

manitobaLawJournal

2018 Volume 41(3), Special Issue

Criminal Law Edition (Robson Crim)

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PUBLICATION INFORMATION

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ISSN 0076-3861

Cite as (2018) 41:3 Man LJ

Printed in Canada on recycled and acid-free paper.

Published annually on behalf of the Faculty of Law, University of Manitoba.

Annual Subscription Rate: Canada: \$35.00 CDN; Foreign: \$35.00 U.S.

Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

ACKNOWLEDGEMENTS

This issue has been supported by a major grant from the Social Sciences and Humanities Research Council program for Aid of Scholarly Journals.

The Manitoba Law Journal gratefully acknowledges the family of Shelley Weiss for the endowment of the Shelley Weiss Publications Office, which houses its ongoing operations at Robson Hall Law School at the University of Manitoba, and for the annual Shelley Weiss scholarship that is awarded to one or more student editors in their second year of our program.

We acknowledge the assistance and peer review administration of the editors and collaborators of www.robsoncrim.com/. For a list of our collaborators please visit: <https://www.robsoncrim.com/collaborators>.

We would also like to thank the *Manitoba Law Journal* Executive Editors for providing their endless support, constant encouragement, and expert editorial advice.



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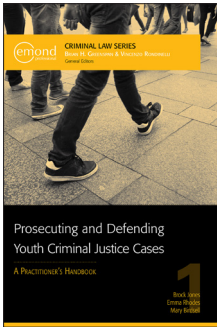
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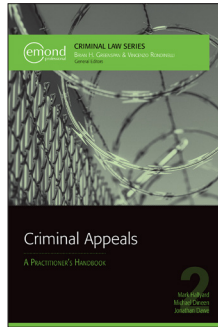
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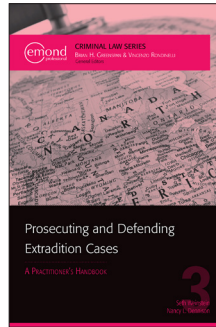
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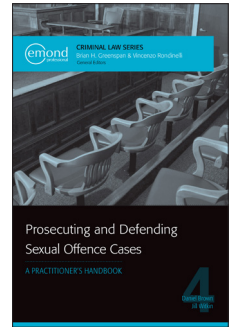
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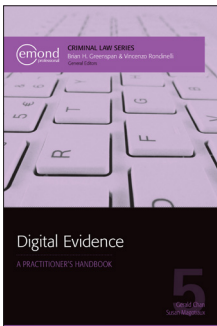
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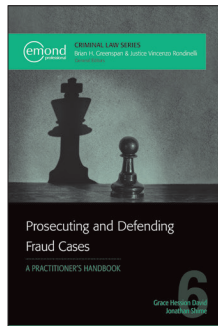
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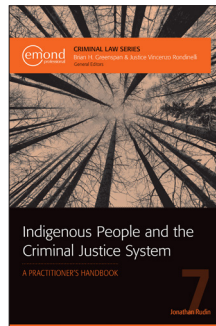
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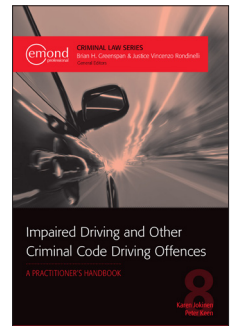


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COMING FALL 2018

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Criminal Law Edition (Robson Crim)

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Manitoba Law Journal and Robson Crim Call for Papers: Due February 1, 2019



The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. This is our fourth 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 41(3) and 41(4) 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 are hoping to dedicate a section of this edition to: **Criminal Justice and Evidentiary Thresholds in Canada: the last ten years**. We 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, 2019. 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, 2019 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.

Towards a Crim Community – Here We Go Again

ANNA TOURTCHANINOVA AND
BRENDAN ROZIERE

Robson Crim, Robson Hall’s criminal law research cluster and Canada’s criminal law blog (Robsoncrim.com), is now in its third year of operation. With the publication of our latest peer-reviewed volumes we have published over 30 refereed articles in the areas of criminal law, criminal justice and criminology. Further, having now partnered with almost 40 academic peer collaborators at Canada’s top universities and law schools we have ensured a robust network of peer reviewers and have fostered a nationwide Crim community. This is a community that is evidenced by our publication of more than 250 blawgs,¹ with bloggers from across Canada, the USA and Europe.

Robson Crim has developed as a hub for national Crim research and now accepts many more submissions than we can accommodate. Further, we have recently tapped into the CanLII Connects system and are excited by the drive towards open access in legal scholarship and authorship. We have made connections with Emond Publishing who have graciously provided editorial assistance to us in these two latest volumes. Our commitment to open access publication, as well as our presence on the usual legal databases and Academia.edu contributes to making our resources easy

¹ See for example Leon Laidlaw, “A Meagre Outlook for Bill C-16: The Case of Transgender University Students” (19 June 2017), Robsoncrim (blog), online <<https://www.robsoncrim.com/single-post/2017/06/19/A-Meagre-Outlook-for-Bill-C-16-The-Case-of-Transgender-University-Students>>; James Gacek, “Judicial Dissensus is not a Disservice to Justice: The Importance of Dissent in the ‘Court of Last Resort’” (5 June 2017), Robsoncrim (blog), online <<https://www.robsoncrim.com/single-post/2017/06/05/Judicial-Dissensus-is-not-a-Disservice-to-Justice-The-Importance-of-Dissent-in-the-%E2%80%98Court-of-Last-Resort%E2%80%99-”>>; Rebecca Jaremko Bromwich, “Sex, Women’s Mental Illness, and Videotape” (26 September 2016), Robsoncrim (blog), online <https://www.robsoncrim.com/single-post/2016/09/26/Sex-Women%E2%80%99s-Mental-Illness-and-Videotape>.

to access. As part of our commitment to advancing legal research and disseminating knowledge in the fields of criminal law, criminal justice and criminology, we present you, this year, with two additional volumes of the Criminal Law Edition of the Manitoba Law Journal.

Thanks to extremely insightful and valuable contributions, last year's special edition Criminal Law volume of the Manitoba Law Journal achieved a ranking in the top 0.1 percent on Academia.edu, amassing over 2500 downloads there alone. Similarly, Robsoncrim.com received over 3000 paper reads on the journal pages and the journal received thousands more downloads on the paid legal databases. From articles as diverse as Mr. Big operations,² bestiality law,³ and the Tragically Hip in the context of wrongful convictions,⁴ we achieved more readership than we could have expected. As part of our commitment to open access fundamentals, these and future pages will remain open and accessible on Robsoncrim.com, themanibalawjournal.com, CanLII, Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. Additionally, submissions from academics, readers, practitioners and students will continue to be considered, as these offer unique and important insights into the field of criminal law and cognate disciplines.

Indeed, the Manitoba Law Journal has a rich history of hosting criminal law analyses.⁵ Yet, following the release of our last call for papers, we were overwhelmed with the volume of submissions for a special edition on criminal law. When we saw the quality of the work, we knew it would be appropriate to consider publishing two volumes. This year, after a significant increase in the number of submissions and an arduous double-

² Amar Khoday and Jonathan Avey, "Beyond Finality: R v Hart and the Ghosts of Convictions Past" (2017) 40(3) Man LJ 111.

³ James Gacek and Richard Jochelson, "'Animal Justice' and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40(3) Man LJ 335.

⁴ Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40(3) Man LJ 1.

⁵ See for example David Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38 Man LJ 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37-2 Man LJ 365; Amar Khoday, "R v Creighton Twenty Years Later: Harm versus Death Revisited" (2013) 37 Man LJ 162.

blind peer review process, we accepted and put together twenty papers into two special volumes, each containing three to four thematically organized sections.

The first section in this volume is titled Investigations, Evidence, and Emerging Legal Tests.

In the opening paper of this volume, “Examining How Lineup Practices of Canadian and U.S. Police Officers Adhere to Their National Best Practice Recommendations”, Michelle Bertrand, Rod Lindsay, Jamal Mansour, Jennifer Beaudry, Natalie Kalmet, and Elisabeth Melsom discuss the construction and administration of police lineups. Using an online survey, the authors collected police officer responses on the degree to which police follow best-practice recommendations across Canada and the United States. They highlight differences between the best-practice recommendations and practice itself, offering suggestions to preserve the effectiveness of police lineups as a law enforcement technique.

Then Christopher Totten and Sutham Cobkit explore American police chief views on vehicle search practices and the legal norms that govern them, in “Police Vehicle Searches under the Fourth Amendment: Evaluating Chiefs’ Perceptions of Search Policies and Practices after *Arizona v Gant*”. Relying on data collected from a mail survey, they show that police search practices have changed in some parts of the U.S. following the United States Supreme Court’s decision in *Arizona v Gant*. Finally, they reflect on what this means for the police and the judiciary going forward.

In “*R v Jarvis*: An Argument for a Single Reasonable Expectation of Privacy Framework”, Ryan Mullins discusses the Ontario Court of Appeal’s interpretation of “reasonable expectation of privacy” in *R v Jarvis*. He argues that the Court’s approach, which distinguished between voyeurism and section 8 cases, should be replaced with a single framework that always considers the “totality of the circumstances” when determining the nature of the privacy interest at stake.

Finally, in “Alibi Evidence: Responsibility for Disclosure and Investigation”, John Burchill discusses the perils of defence counsel withholding alibi evidence and the adverse inference this may draw at trial. He highlights how U.S. and Australian alibi disclosure laws may provide guidelines for defence counsel in Canada to follow in order to preserve the alibi’s credibility at trial or avoid one altogether.

The second section, *Indigenous Peoples, Corrections and Justice*, features two articles.

Celeste McKay and David Milward in “Onashowewin and the Promise of Aboriginal Diversionary Programs” explore the effectiveness of the Onashowewin diversionary program in Winnipeg, MB. Across a sample of 100 Indigenous offenders, they found that the rate of recidivism was only 30%, noticeably lower than comparable studies of Indigenous recidivism. Highlighting Onashowewin’s focus on addressing the needs of Indigenous offenders, they discuss how programs like it may lead to cultural revitalization and offer a step towards Indigenous self-determination.

This section is rounded out by Leah Combs’ paper, “Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*”. She argues that the underlying goal of sections 81 and 84 of the *Corrections and Conditional Release Act*, to involve Aboriginal communities in corrections, has still not been realized twenty-five years after becoming law. While all Indigenous offenders have been impacted, she reveals how Indigenous women have suffered disproportionately.

The issue continues with a section dedicated to Youth and Beyond: Controversies of Accountability.

The section begins with Russell Smandych and Raymond Corrado’s detailed account of youth justice in Canada in ““Too Bad, So Sad”: Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015”. Reflecting on the evolution of youth justice policy over the past two decades, they reveal two ongoing problems: balancing youth rights and interests with criminal accountability and the regional disparities created by the implementation of youth justice policy.

Concluding this section, Scott Mair offers his critique of the *Criminal Code*’s infanticide provision in “Challenging Infanticide: Why Section 233 of Canada’s *Criminal Code* is Unconstitutional”. Arguing that the provision violates the equality rights of newborn children, he suggests how a constitutional challenge may be brought and offers a possible replacement.

The final section, *Sex Work: Court Responses and Discursive Analysis*, interrogates issues surrounding the enforcement and protection of sex worker rights.

In “Remedying the Remedy: *Bedford*’s Suspended Declaration of Invalidity”, Carolyn Mouland discusses the ways in which the Supreme Court of Canada’s remedy for *Charter* violations in *Canada v Bedford*

undermined remedial objectives. She contends that by preserving Canada's unconstitutional prostitution laws for another year, the law increased the risk of harm for sex workers. Proposing that the use of suspended declarations follow a "deliberative remedial procedure", she illustrates how suspended declarations may be granted while mitigating potential harms to rights-bearers.

The closing article of this volume is Leon Laidlaw's "Challenging Dominant Portrayals of the Trans Sex Worker: On Gender, Violence, and Protection". In light of new federal protections against discrimination of trans people and addressing a gap in social science research, Laidlaw investigates enduring challenges for trans sex workers.

Putting together a double volume was no small feat. We would like to thank our authors, who submitted highly relevant and thoughtful pieces of legal analysis, touching on fields of criminology, criminal justice and criminal law, amongst others. We would also like to thank our Robson Crim collaborators, and our peer reviewers,⁶ all of whom helped put this project together for another round. The entire editorial team would like to extend an extra thank you to Rebecca Bromwich, Melanie Murchison, and James Gacek for their help and support, as well as to the Dean of the Faculty of Law, at the University of Manitoba, Dr. Jonathan Black-Branch.

Thank you for reading this special double volume of the Manitoba Law Journal's Criminal Law edition. We look forward to many more. We encourage you to peruse our latest call for papers in the pages that follow and at <https://www.robsoncrim.com/call-for-papers-mlj>.

⁶ Visit our collaborators at <https://www.robsoncrim.com/collaborators>. We thank our collaborators (new and old) including Sasha Baglay, Benjamin Berger, Michelle Bertrand, Steven Bittle, John Burchill, Erin Dej, Robert Diab, Ruby Dhand, James Gacek, Daphne Gilbert, Mandi Gray, Thomas S. Harrison, Chris Hunt, Adelina Iftene, Brock Jones, Rebecca Bromwich, Lara Karaian, Lisa Kelly, Lisa Kerr, Ummni Khan, Jennifer Kilty, Kyle Kirkup, Leon Laidlaw, Michelle Lawrence, Rick Linden, Garrett Lecoq, Lauren Menzie, Melanie Murchison, Michael Nesbitt, Debra Parkes, Nicole O'Byrne, Micah Rankin, Amar Khoday, David Ireland, David Milward, Richard Jochelson, Kristen Thomassen, and Erin Sheley. We also thank the many peer reviewers who assisted us through our digital peer review platform from across the world.

Examining How Lineup Practices of Canadian and U.S. Police Officers Adhere to Their National Best Practice Recommendations^{*}

MICHELLE I. BERTRAND,^{**} R. C. L. LINDSAY,^{***} JAMAL K. MANSOUR,[†] JENNIFER L. BEAUDRY,^{††} NATALIE KALMET,^{†††} AND ELISABETH I. MELSOM[‡]

^{*} This research started while Michelle I Bertrand, Jamal K Mansour, Jennifer L Beaudry, Natalie Kalmet, and Elisabeth I Melsom were in the Department of Psychology, Queen's University.

This research was supported by a doctoral fellowship (award 752-2009-2407) awarded to the first author from the Social Sciences and Humanities Research Council of Canada. We would like to thank Michael Bergsma for his dedicated efforts in programming the survey and SNAP Surveys for hosting the survey.

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^{††} Department of Psychological Sciences; School of Health Sciences; Faculty of Health, Arts and Design, Swinburne University of Technology.

^{†††} Victoria, BC, Canada.

[‡] Ottawa, ON, Canada.

ABSTRACT

Canadian ($N = 117$) and U.S. ($N = 167$) police officers completed a survey about their lineup construction and administration practices. We compared their responses to the respective national best-practice recommendations (BPRs) in place at that time; the two nations had five similar and four different recommendations. We predicted that if officers' lineup practices were to correspond with best-practice recommendations, officers' reports of their practices should be similar when national BPRs were similar, and differ in line with their country's BPRs when BPRs differed. We generally found the predicted pattern of results. Findings were especially striking when the BPRs differed. Some practices were largely in line with BPRs (e.g., double-blind testing), others corresponded to some extent (e.g., sequential lineups), and others were largely not followed (e.g., informing witnesses that it is as important to exonerate the innocent as it is to convict the guilty). However, even though our hypotheses were generally supported, there was considerable variation in practices that did not correspond with BPRs. We interpret these findings as demonstrating that BPRs have some influence on practices. Our findings illustrate the importance of assessing user reactions to BPRs and examining barriers to implementation of BPRs. The findings also indicate that BPRs can influence practice but demonstrate that, in the absence of the stronger action of setting legally binding policies, considerable departure from BPRs occurs.

Keywords: eyewitness identification; lineups; best practice; Canada/U.S. comparison; police

I. INTRODUCTION

There is long-standing evidence of a connection between miscarriages of justice and identification errors.⁷ Post hoc analyses of exonerations have demonstrated that eyewitness misidentifications were a contributing factor in approximately one-third of those wrongful convictions—29.0% in the U.S.⁸ and 36.4% in Canada.⁹ In these cases, many of the eyewitness errors can be directly linked to practices which research has shown increase identification errors. This research has in turn informed national best practice recommendations (BPRs). In order to understand the relationship between these BPRs and police practice, we identified the BPRs made in Canada and the United States and surveyed officers in both jurisdictions about how they carry out eyewitness identification procedures (i.e., their actual practices).

In this article, we discuss the development of national BPRs in Canada and the United States, review previous surveys to contextualize our goals, identify similarities and differences between the countries' BPRs, and then report point-in-time survey data that reflects the extent to which lineup practices in Canada and the U.S. conformed to the national BPRs existing at the time.

⁷ See e.g. Edwin M Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven: Yale University Press, 1932); Samuel R Gross & Michael Shaffer, "Exonerations in the United States, 1989-2012" (2012) University of Michigan Law School Public Law and Legal Theory Working Paper Series, Working Paper No 277, 7th Annual Conference on Empirical Legal Studies Paper, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2092195>; Nancy K Steblay, Jennifer E Dysart & Gary L Wells, "Seventy-Two Tests of the Sequential Superiority Effect: A Meta-Analysis and Policy Discussion" (2011) 17:1 Psychol Pub Pol'y & L 99 at 139.

⁸ The National Registry of Exonerations, "% Exonerations by Contributing Factor," online: <www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>. We note that this website keeps a running tally of all US exonerations since 1989 and updates its database of contributing factors with each new exoneration. This number is current as of March 11, 2018.

⁹ Andrew M Smith & Brian L Cutler, "Introduction: Identification Procedures and Conviction of the Innocent" in Brian L Cutler, ed, *Reform of Eyewitness Identification Procedures* (Washington, DC: APA, 2013) 3 at 21.

II. DEVELOPMENT OF NATIONAL BEST PRACTICE RECOMMENDATIONS (BPRs)¹⁰

The creation of ‘best practice’ recommendations for identification procedures was spurred by cases of wrongful convictions in which mistaken eyewitness identification due to poor procedures and/or practices played a role. The procedures leading to these wrongful convictions were sufficiently widespread that policy-makers have developed and disseminated BPRs at a national level. We discuss these BPRs in the following sections.

A. National Institute of Justice (NIJ; United States)

In 1998 the then-U.S. Attorney General, Janet Reno, assembled the Technical Working Group for Eyewitness Evidence to develop a set of evidence-based BPRs for law enforcement officials regarding the collection and preservation of evidence from eyewitnesses to crimes. The purpose of this group was to develop standard practices that would promote the reliability and accuracy of eyewitness evidence. The final report was published in 1999 and released at a national level.¹¹ We use the term ‘U.S. BPRs’ hereafter to refer to the BPRs put forth by the NIJ.

B. The Sophonow Inquiry (Canada)

Thomas Sophonow was convicted of a murder in Winnipeg, Manitoba based largely on eyewitness evidence. His conviction was overturned by the Manitoba Court of Appeal in 1985 and, in 2000, the Winnipeg Police Service officially cleared Sophonow of the murder. A government inquiry into the factors that contributed to his wrongful conviction concluded that

¹⁰ Additional and/or updated best practice recommendations and legislation have been published in recent years (e.g., US, National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (Washington, DC: The National Academies Press, 2014); Memorandum from Sally Q Yates, Deputy Attorney General, “Memorandum for Heads of Department Law Enforcement Components All Department Prosecutors” (6 January 2017), online: <www.justice.gov/file/923201/download>; however, we limit our discussion to BPRs that existed prior to our data collection (i.e., could have influenced the practices of our respondents).

¹¹ US, National Institute of Justice, Office of Justice Programs, Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), online: <www.nij.gov/pubsum/178240.htm> [NIJ].

the police made several errors in collecting the eyewitness evidence.¹² The Sophonow Inquiry included specific recommendations in its final report as to how lineups should be conducted.

C. Report on the Prevention of Miscarriages of Justice (RPMJ; Canada)

Following several high-profile cases of wrongful convictions and their inquiries (including the aforementioned Sophonow Inquiry), the Federal/Provincial/Territorial Heads of Prosecution Committee convened a working group in 2002 to inform police and prosecutors about the factors associated with wrongful convictions and to make BPRs. The resulting document¹³ included recommendations specific to eyewitness identification and testimony. The RPMJ BPRs did not contradict any BPRs made by the Sophonow Inquiry. Hereafter, ‘Canadian BPRs’ refers to the Sophonow and RPMJ BPRs collectively.

D. Benefits of Best Practice Recommendations (BPRs)

The three national level BPRs described above offered important benefits to the law enforcement community. First, BPRs encourage uniform procedures within a country. For example, in the second author’s first-hand experience, from extensive experience consulting with Canadian police and courts prior to the Sophonow Inquiry, lineup size had varied between provinces (e.g. 6 in Nova Scotia, 8 in Alberta, 10 in Manitoba, and 12 in Ontario).

Second, the BPRs encouraged the use of evidence-based identification procedures (i.e., procedures that had been tested and found to have validity and reliability). Examples of such procedures include the explicit caution

¹² Manitoba, Commission of Inquiry Regarding Thomas Sophonow, by Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Manitoba: Attorney General, 2001).

¹³ Canada, Department of Justice, *Report on the Prevention of Miscarriages of Justice*, by the Federal/Provincial/Territorial Heads of Prosecutions Committee (Ottawa: DOJ, 2005) at i–iii, online: <www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf> [Prevention of Miscarriages of Justice].

that the perpetrator may not be in the lineup,¹⁴ the sequential lineup,¹⁵ and matching fillers to descriptions versus the appearance of the perpetrator.¹⁶ Recent news reports regarding the lack of scientific validity of forensic techniques such as bite mark¹⁷ and hair analysis¹⁸ highlight the importance of using evidence-based techniques and procedures in law enforcement.

E. Recommendations Versus Mandates

Although these BPRs came from high-level bodies, they were not legally mandated changes. Even though not binding, some police officers appear to be adhering to BPRs.¹⁹

III. PREVIOUS SURVEYS OF IDENTIFICATION PROCEDURES

Minimal research has examined how police carry out identification procedures and none of these surveys examined the relationship between BPRs and practice in the way we examined it. Of the extant literature, two surveys²⁰ were published prior to our data collection, while another two surveys²¹ collected data around the same time as our survey.

¹⁴ Roy S Malpass & Patricia G Devine, “Eyewitness Identification: Lineup Instructions and the Absence of the Offender” (1981) 66:4 J Applied Psychology 482.

¹⁵ RCL Lindsay & Gary L Wells, “Improving Eyewitness Identification from Lineups: Simultaneous Versus Sequential Lineup Presentation” (1985) 70:3 J Applied Psychology 556.

¹⁶ CAE Luus & Gary L Wells, “Eyewitness Identification and the Selection of Distracters for Lineups” (1991) 15:1 L & Human Behavior 43.

¹⁷ Radley Balko, “How the Flawed ‘Science’ of Bite Mark Analysis Has Sent Innocent People to Prison,” *The Washington Post* (13 February 2015), online: <www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail/>.

¹⁸ Spencer S Hsu, “FBI Admits Flaws in Hair Analysis Over Decades,” *The Washington Post* (18 April 2015), online: <www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html?utm_term=.b73e59107012>.

¹⁹ Jennifer L Beaudry & RCL Lindsay, “Current Identification Procedure Practices: A Survey of Ontario Police Officers” (2006) 4:4 Can J Police & Security Studies 178.

²⁰ *Ibid*; Michael S Wogalter, Roy S Malpass & Dawn E McQuiston, “A National Survey of US Police on Preparation and Conduct of Identification Lineups” (2004) 10:1 Psychology, Crime & L 69.

²¹ Edie Greene & Andrew J Evelo, “Cops and Robbers (and Eyewitnesses): A Comparison

Of the pre-existing surveys, Beaudry and Lindsay's survey²² was mainly completed by police officers in Ontario, Canada—thus limiting its scope—and the data for Wogalter, Malpass, and McQuiston's survey²³ was collected in 1992, predating the 1999 publication of the U.S. federal BPRs.

Of the surveys conducted around the same time, the Police Executive Research Forum (PERF) was a large, comprehensive U.S.-only survey regarding police eyewitness identification procedures.²⁴ Aside from the inclusion of Canadian officers in our survey, there are other notable differences between their approach and ours. First, the PERF survey targeted individuals who responded on behalf of their agency. Questions were thus framed largely in terms of the agency (e.g., “Does your agency...”, “Who in your agency...”, “Which of the following does your agency...”) or in terms of training procedures (e.g., “Our training includes the following general guidelines...”). In contrast, we asked respondents about their own, individual practices as these practices can vary within a department and officers may not follow agency policy. Second, the PERF survey limited responses to whether procedures were or were not done, which assumes that procedures were either always or never done the same way within each department. In contrast, we asked officers about the frequency with which they had used certain procedures, as all-or-nothing adherence is unlikely. Third, the two surveys included unique questions. For example, PERF asked a greater number of, and more detailed, questions regarding the training officers received in constructing and administering lineups. In turn, we asked more detailed questions regarding adherence to various aspects of the sequential lineup.

