a message to the offender about their conduct, to the victim about their worth in the eyes of the community, and to the community about what we morally require from one another.[95] The system serves this purpose better if it incorporates unmediated victim narratives into this process.

The recent Calgary case of Carey and Cody Manyshots demonstrates the interaction between VIS, social media, and the perceived legitimacy of the justice system on the part of the general public. The Manyshots brothers kidnapped a 17-year-old girl from a bus stop, kept her prisoner, and sexually assaulted her repeatedly.[96] Because the victim did not feel emotionally able to read her statement aloud to the trial court, the Crown prosecutor asked the court to exercise its discretion to allow the prosecutor to read the statement on behalf of the victim.[97] The Court refused and a local social media firestorm followed.[98] (A Facebook page linking to one article on the topic had, two weeks after the decision, received 370 "reactions" and 133 comments.)

One representative commenter underscored the communal importance of the VIS:

> Ridiculous, the reason its [sic] called a victim impact statement is clear, so the victim gets to share the pain and suffering that resulted from the crime. Judges

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93 Sheley, "Expressive Punishment", *supra* note 89.

94 RA Duff, "Guidance and Guidelines" (2005) 105:4 Colum L Rev 1162 at 1182.

95 *Ibid.*

96 Nancy Hixt, "Judge's decision on victim impact statement in Manyshots brothers' case sparks public outrage", *Global News* (27 July 2016), online: <globalnews.ca/news/2852304/judges-decision-on-victim-impact-statement-in-manyshots-brothers-case-sparks-public-outrage/> [perma.cc/5ZQF-6USF].

97 *Ibid.*

98 *Ibid.*

> should uphold that civic right as a part of our legal system no matter what. Taking away the victims [sic] voice is as disgusting as taking away our freedom. I am reinforced in my belief that judges, cops and prosecutors are totally indifferent to the rights of the individual. They hold the balance of power and we are lead around like cattle in a broken system.

By linking the idea of a silenced victim to a general loss of civic freedom, this commenter emphasizes the expressive importance of such statements. As Duff theorizes, they implicate not only the system's obligation to communicate to the victim its condemnation of his or her victimizer, but to relay this message to the rest of the polity. The victim's account of her harm is not only an account of her individual harm but of how her community itself has been harmed through the crime against her. While fairness may require courts to exclude certain statements under certain circumstances, it does so at the risk of negatively impacting public faith in systemic legitimacy.

In sum, particularly in the era of "viral" social media content, VIS can be used to vindicate the rights of the powerless against the powerful as easily as they can be used to increase the punitiveness of the justice system against certain defendants. And, in our *status quo* universe, in which VIS will continue to be used in the latter capacity, there is arguably a greater moral imperative to use them in the former as well. Corporate criminal punishment provides an ideal setting for this endeavor. It is hard to think of a greater power asymmetry than that existing between a corporate defendant, on the one hand, and an individual human victim, on the other.

We do not have examples of many victim impact statements at corporate criminal trials, but it is helpful to consider a couple of victim narratives about corporate harm occurring in other formal settings. Consider, for example, the victims of the 1972 Buffalo Creek disaster, in which a coal slurry dam owned by the Pittston Corporation burst and caused 125 citizens of Logan County, West Virginia to drown in black sludge[99] (additionally, the property destruction left 4,000 people homeless).[100] Despite the fact that the investigation determined that the dam had violated numerous federal and state safety regulations, no criminal charges were ever filed against the Pittston Corporation, its subsidiary Buffalo Mining Co, or any of their officers. The citizens of the

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99 Gerald M Stern, *The Buffalo Creek Disaster* (New York, NY: Vintage Books, 1977) at 11.

100 *Ibid.*

Buffalo Creek area formed a Citizens Commission to investigate the disaster, which concluded:

> We think that this coal company, Pittston, has murdered the people, and we call upon the prosecuting attorney and the judge...to prosecute and bring to trial this coal company...the fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationship between coal companies and state governments...just this complete freedom to ignore these laws with no fear of any kind of prosecution.[101]

These words make explicit the perceptual harms that corporate crime imposes on its victims. The Buffalo Creek victims' commission identified, as part of the trauma the community had suffered, their comparative helplessness relative to a company with (a) continued temporal existence and (b) some sort of interrelationship with structures of state power.