Finally, Greene and Evelo²⁵ sampled Canadian and U.S. robbery detectives who attended professional training conferences and discussed

of Lineup Administration by Robbery Detectives in the USA and Canada” (2015) 21:3 Psychology, Crime & L 297; Police Executive Research Forum, “A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies” submitted to the National Institute of Justice (8 March 2013), online: <www.policeforum.org/assets/docs/Free_Online_Documents/Eyewitness_Identification/a%20national%20survey%20of%20eyewitness%20identification%20procedures%20in%20law%20enforcement%20agencies%202013.pdf> [PERF].

²² Beaudry & Lindsay, *supra* note 19.

²³ Wogalter, Malpass & McQuiston, *supra* note 14.

²⁴ PERF, *supra* note 15.

²⁵ Greene & Evelo, *supra* note 15.

whether the detectives' reported practices followed BPRs. Again, there are notable differences between their survey and ours. First, Greene and Evelo compared both countries' practices only to the BPRs from the U.S. In contrast, we examine the extent to which practices of Canadian and U.S. officers adhere to their respective BPRs. We contend that comparing BPR adherence is better done with reference to the similarities and differences between respective jurisdictions, as this approach takes into consideration that BPRs between jurisdictions are not always the same. Second, we consider guideline areas not discussed by Greene and Evelo (e.g., lineup size, filler selection, and showups).

IV. THE CURRENT SURVEY

Our goal was to investigate the relationship between BPRs and police identification practices. We selected the aforementioned BPRs as the basis of our analysis for several reasons. First, there were no national policy mandates or legislation regarding identification procedures in either country when we conducted the survey (and to our knowledge, there still are not), so the BPRs we use for analysis were the only existing BPRs at a national level. Second, all recommendations were released nationally and should apply to all officers within a country. Third, the BPRs have been cited in all levels of court cases, providing a level of prominence and legitimacy.

Thus, we examined the extent to which practices conformed to BPRs. To this end, we contrasted practices in Canada and the U.S. because both BPRs were published around the same time and covered many of the same topics. What is especially interesting is that the Canadian and U.S. BPRs make the same recommendations for some topics, but different recommendations for others. It stands to reason that if the BPRs are related to practice: a) where recommendations are the same, practices should largely be in line with the BPRs and the same (or at least similar) in both countries, and b) where recommendations are different, practices should differ between countries in a way that is consistent with their respective BPRs. This logic forms the analytic basis for this article.

We note that while we make comparisons between the practices of Canadian and U.S. officers, the between-country comparisons in and of themselves are not the foci of the article. Rather, these comparisons are used

as a vehicle through which to examine the possible impact of BPRs on practice.

A. Inclusion Criteria for Specific Recommendations

We included procedural recommendations in our analysis if the U.S. BPRs and at least one of the two Canadian BPRs recommended how some aspect of an identification procedure—lineup or showup—should be conducted. Though we collected data on many topics of interest, many topics did not meet this criterion for inclusion (i.e., either only one of, or neither, of the countries' BPRs made a recommendation on the topic). In total, we address nine procedural recommendations.

Same best practice recommendations

1. *Instructions to witnesses: importance of exonerating innocent*

The U.S. and RPMJ BPRs recommend including an instruction indicating that exonerating the innocent is just as important as convicting guilty parties.

2. *Instructions to witnesses: perpetrator may or may not be in lineup*

All BPRs recommend informing witnesses that the perpetrator may or may not be in the lineup.²⁶

3. *Multiple suspect lineups*

Eyewitness researchers recommend that lineups contain only a single suspect.²⁷ The U.S. BPRs explicitly recommend using only one suspect per lineup. The Canadian BPRs do not make an explicit recommendation regarding the number of suspects in a lineup; however, both Canadian BPRs strongly imply that lineups should contain only a single suspect as “suspect” is never pluralized.

²⁶ See e.g. Malpass & Devine, *supra* note 8; Nancy K Steblay, “Lineup Instructions” in Cutler, *supra* note 3 at 65–86; Gary L Wells et al, “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads” (1998) 22:6 L & Human Behavior 603.

²⁷ See e.g. Neil Brewer & Matthew A Palmer, “Eyewitness Identification Tests” (2010) 15:1 Legal & Criminological Psychology 77 at 79; Gary L Wells & John W Turtle, “Eyewitness Identification: The Importance of Lineup Models” (1986) 99:3 Psychological Bull 320 at 328.

4. *Filler selection*

All BPRs recommend that fillers match the witness' description of the perpetrator and, if this approach is not possible, that fillers should match the suspect's appearance.²⁸

5. *Feedback to witnesses*

All BPRs recommend against providing feedback to witnesses regarding identification decisions.²⁹ We note variation in the wording as the U.S. BPRs caution against feedback only after an identification, the Sophonow BPRs caution against feedback after either identification or non-identification, and the RPMJ BPRs caution against feedback being given by other officers (i.e., not the lineup administrator) and/or witnesses. Given that all BPRs were concerned with the contaminating effect of providing post-lineup feedback to witnesses, we considered these recommendations to be sufficiently similar.

Different best practice recommendations.

6. *Lineup size*

U.S. BPRs recommend a *minimum* (their emphasis) of five lineup fillers (i.e., a six-person lineup) whereas the Sophonow BPRs recommend at least a 10-person lineup (i.e., suspect plus nine fillers). There is no mention of lineup size in the RPMJ BPRs. No BPRs mention an upper limit to lineup size.

7. *Simultaneous versus sequential presentation*

Proper sequential lineup presentation requires that witnesses view lineup members one at a time, make decisions as to whether each lineup member is or is not the perpetrator at the time they see him or her, are not allowed to see lineup members again once a decision is made, and do not know how many lineup members they will see.³⁰ The U.S. BPRs include

²⁸ See e.g. Luus & Wells, *supra* note 10 at 53; Wells et al, *supra* note 20 at 633; Roy S Malpass, Colin G Tredoux & Dawn McQuiston-Surrett, "Lineup Construction and Lineup Fairness" in RCL Lindsay et al, eds, *The Handbook of Eyewitness Psychology: Volume II: Memory for People* (Mahwah, NJ: Lawrence Erlbaum Associates, 2007) 155.

²⁹ See e.g. Brewer & Palmer, *supra* note 21 at 90; Gary L Wells & Amy L Bradfield, "Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience" (1998) 83:3 J Applied Psychology 360.

³⁰ Lindsay & Wells, *supra* note 9; RCL Lindsay et al, "Beyond Sequential Presentation:

procedural recommendations for conducting both simultaneous and sequential lineups. In a simultaneous lineup, a witness views all lineup members at the same time. The U.S. BPRs also explicitly state that while sequential lineup procedures are included in the guide, there is no preference for the sequential over simultaneous lineup.³¹ In contrast, both the Sophonow and RPMJ BPRs specifically recommend sequential presentation.³²

8. *Double-blind administration*

Under double-blind administration the officer conducting the lineup does not know which lineup member is the suspect, thereby avoiding cues (intentional or otherwise) from the officer that may indicate to the witness which lineup member is the suspect.³³ Although the U.S. BPRs did not include a specific recommendation regarding double-blind administration, they do state that some researchers recommend double-blind lineup procedures. Both the RPMJ and Sophonow BPRs recommend double-blind administration.

9. *Showups*³⁴

The U.S. BPRs include procedures for conducting showups, saying showups are to be used when “circumstances require the prompt display of a single suspect to a witness.”³⁵ There is no mention of showups in the Sophonow Inquiry, but the RPMJ BPRs discourage showups, saying that they should only be used “in rare circumstances, such as when the suspect

Misconceptions and Misrepresentations of Sequential Lineups” (2009) 14 *Legal & Criminological Psychology* 31 at 32; RCL Lindsay et al, “Sequential Lineup Presentation: Patterns and Policy” (2009) 14:1 *Legal & Criminological Psychology* 13; Steblay, Dysart & Wells, *supra* note 1.

³¹ NIJ, *supra* note 11 at 9.

³² *Prevention of Miscarriages of Justice*, *supra* note 13 at 46.

³³ See e.g. Wells et al, *supra* note 20 at 627; Brewer & Palmer, *supra* note 21 at 82; Jacqueline L Austin et al, “Double-Blind Lineup Administration: Effects of Administrator Knowledge on Eyewitness Decisions” in Cutler, *supra* note 3 at 139-160.

³⁴ Both Canadian and US BPRs define showups as the *live* presentation of a single suspect to a witness. The Canadian BPRs explicitly define a showup as such, whereas “live-only” presentation is implied by the wording of the US BPRs (e.g., “Consider transporting the witness to the location of the detained suspect to limit the legal impact of the suspect’s detention.”), and no mention is made of the photo presentation of showups.

³⁵ United States, National Institute of Justice, *supra* note 5 at 27.

is apprehended near the crime scene shortly after the event.”³⁶ Although they are not explicitly different, the wording represents different recommendations. The U.S. BPRs are cautionary but do not actively discourage showups—stating only that care must be taken when using showups due to the procedure’s suggestiveness. The RPMJ BPRs, however, actively discourage showups by labelling them as something that should rarely be used and used only in a particular set of circumstances.

B. The Issue of Causality

It is important to clarify that we are not seeking to make definitive causal claims regarding the impact of BPRs on practice; that is, we do not seek to state conclusively that the national BPRs caused practices (as reflected by patterns in the data), nor that they are the only plausible influence on police practice. It is impossible to isolate causal factors because there are multiple influences on actual practice aside from the national BPRs (e.g., departments or provinces/territories/states may have their own policies). However, our hypotheses and analytic strategy are a unique way to explore whether BPR documents are influential (as they are intended to be).

C. The Current Study

To summarize, we conducted an in-depth survey of Canadian and U.S. police officers about the procedures they used when administering lineups and show-ups. We wanted to determine the extent to which their reported identification practices aligned with their respective national BPRs, and the extent to which differences and similarities in BPRs between Canada and the United States were reflected in police practices. Relevant to this latter aim, we hypothesized that if the BPRs were related to practice:

1. We would find little or no between-country differences for the five topics on which the Canadian and U.S. BPRs made the same or similar recommendations.
2. We would find between-country differences for the four topics on which the Canadian and U.S. BPRs made different recommendations and those differences would align with the countries’ respective BPRs.

³⁶ *Ibid.*

V. METHOD

A. Participants

Canadian and U.S. officers ($N = 284$) involved in carrying out police identification procedures completed an online survey about their practices. Participation in the survey was on a volunteer basis and participants were not compensated for their time.

Respondents were 117 Canadian and 167 U.S. officers. Canadian respondents were from 9 provinces and 2 territories: Alberta ($n = 8$; 6.84%), British Columbia ($n = 36$; 30.77%), Manitoba ($n = 1$; 0.85%), New Brunswick ($n = 4$; 3.42%), Newfoundland ($n = 24$; 20.51%), Northwest Territories ($n = 2$; 1.71%), Nova Scotia ($n = 7$; 5.98%), Ontario ($n = 18$; 15.38%), Quebec ($n = 2$; 1.71%), Saskatchewan ($n = 13$; 11.11%), and the Yukon ($n = 2$; 1.71%).

U.S. respondents were from 34 states that covered all regions of the United States: Alabama ($n = 1$; 0.60%), Alaska ($n = 2$; 1.2%), Arizona ($n = 2$; 1.2%), Arkansas ($n = 2$; 1.2%), California ($n = 9$; 5.39%), Colorado ($n = 5$; 2.99%), Delaware ($n = 3$; 1.80%), Florida ($n = 19$; 11.38%), Georgia ($n = 2$; 1.20%), Hawaii ($n = 2$; 1.20%), Idaho ($n = 2$; 1.20%), Illinois ($n = 10$; 5.99%), Iowa ($n = 2$; 1.20%), Maine ($n = 4$; 2.40%), Maryland ($n = 4$; 2.40%), Massachusetts ($n = 1$; 0.6%), Michigan ($n = 4$; 2.40%), Minnesota ($n = 6$; 3.59%), Missouri ($n = 10$; 5.99%), Nebraska ($n = 2$; 1.20%), New Jersey ($n = 1$; 0.60%), New Mexico ($n = 4$; 2.40%), New York ($n = 21$; 12.57%), North Carolina ($n = 2$; 1.20%), North Dakota ($n = 1$; 0.60%), Ohio ($n = 8$; 4.79%), Oklahoma ($n = 1$; 0.60%), Oregon ($n = 1$; 0.60%), Tennessee ($n = 1$; 0.60%), Texas ($n = 22$; 13.17%), Virginia ($n = 7$; 4.19%), Washington (state, $n = 3$; 1.80%), Wisconsin ($n = 2$; 1.20%), and Wyoming ($n = 1$; 0.60%).

In order to ensure anonymity, we did not ask for potentially identifying information, such as gender, rank, name of police service, or the name of the city/town the officers served. We did obtain other non-identifying, general information, such as years of experience as an officer and lineup administrator, level of government, and population of area policed (see Table 1).

B. Materials and Procedures

1. *Invitation letters*

Letters contained background information about the researchers and the aims of the survey, as well as the survey link and contact information.

2. *Survey*

The survey contained detailed questions regarding photo lineup construction and administration, and showup usage.³⁷ We used previous surveys,³⁸ research, policy, and best-practice eyewitness recommendations to develop questions. The authors developed and edited the survey questions, which were then vetted with a senior member of the Ontario Provincial Police (OPP) for enhanced clarity and relevant terminology.

The survey was web-based and hosted by SNAP Surveys. Officers who agreed to participate provided limited demographic information and answered questions about their identification practices. Officers were asked to respond based on how they had been constructing and/or administering their identification procedures in the preceding 12 months. Officers only responded to questions relevant to their own practices. Thus, if an officer indicated in one question that they did not do a certain procedure (e.g., the sequential lineup), the survey skipped subsequent questions on that topic. As a result, *Ns* for analyses frequently do not match the total number of officers who participated in the survey.

C. Recruitment Procedure

We collected data from February 2008 to July 2009. The survey was reactivated briefly for the month of January 2011 due to a third-party recruitment opportunity.³⁹ We tried to ‘cast a wide net’ through multiple recruitment strategies (detailed below) in order to reach the greatest number

³⁷ We also asked officers questions regarding usage of live lineups (during which lineup members are physically present when a witness is viewing the lineup) and video lineups (at which lineup members are presented to a witness via video). Too few officers reported using either of these presentation methods for reasonable analyses; thus, the current paper addresses only photo lineups.

³⁸ Beaudry & Lindsay, *supra* note 13; Wogalter, Malpass & McQuiston, *supra* note 14.

³⁹ We do not believe that collecting data over these two timeframes significantly impacted our results, as all data collection occurred after the national BPRs referenced earlier were issued and before any subsequent BPRs were issued.

of individuals possible. What this means is that we cannot calculate a response rate because we do not know the total number of people who received the invite (e.g., the survey link could have been passed on, some emails were returned as undeliverable, some emails may never have reached the appropriate targets or, even if they did, some may not have been opened).

1. Email recruitment

We located publicly available email addresses for police officers on the internet, including database-type websites and websites of individual police departments. This netted 282 email addresses for Canada and 2549 email addresses for the U.S. Approximately 13% of emails were returned as undeliverable.

Some officers contacted via email replied that they could not complete the survey without a superior's approval (e.g., Chief of Police), so we targeted police chiefs for subsequent recruitment and asked them to have one or more of their officers complete the survey.

2. Post mail recruitment

Letters were sent by post to the chiefs of the police services in the three largest cities in each province and state, except in cases where the cities did not have their own police force. In many sparsely populated areas in Canada, the only police presence is Canada's federal police service, the Royal Canadian Mounted Police (RCMP). Three provinces—Ontario, Quebec, and Newfoundland—also have provincial police services: the Ontario Provincial Police (OPP), the Sûreté du Québec, and the Royal Newfoundland Constabulary, respectively. We sent the invitation via post to these services.

3. Third-party recruitment

Several contacts were made in attempts to have the survey distributed by individuals within policing organizations. The contacts were either pre-existing or acquired at academic conferences. Contacts were provided with the survey URL and asked to examine and distribute it to any relevant individuals.

D. Analyses

Our analytic strategy differed depending on the types of response options.

i. Never, rarely, sometimes, usually, or always (NRSUA) questions

These questions asked officers to indicate, using the five NRSUA options, how often they conducted a procedure. We analyzed the NRSUA questions using 2 (Canada/United States) x 5 (N/R/S/U/A) Fisher's Exact tests because it is robust to low expected frequencies (which emerged in our data because of the number of response options).

Post-hoc analyses for NRSUA questions compared Canada and the United States for each of the five possible responses (e.g., Canada vs. United States for 'never' responses), resulting in five comparisons. In order to minimize the possibility of finding differences by chance due to conducting multiple tests, we applied a Bonferroni correction of $\alpha = .05/5 = .01$ for post-hoc analyses.

2. Number entry questions

When officers were required to enter a number or a percentage, we examined differences between Canada and the United States using independent samples *t*-tests. Values presented in brackets denote 95% confidence intervals.

3. Rarely, description, always questions

To examine filler selection strategies, we provided officers with a list of 27 physical characteristics and asked them to indicate whether they considered these characteristics "rarely," "only if mentioned in the witness' description" (description), or "always" when selecting lineup fillers based on their similarity to the suspect. This question is addressed only descriptively.

4. Yes/no questions

Yes/No questions were analyzed using a 2 (Canada vs. United States) x 2 (Yes vs. No) chi-square test.

VI. RESULTS AND DISCUSSION

To recap, we expected that if BPRs influenced practice, we would find no between-country differences when the BPRs made the same/similar

recommendations. Conversely, we expected to find between-country differences when the BPRs made different recommendations.

Prior to examining how well police practices match up to each of the BPRs, we briefly describe endorsement of procedures overall, as well as by jurisdiction. As indicated in Table 2, police officers in both countries—in line with BPRs—instructed the witness that the perpetrator may or may not be in the lineup, did not use multiple suspect lineups, and used appropriately-sized lineups. Yet, contrary to BPRs, some police officers reported that they did not instruct witnesses that it is just as important to exonerate the innocent as it is to convict the guilty and did not use double-blind administration.

Results and discussion are provided in further detail for each of the recommendations, followed by a general discussion.

A. Same Recommendations

1. *Instructions to witnesses: Importance of exonerating innocent*

There was no significant difference between Canadian and U.S. officers in how often they informed witnesses that it was as important to exonerate the innocent as it was to convict the guilty (see Table 3, line A). Although both countries' BPRs recommended that officers provide this instruction, officers' responses indicated that they, by and large, did not adhere to this recommendation. About 25% of officers in both countries reported always giving this type of instruction. Contrary to the BPR, the largest percentages of officers in Canada (55.13%) and the U.S. (43.80%) said they never did this. So, as expected, no differences were found between countries, but practices in neither country were consistent with BPRs.

2. *Instructions to witnesses: Absence versus presence of perpetrator*

Providing witnesses with the *may-or-may-not-be-present* instruction prior to showing them a lineup is unbiased because it reminds the witness that identifying someone from the lineup is not the only decision they can make and that they can also respond with uncertainty or say they do not see the perpetrator in the lineup. Police in both countries reported similar, and high, rates of adherence to this BPR (see Table 3, line B). The majority of Canadian (97.44%) and U.S. (85.12%) officers said they always instructed witnesses that the perpetrator may or may not be in the lineup. Again, our hypothesis was supported.

However, this is not the entire story. While failing to provide the *may-or-may-not-be-present* warning results in biased instructions, instructions can also be biased in other ways; for example, when officers overtly or implicitly indicate that the perpetrator is in the lineup and that the witness' "job" is to choose someone. Biased instructions such as these increase choosing and false identification rates,⁴⁰ and can be easily conveyed to witnesses (e.g., by asking them to "select the person they saw commit the crime").

Importantly, 64.10% of Canadian and 38.02% of U.S. officers said they told witnesses "to select the person they saw commit the crime" (i.e., presented biased instructions). Unfortunately, contrary to the BPRs, 17.95% of Canadian and 37.19% U.S. officers said they always presented these biased instructions (see Table 3, line C).

Some officers who adhered to BPRs by giving the unbiased pre-lineup instruction also reported giving a biased instruction, such that witnesses should select the person they saw commit the crime. In fact, 17.9% of Canadian and 33.8% of U.S. officers reported always giving both the unbiased and biased instructions. No research definitively speaks to the effect of providing witnesses with both biased and unbiased instructions, although research by Clark et al.⁴¹ suggests that this practice likely increases choosing rates. In their study, providing seemingly-innocuous prompts suggestive of the perpetrator's presence such as "Take your time," "Look at each photograph carefully," and "So, is there anyone else in the lineup who looks more like him than anyone else?" decreased the probative value of suspect identifications, even when witnesses were also given unbiased instructions.

It is possible that some officers who stated that they used the biased pre-lineup instructions only did so conditionally, in that—prior to seeing the lineup—witnesses were instructed to select the perpetrator only if they saw that perpetrator in the subsequent lineup. Based on the wording of our survey question (i.e., officers were asked how often they said that statement or something similar), we cannot disambiguate between how many officers included the biased instruction without limitation and how many included the instruction conditionally. The distinction is important, as limiting the biased instruction may reduce its deleterious effects. For example, witnesses

⁴⁰ Brewer & Palmer, *supra* note 21 at 83.

⁴¹ Steven E Clark, Tanya E Marshall & Robert Rosenthal, "Lineup Administrator Influences on Eyewitness Identification Decisions" (2009) 15:1 J Experimental Psychology: Applied 63.

may perceive the instruction as a simple explanation of how to respond, rather than an inference that the perpetrator is present (especially when given in tandem with the unbiased instruction). However, it is also possible that the biased instruction will have the same effect, whether or not it is given conditionally, especially considering how seemingly innocuous statements negatively affect probative values.⁴²

In summary, procedures in both countries followed the BPR of providing unbiased lineup instructions. Nonetheless, we have strong concerns that also including biased instructions may undermine the effectiveness of the *may-or-may-not* instruction.

3. *Multiple suspects*

We asked officers to indicate, using the NRSUA scale, how often they constructed multiple-suspect lineups in the event that a particular case: a) had a single perpetrator but multiple suspects, or b) multiple perpetrators and multiple suspects.

Responses were similar for both situations. Regardless of whether there was one or multiple perpetrators, the officers did not significantly differ in how often they used multiple-suspect lineups (see Table 4, line A for single perpetrator; line B for multiple perpetrators). The majority of Canadian (76.79%; both single- and multiple-perpetrator) and U.S. officers (80.67% for single-perpetrator and 82.35% for multiple-perpetrator) reported that they never included multiple suspects in a lineup.

Our hypothesis was supported. In line with the BPR, most officers in both countries reported never presenting multiple suspect lineups for either single- or multiple-perpetrator crimes. Yet, approximately 20% of officers in each country reported using multiple-suspect lineups at least some of the time, and small percentages in both countries reported always using multiple-suspect lineups (5.36% in Canada, 1.68% in the U.S., see also Table 4). This practice is concerning given that multiple-suspect lineups increase false identifications.⁴³

4. *Filler selection*

BPRs for both countries state that officers should use a match-to-description approach when selecting fillers and, if that is not feasible, to use

⁴² See e.g. *ibid* at 74.

⁴³ Brewer & Palmer, *supra* note 21.

a match-to-appearance (or the suspect) approach.⁴⁴ To examine how officers selected fillers, we asked respondents to indicate whether they considered several physical and photographic characteristics of potential fillers “rarely,” “only if mentioned in the witness’ description” (description), or “always” when selecting lineup fillers (see Table 5).

If officers followed the BPRs for filler selection, we would expect that the largest percentages of officers would report using either the “description” or “always” options for each characteristic. In fact, strict adherence to this BPR should find officers only selecting the description option, yet there were few characteristics where this was the most commonly selected option.

Given that officers frequently did not rely on the witnesses’ description when selecting fillers, one interpretation is that, contrary to the BPRs, officers are primarily using a match-to-appearance approach. However, there is another interpretation. Officers in both countries reported that they were most likely to always consider these seven characteristics: race, age, photo background, photo quality, hair color, hair length, and facial hair. Thus, officers in both countries report considering similar features as important for filler selection, and it makes sense to match fillers to a suspect on these characteristics, whether or not they are mentioned in the witness’ description (i.e., a “default values” approach⁴⁵). In the words of one U.S. officer who completed the survey: “Our computer program for the fillers, would generally match the description of the suspect. I would not put a filler

⁴⁴ Many people mistakenly believe that the match-to-suspect strategy must lead to fair lineups. The second author has consulted in cases where this is clearly not true. In one case, a black man who committed a murder was described by the only witness as “Somali”. Police constructed a lineup of black men highly similar in appearance, but only one of the fillers and the suspect were Somali. The witness had no trouble indicating which lineup members were Somali. The fact that police, members of the court, and an eyewitness expert could not make this distinction is not relevant – the witness could and thus the lineup was biased. This pattern explains why lineup members must match the description provided by the witness, not just appear similar to the suspect in the opinion of those constructing the lineup.

⁴⁵ We note that characteristics other than the ones described here could certainly bias a lineup. See, for example, Jamal K Mansour, Michelle I Bertrand & RCL Lindsay, “What Might Be Missed and Noticed? Novel Biases in Lineup Construction” (Paper delivered at the meeting of the American Psychology-Law Society in Portland, OR, USA, March 2013) [unpublished]; RCL Lindsay, Ronald Martin & Lisa Webber, “Default Values in Eyewitness Descriptors: A Problem for the Match-to-Description Lineup Foil Selection Strategy” (1994) 18:5 *L & Human Behavior* 527.

in that was totally opposite to the suspect. Just because a person forgot to mention the size of the nose, I would not put someone with a[n] extra large purple nose, if everyone else had a[n] average nose.” The alternate interpretation is that officers report always considering these features when selecting fillers because these features essentially overlap between both match-to-description and match-to-suspect. If the perpetrator’s race were mentioned in the witness’ description, the officer would match fillers based on the described race. However, if the witness did not mention the perpetrator’s race, or if the suspect was of a race different than described, officers would still match fillers to the suspect’s race in order to avoid biasing the lineup (i.e., to adhere to the BPR). Given the characteristics officers reported they always consider are those that could easily bias a lineup if they differed between suspect and fillers (e.g., race, hair colour, and age), this latter interpretation makes sense. Of course, this does not necessarily mean that officers always constructed unbiased lineups.

Unfortunately, our question format does not allow us to parse out which of these explanations is more likely, or whether officers selected fillers based on some other rationale (e.g., regardless of circumstance, they always consider the same set of characteristics). Thus, we find support for our hypothesis that filler selection practices are similar between countries, but only tentative—and not clear-cut—evidence that practice is in keeping with the spirit of the BPRs.

5. *Feedback to witnesses post-lineup*

We asked officers how frequently they provided feedback to witnesses about their lineup selections (as a percentage of total lineups) and, if they indicated that they gave feedback, how often they did so prior to obtaining a confidence statement. We asked about suspect and filler selections separately. A correction was applied to our test statistics to account for unequal variability in the Canadian ($n = 78$) and US ($n = 121$) samples.

i. **Feedback on suspect selections**

We found differences regarding the percentage of times officers told witnesses they had selected the suspect. Canadian officers reported doing so an average of 10.78% of the time ($SD = 27.00$), whereas American officers reported doing so an average of 39.34% of the time ($SD = 44.29$), $t(196.45) = 5.65$, $p < .001$, $d = 0.82$ [0.52, 1.12]. Of the officers who reported giving such feedback, all Canadian officers ($n = 18$) reported that they never gave this feedback to a witness before obtaining a confidence statement (0.00%);

whereas, American officers ($n = 70$) reported giving feedback before obtaining a confidence statement 16.83% of the time ($SD = 35.07$), $t(69.00) = 4.01$, $p < .001$, $d = 1.06$ [0.51, 1.60].

ii. Feedback on filler selections

On average, Canadian officers reported informing witnesses when they had selected a filler 12.18% of the time ($SD = 30.38$), whereas American officers reported doing so 28.07% of the time ($SD = 40.71$), $t(192.72) = 3.14$, $p = .002$, $d = 0.46$ [0.17, 0.74]. Of the officers who reported giving such feedback, Canadian officers ($n = 15$) never informed witnesses of their filler selection before obtaining a confidence statement (0.00%); in contrast, American officers ($n = 56$) reported giving feedback before obtaining a confidence statement 20.63% of the time ($SD = 38.46$), $t(55) = 4.01$, $p < .001$, $d = 1.17$ [0.55, 1.77].

In partial contrast to our hypotheses, jurisdiction-based differences in practice emerged. If BPRs were related to practice, we expected no officers in either jurisdiction would provide feedback on suspect identifications, and that Canadian officers would not give feedback on filler selections. Contrary to the first prediction, American officers were more likely than Canadian officers to provide feedback on suspect selections. The latter prediction was supported: American officers were more likely than Canadian officers to provide feedback on filler selections. It is worth noting that a majority of officers in both countries did not provide feedback to witnesses, and most officers who did give feedback did not do so until after obtaining a confidence statement; thus, officers' practices were largely in line with BPRs.

Even so, the small but substantial minority (6.62%) of American officers who provided feedback following suspect identifications and prior to confidence statements is a clear failure of practice adhering to national BPRs. Providing feedback to a witness about their identification decision can significantly and substantially alter their stated level of confidence.⁴⁶ As previously mentioned, the U.S. BPRs recommend against providing feedback to a witness—but only if the witness identifies someone and only prior to getting a confidence statement. The wording implies that it is acceptable for officers to give feedback on non-identifications, and that it also is acceptable to give feedback on an identification, provided that they

⁴⁶ Wells et al, *supra* note 20; Wells & Bradfield, *supra* note 23 at 376.

do so after the witness states their confidence. Our results suggest that officers may interpret the BPR to mean that feedback is acceptable under some circumstances. However, even if officers do not provide feedback until after a witness' decision, such feedback can still potentially inflate the witness' confidence and make them more convincing to judges and/or jurors.⁴⁷

B. Different Recommendations

If police practices were in line with BPRs, we expected the Canadian and American officers' practices to differ on the following four topics because their recommendations differed.

6. *Lineup size*

Canadian and American officers reported using different lineup sizes (i.e., suspect + n fillers), $t(102.41) = 24.66$, $p < .001$, $d = 3.42$ [2.87, 3.96]. On average, Canadian officers ($n = 88$) reported using approximately 11 lineup members ($M = 10.99$, $SD = 1.79$), with most indicating using either 10- (35.23%) or 12-person (47.72%) lineups. In contrast, American officers ($n = 127$) reported using approximately 6 lineup members ($M = 6.08$, $SD = 0.64$). Our hypothesis was clearly supported with majorities of officers in both countries using lineups of the size (or larger) recommended by their respective BPRs. Despite the variation in their reports, 86.36% of Canadian officers used at least 10 lineup members. American officers' responses varied little; 98.43% used at least 6 lineup members.

The Canadian results raise the question: why are two lineup sizes commonly used in Canada? Inspection of the reported lineup sizes in each province indicates that provinces known to use 10- or 12-person lineups prior to release of the Sophonow recommendations⁴⁸ continued using the same size lineups, whereas provinces using less than 10-person lineups increased their lineup sizes to meet the minimum recommended size of 10.

Lineup size is one issue that may reflect BPRs following practice rather than the reverse. U.S. police typically used six-person lineups prior to the

⁴⁷ Melissa Boyce, Jennifer Beaudry & RCL Lindsay, "Belief of Eyewitness Identification Evidence" in Lindsay et al, *supra* note 22 at 501-525.

⁴⁸ We note that no formal source for this knowledge exists; rather, this information regarding lineup sizes pre-Sophonow is based on the experience of the second author, who has extensive consulting experience across Canada.

publication of the NIJ BPRs so no change was needed. In Canada, the Sophonow Inquiry recommended 10-person lineups, which were already the norm in Manitoba, the province where the Inquiry took place. Thus, BPRs recommended the status quo in both instances. However, the increase in lineup size in provinces that had previously used smaller lineups (e.g., Alberta) suggests that practices were altered in these provinces in order to comply with the Canadian BPRs.

The jurisdictional differences in lineup size lead to questions regarding the applicability of research findings to Canadian lineups. Canadian officers used lineups that are (approximately) twice the size of those used by U.S. officers; however, most lineup research is conducted with 6-person lineups. Does research with 6-person lineups generalize to larger lineups? There is a small amount of literature regarding the effects of nominal lineup size on identification decisions,⁴⁹ some of which has found that correct identifications in simultaneous lineups decrease as nominal lineup size increases. Further research is needed to determine the generalizability of research with 6-person lineups to procedures in Canada, the United Kingdom (video and live lineups typically contain 9 people while photo lineups contain at least 12), and Australia (lineup size varies by state, but Victoria Police use 8 and 12 people for live lineups and photo lineups,⁵⁰ respectively).

7. *Simultaneous versus sequential presentation*

Because officers may not employ all aspects of the sequential lineup, we defined the sequential lineup within the survey by its most well-known feature: that a witness would view each lineup member one at a time. We also asked the officers if they used the other components of the “sequential

⁴⁹ See e.g. Michelle I Bertrand et al, “Is Increasing Lineup Size an Alternative to Sequential Presentation? The Question Revisited and Revamped” (Poster presented at the meeting of the American Psychology-Law Society in St. Petersburg, Fla, USA, March 2006) [unpublished]; Natalie Kalmet, RCL Lindsay & Michelle I Bertrand, “The Effects of Larger Lineups and Multiple Poses on Identification Accuracy” (Paper presented at the meeting of the American Psychology-Law Society in Portland, OR, USA, March 2013) [unpublished]; Avraham M Levi, “Much Better than the Sequential Lineup: A 120-Person Lineup” (2012) 18:7 *Psychology Crime & L* 631; Glenn J Nosworthy & RCL Lindsay, “Does Nominal Lineup Size Matter?” (1990) 75:3 *J Applied Psychology* 358.

⁵⁰ We note that, in the United Kingdom and Australia, photo lineups are referred to as ‘photoboard,’ but we have used ‘photo lineup’ here to be consistent with the terminology we use throughout the paper.

package” through a series of questions specific to each of the different aspects.⁵¹

Officers who reported using a sequential lineup were asked how frequently they used them. We found that sequential lineups were never used by 16.4% of Canadian and 35.2% of U.S. officers, while they were always used by 71.23% of Canadian and 28.17% of U.S. officers.

In order to obtain a more nuanced understanding of the frequency of use of sequential lineups, we also asked officers who said they had used sequential lineups to indicate the percentage of time they used them. Canadian officers ($n = 73$) reported conducting a greater percentage of their lineups sequentially ($M = 74.74\%$, $SD = 42.35$) than did American officers ($n = 71$, $M = 34.96\%$, $SD = 44.65$), $t(142) = 5.49$, $p < .001$, $d = 0.92$ [0.57, 1.26]. Of the officers who reported using sequential lineups, Canadian officers ($n = 61$) reported using this procedure for a greater percentage of their lineups ($M = 89.44\%$, $SD = 28.56$) as compared to U.S. officers ($n = 46$, $M = 53.96\%$, $SD = 45.31$), $t(71.20) = 4.66$, $p < .001$, $d = 0.91$ [0.50, 1.32]. Notably, of these officers, 85.2% of Canadian and 43.5% of U.S. officers administered all of their lineups sequentially (i.e., 100% of the time).

Our hypothesis was supported: in line with their country’s BPRs, Canadian officers reported using the sequential lineup more frequently than U.S. officers.

i. Sequential lineup rules

Although the presentation of one lineup member at a time is the most salient and memorable feature of the sequential lineup procedure, the procedure actually comprises a package of features.⁵² Taken together, these components are designed to reduce a witness’ tendency to compare amongst lineup members.⁵³ Given the potential for misunderstanding or misapplying the procedure, we asked officers how frequently they used different aspects of the sequential procedure. One of the features (blind administration) is addressed in the following section as it is considered to be important across all lineup procedures. Using the NRSUA scale, officers who reported showing lineup pictures to witnesses one at a time were asked several

⁵¹ Lindsay & Wells, *supra* note 9.

⁵² Lindsay et al, *supra* note 24.

⁵³ *Ibid*; Lindsay & Wells, *supra* note 9.

questions about how often they used certain procedural techniques (see Table 4).

a. View each lineup member only once

As seen in Table 4 (line C), U.S. officers (58.70%) were more likely than Canadian officers (45.90%) to always allow a witness to go through a lineup more than once if the witness did not choose anyone after viewing all lineup members once (i.e. after the first lap). Canadian officers (32.79%) were more likely than U.S. officers (8.69%) to never allow a witness to go through a lineup more than once if the witness did not choose anyone on the first lap.

b. Number of Yes responses allowed

There was a marginally significant ($p = .054$) difference in how frequently Canadian and U.S. officers allowed a witness to select multiple lineup members and then decide among these members at a later time (see Table 4, line D). The most common response for Canadian and American officers indicated that they never allowed multiple selections. However, 4.92% of Canadian and 19.57% of American officers always allowed witnesses to do this.

c. Witness naïve about the number of lineup members

A greater percentage of Canadian (48.33%) than American (19.56%) officers reported never informing witnesses about how many lineup members would be shown; a smaller percentage of Canadian (36.67%) than American (69.57%) officers reported always doing so (see Table 4, line E).

ii. Year of sequential lineup adoption

Lindsay and Wells published the first paper on the sequential lineup in 1985.⁵⁴ In examining the relationship between BPRs and practice, it is useful to know how frequently such procedures were in use before the BPRs were developed. We asked our officers in which year they first used the sequential lineup (see Figure 1). Although some officers reported adopting it before the issuance of the BPRs, most began using it only after the BPRs were issued. While we cannot parse out the reasons officers began using the sequential lineup (e.g., whether they changed their procedure from simultaneous to sequential, or whether the sequential lineup is what they always used), it is clear that the BPRs preceded usage for a large number of officers.

⁵⁴ Lindsay & Wells, *supra* note 9.

iii. Sequential lineup conclusions

Many researchers promote sequential over simultaneous lineups because sequential lineups reduce false identifications more than they reduce correct identifications, thereby providing more diagnostic information.⁵⁵ The benefits of sequential lineups are reduced when aspects of the package are violated.⁵⁶ We found considerable cross- and within-jurisdictional variation in adherence to the complete sequential lineup procedure, with many officers not fully employing sequential lineup procedures. Our hypothesis that Canadian and U.S. practices would differ appears supported. However, we do caution that while Canadian officers appear to follow the entire sequential lineup “package” more closely, this does not mean that the majority are doing so and, in some cases, large percentages are not. Of the Canadian officers who had used the sequential lineup, only 26.23% reported always employing the “sequential package.”⁵⁷ None of the U.S. officers reported carrying out all aspects of the sequential lineup. An important point to note, however, is that these additional aspects of the sequential lineup⁵⁸ are not mentioned in any of the BPRs—even though the U.S. BPRs provide instructions on how to carry out a sequential lineup—so it is possible that officers think the one-at-a-time presentation is all that is required for proper sequential procedure.

8. *Double-blind procedures*

We asked officers questions regarding how often the lineup administrator was an officer who did versus did not know who the suspect in a lineup was. Answers were recorded using the NRSUA options.

⁵⁵ Steblay, Dysart & Wells, *supra* note 1.

⁵⁶ See e.g. Ruth Horry, Matthew A Palmer & Neil Brewer, “Backloading in the Sequential Lineup Prevents Within-Lineup Criterion Shifts That Undermine Eyewitness Identification Performance” (2012) 18:4 J Experimental Psychology: Applied 346; RCL Lindsay, James A Lea & Jennifer A Fulford, “Sequential Lineup Presentation: Technique Matters” (1991) 76:5 J Applied Psychology 741; Nancy K Steblay, Robert W Tix & Samantha L Benson, “Double Exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy” (2013) 27:5 Applied Cognitive Psychology 644.

⁵⁷ Lindsay et al, *supra* note 24.

⁵⁸ Lindsay & Wells, *supra* note 9.

i. Officer in charge of the case

A greater percentage of Canadian (54.70%) than American (5.99%) officers reported that the officer in charge of the case never conducted the lineup, and fewer Canadian (18.80%) than American (69.46%) officers reported that this usually happened (see Table 4, line F).

ii. Double-blind administration

More Canadian than American officers reported another officer—who was not involved in the case and who did not know the suspect's identity—always (47.01% versus 3.59%) or usually (24.79% versus 4.19%) conducted the lineup. Conversely, fewer Canadian than American officers reported that double-blind administration was never (9.40% versus 56.89%) or rarely (10.26% versus 25.15%) their procedure (see Table 4, line G).

Our hypothesis was clearly supported in the case of double-blind administration, which is recommended only by Canadian BPRs. Fewer Canadian than U.S. officers reported that the officer in charge of a case conducted lineups, with more Canadian than U.S. officers reporting that lineups were specifically conducted double-blind. This is a clear example of consistency between BPRs and practice within a jurisdiction that results in large differences in practice between jurisdictions. It is important to note, however, that this BPR was not always followed by Canadian officers.

9. Showups

Significantly fewer Canadian (22.22%) than U.S. officers (73.65%) reported using showups in the 12 months preceding the survey, $\chi^2(1, N = 284) = 72.97, p < .001, V = .51$. Of officers who had used a showup, Canadian officers reported using approximately 1 showup ($n = 26, M = 0.88, SD = 1.31$) in the 12 months preceding the survey, which was fewer showups compared to the U.S. officers who reported using 6 to 7 showups ($n = 123, M = 6.61, SD = 13.32$), $t(132.02) = 4.66, p < .001, d = 1.01 [0.56, 1.44]$.

Our hypothesis regarding showups was supported as there were jurisdiction-based differences in practice consistent with the different BPRs in officers' reports of using showups. We interpret the showup results with caution as the low rate of reported showup usage differs from archival research estimates, which finds showups are commonly used.⁵⁹ One possibility for this difference is that the officers who responded to our

⁵⁹ See e.g. Bruce W Behrman & Sherrie L Davey, "Eyewitness Identification in Actual Criminal Cases: An Archival Analysis" (2001) 25:5 L & Human Behavior 475 at 477.

survey—whose participation was based on their experience constructing and/or administering lineups in the year preceding the survey—may not be the officers who conduct showups. Specifically, patrol officers may be more likely to use showups than detectives; as a result, our recruitment method may have biased our sample to officers who are less likely to rely on showups. In the words of one officer: “The term ‘show up’ as used in our department refers to the victim or witness seated in a squad car or otherwise shielded from view of the suspect. The suspect is handcuffed to prevent escape and standing outside the squad car. The suspect is illuminated with squad car spotlights or flashlights if necessary. The distance is usually no more than 50 feet. A show up would only be conducted by uniformed officers when an arrest is made very soon after the crime, usually within minutes. Detectives use the sequential photo lineup for the follow-up investigation and rarely if ever do a show-up [sic].”

VII. GENERAL DISCUSSION

The patterns in our data generally support our hypotheses. By and large we found similarities in practices for recommendations that crossed jurisdictional boundaries, and differences in practices for jurisdictionally-unique recommendations. The differences in practice were especially striking in cases where the BPRs addressed the same topic but made different recommendations (e.g., lineup size). While many officers reported practices that were in line with BPRs, there was substantial variation in the officers’ responses. For nearly every measure, officers—even within a country—selected the full range of responses. Thus, although practice did generally align with BPRs, our results underscore that BPR adherence needs to be a continued priority in both countries.

A. Causal Relationship Between Best Practice Recommendations and Practice⁶⁰

While we do not seek to make definitive claims that the BPRs caused changes in procedures and practice, our analytic strategy is a unique way to examine the potential influence of BPRs on police officers’ practices.

⁶⁰ For discussion on policy adherence in the United Kingdom, see Ruth Horry et al, “Video Identification of Suspects: A Discussion of Current Practice and Policy in the United Kingdom” (2013) 7:3 Policing 307.

Although it is possible that the BPRs did not influence our respondents' practices, the patterns in our data are difficult to explain in the absence of any influence whatsoever of the BPRs. In addition, we provided evidence in the case of sequential lineups that practice was more widespread after the BPRs existed, and note that some officers indicated in their written comments that they were aware of and tried to follow the national BPRs. Taken together, our results suggest that the BPRs likely had some influence on practice, though the influence was neither uniform nor is it likely that the BPRs were the only influence at work.

B. Survey Limitations

Some of the well-known limitations of survey research are present in our survey. Despite our recruiting efforts, our sample is neither representative nor random. As well, responding officers may be more conscientious about their identification practices and therefore more likely to follow BPRs and, conversely, non-responders may have been less likely to adhere to BPRs. These issues, however, are unlikely to have impacted the survey in a manner that would bias the pattern of results. Even if non-responders to our survey would have reported poorer practices than responders, their responses would only strengthen our evidence that more concentrated efforts are needed to obtain BPR compliance. It is unlikely that non-responders were adhering more stringently to the BPRs such that their inclusion would merit a change in our conclusions. Additionally, there are many practices officers reported that are contrary to the BPRs, so it does not seem to be the case that only officers from BPR-adhering departments completed our survey.

Non-representative and non-random samples are common challenges faced by researchers surveying the police on such issues as eyewitness identification procedures,⁶¹ selection of police officers,⁶² alibis,⁶³ and interviewing and interrogation.⁶⁴ We note that our diverse recruitment

⁶¹ Beaudry & Lindsay, *supra* note 13 at 182; Greene & Evelo, *supra* note 15 at 310; PERF, *supra* note 15; Wogalter, Malpass & McQuiston, *supra* note 14 at 77.

⁶² Robert E Cochrane, Robert P Tett & Leon Vandecreek, "Psychological Testing and the Selection of Police Officers" (2003) 30:5 *Criminal Justice & Behavior* 511 at 530.

⁶³ Jennifer E Dysart & Deryn Strange, "Beliefs About Alibis and Alibi Investigations: A Survey of Law Enforcement" (2012) 18:1 *Psychology Crime & L* 11 at 21.

⁶⁴ Saul M Kassin et al, "Police Interviewing and Interrogation: A Self-Report Survey of

strategies and our resultant sample size of 117 Canadian and 167 U.S. officers compares favourably to these other published surveys of police officers: only two had larger sample sizes than we did. As well, the only published survey of both Canadian and U.S. officers⁶⁵ had a smaller sample than ours (55 U.S. and 90 Canadian police officers). Despite the limitations we have identified, our research positively adds to the extant literature. Our survey adds previously unknown information. Additionally, where our questions overlap with other published research we have replicated their findings, and because of our larger sample and nuanced questions, expanded on them.

Our ability to assess officers' awareness of BPRs and their impact on practice is limited because we did not specifically ask about their knowledge of the national BPRs or the basis of any possible departmental procedures or policies. Nonetheless, the degree of compliance with BPRs at the day-to-day level of policing, rather than just formal adoption by police services, is the true measure of whether or not a BPR is effectively "adopted." Officers responding to the survey may not have been aware that they were following BPRs. That is, a department may issue a change in identification procedures based on one of the BPRs, but individual officers may only know the outcome (i.e., change in procedure that guides their practice) and not know the basis of or reason for the change. Thus, asking about actual practices still provides important data regarding the influence of BPRs.

Interestingly, when asked at the end of the survey if they had any comments or suggestions, some officers' responses suggested awareness of the BPRs. For example, one Canadian officer said, "We are trying hard to stick to the recommendations under the Sophonow enquiry [sic] even in our small jurisdiction." Another Canadian officer said, "We use many of the recommendations of the Sophonow [sic]." One of the U.S. officers said, "My agency has standardized the lineup procedures (sequential). We have a written form that is supposed to be used on all lineups to advise the viewer of the instructions (based largely on the US Federal guidelines)." Although we cannot infer that officers are largely aware of their respective BPRs, such voluntarily-made comments clearly indicate that at least some officers are aware of them and the BPRs' impact on their practices.

Police Practices and Beliefs" (2007) 31:4 L & Human Behavior 381 at 396.

⁶⁵ Greene & Evelo, *supra* note 15.

While our data are somewhat dated, our investigation of the possible influence of BPRs on practice is important. Although references directly connecting practices to national BPRs came from spontaneous, anecdotal comments by respondents, the other survey data does provide indirect evidence for this connection. In particular, our results demonstrate that some awareness of and influence by BPRs exists. As such, our survey provides a snapshot regarding the influence of BPRs on practice shortly after the BPRs were issued. Whether a more recent survey—or one 20 years from now—would show further change is somewhat irrelevant to our aims as we are not trying to reflect current practice, but rather to show that the issuance of BPRs is insufficient to prompt changes in police practice.

C. Barriers to Best Practice Implementation and Adherence

Even though the patterns in our data generally support our hypotheses, the data are so variable that even when many officers reported practices in line with BPRs, many did not. In nearly all cases, the full range of responses was selected. This indicates that correspondence between BPRs and practice is not strong enough and research on barriers to BPR implementation and adherence is needed.

We agree with a principle stated in the U.S. BPRs in that we also assume good faith in practices and reporting on the part of officers. It is easy to lay blame on individual officers when BPRs are not followed, yet the reasons why they may not be followed are complex, varied, and unlikely to operate in isolation. These reasons must be understood so that the procedures developed, tested, and subsequently written into BPRs match the challenges faced by police officers in the field and are easily adopted into practice. We discuss below some of these potential barriers and encourage investigation into these areas.

1. Disregarding Best Practice Recommendations

An individual officer may know of the BPR but, for whatever reason, disregard it. We suspect that such actions reflect difficulty in understanding the BPR wording, a lack of specification in parts of the BPRs or the rationale as to why they should be followed, time restrictions, and/or training issues rather than officers deliberately not following BPRs (though we cannot dismiss this as a possible factor). Further, there may be exceptional circumstances where close adherence to BPRs is precluded, or their departmentally-recommended procedures may differ from the BPRs.

2. *Lack of desire to change*

Officers may not want to change their practices. For example, they may think that their current practices work well. Alternatively, officers may resist change if they perceive that BPRs remove their discretion, question their integrity, or are dictated by people—such as researchers and administrators—who are far removed from policing and do not understand their jobs.

3. *Lack of resources*

Some departments may feel that while changes to procedure would be an improvement, they would be too costly or difficult to implement. For example, large police services with many officers may more easily implement double-blind administration than small services where it is difficult to find an officer unaware of a suspect's identity.

4. *Lack of training*

In the second author's experience, unlike other skills, officers seem to learn how to conduct identification procedures by watching other officers rather than undergoing rigorous training themselves. This observation matches up with our data in that over 75% of officers in both countries reported learning to construct lineups "on the job" or from a colleague, while fewer than half reported learning through coursework or professional instruction (see Table 1). Some of the recommendations (e.g., lineup size) are easy to implement regardless of whether training is provided. However for more nuanced recommendations (e.g., filler selection), training would be valuable to provide appropriate guidance and promote consistent approaches to BPR implementation.

The U.S. BPRs were accompanied by a training manual for law enforcement trainers,⁶⁶ but it was not released until four years after the recommendations were published. Because our data were collected after the training manual was released and there were still large deviations from the BPRs, this suggests that many officers did not receive and/or follow training that was based on this manual. To our knowledge, both Canadian BPRs recommended (ongoing) training for officers, but neither document included a training guide.