Very similar themes appear in the congressional testimony of Keith Jones, whose son Gordon died on the *Deepwater Horizon:* "TransOcean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the 10 good men who died with him."[102]

Again, it is not only the loss of Gordon that Jones identifies here but the asymmetry between that loss and the impossibility of an equivalent loss on the side of an enduring entity like Halliburton. The disruption to the belief-in-a-just-world heuristic, as discussed above, resulting from perceived unfairness, appears in both of these accounts of suffering due to unpunished or inadequately punished corporate crime.

These victim narratives draw attention to the *sine qua non* of a corporate criminal act — to that which justifies punishing the institution itself above and beyond the culpable individual actors that can and should also be charged where possible. It is not just that the harm imposed by corporations is severe. That can be true and yet, it can still be the case that punishing both individual employees and the corporation is redundant if the latter is

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101 Appalshop's Buffalo Creek Film Preservation & Digital Outreach Project, "The Buffalo Creek Flood: An Act of Man Transcript" (1975) at 5, online (pdf): <buffalocreekflood.org/media/BCF-transcript.pdf> [perma.cc/M3CM-7KCW].

102 US, *Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the House Committee on the Judiciary*, 111th Cong (2010) at 25 (Keith Jones), online: <www.govinfo.gov/content/pkg/CHRG-111hhrg56642/pdf/CHRG-111hhrg56642.pdf> [perma.cc/9MT8-FLKB].

punished for the same harm as the former. The issue is that the psychic harm posed by corporate crime is distinct in kind.

From these premises it becomes clear that victim narratives have the potential to give coherence to a conceptually unstable area of the criminal law. In the first place, the use of VIS at corporate sentencing provides evidence of the distinctly corporate aspects of victim harm for a sentencing body, whose job it is to dispense appropriate punishment. In the second, where the Crown's under-enforcement of the *Criminal Code* against corporations may be a substantially cultural, rather than doctrinal, problem, the expressive function of VIS may serve to reflect and enhance social norms about corporate criminality and thereby bring popular demand for corporate prosecutions more in line with that for individual criminals.

V. Remediation Agreements and Corporate Victims: A Comparative Perspective

The timing of this article renders it impossible to leave the topic of VIS as evidence of corporate criminal harm in Canada without at least considering the recent sea change in white-collar enforcement. In September 2018, after many years of discussion and recent months of lobbying, Parliament adopted amendments to the *Criminal Code* allowing the Crown to use remediation agreements to resolve cases of organizational misconduct. Modeled after the deferred prosecution agreement (DPA) pioneered by the United States Department of Justice, remediation agreements provide a mechanism for a corporation to settle a criminal investigation without having to resort to a guilty plea.

According to section 715.31 of the *Criminal Code*, the agreements have the following objectives:

> **(a)** to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
>
> **(b)** to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
>
> **(c)** to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
>
> **(d)** to encourage voluntary disclosure of the wrongdoing;
>
> **(e)** to provide reparations for harm done to victims or to the community; and

> **(f)** to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.[103]

Subsection 715.32(2) instructs that prosecutors, in determining whether to offer a remediation agreement, should consider the following factors:

> **(a)** the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
>
> **(b)** the nature and gravity of the act or omission and its impact on any victim;
>
> **(c)** the degree of involvement of senior officers of the organization in the act or omission;
>
> **(d)** whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
>
> **(e)** whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
>
> **(f)** whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
>
> **(g)** whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
>
> **(h)** whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
>
> **(i)** any other factor that the prosecutor considers relevant.[104]

Judging by the American experience with DPAs, this new addition has the potential to exacerbate the under-enforcement problems discussed above. In the U.S., the rise of the era of deferred and non-prosecution agreements has meant that greater numbers of criminal corporations escape formal criminal charges entirely, in exchange for paying fines and making stipulated changes to internal governance.[105] These agreements are "mutually beneficial" to the extent that they make life easier for prosecutors, who can avoid the massive discovery process involved in taking a

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103 *Criminal Code*, *supra* note 3, s 715.31.

104 *Ibid*, s 715.32(2).

105 David M Uhlmann, "Deferred and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" (2013) 72:4 Md L Rev 1295 at 1298.

corporation to trial, and for corporations, who can avoid the sting of criminal conviction and its collateral effects (especially the risk of being barred from business with the government), which was the major concern of SNC-Lavalin.