⁶⁶ US, National Institute of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (September 2003), online: <www.nij.gov/pubs-sum/188678.htm>.

5. Lack of clarity in best practice recommendations

Related to issues with training, another important potential barrier is that the BPRs may not be clear or specific enough to engender change that will be consistent from one officer to another. For example, the Canadian BPRs specify that lineups should be presented sequentially—but that is all. None of the other aspects of the procedure are mentioned⁶⁷ so officers may think they are conducting sequential lineups when they use the one-at-a-time presentation and are simply unaware of the other aspects of the procedure. Providing step-by-step procedures would help remove such ambiguity.

6. Issues with initial and continued dissemination

Some officers may be unaware these BPRs exist—which in itself would be a failure of the BPRs to have an impact. Most of the BPR documents are freely available online⁶⁸ and agencies in both countries made efforts to distribute them widely and at a national level, but we know neither the exact dissemination strategies (e.g., paper copies, emailed documents, providing links to online documents, etc.), nor the breadth of distribution (e.g., to law enforcement at all levels of government, only to those on mailing lists of professional organizations, upon request, etc.), nor the extent to which those who received the BPRs read, understood, or internalized them.

Time may also reduce the ongoing dissemination of BPRs. BPRs may be well-implemented immediately upon release and officers may be trained in conducting procedures correctly, but performance may deteriorate over time as trained officers forget particular aspects, retire, or move on to other duties. The next generation of identification officers may be less aware of and less concerned about BPRs in the absence of controversial cases that draw attention to them.

D. Our Recommendations

In order for BPRs to effect change in practice, we propose that when procedural recommendations are issued, (1) they should be described in detail in BPR documents, and (2) that easily accessible training materials should be issued concurrently with the BPRs so officers have guidance in

⁶⁷ Lindsay & Wells, *supra* note 9.

⁶⁸ The results of the Sophonow Inquiry were previously available online; however, by October 2014, the Manitoba Government had limited access to the Legislative Library.

applying the recommendations. Training materials should describe in detail actions that both align with and contravene BPRs.

Our data illustrates the importance of this last point as some of the reported practices are well-known by researchers to decrease the effectiveness of the procedure (e.g., allowing witnesses to view lineup members more than once in a sequential lineup),⁶⁹ but are not discussed in the BPRs and so do not technically violate the BPRs. Officers may not know that they are reducing the effectiveness of the procedure by allowing this behavior from witnesses; therefore, it is important for officers to know if variations in procedures will be detrimental. In addition to promoting uniformity, such an approach would facilitate experimental testing to discover whether the procedures provide evidence that is diagnostic of guilt.

The provision of training materials might be modeled after research ethics certification protocols in universities. In recent years, many universities have developed training procedures for anyone who will be conducting research with human research participants. Before a person is permitted to conduct research, they first must complete a course and pass a test on research ethics. This approach could be adapted to police officers by insisting that only identification evidence collected by an officer certified via training to gather identification evidence would be admissible in court. Such training would also promote procedural consistency, provided the same training was offered to officers nation-wide. This could be accomplished by using the same type of system as universities: web-based training procedures with built-in feedback.⁷⁰ Web-based systems have the advantage that they are accessible at any time for further study or review.

E. Is It Time to Mandate Change?

While neither Canada nor the U.S. currently have national-level mandated policies on eyewitness identification procedures, this can change. One mechanism for policy change is for defence lawyers to successfully challenge specific procedures in court, setting a precedent in all courts at and below that court level. While case law is certainly an important

⁶⁹ See Lindsay, Lea & Fulford, *supra* note 50; Steblay, Tix & Benson, *supra* note 56.

⁷⁰ One example is that most (if not all) universities in Canada require faculty and students conducting research that involves human participants to complete the federal government's "Tri-Council Policy Statement 2 Tutorial Course on Research Ethics," online: <www.pre.ethics.gc.ca/eng/education/tutorial-didacticiel>.

mechanism for change, it will not have force of law at a national level unless a case is heard by a country's Supreme Court.

What complicates such endeavours is that the Supreme Courts only hear a small percentage of cases seeking leave for appeal. For example, the Supreme Court of Canada hears only 65–80 of the approximately 500–600 cases seeking leave for appeal annually.⁷¹ Further, such endeavours are very costly. The financial challenges in bringing an appeal before a Supreme Court could present a significant barrier for some of those who would seek leave to appeal. Additionally, even if the Supreme Court does make a decision that mandates the way identification procedures should be conducted, there is no built-in mechanism for updating or changing practices as research in the area progresses. As such, mandating best practices via Supreme Court decisions is a costly and ineffective mechanism for meaningful and ongoing change.

Another mechanism for policy change is for individual police services, or provinces/territories/states, to recommend or mandate best practices. Several states in the U.S. have done exactly this (to the best of our knowledge, no Canadian provinces/territories have done so). For example, Maryland passed a law requiring law enforcement agencies to have written procedures for conducting eyewitness identifications by January 1, 2016.⁷² Departments are required to provide the State Police with a copy of their written procedures so they can be compiled and made available for public inspection. Likewise, in 2015, Colorado passed its *Act Concerning Statewide Policies and Procedures for Law Enforcement Agencies that Conduct Eyewitness Identifications*.⁷³ The Act specified that by July 1, 2016, law enforcement agencies had to develop written eyewitness identification procedures based on well-accepted peer-reviewed research, or use those developed by the Colorado District Attorney's Council. Other states, such as New Jersey, Wisconsin, and North Carolina, have mandated that their law enforcement agencies use specific procedures, such as double-blind sequential lineups

⁷¹ Supreme Court of Canada, "Role of the Court," online: <<http://www.scc-csc.ca/court-court/role-eng.aspx>>.

⁷² Md Code Ann. [Pub. Safety] §3–506 (2017), online: <mgaleg.maryland.gov/webmgafirmStatutesText.aspx?pid=&tab=subject5&stab=&ys=2017RS&article=gps§ion=3-506&ext=html&session=2017RS>.

⁷³ US, SB 15-058, *An Act Concerning Statewide Policies and Procedures for Law Enforcement Agencies That Conduct Eyewitness Identifications*, 2015, online: <https://leg.colorado.gov/sites/default/files/images/olls/2015a_sl_110.pdf>.

and the ‘*may-or-may-not-be-present*’ caution regarding the perpetrator’s presence in the lineup. Yet, other states do not recommend procedures such as the sequential lineup or double-blind administration, demonstrating the inconsistency in procedural recommendations and/or requirements between states.⁷⁴

The problem evident with individual departments and/or non-national governmental bodies developing their own procedures is that what is specifically mandated will vary between locations. Furthermore, because some provinces/states will not have such mandates, practices will continue to vary widely across individual countries. While efforts to update procedures according to best-practice recommendations are important and commendable, unless all police forces in a country voluntarily adopt such changes—and adopt the same changes—there will be no uniformity. Such changes would require the coordination and cooperation of thousands of law enforcement agencies (e.g., PERF identified 15 685 unique agencies in the U.S).⁷⁵ The U.S. and RPMJ BPRs explicitly state that the recommendations are not legal mandates, yet it may be time to move to such a system in order to effect systematic and consistent procedural changes. The most effective training manuals and distribution strategies are irrelevant if procedural recommendations are not adopted.

We echo the sentiments of Beaudry and Lindsay⁷⁶ that it may be time to develop a system like that of the Home Office in England and Wales in which identification procedures are legally mandated by the Police and Criminal Evidence (PACE) Act Codes of Practice.⁷⁷ Any deviations from these codes of practice must be justified to the court’s satisfaction. A key advantage of such a system is that procedures can change as better techniques are developed without requiring changes in laws. For example,

⁷⁴ We refer readers to the Police Executive Research Forum report, *supra* note 15, for a more detailed summary regarding the specific procedures each of these states adopted.

⁷⁵ See e.g. *ibid* at 37.

⁷⁶ Beaudry & Lindsay, *supra* note 13 at 183.

⁷⁷ *Police and Criminal Evidence (PACE) Act*, Codes of Practice, Code D (2011), online: <<https://www.gov.uk/government/publications/pace-code-d-2017>>.

PACE Code D was updated in 2011⁷⁸ and 2017.⁷⁹ These frequent updates allowed required procedures to change with advances in research.

As Beaudry and Lindsay⁸⁰ pointed out, this system may be more easily implemented in Canada than the U.S. because Canada has a single, overarching national criminal code. Unfortunately, the United States cannot have national mandates due to its state and national criminal codes, but this would not preclude the different states from agreeing to mandate the same set of best-practice policies. While certainly not as elegant and simple as a national mandate, this type of cooperative arrangement would essentially function as such and, while not easy to coordinate in an absolute sense, it would certainly be easier to coordinate 50 states compared to over 15 000 individual law enforcement agencies.

F. Conclusions

It is apparent from our analysis that BPRs likely have some influence on practice, even in the absence of legal mandates for change. In some cases, the likely influence of BPRs was striking and obvious (e.g., double-blind administration); in other cases, BPRs and practice did not completely align (e.g., sequential lineups and providing the unbiased may-or-may-not-be-present' instruction to witnesses). In still other cases, BPRs and practice were quite far apart (e.g., providing an instruction that it is just as important to exonerate the innocent as it is to convict the guilty). Although there was some consistency in practice, there was still considerable variation in the practices officers reported carrying out both within and between national jurisdictions.

The production of national-level BPRs requires substantial investments of time and resources. The three sets of BPRs we used for comparison each took approximately 1–2 years to develop and publish and, in the case of the U.S. BPRs, another year was spent developing a related training manual.⁸¹ It is clear from our survey that BPRs and practice do not always correspond and, even when they do, there are still unintended—and almost certainly undesirable—variations in practices.

⁷⁸ *Police and Criminal Evidence (PACE) Act 1984* (UK), c 60, Codes of Practice, Code D (2017), online: <<https://www.gov.uk/government/publications/pace-code-d-2011>>.

⁷⁹ *Ibid.*

⁸⁰ Beaudry & Lindsay, *supra* note 13.

⁸¹ Lindsay & Wells, *supra* note 15.

Table 1. *Experience, training, and job-related demographics for Canadian and U.S. officers surveyed*

Demographic category	Officer location	
	Canada	U.S.
<u>Mean years of experience</u>		
As officers	14.85 (8.37)	17.87 (7.36)
Constructing lineups	8.85 (7.97)	9.38 (7.00)
Administering lineups	10.13 (7.73)	9.79 (7.09)
<u>Training constructing lineups</u>		
“On the job”/No formal training	77.61%	83.59%
From a colleague	77.61%	76.56%
From written guidelines	64.18%	39.84%
Coursework/Professional instruction	41.79%	36.72%
<u>Breadth of experience</u>		
Constructed & administered lineups	85.47%	95.21%
Only constructed	0.85%	2.40%
Only administered	13.68%	2.40%
<u>Mean number of lineups</u>		
Constructed	8.98 (21.84)	20.50 (49.05)
Administered	7.25 (19.94)	18.74 (37.43)
<u>Level of government</u>		
Municipal/Local	66.67%	95.21%
Provincial/State	29.06%	4.27%

Federal	4.27%	0.60%
Population of area served ≥100,000 people	82.91%	81.44%

Note: For mean years of experience, standard deviation is provided in parentheses. For training constructing lineups, officers could endorse as many options as applied to them. For mean number of lineups, officers were asked how many photo lineups they had constructed and administered in the 12 months preceding the survey; standard deviation is provided in parentheses. For level of government, officers reported the level of government at which their particular unit operated.

Table 2. Compliance of Canadian and U.S. officers' lineup procedures with best practice recommendations

	Recommendation	Canada	U.S.
1	Instructions to witnesses: importance of exonerating innocent	25.64	29.75
2	Instructions to witnesses: perpetrator may or may not be in lineup	97.44	85.12
3	Multiple suspect lineups (single perpetrator)	76.79	80.67
	Multiple suspect lineups (multiple perpetrators)	76.79	82.35
4	Filler selection	~	~
5	Feedback on suspect selections	89.22	60.66
	Feedback on filler selections	87.82	71.93*
6	Lineup size	86.36	98.43
7	Sequential presentation	71.23	28.17*
	Usage of full sequential procedure	26.23	0.00*
8	Double-blind administration	47.01	9.40*
9	Showups	~	~

Note: Numbers in columns represent the percentages of officers who reported practices that were fully compliant with best practice recommendations (i.e., they either 'never' or 'always' did the recommended procedure, or reported doing it 100% of the time). Asterisks indicate that a country had no specific recommendation to carry out that procedure, but numbers are provided for context of practices between countries. Numbers are not provided for filler selection and showups as the data was not amenable to summary in this format.

Table 3. Percentage of Canadian and U.S. officers surveyed who gave the following instructions (or something similar) to a witness prior to conducting a lineup.

	n	Never	Rarely	Sometimes	Usually	Always	Fisher's	p
A) Instruct witnesses that it is as important to exonerate the innocent as it is to convict the guilty	Canada	78	55.13	5.13	7.69	6.41	25.64	
	U.S.	121	43.80	14.05	4.13	8.26	29.75	6.44 .16
B) Instruct witnesses that the perpetrator may or may not be in the lineup	Canada	78	1.28	0.00	0.00	1.28	97.44	
	U.S.	121	4.96	0.83	3.31	5.79	85.12	7.40 .08
C) Instruct witnesses to select the person they saw commit the crime	Canada	78	64.10*	3.85	7.69	6.41	17.95*	
	U.S.	121	38.02*	9.92	8.26	6.61	37.19*	14.93 .004

Note: Fisher's tests were conducted for differences between jurisdictions across the five response categories. Numbers in columns are the percentages of respondents choosing that option. Asterisks indicate significant post-hoc comparisons (Canada versus U.S.) at .01 level (Bonferroni corrected).

E) Sequential lineups: Accurately inform the witness of how many people they will be seeing	Canada	60	48.33*	5.00	5.00	5.00	36.67*	14.51	.003
	U.S.	46	19.56*	0.00	6.52	4.35	69.57*		
F) How often lineups are conducted by the officer in charge of the case	Canada	117	54.70*	7.69	14.53	18.80*	4.27	117.23	<.001
	U.S.	167	5.99 *	2.40	8.98	69.46*	13.17		
G) How often lineups are conducted by an officer not otherwise involved in the case and who does not know which lineup member is the suspect (double-blind administration)	Canada	117	9.40*	10.26*	8.55	24.79*	47.01*	144.04	<.001
	U.S.	167	56.89*	25.15*	10.18	4.19*	3.59*		

Note: Fisher's tests were conducted for differences between jurisdictions across the five response categories. Numbers in columns are the percentages of respondents choosing that option. Asterisks indicate significant post-hoc comparisons (Canada v US) at .01 level (Bonferroni corrected).

Table 5. Percentage of Canadian ($N = 67$) and U.S. officers ($N = 128$) surveyed who selected lineup fillers based on their similarity to the suspect with regard to 27 characteristics

Criteria	CANADA			USA		
	Rarely	Description	Always	Rarely	Description	Always
Race/Ethnic group	0.00	16.42	83.58	1.56	1.56	96.88
Age	0.00	25.37	74.63	0.78	15.63	83.59
Background of the Photo	23.88	2.99	73.13	16.41	10.16	73.44
Photographic Quality	25.37	8.96	65.67	14.84	10.16	75.00
Hair Colour	8.96	29.85	61.19	5.47	10.16	84.38
Hair Length	7.46	37.31	55.22	5.47	14.06	80.47
Facial Hair	5.97	38.81	55.22	3.13	19.53	77.34
Eye-gaze	38.81	7.46	53.73	34.38	10.94	54.69
General Facial Features	25.37	25.37	49.25	18.75	21.09	60.16
Hair Style	17.91	38.81	43.28	14.06	21.88	64.06
Photo Recency	52.24	5.97	41.79	34.38	16.41	49.22
Skin Complexion	26.87	35.82	37.31	7.81	25.78	66.41
Eye Glasses	19.40	43.28	37.31	10.94	32.03	57.03
Weight/Build	23.88	43.28	32.84	16.41	22.66	60.94
Face Shape	47.76	22.39	29.85	27.34	32.81	39.84
Distinguishing Marks	35.82	37.31	26.87	23.44	34.38	42.19

Eye Colour	47.76	29.85	22.39	22.66	34.38	42.97
Pose	68.66	8.96	22.39	50.78	17.97	31.25
Nose	43.28	37.31	19.40	32.81	41.41	25.78
Lips	49.25	31.34	19.40	36.72	38.28	25.00
Height	53.73	29.85	16.42	42.19	18.75	39.06
Forehead	56.72	28.36	14.93	42.19	35.16	22.66
Chin	55.22	29.85	14.93	38.28	39.84	21.88
Cheeks	58.21	28.36	13.43	37.50	39.06	23.44
Eyebrows	55.22	32.84	11.94	37.50	38.28	24.22
Neck	64.18	26.87	8.96	42.19	35.94	21.88
Clothing	86.57	5.97	7.46	60.94	18.75	20.31

Note: Response options were: “Rarely”, “Only if included in the witness’ description” (description), and “Always”. The options are ordered from greatest to least based on the Canadian officers’ “always” responses.

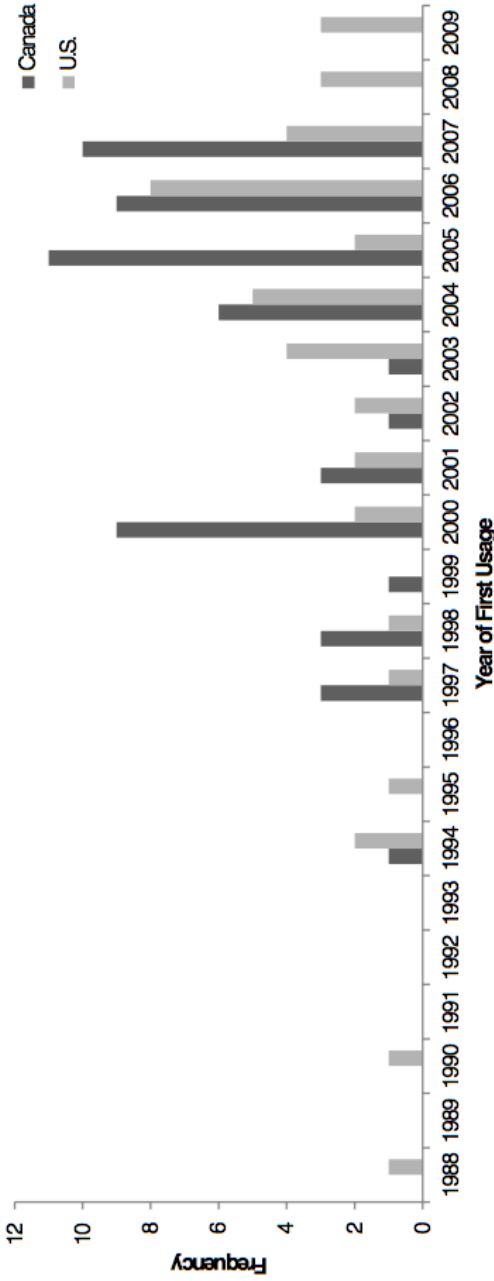


Figure 1. Year in which Canadian and U.S. officers surveyed reported first using the sequential lineup.
 Note: The U.S. best practice recommendations came into effect in 1999, the Sophonow best practice recommendations came into effect in 2001, and the RPMJ best practice recommendations came into effect in 2005.

Police Vehicle Searches under the Fourth Amendment: Evaluating Chiefs' Perceptions of Search Policies and Practices after *Arizona v Gant*

CHRISTOPHER TOTTEN* AND
SUTHAM COBKIT**

ABSTRACT

In 2009, in *Arizona v Gant*, the United States Supreme Court significantly changed the Fourth Amendment norms governing police searches of vehicles incident to arrest. To date, there is no known empirical study of police practices and policies regarding these norms. This survey study aims to fill this “gap” by surveying police chiefs from large, populated U.S. cities concerning their perceptions of police practices and policies in the area of vehicle searches, in particular vehicle searches incident to arrest. Specifically, the study aims to examine chiefs' perceptions of the frequency with which police officers search vehicles under *Gant*/search incident

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doctrine compared to other procedures for searching vehicles under the Fourth Amendment (i.e., the impoundment/inventory procedure, the automobile search exception, the consent search exception, and searches under warrant). In addition, the survey explores chiefs' perceptions regarding the implications of *Gant* for police vehicle searches incident to arrest specifically and police vehicle searches more broadly. In general, the study's detailed findings align with current Fourth Amendment norms in the police vehicle search context; that is, chief perception of officer policies and practices related to vehicle searches aligns with Fourth Amendment requirements in this area, including search incident to arrest law under *Gant*. In addition, almost half of the chiefs surveyed indicated that officers have searched vehicles less often incident to arrest because of *Gant*. This latter finding is noteworthy, and appears to align with the limitations imposed by *Gant* on vehicle searches incident to arrest. Various implications of the findings for the police and the judiciary are explored.

I. INTRODUCTION

This empirical study of law enforcement chiefs from large, populated cities throughout the United States examines police department practices and policies in the area of vehicle searches, in particular vehicle searches incident to arrest. The legal norms regarding the latter searches substantially changed in 2009 as a result of the landmark United States Supreme Court case of *Arizona v Gant*.¹ This survey study is the first known empirical study on the implications of *Gant* for police vehicle search practices and policies. Specifically, the study aims to examine police chiefs' perceptions of the frequency with which police officers search vehicles under *Gant*/search incident doctrine, compared to other procedures for searching vehicles under the Fourth Amendment (i.e., the impoundment/inventory procedure, the automobile search exception, the consent search exception, and searches under warrant). In addition, the survey explores police chiefs' perceptions regarding the implications of *Gant* for police vehicle searches incident to arrest specifically and police vehicle searches more broadly.

Though the underlying jurisprudence (i.e., *Gant* and its progeny) forming the basis of this study's focus derives from courts in the United

¹ *Arizona v Gant*, 129 S Ct 1710 (USSC 2009) [*Gant*].

States, the study's findings have implications beyond the American context. For example, the study provides broader insights into possible interactions between police perception and legal rules, including jurisprudentially derived rules. In particular, the study sheds light on how changes to legal rules, including those of a constitutional variety, may have implications for police perception of workplace conduct or practices. This conduct invariably comprises certain police work aimed at investigating and solving crimes, such as investigatory searches of vehicles and other locations (the former being the focus of the current study). It is also worth noting that some of the police investigatory practices and techniques examined in this study (e.g., searches under consent or warrant) may be utilized by law enforcement in jurisdictions outside the United States. Accordingly, this study provides much-needed exploration of the potential intersections between evolving legal norms concerning critical police work-place practices, on the one hand, and law enforcement perception of those practices, on the other hand. The need is amplified in this case since both the underlying police conduct in question (i.e., vehicle searches) and the legal norms controlling it (e.g., *Gant*) have the potential to impact and shape individuals' constitutional privacy rights. In particular, this study finds that in the wake of *Gant*, a majority of police chiefs perceive that officers in their departments search vehicles incident to the arrest of vehicle occupants less or somewhat less frequently than they search vehicles under (1) the impoundment and inventory exception to the Fourth Amendment warrant requirement, and (2) the consent exception to the warrant requirement.² On the other hand, a majority of chiefs report that officers search vehicles incident to the arrest of vehicle occupants more or somewhat more often than they search vehicles under warrant.³ The comparative data between police searches incident to arrest (*Gant*) and the automobile search exception was less conclusive, with the largest percentage of chiefs perceiving that officers search vehicles incident to the arrest of vehicle occupants less or somewhat less frequently than they search vehicles under the automobile exception.⁴ Nonetheless, a significant percentage of chiefs reported that their officers either search vehicles incident to arrest more or somewhat more frequently than they search vehicles under the automobile

² See Part IV (Findings) and Table 1, *below*.

³ *Ibid.*

⁴ *Ibid.*

exception or they (the officers) search vehicles at the same frequency under both exceptions (i.e., the search incident and automobile exceptions).⁵ In addition, the survey study revealed that the majority of chiefs perceived that officers in their departments did not search vehicles less often incident to the arrest of a vehicle occupant because of *Gant*.⁶ Finally, a substantial majority of chiefs noted that officers did not search vehicles less often overall because of *Gant*.⁷

In general, the empirical survey findings align with current Fourth Amendment norms in the police vehicle search context; that is, police chief perception of officer policies and practices related to vehicle searches align with Fourth Amendment requirements in this area, including search incident to arrest law under *Gant*.⁸ However, the comparative findings regarding chief perception of search incident doctrine in the vehicle context and the automobile exception are less conclusive, and may reflect the complexities of the legal landscape in these areas.⁹ In addition, police chief perception that officers have not searched vehicles less often overall because of *Gant* may reflect the fact that officers have a variety of procedures and tools available to them under the law to search vehicles (i.e., apart from *Gant* and search incident doctrine). Lower courts have also been sanctioning police vehicle searches under these alternative procedures, even when *Gant* disallows the search in question.¹⁰ Finally, the study's finding that a slim majority of chiefs reported that officers have not searched vehicles less frequently incident to arrest because of *Gant* may reflect the nature of *Gant*'s evidentiary prong, as well as the expansive interpretation of the prong by numerous lower courts.¹¹ However, the fact that nearly half of the chiefs surveyed indicated that officers have searched vehicles less often incident to arrest because of *Gant* is also noteworthy, and appears to

⁵ *Ibid.*

⁶ See Part IV (Findings) and Table 2, *below*.

⁷ See Part IV (Findings) and Table 3, *below*.

⁸ See Part IV (Findings) and Table 3 and Part V (Analysis), *below*.

⁹ See Part V (Analysis), *below*.

¹⁰ *Ibid.*

¹¹ *Ibid.*

align with the limitations placed by *Gant* on vehicle searches incident to arrest.¹²

Part II of this study explains the *Arizona v Gant* decision and the previous landmark, United States Supreme Court case in the vehicle search incident to arrest context, *New York v Belton*.¹³ Part III consists of the study's methodology, including information regarding the respondents for the survey (i.e., the police chiefs) as well as the survey questions. This part also includes a brief review of the relevant literature. Part IV explains the study's findings concerning police chief perception of officer practices and policies in the area of vehicle searches under the Fourth Amendment, including vehicle searches incident to arrest (i.e., *Gant*). The findings are also summarized in three tables at the end of Part IV. Part V analyzes the study's findings and offers possible conclusions that can be derived from the survey data.

II. ARIZONA V GANT¹⁴

This Part consists of a detailed explanation of the recent, landmark United States Supreme Court case of *Arizona v Gant*, which significantly changed search incident to arrest law in the vehicle context. The Part also addresses previous, landmark United States Supreme Court cases in this context, *New York v Belton* and *Thornton v United States*.¹⁵

In *Gant*, two police officers knocked on the door of a home, and asked to speak to its owner. The defendant, *Gant*, who answered the door, explained that the owner was not present at the time but would return later.¹⁶ After leaving the home, the officers discovered through a records check that there was an outstanding warrant for *Gant*'s arrest for driving with a suspended license.¹⁷ Upon their return to the same home where they

¹² *Ibid.*

¹³ *New York v Belton*, 453 US 454 (USSC 1981) [*Belton*].

¹⁴ Part II includes an excerpt from Christopher D Totten, "Arizona v. Gant and Its Aftermath: A Doctrinal 'Correction' Without the Anticipated Privacy 'Gains'" (2010) 46 *Crim L Bull* 1293 [*Aftermath*], with permission © 2010 Thomson Reuters. Note that several edits were made to the excerpt for the purpose of clarity and readability.

¹⁵ *Thornton v United States*, 541 US 615 (USSC 2014) [*Thornton*].

¹⁶ *Gant*, *supra* note 1 at 1710, 1714–1715.

¹⁷ *Ibid* at 1715.

had spoken with Gant earlier in the day, the officers noticed a man in the back of the home and a woman in a vehicle parked in the front of the home. Upon the arrival of a third officer to the home, the man was arrested for providing a false name and the woman was arrested for drug paraphernalia possession. Both of these arrestees were then handcuffed and placed in separate patrol cars.¹⁸ After these events transpired, Gant arrived at the home in his car. He parked his car on the driveway, exited the vehicle, and closed the door.¹⁹ One of the officers, who at the time was approximately thirty (30) feet away from Gant, called to him. Gant and this officer walked towards each other, meeting approximately ten to twelve (10–12) feet from Gant’s car.²⁰ Upon their meeting, the officer arrested and handcuffed Gant.²¹ With no other police vehicles available in which to place Gant, the arresting officer called for “back-up.” When two “back-up” officers arrived, Gant was placed handcuffed in the backseat of their locked patrol car.²² Officers then proceeded to search Gant’s car, and found a bag of cocaine in the backseat within a jacket pocket, as well as a gun.²³

Gant was subsequently charged for drug possession and drug paraphernalia possession.²⁴ He moved to exclude the drug evidence by arguing that the police search of his vehicle violated the Fourth Amendment.²⁵

The Court in *Gant* found that under these particular factual circumstances, the search by police of the defendant Gant’s vehicle was unconstitutional under the Fourth Amendment.²⁶ In reaching its holding,

¹⁸ *Ibid.*

¹⁹ *Ibid.* Officers recognized Gant’s car as it approached the driveway, and one officer named Griffith was able to confirm that Gant was the driver of the car by shining a flashlight into the car as Gant drove by.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid* at 1714, 1723–1724. Such a ruling of an unconstitutional search would generally result in the exclusion of the evidence of the drugs found in defendant’s vehicle (e.g., absent another applicable exception to the Fourth Amendment warrant requirement rendering the search permissible). The US Supreme Court, in reaching its finding of unconstitutionality, affirmed the decision of the Arizona Supreme Court, holding that

the Court clarified existing search incident to arrest doctrine in the vehicle context; in particular, the Supreme Court squarely rejected a majority trend among lower courts since the time of *New York v Belton*, its previous foundational case in this context. Since *Belton*, lower courts increasingly read *Belton* to “allow a vehicle search [by police of the passenger compartment] incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”²⁷ The Supreme Court in *Gant* rejected this interpretative reading of *Belton* by lower courts because it was inconsistent with the justifications underlying the traditional rule allowing police to search the suspect’s “armspan,” or “reaching distance,” incident to an arrest (e.g., officer safety

the search of defendant’s vehicle was unreasonable. See *ibid* at 18. For further description of the Arizona Supreme Court’s decision, see *ibid* at 1715–1716.

²⁷ *Ibid* at 1718. According to the Court in *Gant*, “[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would thus untether the rule from the justifications underlying the *Chimel* exception [e.g., the search incident to arrest exception to the Fourth Amendment warrant requirement] — a result clearly incompatible with our statement in *Belton*” The Court in *Gant* rejected this broad reading of *Belton* because “in most cases the vehicle’s passenger compartment will not be within the arrestee’s [actual] reach at the time of the search.” For example, in most cases the officer will move the recent vehicle occupant to a location outside the reach of the vehicle’s passenger compartment and secure the occupant/arrestee in this location (i.e., the patrol car) prior to searching the vehicle. The Court in *Gant* believed this broad reading of *Belton* by the lower courts stemmed from Justice Brennan’s dissent in *Belton* where he said that that the majority opinion in *Belton* rested on “the fiction ... that the interior of the car is always within the immediate control of an arrestee who has recently been in the car” (*Gant*, *supra* note 1 at 1718, citing *Belton*, *supra* note 13 at 466). Note that the dissent in *Gant* believed that *Belton* itself allowed vehicle searches incident to an arrest of an occupant even if there was no longer any possibility of access to the vehicle by the occupant (see *Gant*, Alito J, dissenting at 1). For a further discussion of Justice Alito’s dissent in *Gant*, and for the list of justices who joined Alito’s dissent, see *infra* note 40. The holding in the US Supreme Court’s opinion in *Belton* read as follows: “When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile” (see *Belton*, *supra* note 13 at 460). Previous to its holding statement, the Court in *Belton* also said, “Our reading of the cases [interpreting the scope of search incident to arrest doctrine in the context of vehicles] suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]’” (*Belton*, *supra* note 13, citing *Chimel v California*, 395 US 752 (USSC 1969) at 763 [*Chimel*]).

and evidence preservation as established in the Court's foundational *Chimel* decision), and because of the realities of police-citizen encounters in the particular context of vehicle searches and arrests.²⁸ For example, most vehicle occupants who are arrested by police will not be within actual "reaching distance" of their passenger compartment at the time of the vehicle search because they will be secured with handcuffs, or in some other way, in the officer's patrol car; hence, these occupants will not be able to destroy evidence located in the compartment or retrieve a weapon from the compartment capable of causing harm to the officer. Thus, the prevailing, expansive reading of *Belton* effectively meant that in many cases courts were sanctioning searches by police incident to the arrest of vehicle occupants where the traditional justifications underlying search incident doctrine were entirely absent. Accordingly, the Court specifically held in *Gant* that "police [are authorized] to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."²⁹

Theoretically speaking, this holding statement could have completed the Supreme Court's legal opinion, as it had seemingly at this point removed the aforementioned conceptual inconsistency reflected in the post-*Belton* interpretative trend among lower courts. But the Court in *Gant* continued to add to its holding, indicating that "[a]lthough it does not follow from *Chimel* [e.g., the Court's seminal case establishing the modern search incident to arrest doctrine along with the doctrine's scope and underlying justifications], we also conclude that circumstances unique to the [vehicle] context justify a search incident to a lawful arrest when it is 'reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.'"³⁰

²⁸ *Gant*, *supra* note 1 at 1718. For a discussion of the conflict between lower court interpretation of *Belton* and the *Chimel* rule, see also *supra* note 27 and accompanying text. Regarding the permissible scope of a traditional police search incident to a lawful custodial arrest (e.g., outside the vehicle context), the Court in *Chimel* found that "[t]here is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." This is often referred to as the "armspan" or "wingspan" rule. For a good discussion of the underlying justifications for traditional search incident to arrest doctrine (e.g., officer safety and evidence preservation), see *Chimel*, *supra* note 27 at 762-763.

²⁹ *Gant*, *supra* note 1 at 1719.

³⁰ *Ibid* citing *Thornton*, *supra* note 15 at 632. See also *Gant*, *supra* note 1 at 1715, where the

Applying its two-pronged holding statement, or test, to the facts of the case, the Court found that defendant *Gant* was neither in reaching distance of his vehicle at the time of the police search nor was there a possibility that police could find evidence related to his offense of arrest (e.g., driving with a suspended license). Concerning the first prong of the *Gant* test (the “safety” prong), the defendant could not have reached into, or accessed, the passenger compartment of his vehicle because he, along with the other arrestees at the scene, was outnumbered by police officers.³¹ In addition, the defendant, along with the other arrestees, was “handcuffed and secured in separate patrol cars”³² prior to the search by police of defendant’s car.³³ Regarding the second prong of *Gant* (e.g., the “evidentiary basis” prong),

Court proceeded to give examples of when this part of its holding, or rule, would be satisfied. For example, according to the Court, “in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence [e.g., to the crime of arrest].” However, in “other [cases], including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.” Note that, in both *Belton* and *Thornton*, the underlying offenses of arrest were drug crimes. The second, “evidentiary” prong of *Gant* has its source in a separate opinion in *Thornton* by Justice Scalia. See *Thornton*, *supra* note 15. The majority opinion in *Thornton* held that “*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both occupants and recent occupants” (*Thornton* at 622) <[Thus, *Thornton* extended the *Belton* rule to those situations where the officer initiated contact with an arrestee outside but near the arrestee’s vehicle. For a discussion of *Chimel*, see *supra* note 27.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004502347&pubNum=0000708&originatingDoc=1b1f5afecfbc211dfb11b998a49d26673&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&tr ansitionType=DocumentItem&contextData=(sc.UserEnteredCitation)>.</p>
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³¹ There were five officers to the three arrestees at the scene. *Gant*, *supra* note 1 at 1719. Note that while the first part of the *Gant* rule has been termed the ‘safety’ prong, it is possible that an unsecured arrestee within “reaching” distance of the passenger compartment may not only be able to gain access to a weapon in that compartment to use against an officer or other “third” party but may also be able to grab evidence from that area for purposes of destroying or concealing it. Thus, this prong perhaps could be better termed the “emergency” prong because it allows police to search the passenger compartment in an emergency to prevent harm to themselves or third parties from a weapon, and to prevent evidence destruction or concealment. For purposes of this prong of the *Gant* rule, an emergency arises when the arrestee is unsecured and within reaching distance of the passenger compartment (e.g., at the time of the police search).

³² *Gant*, *supra* note 1 at 1719.

³³ *Ibid.*

because the defendant was arrested for driving with a suspended license, the Court concluded that “police could not expect to find evidence in the passenger compartment of [defendant’s] car.”³⁴

Interestingly, the Court rejected the broad reading of *Belton* previously endorsed by lower courts—that police may search the passenger compartment of a vehicle incident to an arrest of a vehicle occupant regardless of the arrestee’s lack of closeness or access to that compartment in an individual case—because such a reading both fails to respect important Fourth Amendment privacy interests and does not significantly contribute to law enforcement interests. The Court noted that while citizens have less privacy interests in vehicles than homes, the privacy interest afforded vehicles is nevertheless “important and deserving of constitutional protection.”³⁵ In addition, according to the Court, the broad reading of *Belton* does not significantly contribute to law enforcement interests because it does not provide sufficient guidance, or clarity, to officers conducting searches of vehicles incident to the arrest of recent occupants.³⁶ Finally, the Court rejected a broad reading of *Belton* because officer safety and concerns regarding evidence destruction or concealment by vehicle occupants, are

³⁴ *Ibid.* In sum, the Court stated that “[b]ecause police could not reasonably have believed either that [defendant] Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.”

³⁵ *Ibid.* at 1720. Regarding the privacy interests, the Court elaborated: “It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense [and is arrested for that offense], when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”

³⁶ *Ibid.* at 1720–1721. The Court said that “at the same time [the State] undervalues these privacy concerns [in vehicles], the State exaggerates the clarity its [broad] reading of *Belton* provides.” For example, according to the Supreme Court, “[lower] [c]ourts that have read *Belton* expansively are at odds regarding how close in time [the vehicle search must be] to the arrest and how proximate to the arrestee’s vehicle an officer’s first contact with the arrestee must be to bring the encounter within *Belton*’s purview, and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene.”

adequately addressed by both its more narrow reading of *Belton* as well as by other exceptions to the Fourth Amendment warrant requirement in the vehicle context. For example, even under the Court's holding in *Gant*, officers may still search the passenger compartment of a vehicle incident to an occupant's arrest if the occupant is "within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest."³⁷ In addition, under another exception to the warrant requirement dealing with vehicles, officers may conduct a protective search or "frisk," of the passenger compartment of a vehicle for weapons if they have reasonable suspicion that any vehicle occupant or recent occupant is dangerous and may gain immediate access to a weapon within the vehicle.³⁸ Moreover, under the automobile exception to the warrant requirement, if an officer has probable cause to believe that a vehicle contains contraband, the officer may search any part of the vehicle capable of containing this contraband.³⁹

Finally, the Court took issue with the dissent's argument that police reliance on an expansive *Belton* rule for twenty-eight years justified maintaining the rule. In particular, the Court found that the privacy interests possessed by citizens in their vehicles outweighed any law enforcement reliance interest on a broad *Belton* rule:

Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result [of adherence to a broad reading of *Belton*]. The fact that the law enforcement community may view the [broad reading] of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights protected.⁴⁰

³⁷ *Ibid* at 1721.

³⁸ *Ibid* citing *Michigan v Long*, 463 US 1032 (USSC 1983) [*Long*].

³⁹ *Gant*, *supra* note 1 at 1721 citing *US v Ross*, 456 US 798 (USSC 1982) [*Ross*]. The Court noted that the automobile exception to the Fourth Amendment under "Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader [e.g., it includes areas outside the passenger compartment of the vehicle, including the trunk]."

⁴⁰ *Gant*, *supra* note 1 at 1722-1723. The principal dissenting opinion was written by Justice Alito and joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer. The majority, unlike the dissent, believed that a broad reading of *Belton* was not required under the principle of *stare decisis*. The Court said, "We have never relied upon *stare decisis* to justify the continuance of an unconstitutional police practice" (at 1722).

III. METHODOLOGY

This part will first discuss the respondents or samples (i.e. the police chiefs) involved in the survey study. The part will then turn to an explanation of the sample instrument (i.e., the survey) used in the study, including the survey questions. Finally, the part will turn to a brief review of the relevant, existing literature.

A. Samples

For this study, surveys were mailed to police chiefs in 250 large cities in the United States that have a population of 100,000 or more. Chiefs' names and addresses were obtained from the 2014 National Directory of Law Enforcement Administrators. On September 8, 2015, cover letters and surveys were mailed with a return, self-addressed stamped envelope, asking the chiefs about their police department's practices and policies on vehicle searches, in particular vehicles searches incident to arrest under *Gant*. A follow-up survey was conducted on October 16, 2015. In total, forty-two usable surveys were returned (i.e., a 16.8 percent response rate). (Note: Because not every survey respondent opted to answer all of the questions appearing on the survey, some of the numbers for certain responses in this section may not equal 42).

The mail survey method was chosen for this study for three principal reasons. First, for surveys such as this one with a national scope, mailing the survey entails considerable time and cost savings compared to other available methods (e.g., a survey using a one-on-one interview approach).

Also, the majority believed that *Gant* was factually distinguishable from *Belton* (and *Thornton*). In this regard, the Court said, "The safety and evidentiary interests that supported the search in *Belton* simply are not present in this case. Indeed, it is hard to imagine two cases that are factually more distinct, as *Belton* involved one officer confronted by four unsecured arrestees suspected of committing a drug offence and this case involves several officers confronted with a securely detained arrestee apprehended for driving with a suspended license. This case is also distinguishable from *Thornton*, in which the [defendant] was arrested for a drug offense." Justice Breyer wrote a brief, separate dissenting opinion in which he explained that his agreement with the other dissenting judges stemmed from the fact that he did not believe there existed sufficient justification to overrule *Belton*. Breyer joined the principal dissent except for its final section dealing with the other dissenters' argument that *Belton* was not poorly reasoned (and therefore should not be overruled). See Breyer J's dissenting reasons at 1725-1726. Justice Scalia wrote a concurring opinion.

Second, a mail survey allows the respondent to answer each question in writing more freely, without concern or fear of being pressured to do so by an interviewer. In other words, the respondent can take more time to answer each question. Third, mail surveys provide greater assurance for the respondents that their answers will be either anonymous or confidential, making them more willing to participate in the study.

With respect to the chiefs' highest level of education, twenty-eight (73.7%) chiefs or respondents described having a master's degree or above, and six (15.8%) reported that they had obtained a bachelor's degree. The remaining four respondents (10.5%) indicated that they possessed an associate's degree or "some college." Regarding the duration or length of service in law enforcement, six (15.8%) respondents described being in law enforcement for less than 25 years, while the remaining thirty-two respondents (84.2%) indicated having been in law enforcement for more than 25 years. Finally, thirty-two (82.1%) respondents stated that their police department offered a training program or workshop on the propriety of vehicle searches and arrests in the past year. Twenty-three respondents (74.2%) stated that most training programs were fewer than five hours in duration. Accordingly, based on this data, the three factors of graduate education, length of service, and training reflect the fact that the vast majority of the respondents had more than sufficient background, knowledge, and experience in law enforcement and vehicle searches to respond to the study's survey. Overall, the respondents' personal and law enforcement background make their responses to the survey more credible and not based on mere speculation.

Regarding the number of vehicle searches incident to arrest performed by the chiefs' police departments in the preceding year, the average number of searches was 314. Concerning how many arrests were made by the chiefs' departments over the previous year, the average number of arrests was 21,528. Approximately 4,119 (19.1%) of these arrests constituted arrests of current or recent vehicle occupants.

The mailed survey instrument contained six questions on police practices and policies related to vehicle searches. The chiefs were asked: (1) whether officers in their departments currently search vehicles based on or incident to the arrest of a vehicle occupant more, the same, or less than they search vehicles under the automobile search exception; (2) whether officers in their departments currently search vehicles based on or incident to the arrest of a vehicle occupant more, the same, or less than they search vehicles

under the impoundment and inventory procedure; (3) whether officers in their departments currently search vehicles based on or incident to the arrest of a vehicle occupant more, the same, or less than they search vehicles under the consent search exception; (4) whether officers in their departments currently search vehicles based on or incident to the arrest of a vehicle occupant more, the same, or less than they search vehicles by obtaining a warrant; (5) whether in approximately the last two years, officers have searched vehicles less often based on or incident to the arrest of that vehicle's occupant because of the safety and evidentiary prongs of *Gant*; and (6) whether in approximately the last two years, officers have searched vehicles less often overall because of the safety and evidentiary prongs of *Gant*.⁴¹ Regarding questions one through four, respondents could select from the following options listed on the survey in order to indicate the frequency with which officers search vehicles incident to arrest, on the one hand, compared to the other vehicle search procedures, on the other hand: More, Somewhat More, the Same, Somewhat Less, Less. For these questions (i.e., one through four), the possible mean scores ranged from 1 to 5, with 1 meaning "Less" and 5 meaning "More." The chiefs' responses on questions one through four are summarized in Table 1 in the Findings section. For question numbers 5 and 6 above, which appear in Table 2 in the Findings section, the chiefs could respond by simply indicating "yes" or "no."

B. Relevant Literature

Though there are no known studies on police perception of vehicle searches incident to arrest under *Gant*, there are a few previous empirical studies focused on the related topic of officer knowledge of search and

⁴¹ Note that these latter two survey questions required the chiefs to consider certain potential impacts of *Gant* on police vehicle search practices. In a related study, the co-authors of the current study found that the vast majority of chiefs (88.1%) that were surveyed had heard of *Gant*. See Christopher D Totten & Sutham Cobkit, "Police Vehicle Searches Incident to Arrest: Evaluating Chiefs' Knowledge of *Arizona v Gant*" (2017) 11 NYU JL & Liberty 257 [*Evaluating Chiefs*]. See *ibid* at 276, Table 3. Overall, however, this related study concluded that chief knowledge on search incident to arrest law in general and *Gant* in particular was "rather uneven." See *ibid* at 258, 273–276. A future study may examine in more depth the relationship, if any, between police knowledge of *Gant*, on the one hand, and police perception of vehicle searches and their frequency following *Gant*, on the other hand. A future study may also include "line," or patrol, officers.

seizure laws. For example, Perrin, Caldwell, Chase, and Fagan conducted a survey study on overall police knowledge of search and seizure laws. This study involved mostly officers and detectives from a single county in California. The successful response rate regarding these laws was rather low (i.e., approximately 50%).⁴² In another study, Eugene Hyman concluded that “the average officer did not know or understand proper search and seizure rules,”⁴³ and that “supervisors and senior officers only achieved slightly improved scores.”⁴⁴ Similarly, research undertaken by Stephen Wasby found “recruit training is sadly lacking in criminal procedure content”⁴⁵ and “[t]he spirit and tone of communication about the law, particularly when the law favorable to defendants’ rights, is often negative, with the need for compliance stressed only infrequently.”⁴⁶ Moreover, the current study’s authors surveyed law enforcement chiefs regarding their understanding of search and seizure law (i.e., the knock-and-announce rule). The authors concluded that chiefs understood the rule in factual situations involving both searches⁴⁷ and arrests.⁴⁸ However, these same authors also found that police chief knowledge of search incident to arrest law in general and *Gant* in particular was “rather uneven.”⁴⁹

In addition, Heffernan and Lovely found that approximately 50% of law enforcement officers in their study, committed intentional or

⁴² See L Timothy Perrin et al, “If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule” (1998) 83 Iowa L Rev 669 at 712–713, 724–725, 735. Perrin et al. noted “[c]lose to half of those participating in the study held the rank of officer at the time they responded to the questionnaire, about one-fifth held the rank of detective, and the remainder, about one-third, held a rank above detectives” (at 719).

⁴³ Eugene Michael Hyman, “In Pursuit of a More Workable Exclusionary Rule: A Police Officer’s Perspective” (1979) 10 PAC LJ 33 at 47.

⁴⁴ *Ibid.*

⁴⁵ Stephen L Wasby, “Police Training about Criminal Procedure: Infrequent and Inadequate” (1978) 7 Policy Studies J 461 at 464.

⁴⁶ *Ibid* at 466.

⁴⁷ See also Christopher D Totten & Sutham Cobkit, “The Knock and Announce Rule and Police Searches after *Hudson vs. Michigan*: Can Alternative Deterrents Effectively Replace Exclusion for Rule Violations?” (2012) 15:3 New Criminal L Rev 446.

⁴⁸ See Christopher D Totten & Sutham Cobkit, “The Knock and Announce Rule and Police Arrests: Evaluating Alternative Deterrents to Exclusion for Rule Violations” (2013) 48 USF L Rev 71 at 99–100.

⁴⁹ See *Evaluating Chiefs*, *supra* note 41 at 273–276.

unintentional errors in applying search and seizure laws.⁵⁰ Finally, Orfield undertook two studies on the exclusionary rule, which is one remedy for police violations of search and seizure laws. Orfield concluded that officers generally know the reasons for evidence exclusion in the cases they work⁵¹ and approach subsequent searches with more caution when evidence has been excluded in their cases.⁵²

IV. FINDINGS

Based on the data collected from the survey (see Table 1 following this part), the majority of chiefs (56%) reported that police officers in their departments search vehicles incident to the arrest of a vehicle occupant less or somewhat less frequently than they search vehicles under the impoundment and inventory exception to the Fourth Amendment warrant requirement. Conversely, chiefs noted that only a small minority of officers in their departments (14.6%) searched vehicles incident to arrest more or somewhat more frequently than they searched vehicles through the impoundment and inventory exception or procedure. Indeed, this question or finding regarding the comparative frequency with which police search

⁵⁰ William C Heffernan & Richard W Lovely, “Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law” (1991) 24 U Mich JL Ref 311 at 348. See also Ronald L Akers & Lonn Lanza-Kaduce, “Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms” (1986) 2 Sam Houston State U Research Bull at 1-6 (surveying over 200 officers across two cities with 19% of respondents conceding that they performed searches of “questionable authenticity” at least once each month and 4% acknowledging that they knowingly committed invalid searches at least once a month).

⁵¹ Myron Orfield, Jr, “The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers” 54 U Chicago L Rev 1016 at 1017-18, 1027-29 [*Police Study*].