While the U.S. Department of Justice's official factors for determining whether a corporation should be criminally charged include "the risk of harm to the public" posed by the crime committed (and the reciprocal costs of a prosecution to both the public and innocent third parties such as employees), they also include such factors as "remedial efforts" and "willingness to cooperate."[106] The prevalence of DPAs thus ties much of federal criminal enforcement against corporations to the relative ease with which the two sides can strike a bargain, as opposed to the degree of actual harm to human victims. The use of DPAs and NPAs is not even consistent across the DOJ: the Environment and Natural Resources Division and the Antitrust Division rarely use them, while the Criminal Division and some United States Attorney's offices resort to them more often than not.[107]

The gap between the primary American substantive culpability standard and the DOJ's extremely nuanced factors to guide prosecutorial decision-making has created, what some scholars have referred to as, problems of incongruence. As William Laufer and Alan Strudler put it:

> First, forward problems emerge where changes in the general part of the law—liability rules and culpability standards—are conceived without concern for how punishment is crafted or justified. And reverse problems arise where standards for punishment impose liability or culpability that conflict with extant law in theory or practice.[108]

As Laufer and Strudler argue, the federal charging guidelines wholly abandon the rule of *respondeat superior* and instead measure "features of the corporate person," particularly as measured by post-offence behaviour which "may bear little correspondence to the underlying offence."[109] Other scholars note that the massive increase in corporate cooperation with criminal investigations has unintentionally blurred the line between the

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106 US, Department of Justice, *Principles of Federal Prosecution of Business Organizations* (Washington, DC: Department of Justice, 2019) at s 9-28.300, online: <www.justice.gov-principles-federal-prosecution-business-organizations> [perma.cc/UJ8J-WZFJ].

107 Uhlmann, *supra* note 105 at 1301.

108 William S Laufer & Alan Strudler, "Corporate Crime and Making Amends" (2007) 44:4 Am Crim L Rev 1307 at 1311.

109 *Ibid.*

prosecuting government and the private entity being prosecuted.[110] This results in doctrinal problems such as as: the risk of corporations qualifying as agents of the state for the purposes of Constitutional exclusionary rules; the risk of undermining employees' Fifth Amendment protections against self-incrimination; the possibility of the government being deemed "in control" of corporate documents for the purposes of discovery requests by individual employees; and prosecutors acting "beyond their institutional competence" by adopting corporate oversight roles.[111]

How all of these concerns shake out in Canadian doctrine remains, of course, to be seen. It is encouraging that subsection 715.32(2)(b) specifically mentions harm to victims as a relevant factor, which is not considered in the U.S. Department of Justice's charging guidelines related to DPAs. To the extent that DPAs have allowed American prosecutors *carte blanche* to threaten over-enforcement without the need for a complicated criminal trial, they are less likely to have that effect in Canada, simply due to the more nuanced liability standard for corporate criminal *mens rea* required by sections 22.1 and 22.2. Corporations that feel like they could beat criminal charges under those provisions are less likely to agree to remediation agreements where the evidence suggests that the Crown would not be able to prove the necessary elements at trial. The availability of such agreements is, however, far more likely to exacerbate the more pressing problem of under-enforcement. If prosecutors are already reluctant to bring charges against corporations due to the complicated discovery process such trials entail, it stands to reason that they will be even less likely to do so with an easier option at hand. Attention to victim harm — not only by prosecutors and courts, but by the public in general — may prove an important buffer against such a risk.

At the end of the day, Canadian criminal enforcement against corporations remains in a state of ferment. The 2004 amendments to the *Criminal Code* came from a sudden public awareness of the nature of corporate negligence and the material harms to victims it causes. The SNC-Lavalin affair has again thrown the specter of corporate lawlessness into the public sphere. While not all cases of corporate crime have easy-to-identify victims, where they exist, their narratives provide important evidence of the

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110 See generally Barry A Bohrer & Barbara L Trencher, "Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation" (2007) 44:4 Am Crim L Rev 1481.

111 *Ibid.*

nature of corporate criminal harm. The expressive value of victim impact statements in providing coherence to the project of corporate criminal liability is particularly high in this ever-changing environment.