⁵² *Ibid.* Orfield also determined that the exclusionary rule assists officers in mastering search rules (noting exclusion of evidence promotes the implementation of certain training programs to assist officers in complying with search and seizure laws); see also Myron Orfield, Jr, “Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts” (1992) 63 U Colo L Rev 75 at 80-82 [*Courts Study*] (evidence suppression helpful in teaching police about search and seizure laws). Orfield’s police study involved patrol or “line” officers as well as detectives trained in drug detection and investigation. Orfield, *Police Study*, *supra* note 51, at 1024-1025. Orfield’s courts study included judges, public defenders, and prosecutors from an Illinois county. See Orfield, *Courts Study* at 81-84.

vehicles incident to arrest compared to the impoundment and inventory procedure received the lowest mean score (i.e., 2.20). Similarly, the majority of the chiefs (52.4%) reported that police officers in their departments search vehicles less or somewhat less under the search incident to arrest exception than they search vehicles under the consent search exception to the Fourth Amendment. Only 14.3 percent of chiefs stated that officers search vehicles more or somewhat more frequently incident to the arrest of a vehicle occupant than they search vehicles under the consent search exception.

However, a sizeable majority of chiefs (59.6%) indicated that officers currently search vehicles incident to the arrest of a vehicle occupant more or somewhat more than they obtain warrants to search vehicles. On the other hand, 28.5% of chiefs reported that officers search vehicles incident to arrest less or somewhat less than they search vehicles by obtaining a warrant. Indeed, this question or finding regarding the comparative frequency with which police search vehicles incident to arrest compared to under warrant, received the highest mean score (i.e., 3.43).

Regarding the automobile exception to the Fourth Amendment, the largest percentage of chiefs (45%) stated that officers in their departments search vehicles incident to the arrest of vehicle occupants less or somewhat less frequently than they search vehicles under the automobile exception. But 30% of chiefs reported that officers search vehicles at the same frequency under both exceptions (i.e., the search incident to arrest exception and the automobile exception). In addition, 25% of chiefs indicated that officers actually search vehicles incident to the arrest of vehicle occupants more or somewhat more frequently than they search vehicles under the automobile exception. The mean score for the automobile exception question or finding was 2.55.

Moreover, based on the survey data (see Table 2 following this part), the majority of chiefs (55%) report that in the last two years preceding the survey, officers in their departments did not search vehicles less often incident to the arrest of a vehicle occupant because of the safety and evidentiary prongs of *Gant*. Finally, in the last two years preceding the survey, a strong majority of chiefs (65%) reported that officers in their departments did not search vehicles less often overall because of the safety and evidentiary prongs of *Gant*. The latter finding is reflected in Table 3 following this part.

Table 1. Respondents’ Responses Regarding Police Practices and Policies on Vehicle Searches (N = 42)

Question	More or Somewhat More	The Same	Less or Somewhat Less	Mean Score
Officers in your department currently search vehicles based on or incident to an arrest of a vehicle occupant_____than they search vehicles under the <i>automobile search exception</i>	10 (25.0%)	12 (30.0%)	18 (45.0%)	2.55
Officers in your department currently search vehicles based on or incident to an arrest of a vehicle occupant_____than they search vehicles under the <i>impoundment search exception.</i>	6 (14.6%)	12 (29.3%)	23 (56.0%)	2.20
Officers in your department currently search vehicles based on or incident to an arrest of a vehicle occupant_____than they search vehicles under the <i>consent search exception.</i>	6 (14.3%)	14 (33.3%)	22 (52.4%)	2.36
Officers in your department currently search vehicles based on or incident to an arrest of a vehicle occupant_____than they search vehicles by <i>obtaining a warrant.</i>	25 (59.6%)	5 (11.9%)	12 (28.5%)	3.43

Note: Scores ranged from 1 to 5, with 1 meaning less and 5 meaning more.

Table 2. Respondents’ Perception of Police Vehicle Search Incident Frequency Because of Gant (N=42)

Question	Yes	No
In approximately the last two years, officers have searched vehicles less often incident to arrest because of Gant (i.e., 2-prongs rule).	18 (45%)	22 (55%)

Table 3. Respondents’ Perception of Police Vehicle Search Frequency Because of Gant (N=42)

Question	Yes	No
In approximately the last two years, officers have searched vehicles	14 (35%)	26 (65%)

V. ANALYSIS

In general, the empirical findings consisting of the survey data align with current Fourth Amendment norms in the police vehicle search context. In particular, the chiefs’ perceptions of officer policies and practices in their departments related to vehicle searches aligns with the requirements and realities of Fourth Amendment norms in this area, including search incident to arrest law under *Gant*. For example, most chiefs (56%) report that officers in their departments search vehicles incident to the arrest of vehicle occupants less or somewhat less than they search vehicles under the impoundment and inventory procedure or exception to the Fourth Amendment.⁵³ This finding aligns with the relative easiness under current Fourth Amendment norms for police to search vehicles under the impoundment and inventory procedure compared to searching vehicles incident to arrest under *Gant*. In particular, to search under *Gant*, officers must first develop probable cause to arrest a vehicle occupant or recent occupant, and then satisfy the requirements of either the safety or evidentiary prongs of *Gant*. Even if officers meet these criteria, they are limited under *Gant* to searching the passenger compartment of the vehicle.⁵⁴

However, to search under the impoundment and inventory procedure, officers only need to identify one of many allowable justifications for impoundment.⁵⁵ Once impounded, a vehicle inventory search may be

⁵³ See Part IV (Findings) and Table 1, *above*.

⁵⁴ See *Gant*, *supra* note 1 at 1710, 1719. See also *supra* notes 29 and 30 and accompanying text (explaining safety and evidentiary prongs of *Gant*). See also *Belton*, *supra* note 13 at 460, 461 (limiting searches incident to arrest at vehicles to passenger compartments).

⁵⁵ See *South Dakota v Opperman*, 428 US 364 at 368–369 (USSC 1976) [*Opperman*] (allowing vehicle impoundment to remove any impediment to the flow of traffic and thereby promote public safety, and also to preserve evidence following a vehicular accident). See also *Opperman* at 369 (allowing impoundment as a result of parking

conducted without a warrant or probable cause, and is only limited by the internal regulations of the officer's department and the general requirement that the officer conduct the inventory for non-investigatory, administrative reasons.⁵⁶ Moreover, the United States Supreme Court has approved vehicle inventories of almost every imaginable area of the vehicle.⁵⁷ Accordingly, chief perception that officers in searching vehicles rely upon the impoundment and inventory procedure more frequently than the search incident exception aligns with the requirements and comparative flexibility of the relevant, underlying Fourth Amendment norms.

Similarly, the empirical finding that most police chiefs (52.4%) perceive that officers in their departments search vehicles under the search incident to arrest exception less or somewhat less than they search vehicles under the consent exception, aligns with Fourth Amendment laws.⁵⁸ For example, in order to search vehicles under the consent search exception, police essentially need only to obtain voluntary and knowing consent from an

violations); see also *Colorado v Bertine*, 479 US 367 (USSC 1997) [*Bertine*] (allowing impoundment following arrest of the driver); see also *United States v Ford*, 872 F.2d 1231 (6th Cir 1989) (impoundment due to driver injury); *United States v Lopez*, 547 F.3d 364 (2d Cir 2008) at 372 (driver intoxication); *United States v Mitchell*, 2013 WL 3808152 (D Fla 2013) (vehicle has stolen tires); *United States v Bizzell*, 19 F.3d 1524 (4th Cir 1994) (vehicle forfeiture); *United States v Penn*, 233 F.3d 1111 (9th Cir 2000) (driving without valid license); *United States v Cooper*, 949 F.2d 737 (5th Cir 1991) (vehicle seized as instrument of crime).

⁵⁶ See *Opperman*, *supra* note 55 at 372 (approving an inventory search of vehicle following impoundment to secure vehicle's contents). See also *Opperman* at 372 (inventories conducted according to "standard police procedures are reasonable."). See also *Bertine*, *supra* note 55 at 371 (no warrant or probable cause needed for police inventory search due to its routine nature and non-criminal, administrative purposes). See also *ibid* at 375 ("Nothing in [our previous decisions] prohibits the exercise of police discretion [in inventorying vehicles] so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity"). See *ibid* at 372 ("...inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.") See also *Florida v Wells*, 495 US 1 at 4 (1990) (inventory searches must not be for criminal, investigatory purposes).

⁵⁷ See *Bertine*, *supra* note 55 at 375 (permitting inventory search of closed backpack in passenger compartment). See also *Opperman*, *supra* note 55 at 375, n 10 (permitting inventory of glove compartment); *United States v Rankin*, 261 F.3d 735 (8th Cir 2001) (trunk); *United States v Lumpkin*, 159 F.3d 983 (6th Cir 1998) at 988 (engine compartment).

⁵⁸ See Part IV (Findings) and Table 1, *above*.

authorized person to search the vehicle. No development of probable cause by an officer is required prior to the officer searching under the consent exception.⁵⁹ In addition, such consent need not be preceded by a police instruction that the person is free to withhold consent, and in non-custodial situations no Miranda warnings need be provided.⁶⁰ Furthermore, so long as the person does not place a restriction on an area of the vehicle to search and the item or object to be searched is of relatively smaller size, police are permitted to search the entire vehicle for the object.⁶¹

In contrast, to search the more limited area of the vehicle passenger compartment incident to arrest under *Gant*, police must first develop probable cause to arrest an occupant of the vehicle and then must ensure themselves that at least one of the two, specific prongs of *Gant* is satisfied.⁶² Thus, the chiefs' report that officers search vehicles less or somewhat less

⁵⁹ See *Schneckloth v Bustamonte*, 412 US 218 at 228 (USSC 1973) [*Schneckloth*]. (“[T]he Fourth and Fourteenth Amendments require that consent not be coerced, by explicit or implicit means, by implied threat or covert force.”) See also *ibid* at 228–229 (“Just as was true with confessions the requirement of ‘voluntary’ consent reflects a fair accommodation of the constitutional requirements involved.”) Individuals authorized to give consent for a police vehicle search are those individuals whose Fourth Amendment rights would be violated if the police unreasonably searched the vehicle (i.e., those individuals whose reasonable expectations of privacy would be violated if police illegally searched the vehicle without valid consent). See *Rakas v Illinois*, 439 US 128 at 133–134 (USSC 1978). See *ibid* at 143 (The “capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”)

⁶⁰ See *Schneckloth*, *supra* note 59 at 248–249. (“Voluntariness is a question of fact to be determined from all the circumstances, and while the subject’s knowledge of a right to refuse is a factor to be taken into consideration, the prosecution is not required to demonstrate such knowledge as a prerequisite to establish a voluntary consent.”) See also generally *Miranda v Ariz*, 384 US 436 at 478–79 (USSC 1966) (noting that the warnings apply to individuals in custody who are interrogated by police).

⁶¹ See *Florida v Jimeno*, 500 US 248 at 251 (USSC 1991) [*Jimeno*] (allowing police to search a particular container in passenger compartment when defendant placed no limitation on the search of his vehicle for drugs). See also *United States v Neely*, 564 F.3d 346 at 349–351, 353 (4th Cir 2009) (restricting police search to vehicle trunk based on defendant’s consent to search only that area of vehicle). See also *Jimeno*, *supra* at 251 (absent restriction placed by defendant on scope of consent search, scope “generally defined by its expressed object”).

⁶² See generally *supra* notes 29 and 30 and accompanying text (explaining *Gant* rule or prongs).

frequently under search incident doctrine than they search vehicles under the consent exception reflects the relative ease under the Fourth Amendment with which police can obtain permission from drivers and other authorized persons to search vehicles, and the often greater, allowable scope of a consent search.

However, most chiefs (59.6%) report that police officers in their departments search vehicles incident to the arrest of vehicle occupants more or somewhat more frequently than they search vehicles under warrant.⁶³ This finding aligns with the relatively stricter requirements under the law for obtaining a search warrant. For example, to obtain a warrant to search a vehicle, officers must prepare an affidavit establishing probable cause to search a particular vehicle for contraband, and then present the affidavit to a judge under oath. In turn, the judge must review the affidavit and decide whether it merits the issuance of a search warrant.⁶⁴ These stricter requirements consume valuable officer time and energy; in contrast, officers can search a vehicle incident to the arrest of a vehicle occupant on a public roadway without obtaining a search warrant (or an arrest warrant, for that matter). Instead, in order to search a vehicle incident to arrest on a public roadway, officers under *Gant* need only develop probable cause for the occupant's arrest while at the scene of the vehicle stop. Based on the arrest, police may search the vehicle's passenger compartment without a warrant provided one of the two *Gant* prongs is satisfied. Significantly, under the search incident doctrine in this context, police need not present the probable cause evidence underlying the arrest or search to a judge for evaluation.⁶⁵ Accordingly, the fact that it is generally quicker and less cumbersome for officers to search vehicles incident to arrest compared to with a warrant may explain why the majority of chiefs report that officers search vehicles more frequently using the former method.

The findings consisting of the comparative data between vehicle searches incident to arrest and searches under the automobile exception appear to be less conclusive and more nuanced. On the one hand, the largest percentage of chiefs (45%) report that their officers search vehicles

⁶³ See Part IV (Findings) and Table 1, *above*.

⁶⁴ See US Const amend IV; see also generally *Warden (Maryland Penitentiary) v Hayden*, 387 US 294 (USSC 1967). See also *Coolidge v New Hampshire*, 403 US 443 at 467 (USSC 1971).

⁶⁵ See generally *supra* notes 29 and 30 and accompanying text (explaining *Gant* rule or prongs).

incident to the arrest of vehicle occupants less or somewhat less frequently than they search vehicles under the automobile search exception.⁶⁶ This finding may stem from the fact that in order to search a vehicle incident to arrest under *Gant*, an officer must first establish probable cause to arrest an occupant. If the occupant/arrestee is secured and no longer within reaching distance of the vehicle (i.e., a likely possibility), the officer must then develop—in order to search the passenger compartment under the evidentiary prong of *Gant*—a reasonable belief that evidence related to the crime of arrest is located within the vehicle.⁶⁷ In contrast, in order to search a vehicle under the automobile exception, the officer must only develop a reasonable belief (i.e., probable cause) that contraband is located somewhere within the vehicle.⁶⁸ There is no accompanying need under the automobile exception to develop probable cause for an arrest. In addition, the automobile exception may allow for a more extensive search of the vehicle beyond the passenger compartment, including the trunk.⁶⁹

However, a combined 55% of chiefs state that they search vehicles incident to arrest more or somewhat more (25%) or at least the same (30%) as they search vehicles under the automobile exception.⁷⁰ This finding may reflect the difficulty police encounter in certain instances of developing independent probable cause to search a vehicle under the automobile exception.⁷¹ Rather, police may at times find it easier to search a vehicle under search incident doctrine by arresting an occupant of the vehicle who, for example, has an outstanding arrest warrant against him on a previous crime or law violation (e.g., drug or weapons-related crimes, etc.). Once the

⁶⁶ See Part IV (Findings) and Table 1, *above*.

⁶⁷ See *supra* notes 29 and 30 and accompanying text (explaining the two prongs of *Gant*, the safety and evidentiary prongs).

⁶⁸ See *Carroll v United States*, 267 US 132 at 149 (USSC 1925) [*Carroll*]; *United States v Ortiz*, 422 US 891 at 896 (USSC 1975).

⁶⁹ See *Ross*, *supra* note 39. (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”) See also *ibid* at 824. (“The scope of a warrantless search of an automobile is ... defined by the object of the search and the places in which there is probable cause to believe that it may be found. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.”)

⁷⁰ See Part IV (Findings) and Table 1, *above*.

⁷¹ See *supra* notes 30 and 69 and accompanying text; Part IV (Findings) and Table 1, *above*.

officer essentially fulfills the command of this pre-existing warrant by arresting the occupant, the officer can often search the passenger compartment of the vehicle under the evidentiary prong of *Gant*. This is because lower courts have sanctioned searches under the evidentiary prong following arrests on various crimes.⁷² Accordingly, there may be instances when searching vehicles under *Gant* is more straightforward and easier for the officer than developing independent probable cause for the search under the automobile exception.

Separately, the fact that most of the chiefs (65%) report that officers have not searched vehicles less often overall because of the *Gant* ruling may reflect the presence of numerous procedures under the law that officers have at their disposal to search vehicles (i.e., apart from search incident doctrine).⁷³ For example, the United States Supreme Court and lower courts have sanctioned vehicles searches by police without a warrant under the automobile exception,⁷⁴ consent search exception,⁷⁵ impoundment/inventory procedure,⁷⁶ vehicle “frisk” procedure,⁷⁷ and abandonment doctrine.⁷⁸ In addition, lower courts have been receptive to finding that even though a vehicle search incident to arrest is not authorized under *Gant*, other search procedures apply to permit the search (e.g, the automobile exception).⁷⁹ Thus, it is somewhat unsurprising that a smaller

⁷² For a definition of the evidentiary prong of *Gant* (i.e., the underlying rule associated with this prong), see *supra* note 30 and accompanying text. For examples of when the underlying crime of arrest will trigger or satisfy the evidentiary prong of *Gant*, see *Gant*, *supra* note 1 at 1715 (referring to previous cases where the underlying crimes of arrest were related to drugs); *United States v Vinton*, 594 F.3d 14 at 25–26 (Cir DC 2010) (crime of arrest consisted of illegal firearms possession); *United States v Tinsley*, 365 Fed Appx 709 at 711 (8th Cir 2010) (driving under the influence of alcohol). But see *Gant*, *supra* note 1 at 1715 (arrests on traffic violations do not satisfy evidentiary prong).

⁷³ See Part IV (Findings) and Table 3, *above*.

⁷⁴ See generally *Carroll*, *supra* note 68 at 132.

⁷⁵ See generally *Schneckloth*, *supra* note 59.

⁷⁶ See generally *Opperman*, *supra* note 55.

⁷⁷ See *Long*, *supra* note 38.

⁷⁸ *United States v Ramirez*, 145 F.3d 345 (5th Cir 1998).

⁷⁹ See *Aftermath*, *supra* note 14 at 1300–1301, 1306–1307 (citing and explaining lower court decisions relying upon automobile exception and inventory exception to permit police vehicle search, when *Gant* itself disallowed search in question). See also *ibid* at 1302–1303 (explaining lower court cases where protective sweep doctrine allowed vehicle search even though suspect secured farther away from vehicle and hence *Gant*

percentage of chiefs (35%) report that their officers are searching vehicles less often overall because of the limitations placed by *Gant* on searching vehicles incident to arrest.⁸⁰ Nevertheless, the notion itself that police perception of job-related practices or conduct may reflect the evolving landscape of jurisprudential decisions and norms is noteworthy.

The study's finding that a little over half (55%) of the chiefs report that officers have not searched vehicles less frequently incident to arrest because of *Gant* may reflect the flexible nature of the evidentiary prong as well as the broad interpretation of the prong by numerous lower courts.⁸¹ For example, police may search the passenger compartment of a vehicle incident to arrest under the evidentiary prong provided they have reason to believe that some evidence related to the crime of arrest is located in the vehicle.⁸² In turn, lower courts have permitted vehicle searches under the prong after arrests of occupants or recent occupants on a variety of crimes. Indeed, the only type or category of criminal arrest of vehicle occupants that apparently does not permit or trigger a vehicle search under the evidentiary prong is arrests related to vehicle infractions (e.g. driving on a suspended license).⁸³

Significantly, however, nearly half (45%) of the chiefs stated that officers have searched vehicles less often incident to arrest because of *Gant*.⁸⁴ This finding reflects a sizeable percentage of chiefs, and aligns with the limitations placed by *Gant* on vehicle searches incident to arrest. This finding also provides insight into how officers' perceptions of key workplace practices may reflect changing legal norms. For example, police and in particular line officers following *Gant* may not search vehicles under its safety prong once the occupant or occupants are secured and no longer able to reach inside the vehicle (e.g., to grab a weapon or destroy evidence).⁸⁵ Because officers may ordinarily be inclined for safety and other reasons to secure individuals they arrest and/or move these individuals to locations farther away from the vehicle, officers may be prevented from searching under *Gant*'s safety prong. In turn, they may perceive (albeit incorrectly)

inapplicable).

⁸⁰ See Part IV (Findings) and Table 3, *above*.

⁸¹ See Part IV (Findings) and Table 2, *above*.

⁸² *Gant*, *supra* note 30 and accompanying text.

⁸³ *Gant*, *supra* note 72 and accompanying text.

⁸⁴ See Part IV (Findings) and Table 2, *above*.

⁸⁵ *Gant*, *supra* note 29 and accompanying text.

that they can no longer search the vehicle incident to arrest under *Gant*; that is, they may not realize that *Gant*'s evidentiary prong may still permit the vehicle search incident to arrest to proceed under these circumstances. This latter point may be ripe for further exploration of an empirical nature.

VI. CONCLUSION

After the United States Supreme Court in *Arizona v Gant* substantially changed the norms surrounding police vehicle searches incident to arrest, no known study has examined empirically law enforcement perception of these and related vehicle search norms. Accordingly, this study fills this gap by surveying police chiefs in the United States on their perceptions concerning police vehicles search practices and policies, including those related to *Gant*. Overall, the study finds that after *Gant*, chiefs perceive that officers search vehicles incident to the arrest of vehicle occupants less or somewhat less frequently than they search vehicles under (1) the impoundment and inventory exception to the Fourth Amendment warrant requirement, and (2) the consent exception to this requirement.⁸⁶ On the other hand, a majority of chiefs note that police search vehicles incident to arrest more or somewhat more frequently than they search vehicles by obtaining a warrant.⁸⁷ The comparative data between police searches incident to arrest (*Gant*) and the automobile search exception was less conclusive and more nuanced.⁸⁸ In addition, the majority of chiefs reported that officers did not search vehicles less often incident to arrest because of *Gant*.⁸⁹ Finally, a significant majority of the chiefs perceived that officers did not search vehicles less often in general as a result of *Gant*.⁹⁰

Overall, the empirical findings align with the prevailing Fourth Amendment rules in the police vehicle search context; that is, police chief perception of law enforcement policies and practices concerning vehicle searches aligns with Fourth Amendment norms in this area, including *Gant*.⁹¹ However, the comparative findings concerning chief perception of

⁸⁶ See Part IV (Findings) and Table 1, *above*.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ See Part IV (Findings) and Table 2, *above*.

⁹⁰ See Part IV (Findings) and Table 3, *above*.

⁹¹ See Part V (Analysis), *above*.

search incident doctrine in the vehicle context and the automobile exception are somewhat inconclusive, and may mirror the complexities of the law in these areas.⁹² Moreover, chief perception that officers have not searched vehicles less often in general as a result of *Gant* may reflect the fact that police have numerous, other tools under the law to search vehicles apart from search incident doctrine.⁹³ Finally, the study's finding that a small majority of chiefs perceived that officers have not searched vehicles less often incident to arrest as a result of *Gant* may have to do with *Gant*'s evidentiary prong, including judicial interpretation of the prong.⁹⁴ Nonetheless, the finding that a sizeable percentage of chiefs perceive that officers search vehicles less frequently incident to arrest because of *Gant* is significant, and seems to align with *Gant*'s restrictions on police vehicle searches incident to arrest.⁹⁵ The finding also sheds light on how police perception of important workplace practices (i.e., searches of community members' vehicles incident to those members' arrests) may reflect changing legal norms.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

R v Jarvis: An Argument for a Single Reasonable Expectation of Privacy Framework

RYAN MULLINS*

ABSTRACT

The “reasonable expectation of privacy” concept plays an important role in Canadian criminal and constitutional law, particularly in the context of s. 8 of the *Charter*. This article analyzes a recent Ontario Court of Appeal decision, *R v Jarvis*, which concerned the interpretation of a “reasonable expectation of privacy” in the context of voyeurism. In *Jarvis*, the Court of Appeal distinguished between a reasonable expectation of privacy in the contexts of voyeurism and s. 8, and declined to apply the “totality of the circumstances” approach. The author argues for the application of a single reasonable expectation of privacy framework—one which incorporates the robust and flexible “totality of the circumstances” approach—in both constitutional and non-constitutional contexts. Applying the totality of the circumstances approach guarantees that all relevant factors are considered when assessing the presence and degree of a reasonable expectation of privacy.

Keywords: Criminal law; voyeurism; *Charter of Rights and Freedoms*; reasonable expectation of privacy; totality of the circumstances; *Jarvis*

I. INTRODUCTION

The “reasonable expectation of privacy” concept plays an important role in Canadian criminal and constitutional law. Its most frequent application is in the context of s. 8 of the *Charter*, where it affords

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protection from unreasonable state search and seizure.¹ Here, the reasonable expectation of privacy acts primarily as a threshold.² Without a reasonable expectation of privacy in the subject matter of the search or seizure, one cannot claim the protection of s. 8. This concept has generated a remarkable body of jurisprudence since the seminal *Hunter v Southam*³ was decided by the Supreme Court of Canada in 1984. As a result, a robust and versatile framework for assessing the presence and degree of an individual's reasonable expectation of privacy has developed. This framework is often referred to as the totality of the circumstances approach.⁴

A reasonable expectation of privacy (on the part of the complainant) also constitutes an essential element of certain *Criminal Code* offences.⁵ The *actus reus* of voyeurism, for example, is made out where an individual surreptitiously observes or records a person who is in circumstances that give rise to a reasonable expectation of privacy.⁶ The *mens rea* requires the observation or recording to be for a sexual purpose, or for the purpose of observing or recording an individual that is either in a place where they can reasonably expect to be nude, exposing their sexual regions, or engaging in explicit sexual activity, or in a place where they are in fact nude, exposing their sexual regions, or engaging in explicit sexual activity.⁷

¹ See section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

² Reasonable expectation of privacy also serves “as a description of the result of the balancing exercise that seeks to weigh an individual’s privacy interest against the state’s interest in intruding upon this privacy, in order to determine what level of protection the individual’s interest merits.” Lisa M Austin, “Information Sharing and the ‘Reasonable’ Ambiguities of Section 8 of the Charter” (2007) 57:2 UTLJ 499 at 503 [Austin, “Reasonable Ambiguities”].

³ *Hunter et al v Southam Inc*, [1984] 2 SCR 145, (*sub nom Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*) 55 AR 291 [Hunter].

⁴ *R v Edwards*, [1996] 1 SCR 128 at para 45, 26 OR (3d) 736 [Edwards]; Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law, 2016) at 76.

⁵ *Criminal Code*, RSC 1985, c C-46, ss 184 (private communications, as interpreted in *Goldman v R*, [1980] 1 SCR 976, 108 DLR (3d) 17), 162 (voyeurism), 162.1 (publication, etc., of an intimate image without consent).

⁶ *Ibid*, s 162(1).

⁷ *Ibid*, s 162(1)(a)–(c).

This article analyzes a recent Ontario Court of Appeal decision, *R v Jarvis*,⁸ which involved a high school teacher surreptitiously video recording female students while on school property. At issue was the reasonable expectation of privacy of the students. Both the majority and the dissent distinguish between a reasonable expectation of privacy in the context of s. 8, and in the context of voyeurism, respectively. This causes them to refrain from applying the robust reasonable expectation of privacy framework developed in the constitutional context, and to disregard relevant privacy jurisprudence, including cases concerning students' reasonable expectation of privacy in school. Instead, the majority establishes their own reasonable expectation of privacy framework, one which lacks a consideration of the totality of the circumstances. The result is a narrow reasonable expectation of privacy framework that is largely location based and binary.

I argue the following: First, the Court unnecessarily distinguishes between a reasonable expectation of privacy in the contexts of voyeurism and s. 8, respectively. Select jurisprudence, and pragmatism, support the application of a single reasonable expectation of privacy framework in both constitutional and non-constitutional contexts. Second, at the least, a reasonable expectation of privacy framework, in any context, should involve a consideration of the totality of the circumstances. This position is supported by Canadian voyeurism jurisprudence. While the *Jarvis* majority is not the first to question the applicability of s. 8 principles to voyeurism, it is the only voyeurism case of any depth that does not utilize a totality of the circumstances approach when analyzing a reasonable expectation of privacy.

II. THE *JARVIS* DECISIONS

Do students have a reasonable expectation of privacy while in the common areas at school? This question was recently addressed by the Ontario Court of Appeal in *Jarvis*. A 2-1 majority held that they do not, subject to narrow exceptions.

Jarvis, a high school teacher, was charged with committing voyeurism under s. 162(1)(c) of the *Code*:

⁸ *R v Jarvis*, 2017 ONCA 778, 356 CCC (3d) 1 [*Jarvis* ONCA].

162 (1) Every one commits an offence who, surreptitiously, observes – including by mechanical or electronic means – or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if (c) the observation or recording is done for a sexual purpose.⁹

On multiple occasions, Jarvis used a pen camera to surreptitiously record his interactions with female students, and one female colleague. The videos were taken on school premises, and often focused on the individuals' chests and cleavage.¹⁰

The case turned on two issues:¹¹ first, were the recordings made in circumstances that gave rise to a reasonable expectation of privacy and, second, were the recordings made for a sexual purpose?¹² At trial, Goodman J found that the students did have a reasonable expectation of privacy at school. Justice Goodman held that the quasi-public environment and the presence of security cameras diminished, but did not eliminate, a reasonable expectation of privacy.¹³ Justice Goodman also paid particular attention to the use of technology in facilitating the alleged offence. He reasoned that Jarvis would not have recorded surreptitiously if there were no objective privacy interests to invade.¹⁴ Moreover, the use of technology increased the severity of the alleged infringement: these were not fleeting interactions, but rather sustained, permanent recordings.¹⁵

Jarvis was ultimately acquitted however, because Goodman J was left with a reasonable doubt that the videos were taken for a sexual purpose.¹⁶ Justice Goodman believed that other, non-sexual inferences could be drawn from the recordings,¹⁷ although he failed to describe such inferences. The Crown appealed the decision to the Ontario Court of Appeal.

⁹ *Criminal Code*, *supra* note 5, s 162(1)(c).

¹⁰ *Jarvis ONCA*, *supra* note 8 at para 7.

¹¹ In a separate pre-trial application, Jarvis challenged the constitutionality of the search and seizure of the videos on his pen camera. Justice Goodman found that the original warrantless search of the pen camera violated section 8, but admitted the evidence under the *Grant* analysis and section 24(2) of the *Charter*. See *R v Jarvis*, 2014 ONSC 1801, 312 CRR (2d) 17.

¹² *Jarvis ONCA*, *supra* note 8 at para 18.

¹³ *R v Jarvis*, 2015 ONSC 6813 at paras 47–48, 25 CR (7th) 330 [*Jarvis ONSC*].

¹⁴ *Ibid* at para 40.

¹⁵ *Ibid* at para 41.

¹⁶ *Ibid* at para 79.

¹⁷ *Ibid* at para 77.

The Court of Appeal first addressed the sexual purpose issue. Reversing Goodman J, they unanimously found that the videos were taken for a sexual purpose. In their view, Goodman J had made two errors of law: first, by suggesting that a “lack of nudity or sexually suggestive clothing or poses could derogate from the sexual purpose of the videos”¹⁸ and, second, by concluding that other, non-sexual inferences could be drawn from the videos without an evidentiary basis.¹⁹

The Court then divided over the reasonable expectation of privacy issue. The majority accepted the respondent’s argument that Goodman J had conflated the surreptitious element with the reasonable expectation of privacy element, allowing the former to influence the interpretation of the latter.²⁰ As a matter of statutory interpretation, the majority held that, “[i]f the fact that [the complainants] are being surreptitiously recorded without their consent for a sexual purpose were enough to give rise to a reasonable expectation of privacy, that would make the privacy requirement redundant.”²¹ As such, the trial judge had erred in law “by finding that the students were in circumstances that gave rise to a reasonable expectation of privacy ... while engaging in normal school activities and interactions in the public areas of the school where there were many other students and teachers.”²²

Writing for the majority, Feldman JA held that the students were not in circumstances that gave rise to a reasonable expectation of privacy: “If a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.”²³ The location—the common areas of a school—and the presence of security cameras, and other individuals, eliminated any reasonable expectation of privacy.²⁴ Justice Feldman noted, however, that there may be exceptional circumstances where an individual in a public place does have a reasonable expectation of privacy. For example,

¹⁸ *Jarvis* ONCA, *supra* note 8 at para 53.

¹⁹ *Ibid* at para 54.

²⁰ *Ibid* at para 101.

²¹ *Ibid* at para 108.

²² *Ibid* at para 110.

²³ *Ibid* at para 108.

²⁴ *Ibid* at para 104.

one may hold a reasonable expectation of privacy that is limited to the “areas of the body that are covered or hidden.”²⁵

Justice Huscroft, in lone dissent, framed the reasonable expectation of privacy issue as a normative, not descriptive,²⁶ assessment: “should high school students expect that their personal and sexual integrity will be protected while they are at school?”²⁷ He held that they should. In his view, the majority’s approach, which was largely location based, was too rigid.²⁸ While location is a relevant consideration, Huscroft JA felt that it should not be determinative;²⁹ the fact that the students were in a quasi-public place, and would be seen by others, did not eliminate a reasonable expectation of privacy.³⁰

In addition, Huscroft JA disagreed with the majority’s assertion that a reasonable expectation of privacy must be determined without considering the impugned conduct at issue.³¹ For Huscroft JA, to hold otherwise would lead to the absurd result that “the scope of the voyeurism offence is narrowed by the very thing Parliament intended to protect in establishing the offence – the reasonable expectation of privacy.”³²

III. THE DIFFERENT REASONABLE EXPECTATION OF PRIVACY FRAMEWORKS

A. Reasonable Expectation of Privacy in the *Charter* Context

In the context of s. 8 of the *Charter*, the evolution of the reasonable expectation of privacy framework has been gradual and piecemeal. As noted above, the Supreme Court of Canada’s decision in *Hunter v Southam*—where the Court first articulated the concept of a reasonable expectation of privacy, and its constitutional implications³³—marks the beginning of a line

²⁵ *Ibid* at para 96.

²⁶ *Ibid* at para 117.

²⁷ *Ibid* at para 131.

²⁸ *Ibid* at para 124.

²⁹ *Ibid* at para 128.

³⁰ *Ibid* at para 133.

³¹ *Ibid* at para 134.

³² *Ibid*.

³³ *Hunter*, *supra* note 3 at 159.

of landmark s. 8 cases spanning three decades. As Professor Richard Jochelson notes, *Hunter* “delineated the constitutional minimums that the state must honour in the context of searches of citizens.”³⁴ These minimums included obtaining prior authorization to perform a search (i.e., a warrant), whenever feasible, from an individual “capable of acting judicially,”³⁵ whom was satisfied of the existence of “reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.”³⁶ From there, the Court has worked to groom (or, sometimes, prune³⁷) the protections offered under this branch of the constitutional tree.

Many equally important cases have followed *Hunter*. While a comprehensive overview³⁸ of its extensive lineage is beyond the scope of this article, I will briefly touch upon select cases which were fundamental to the development of the reasonable expectation of privacy framework during the course of my explanation, below.

Aside from developing a reasonable expectation of privacy framework, s. 8 jurisprudence has also established several general principles which guide the framework’s application. For example, reasonable expectation of privacy is a normative, not descriptive, standard.³⁹ Considering competing interests (typically, police investigation and citizen privacy), the court evaluates whether the individual ought to reasonably expect privacy in the circumstances. Put another way, the court must consider whether the individual’s “interest in privacy *should* be prioritized over other interests.”⁴⁰ Another principle is that the nature of the privacy interest must be framed

³⁴ Richard Jochelson, “Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of *Patrick*” (2009) 72 Sask L Rev 199 at 201 [Jochelson, “Trashcans and Constitutional Custodians”].

³⁵ *Hunter*, *supra* note 3 at 162.

³⁶ *Ibid* at 168.

³⁷ See e.g. Richard Jochelson, “Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference” (2008) 13:2 Rev Const Stud 209; Don Stuart, “The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain” (1999) 25:1 Queen’s LJ 65.

³⁸ For such an overview, see Coughlan, *supra* note 4 at 71–89; Jochelson, “Trashcans and Constitutional Custodians,” *supra* note 37 at 201–208.

³⁹ *R v Tessling*, 2004 SCC 67 at para 42, [2004] 3 SCR 432 [Tessling]; *Jarvis ONCA*, *supra* note 8 at para 117.

⁴⁰ *Jarvis ONCA*, *supra* note 8 at para 117 [emphasis in original].

in broad and neutral terms.⁴¹ The apparent illegality of the circumstances cannot be used to colour and prejudice the analysis.

The reasonable expectation of privacy framework is now mostly well settled. Section 8 applies if, and only if, the individual claiming its protection establishes a reasonable expectation of privacy in the subject matter of the search or seizure.⁴² The court decides whether the claimant has a reasonable expectation of privacy in the subject matter of a search or seizure, and its degree, by considering the totality of the circumstances.⁴³ The “totality of the circumstances” assessment gives the reasonable expectation of privacy framework its robustness and versatility. As stated in *R v Gomboc*, “[a]n examination of the ‘totality of the circumstances’ involves consideration of *all*, not just some, of the relevant circumstances.”⁴⁴ Ever since the Supreme Court of Canada’s decision in *Tessling*, the relevant considerations have usually been grouped under four headings.⁴⁵

First, what is the subject matter of the alleged search? The subject matter of the search or seizure should not be determined “narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action.”⁴⁶ This was not always the philosophy of the courts. In the early decision of *R v Edwards* (the case in which the totality of the circumstances approach was developed), we see a specific focus on property-related considerations.⁴⁷ The accused was a drug dealer storing crack cocaine at his girlfriend’s apartment. When police searched the property, found the crack cocaine and charged Edwards, the accused tried to establish a reasonable expectation of privacy in his girlfriend’s apartment, which would enable him to challenge the constitutionality of the search. The Court rejected his

⁴¹ *R v Wong*, [1990] 3 SCR 36 at 50, 1 CR (4th) 1 (“it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engaged in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy” at 50).

⁴² *Edwards*, *supra* note 4 at para 45 (technically, a potential intrusion is not deemed a “search” or “seizure” unless, and until, a reasonable expectation of privacy is found).

⁴³ *Ibid.*

⁴⁴ *R v Gomboc*, 2010 SCC 55 at para 94, [2010] 3 SCR 211 [*Gomboc*] [emphasis in original].

⁴⁵ See Coughlan, *supra* note 4 at 76. See also *R v Marakah*, 2017 SCC 59 at para 11 [*Marakah*]; *R v Cole*, 2012 SCC 53 at para 40, [2012] 3 SCR 34 [*Cole*].

⁴⁶ *R v Ward*, 2012 ONCA 660 at para 65, 112 OR (3d) 321 [*Ward*].

⁴⁷ *Edwards*, *supra* note 4 at para 45.

argument, holding that Edwards had failed to establish any proprietary interests in the apartment.⁴⁸ Among other things, Edwards could not show that he owned the apartment, exercised control over it, nor regulated who could access it.

In contrast, more recent cases have better reflected the modern philosophy that the subject matter should be identified with precision. In *R v Kang-Brown*, for example, the subject matter of a sniffer-dog search was not the air around the bag but the contents of the bag itself.⁴⁹ In *R v Patrick*, the subject matter of a police search was not the garbage that had been left at the property line for collection; it was “a bag of ‘information’ whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder’s activities and lifestyle.”⁵⁰

A diversity of subject matters *per se* has also contributed to flux in the reasonable expectation of privacy framework. In recent years, technological advances have occasioned the need to assess reasonable expectations of privacy over more intangible subject matters, such as thermal energy emanations,⁵¹ electricity readings⁵² and electronic text message conversations.⁵³ In these situations, the property-related considerations of *Edwards* have been either transposed, rendered inapplicable, or minimized in relation to informational-privacy considerations. As such, a nuanced approach to determining the nature of the subject matter—or, more importantly, what the subject matter may reveal about a particular individual—has become vital to the reasonable expectation of privacy assessment.

Second, does the claimant have a direct interest in the subject matter? This is sometimes characterized as a question of standing.⁵⁴ Without a direct interest, an individual will be unable to claim the protection of s. 8. As Professor Steve Coughlan notes, the presence of this interest will be obvious

⁴⁸ *Ibid* at para 46.

⁴⁹ *R v Kang-Brown*, 2008 SCC 18 at paras 58, 174, [2008] 1 SCR 456.

⁵⁰ *R v Patrick*, 2009 SCC 17 at para 30, [2009] 1 SCR 579 [*Patrick*].

⁵¹ *Tessling*, *supra* note 39.

⁵² *Gomboc*, *supra* note 44.

⁵³ *Marakah*, *supra* note 45; *R v Jones*, 2017 SCC 60, [2017] 2 SCR 696 [*Jones*]; *R v TELUS Communications Co*, 2013 SCC 16, [2013] 2 SCR 3.

⁵⁴ *Edwards*, *supra* note 4; *Marakah*, *supra* note 45.

where the search is of one's home, person, or vehicle.⁵⁵ However, the interest need not be possessory or proprietary to satisfy this component.⁵⁶

Third, does the claimant have a subjective expectation of privacy in the subject matter? The importance of this element is dwindling. The subjective expectation of privacy is a low hurdle,⁵⁷ and the court may presume or infer its existence in the absence of claimant testimony.⁵⁸ This approach is consistent with the normative characterization of the reasonable expectation of privacy. Given the waning value of the subjective expectation of privacy, it remains to be seen whether this element will eventually be abandoned by the courts.

Fourth, would a subjective expectation of privacy be objectively reasonable in the circumstances? The core of the reasonable expectation of privacy analysis is performed at this stage. Ultimately, all relevant circumstances of the case must be considered, although there is no definitive list.⁵⁹ Previously, examples of relevant considerations have included: place where the search occurred, control over the subject matter of the search, whether the subject matter was in public view, whether the subject matter was encompassed by a statutory or contractual framework, or whether the subject matter tended to expose biographical information about the claimant.⁶⁰ No single consideration is determinative.⁶¹

The applicability of any given consideration will be circumscribed by the nature of the relevant privacy interest(s).⁶² The jurisprudence has recognized three privacy interest categories: physical privacy,⁶³ "involving

⁵⁵ Coughlan, *supra* note 4 at 77.

⁵⁶ See e.g. *Hunter*, *supra* note 3 at 158; *R v Dymont*, [1988] 2 SCR 417 at 426-427, 73 Nfld & PEIR 13; *R v Plant*, [1993] 3 SCR 281 at 291-292, 84 CCC (3d) 203 [*Plant*].

⁵⁷ *Patrick*, *supra* note 50 at para 37.

⁵⁸ *Jones*, *supra* note 53 at para 21.

⁵⁹ *Cole*, *supra* note 45 at para 45.

⁶⁰ See e.g. *Edwards*, *supra* note 4 at para 45; *Patrick*, *supra* note 50 at para 27.

⁶¹ Coughlan, *supra* note 4 at 76.

⁶² *R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 40, 352 CCC (3d) 525; Hamish Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2011), 54 SCLR (2d) 335 at 338.

⁶³ Originally, physical privacy was referred to as "personal privacy." The latter term is now used as an umbrella under which physical, territorial, and informational privacy all fall. See *Ward*, *supra* note 46 at para 60.

bodily integrity and the right not to have our bodies touched or explored,”⁶⁴ territorial privacy, “involving varying expectations of privacy in the places we occupy,”⁶⁵ and informational privacy, “involving ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’”⁶⁶ The latter category often considers how far the information is from a “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.”⁶⁷ These categories, which may overlap, operate as analytical tools in the reasonable expectation of privacy analysis.⁶⁸

Even if a reasonable expectation of privacy is established, its degree may be diminished depending on the circumstances.⁶⁹ Such is the case in schools. In *R v M(MR)*,⁷⁰ the Supreme Court addressed the student-privacy question explicitly: “To what extent are students entitled to an expectation of privacy while they are on school premises?”⁷¹ This case involved the search of a 13-year-old student by the vice-principal, which yielded a small amount of marijuana. The Court unanimously held that students have a diminished, but existent, reasonable expectation of privacy in their person while at school.⁷² The privacy expectation was reduced because students knew that they may be subject to search by school authorities.⁷³ In *R v A(M)*,⁷⁴ which concerned a sniffer-dog search on school property, a majority

⁶⁴ *Gomboc*, *supra* note 44 at para 19.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Plant*, *supra* note 56 at 293.

⁶⁸ Coughlan, *supra* note 4 at 82–83.

⁶⁹ *Tessling*, *supra* note 39 at para 22. After a reasonable expectation of privacy is found, its degree is used to configure the level of justification required to intrude upon it. The extent of the privacy expectation also factors into the exclusion of evidence test. See Coughlan, *supra* note 4 at 71, n 21.

⁷⁰ *R v M(MR)*, [1998] 3 SCR 393, 166 DLR (4th) 261 [M(MR)].

⁷¹ *Ibid* at para 1.

⁷² *Ibid* at paras 32 (Cory J, for the majority), 71 (Major J, dissenting in part).

⁷³ *Ibid* at para 33.

⁷⁴ *R v A(M)*, 2008 SCC 19 at paras 1 (Lebel J, for the majority), 65 (Binnie J, concurring in part), 157 (Bastarache J, dissenting), [2008] 1 SCR 569 [A(M)].

of the Supreme Court also found a diminished, but existent, reasonable expectation of privacy in the contents of students' backpacks.

B. Reasonable Expectation of Privacy in *Jarvis* (Court of Appeal)

Justice Feldman, for the majority, crafts a reasonable expectation of privacy framework from scratch. As was excerpted in Part II, “[i]f a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.”⁷⁵

Justice Feldman’s primary consideration—informed, in part, by the Oxford English Dictionary definition of privacy⁷⁶—appears to be location: “A person expects privacy in places where the person can exclude others ... [or] where a person feels confident that they are not being observed.”⁷⁷ While “students expect a school to be a protected, safe environment ... where their physical safety, as well as their personal and sexual integrity is protected,”⁷⁸ the common “areas of the school where students congregate and where classes are conducted are not areas where people have any expectation that they will not be observed or watched.”⁷⁹

This characterization embodies a descriptive, as opposed to normative, approach. The fact that students will be observed by security cameras, and other individuals, dominates the analysis, and erases any reasonable expectation of privacy. Aside from being contrary to Supreme Court of Canada jurisprudence,⁸⁰ a descriptive approach threatens the existence of privacy in societies where the use of audio-visual technology is ubiquitous.⁸¹ Moreover, a descriptive approach makes the reasonable expectation of

⁷⁵ *Jarvis* ONCA, *supra* note 8 at para 108.

⁷⁶ *Ibid* at para 93.

⁷⁷ *Ibid* at para 94.

⁷⁸ *Ibid* at 104.

⁷⁹ *Ibid*. This consideration ties into Feldman J’s larger statutory interpretation of a “reasonable expectation of privacy.” For more discussion on the statutory interpretation conducted in *Jarvis*, see Michael Plaxton, “Privacy, Voyeurism, and Statutory Interpretation” Crim LQ [forthcoming in 2018].

⁸⁰ *Tessling*, *supra* note 39 at para 42.

⁸¹ See generally Lisa Austin, “Privacy and the Question of Technology” (2003) 22:2 Law & Phil 119.

privacy analysis strictly binary. There appears to be no room for degrees of privacy in the majority's framework; if a reasonable expectation of privacy applies to any part of your body, it is all or nothing. This runs contrary to jurisprudential and academic conceptions of privacy, where the existence of a reasonable expectation of privacy is often considered a matter of degree.⁸²

Conversely, Huscroft JA's approach approximates the totality of the circumstances analysis. He considers the following factors while assessing the students' reasonable expectation of privacy:

- students are required to attend school for an educational purpose;
- schools are not public places open to all; access to them is controlled by school authorities;
- the high school's hallways and grounds are under 24-hour video surveillance, but the surveillance does not focus on particular students or their body parts;
- access to surveillance video recordings for personal use is not permitted; and
- school board policy prohibited the appellant from making the type of visual recordings that he made.⁸³

Justice Huscroft concludes, "the students' interest in privacy is entitled to priority over the interests of anyone who would seek to compromise their personal and sexual integrity while they are at school."⁸⁴

Both the majority and the dissent in *Jarvis* distinguish between a reasonable expectation of privacy in the context of s. 8 of the *Charter*, and a reasonable expectation of privacy in the context of voyeurism. The majority focuses on the fact that it is a private citizen, and not the state, doing the intruding. In their words, "[i]n the context of this offence, the protection is not from the state but from other people. There is no issue of prior judicial authorization. ... [the protection] is applicable solely to a complainant's privacy interest in not having their body viewed or video-recorded in a sexual context."⁸⁵ Justice Huscroft, on the other hand, concludes that "[t]he

⁸² *R v Mills*, [1999] 3 SCR 668 at para 108, 180 DLR (4th) 1; *Tessling*, *supra* note 39 at para 22; Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305 at 321-322; Austin, "Reasonable Ambiguities," *supra* note 2 at 503; Richard Jochelson, James Gacek & Lauren Menzie, *Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (New York: Routledge, 2018) at 24.

⁸³ *Jarvis* ONCA, *supra* note 8 at para 131.

⁸⁴ *Ibid* at para 133.

⁸⁵ *Ibid* at para 86 [emphasis added].

reasonable expectation of privacy analysis performs a fundamentally different role in the context of the voyeurism offence.”⁸⁶

These observations are correct. Concerning Feldman JA’s position, since the apparent intruder is not the state, the protection and procedures of s. 8 do not apply. Concerning Huscroft JA’s position, the role of the reasonable expectation of privacy is fundamentally different in the context of voyeurism and in the context of s. 8. In the former context, it is an essential element of the offence. Without it, there can be no finding of guilt. In the latter context, it is the threshold one must reach before analyzing the reasonableness of the search or seizure. A reasonable expectation of privacy is necessary, but not sufficient, for the s. 8 analysis.

It is not obviously correct, however, that the truth of these propositions should occasion a departure from the reasonable expectation of privacy framework developed in the context of s. 8, solely because the concept is being applied in a non-constitutional context. In other words, there appears to be no principled reason for determining the presence and degree of an individual’s reasonable expectation of privacy based on who is intruding (i.e., the nature of the intruder),⁸⁷ or the role that privacy plays in a larger analytical framework. Contrary to the respective approaches of the majority and the dissent, the nature of the intruder, and the role of the reasonable expectation of privacy concept in a larger analytical framework, should not be used to constrain the content of a reasonable expectation of privacy.

IV. AN ARGUMENT FOR A SINGLE FRAMEWORK

In the context of s. 8, must the accused’s reasonable expectation of privacy be assessed against the state in isolation, or can it be assessed against the world at large? In other words, does a reasonable expectation of privacy against the public also constitute a reasonable expectation of privacy against the state, and vice versa?

The jurisprudence is not well settled on this point. In fact, there appears to be little direct consideration of this issue. This is to be expected: in the

⁸⁶ *Ibid* at para 120 [emphasis added].

⁸⁷ Professor A Wayne MacKay makes a similar point in the section 8 context, arguing that the standard of a reasonable search should not be lowered for teachers simply because they are not police officers. See A Wayne Mackay, “Don’t Mind Me, I’m from the R.C.M.P.: R. v. M. (M.R.) – Another Brick in the Wall Between Students and Their Rights” (1997), 7 CR (5th) 24 at 32.

context of s. 8, the antagonist is always the state. An affirmative answer, however, would add support to the proposition that the presence and degree of a reasonable expectation of privacy should not be constrained by the nature of the intruder. If a reasonable expectation of privacy against the public is also one held against the state, any reason to distinguish between the two—aside from determining the application of constitutional protection—disappears.

In *R v Ward*,⁸⁸ the Ontario Court of Appeal has seemingly subscribed to the state-in-isolation approach. Speaking for the Court, Doherty JA held that:

[a] purposive approach to s. 8 ... dictates that personal privacy claims be measured as against the specific state conduct and the purpose for that conduct. ... a person, by allowing others into a zone of personal privacy, does not forfeit a claim that the state is excluded from that same zone of privacy.⁸⁹

Conversely, there is some jurisprudential support for the world-at-large approach. This position was recently endorsed by Moldaver J in *R v Marakah*.⁹⁰

In *Marakah*, a majority judgement authored by McLachlin CJ (as she then was) held that, in certain circumstances, an individual may maintain a reasonable expectation of privacy in text messages that have been sent, received and retained by their intended recipient.⁹¹ Justice Moldaver, writing for himself and Côté J in dissent, held that the sender no longer has any control over the messages once they have been delivered. Thus, a continuing expectation of privacy in those messages is unreasonable.⁹²

Concerning a reasonable expectation of privacy and the nature of the intruder, Moldaver J stated the following:

in this Court's significant body of s. 8 jurisprudence, including *Duarte*, the question of whether an individual holds a reasonable expectation of privacy in a particular subject matter is answered in relation to the world at large, not the state in isolation. If an expectation of personal privacy is unreasonable against the public, then it is also unreasonable against the state.⁹³

⁸⁸ *Ward*, *supra* note 46.

⁸⁹ *Ibid* at paras 76-77.

⁹⁰ *Marakah*, *supra* note 45 (Moldaver J, dissenting on a different point).

⁹¹ *Ibid* at paras 4-5.

⁹² *Ibid* at para 98 (Moldaver J, dissenting).

⁹³ *Ibid* at para 160 [emphasis added].

In support of this position, Moldaver J points to several cases⁹⁴ where the presence and degree of a reasonable expectation of privacy were discussed in relation to public access. These cases indicate that the ability of the public at large to access, or publish, the subject matter of a search or seizure derogates from a reasonable expectation of privacy, even in the context of s. 8.

The bulk of Justice Moldaver's analysis on the nature of the intruder relates to his claim that he and McLachlin CJ disagree about whether a reasonable expectation of privacy should be assessed against the state in isolation.⁹⁵ With respect, it is not entirely clear that there is actual disagreement on this point. The ostensible point of contention is the following excerpt from McLachlin CJ: "[t]he risk that the recipient could have disclosed [the electronic conversation], if he chose to, does not negate the reasonableness of Mr. Marakah's expectation of privacy against state intrusion."⁹⁶

Justice Moldaver seems to fasten on McLachlin CJ's use of "state." However, McLachlin CJ's pronouncement merely echoes a rule from *R v Duarte*,⁹⁷ namely, that a reasonable expectation of privacy can apply to an ongoing conversation despite the risk that one of the participants may later disclose its contents to a third party.⁹⁸ The specific reference to the state is not necessarily determinative. As Moldaver J himself points out, the use of state-specific language is to be expected in the s. 8 context.⁹⁹ This, however, "does not mean that a person's reasonable expectation of personal privacy against the state is distinct from his or her reasonable expectation of personal privacy against the world."¹⁰⁰ The use of "state" in *Marakah*, a s. 8 case, is logical given that the state is, in fact, the antagonist.

⁹⁴ *Ibid* at para 162, citing *Patrick*, *supra* note 50 at paras 2, 43; *Gomboc*, *supra* note 44 at paras 33, 41; *Tessling*, *supra* note 39 at paras 40, 46-47; *Plant*, *supra* note 56 at 294-295; *R v Stillman*, [1997] 1 SCR 607 at para 62, 185 NBR (2d) 1. See also *R v Duarte*, [1990] 1 SCR 30 at 43-44, 48, 71 OR (2d) 575 [*Duarte*]; *Edwards*, *supra* note 4 at paras 49-50.

⁹⁵ *Marakah*, *supra* note 45 at para 158.

⁹⁶ *Ibid* at para 45.

⁹⁷ *Duarte*, *supra* note 94 at 43-44.

⁹⁸ *Marakah*, *supra* note 44 at para 163.

⁹⁹ *Ibid* at para 164.

¹⁰⁰ *Ibid* [emphasis added]. But see James AQ Stringham, "Reasonable Expectations Reconsidered: A Return to the Search for a Normative Core for Section 8?" (2005), 23 CR (6th) 245 at 249.

Chief Justice McLachlin’s pronouncement does not appear to foreclose the possibility that a reasonable expectation of privacy can be applied to the world at large. Chief Justice McLachlin does not explicitly disagree with Moldaver J on this point, and an implicit disagreement is not readily apparent. The existence of a disagreement will determine whether or not Moldaver J is in actual dissent on this point, and whether his analysis is *obiter dictum*. In either event, it remains to be seen whether Moldaver J’s analysis, and summary of relevant case law, garners any attention when *Jarvis* is decided by the Supreme Court of Canada.¹⁰¹

Finally, pragmatism, too, dictates that a protean concept such as privacy should be assessed under a single flexible and robust framework. Otherwise, individuals will be needlessly subject to separate bodies of jurisprudence, offering different levels of privacy, based entirely on who is intruding on their privacy. This is an unnecessary complication. The totality of the circumstances analysis, and the reasonable expectation of privacy jurisprudence developed in the context of s. 8, could be adapted to voyeurism and any other non-constitutional, privacy-engaging contexts that may arise in the future. The “subject matter of the apparent search” could become the “subject matter of the apparent intrusion,” and so on. Ultimately, the most essential import from the s. 8 context is the totality of the circumstances analysis. It seems bizarre to assess whether we ought to recognize a reasonable expectation of privacy without a consideration of all the relevant circumstances of the case.

V. THE TOTALITY OF THE CIRCUMSTANCES AND VOYEURISM

Voyeurism is a relatively new offence that has received little judicial attention.¹⁰² So, too, has the reasonable expectation of privacy component of the offence.¹⁰³ A case law search of WestLaw and CanLII yielded thirty-two cases where voyeurism was tried or appealed.¹⁰⁴ Of these cases, only five

¹⁰¹ *R v Jarvis*, 2017 ONCA 778, 356 CCC (3d) 1, appeal as of right to the SCC, 37833 (20 April 2018). The Supreme Court of Canada granted intervenor status to the Privacy Commissioner of Canada and the Information and Privacy Commissioner of Ontario, among others.

¹⁰² *R v Rudiger*, 2011 BCSC 1397 at para 74, 278 CCC (3d) 524 [*Rudiger*]; *R v Keough*, 2011 ABQB 48 at para 147, 267 CCC (3d) 193 [*Keough*].

¹⁰³ *Keough*, *supra* note 102 at para 152.

¹⁰⁴ Noting up with WestLaw (citing references) for the voyeurism provision yielded 129

have engaged significantly with the meaning of a reasonable expectation of privacy. These cases include: both *Jarvis* decisions, *R v Rudiger*,¹⁰⁵ *R v Lebenfish*¹⁰⁶ and *R v Taylor*.¹⁰⁷ Both *Jarvis* decisions, *Rudiger* and *Lebenfish* consider the applicability of s. 8 to the context of voyeurism.

In *Rudiger*, the accused was caught in the act of video recording children while hidden in his van. The vehicle was stationed in a parking lot adjacent to a public park, where the children were at play. The videos depicted the children's private areas while they were being changed by their caregivers.¹⁰⁸ Justice Voith held that the application of s. 8 jurisprudence to the case should be treated with caution because of the idiosyncrasy of constitutional interpretation, the balancing between state interests and the accused's privacy, and the nature of the privacy interests usually engaged in s. 8 contexts.¹⁰⁹ Notwithstanding this caution, Voith J endorsed the application of "overarching considerations"¹¹⁰ stemming from s. 8, including: privacy is a protean concept, whether a reasonable expectation of privacy exists is based on an assessment of the totality of the circumstances, the expectation of privacy is a normative, not descriptive standard, and s. 8 protects people, not places.¹¹¹ Justice Voith concluded that—notwithstanding the public location—the caregivers, and their children, had a reasonable expectation of privacy.¹¹² In his view, the use of technology to zoom in on, and permanently record, the children's private areas vastly exceeded their reasonable

case results with the following filters engaged: search within results "privacy" and only show results citing "Subsection or Clause" 162, 162(1) and letter subsections. Due to the way WestLaw aggregates results, many of these cases were duplicates. I analyzed the list of cases to exclude duplicates and sentencing decisions. I then searched for the keyword "privacy" in the remaining results to assess their engagement with the reasonable expectation of privacy element. A CanLII Document Text search of "162 voyeurism" yielded 148 cases. I cross-referenced the CanLII list against the WestLaw list and analyzed the non-duplicate cases for their engagement with a reasonable expectation of privacy.

¹⁰⁵ *Rudiger*, *supra* note 102.

¹⁰⁶ *R v Lebenfish*, 2014 ONCJ 130, 10 CR (7th) 374 [*Lebenfish*].

¹⁰⁷ *R v Taylor*, 2015 ONCJ 449 [*Taylor*].

¹⁰⁸ *Rudiger*, *supra* note 102 at para 76.

¹⁰⁹ *Ibid* at paras 82–87.

¹¹⁰ *Ibid* at 88.

¹¹¹ *Ibid*.

¹¹² *Ibid* at paras 103–117.

expectations of privacy.¹¹³ Echoing *Tessling*, Voith J cautioned against allowing technology to shrink the private sphere.¹¹⁴

In *Lebenfish*, the accused was taking pictures of naked women at a public, clothing-optional beach. At issue was whether the accused obtained the photographs surreptitiously, and whether the beachgoers had a reasonable expectation of privacy. After holding that the Crown had failed to establish the surreptitious element, Green J commenced his analysis on the latter issue, endorsing the view that certain privacy concepts—protean, totality of the circumstances, and normative, not descriptive, assessment—were of “general application to any evaluation of privacy claims,”¹¹⁵ including voyeurism.¹¹⁶ Quoting *Rudiger*, Green J noted, however, that not all of the s. 8 concepts could be transposed.¹¹⁷ Considering the totality of the circumstances, Green J concluded that the nude beachgoers did not hold a reasonable expectation of privacy, citing factors including: the public and clothing-optional nature of the beach, the absence of signage, city policy or city by-laws prohibiting photography on the beach, and the fact that the photographs captured only that which was immediately visible to the naked eye (i.e., not enhanced through a zoom lens or other technological means).¹¹⁸

In a similar case, *Taylor*, the accused took pictures of women’s buttocks while they were sunbathing in thong bikinis on the beach. Justice Blouin endorsed the approaches of *Rudiger* and *Lebenfish*.¹¹⁹ Unlike *Lebenfish*, however, Blouin J found that, despite the possibility that the women would be “ogled,”¹²⁰ they had a reasonable expectation that close-ups of their private areas would not be “captured as a permanent record”¹²¹ by the accused.¹²² This case also differed from *Lebenfish* in that the surreptitious

¹¹³ *Ibid* at para 110.

¹¹⁴ *Ibid* at para 112.

¹¹⁵ *Lebenfish*, *supra* note 106 at 36.

¹¹⁶ *Ibid* at paras 35–36.

¹¹⁷ *Ibid* at para 36.

¹¹⁸ *Ibid* at para 40.

¹¹⁹ *Taylor*, *supra* note 107 at para 28.

¹²⁰ *Ibid* at para 32.

¹²¹ *Ibid*.

¹²² *Ibid*.

element was made out, the beach in question was not clothing-optional, and the accused used a zoom lens to focus on the complainants' private areas. Taylor was ultimately acquitted because Blouin J was not satisfied beyond a reasonable doubt that the images were captured for a sexual purpose.

We already know the position of the Court of Appeal in *Jarvis*. Justice Goodman, on the other hand, adopted an approach similar to that of *Rudiger* and *Lebenfish*. It is interesting to note that Goodman J initially declined to apply the s. 8 analysis to the voyeurism offence, stating that the s. 8 test was not flexible enough.¹²³ Justice Goodman recognized, however, that "there may be overarching considerations relevant to this [voyeurism] assessment,"¹²⁴ and concluded "that whether a reasonable expectation of privacy exists, in a given case, is based on an assessment of the totality of the circumstances ... that the expectation of privacy is a normative rather than a descriptive standard [and] ... that s. 8 'protects people and not places.'"¹²⁵ As we can recall, the totality of the circumstances led Goodman J to find that the students held a reasonable expectation of privacy.

Most of these decisions indicate a willingness to recognize certain fundamental privacy principles in all contexts, voyeurism included. Most important among these principles is the recognition that a reasonable expectation of privacy should be determined with reference to the totality of the circumstances. While the Ontario Court of Appeal is not bound by these decisions, it is interesting to note that the Court's decision is the only one proceeding against the slight jurisprudential tide.

If these fundamental privacy principles were adopted by the majority in *Jarvis*, it is possible that the reasonable expectation of privacy outcome would have been different. Imagine, as a result, that relevant s. 8 jurisprudence applied, and that the reasonable expectation of privacy was determined based on an assessment of the totality of the circumstances. As a starting point, precedent indicates that the students have an existing, but diminished, reasonable expectation of privacy in their person while at school,¹²⁶ and that "the public nature of the forum does not eliminate all privacy claims."¹²⁷ Of course, whether a reasonable expectation of privacy

¹²³ *Jarvis* ONSC, *supra* note 13 at para 37.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at para 30.

¹²⁶ *M(MR)*, *supra* note 70 at paras 32, 71; *A(M)*, *supra* note 74 at paras 1, 65, 157.

¹²⁷ *Ward*, *supra* note 46 at para 72.

exists is not strictly precedent-based, but is determined based on the totality of the circumstances.

Whether a reasonable expectation of privacy exists would depend on a consideration of the relevant factors, including: the quasi-public location (the common areas of the school); the potential for observation by other people and security cameras; whether the subject matter—the cleavage area, with the attendant potential compromise of sexual- and bodily-integrity privacy interests—would be considered within the public view;¹²⁸ Huscroft JA’s factors,¹²⁹ including the school policy prohibiting Jarvis’ video recordings; the impact of using technology in the commission of the crime;¹³⁰ the particular vulnerability of children, and the heightened protection of their privacy;¹³¹ and the relationship of trust inherent in the student-teacher relationship.¹³²

Applying the totality of the circumstances analysis does not guarantee a particular outcome. A judge weighing the facts of *Jarvis* under this framework would still have to consider the factors that erode a reasonable expectation of privacy, and may come to the same conclusion as the majority. What the totality of the circumstances analysis does guarantee, however, is a consideration and balancing of all the relevant factors.

VI. CONCLUSION

The *Jarvis* decision engages with a number of important privacy-related issues. Do students have a reasonable expectation of privacy at school? To what extent does one’s appearance in a public, or quasi-public, place erode their reasonable expectation of privacy? What is the impact of technology on our privacy interests? Underpinning all of these specific issues, however, is a lurking question: how should a reasonable expectation of privacy be assessed generally?

¹²⁸ *Tessling*, *supra* note 39 at para 40 (“a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public”).

¹²⁹ *Jarvis ONCA*, *supra* note 8 at para 131.

¹³⁰ *Rudiger*, *supra* note 102 at paras 93–101, 110–117; *Taylor*, *supra* note 107 at para 32.

¹³¹ *AB v Bragg Communications*, 2012 SCC 46 at paras 14, 17–18, [2012] 2 SCR 567. See also Brock Jones, “Jarvis: Surely Schoolchildren Have a Reasonable Expectation of Privacy Against Videotaping for a Sexual Purpose?” (2017), 41 CR (7th) 71.

¹³² *Jarvis ONCA*, *supra* note 8 at para 47.

Over the course of this article, I have argued that the answer to this question need not change based on the nature of the intruder, or the role that privacy plays in a larger analytical framework. There is no principled reason to allow either of these factors to singlehandedly constrain the content of a reasonable expectation of privacy. With respect, if the majority's approach in *Jarvis* is preserved, the nuance of the reasonable expectation of privacy analysis, at least in the context of voyeurism, will be lost. While *Jarvis* only considers a reasonable expectation of privacy vis-à-vis this specific offence, the Court's distinction between the constitutional and non-constitutional context has potentially wider implications given the ever-increasing creep of technology into our private lives.

Both s. 8 of the *Charter*, and the offence of voyeurism, protect people, not places. As such, a single reasonable expectation of privacy framework—one which considers the totality of the circumstances—should be adopted. The implementation of this framework ensures an approach to privacy that is robust, flexible and sensitive to any factual matrix. The difficulty of assessing a reasonable expectation of privacy without a consideration of all the relevant circumstances seems readily apparent. With *Jarvis* under reserve by the Supreme Court of Canada, one hopes that the Court will endorse a framework that brings clarity and consistency to this important issue.

Alibi Evidence: Responsibility for Disclosure and Investigation

JOHN BURCHILL *

al·i·bi (noun) 1. *Law* - A form of defence whereby a defendant attempts to prove that he or she was elsewhere when the crime in question was committed. From Latin, meaning “elsewhere” (alius, other on the model of ibi, there).

I. INTRODUCTION

The consequence of the defence failing to disclose an alibi properly to the Crown is that the trier of fact may draw an adverse inference that it has been fabricated. Although there may be good reason why defence counsel may wish to withhold alibi evidence from the Crown or even the police, they risk an adverse inference at trial which they may not be able to correct later.

While the imposition of an evidentiary burden on the accused may be justified even though it still impairs the right to be presumed innocent,¹ raising an alibi can be regarded as a very high risk defence as it can effectively reverse the onus of proof with a jury believing the accused (or his witnesses) has lied to escape conviction. On the other hand, providing it to the Crown or the police in a timely manner could mean, if your client is innocent, the timely dismissal or stay of charges by the Crown.

Although there is no standard mechanism for disclosing an alibi in Canada, many U.S. and Australian states have stringent “alibi-notice-laws” imposed on defence counsel. By adopting some of the legislated practices elsewhere, defence counsel in Canada may be able to navigate some of the

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¹ *Cf R v Laba*, [1994] 3 SCR 965 at 1011, 120 DLR (4th) 175, per Sopinka J for the majority. See also John G Webster, “The Proper Approach to Detection and Justification of Section 11(d) Charter Violations Since Laba” (1995), CR 39 (4th) 113.

intricacies in the law to the benefit of all parties without having such rules imposed on them by statute.

For example, an accused is facing trial on a serious offence which, if convicted, could result in a significant penitentiary term. The accused has confided in counsel that they are innocent and provided a version of events that, if believed, puts them hundreds of miles from the crime at the relevant time. After some basic fact checking of the story, Counsel decides to call the accused as the only witness. For tactical reasons, or maybe because of some mistrust of the police or the Crown with the information, the information is not disclosed in advance of trial.

In order to constitute an alibi, the evidence at issue must be determinative of the final issue of guilt or innocence. Such evidence contemplates that it is impossible for the accused to have committed the crime because, at the time of its commission, he was elsewhere.² There must be no “window of opportunity.”³

The requirements of an alibi are strict; evidence that an accused had only a limited opportunity to commit a crime is not an alibi. Once properly raised, the Crown must refute the alibi beyond a reasonable doubt or the accused is entitled to be acquitted.⁴

On February 20, 2017, the Supreme Court released a short judgment, affirming the majority decision of the British Columbia Court of Appeal that a false alibi or deliberate lie could be used as some evidence of guilt without first considering whether there was sufficient evidence of concoction, independent of the evidence used to reject the alibi.⁵

In *R v Clifford*, defence counsel did not call the accused; rather the alibi was led through to two police officers who had interviewed him about an arson that took place in Cranbrook, British Columbia. The accused maintained he was in Camrose, Alberta, at the time of the fire – some 670 kilometres away. However, based on evidence of the accused’s animus towards the victims, cellphone records and the presence of a car he used in Cranbrook at the relevant time, the trial judge found his alibi was irreconcilable with evidence led by the Crown.

² *R v MR* (2005), 195 CCC (3d) 26; [2005] OJ No 883 (QL) at para 29 (CA).

³ *R v TWC*, [2006] OJ No 1513 (QL); 209 OAC 119 at para 2 (CA).

⁴ *R v Allen*, 2017 MBCA 88 at para 8, 142 WCB (2d) 71 [*Allen* MBCA].

⁵ *R v Clifford*, 2017 SCC 9, [2017] 1 SCR 164, aff’g 2016 BCCA 336 at paras 30–32, aff’g 2015 BCSC 435 [*Clifford*].

As a result the trial judge expressly found that the alibi given to the police was deliberately false and could be used as some evidence of guilt. However it could not be the only evidence. There needed be other evidence independent of the finding that an alibi is false to conclude that it was deliberately fabricated and that the accused was involved in that attempt to mislead the jury.⁶ A false alibi or a lie, without more, is not evidence that can assist the prosecution in establishing guilt. There must be other evidence, independent of that finding upon which the trier of fact can find fabrication or concoction such that it may constitute incriminating evidence for the prosecution.⁷

II. DELAYED DISCLOSURE OF ALIBI

While the ‘alibi’ in *Clifford* was provided to the police within days of the offence “when there was no possibility of forgetfulness, mistake or oversight” on the part of the accused,⁸ the risk of proffering the same evidence months or years later at trial when it may be harder to disprove (or corroborate), carries the same risk should a witness die or become forgetful. Indeed, if it is possibly true, failing to disclose the alibi in a timely manner to either the police or the Crown may result in adverse inferences against the accused.

For example, in *R v Cain*, the accused were arrested for murder in November 2006 and committed to stand trial in October 2007. While the defence obtained alibi statements from several witnesses in late 2006 and subsequently advised the Crown and police as to the existence of an alibi defence in December 2007, no details were provided except that one of the witnesses had died a few days earlier (but a year after the defence had obtained a statement from him). The statement of the dead witness was provided to the Crown in June 2008 and the information about the other witnesses was provided in December 2008, a month before the original trial date. The alibi witnesses subsequently made themselves available for interview by the police on February 25, 2009.

⁶ *R v Laliberté*, 2016 SCC 17 at para 4, [2016] 1 SCR 270.

⁷ *Oland v R*, 2016 NBCA 58 at para 8, [2016] NBJ No 288 (QL) (new trial ordered), aff’d 2017 SCC 17, [2017] 1 SCR 250 (but the issue of alibi was not argued before the Court) [*Oland*].

⁸ *Clifford*, *supra* note 5 at para 30.

The trial judge gave ‘late alibi adverse inference’ instructions to the jury, which advised that they “may, not must, accord less weight to the alibi.” The jury ultimately returned a verdict of guilty. The Ontario Court of Appeal affirmed the jury instructions were correct, holding:

It was obvious on the record that investigation of both alibis was hampered by the late disclosure. This was a case in which early disclosure was critical to a proper investigation of both alibis. The police had to be able to assess the accuracy of each alibi witness’s [sic] estimate of the timing of the movements of the accused ... [Indeed] late disclosure ... deprived police of the ability to speak with Williams as disclosure that Williams was the alibi witness was not made until after he was dead.⁹

While it is true that an accused person does not have to disclose his defence, including alibi, the consequence of failing to disclose an alibi in a timely manner to the Crown is that the judge or jury may draw an adverse inference that it has been fabricated. Nevertheless, a delayed disclosure by the accused may only weaken the alibi evidence, and it cannot be excluded at trial.

An alibi does not need to be disclosed on arrest or at the first possible opportunity. All that is required is that it be disclosed sufficiently prior to trial and in a manner that will permit a meaningful investigation by the Crown. Given the ease with which an alibi could be fabricated, this rule protects against a last minute defence that may be impossible for the Crown to verify. Where the alibi is not disclosed and the accused presents it for the first time at trial, the judge can instruct the jury to draw an adverse inference from the late disclosure, but cannot prevent the evidence from being called.

However, where there is evidence that an alibi has been fabricated, this may be used as circumstantial evidence to draw an inference or “consciousness” of guilt. Nevertheless, an alibi that is merely disbelieved or rejected cannot serve to corroborate or complement the Crown’s case, let alone permit an inference of guilt by the Crown. As noted by the Supreme Court in *R v Hibbert*:

Evidence that the accused attempted to put forward a fabricated defence, that effort, akin to an effort to bribe or threaten a witness or a juror, could be tendered as evidence of consciousness of guilt. However, an alibi that is merely disbelieved

⁹ *R v Cain*, 2015 ONCA 815 at paras 34, 36, 330 CCC (3d) 478, leave to appeal to SCC refused 2016 CanLII 66195. See also *R v Gulliver*, 2018 SCC 24, aff’g 2017 ABCA 223 at para 8, which found the trial judge was entitled to rely on a late disclosure of 18 months when evaluating the strength of the alibi evidence in determining it was unreliable [cited to ABCA].

is not evidence of guilt. It is only if it can be proven that the accused participated in the deceit or was directly involved in creating the false alibi, that there can be an inference of guilt.¹⁰

Nevertheless, even if defence counsel has notified the Crown of its intention to present an alibi, the Crown may have to wait until the accused has presented the evidence before it seeks to establish that it was false and/or fabricated. The reason for this is that the Crown cannot rebut a defence not called, and the accused is under no duty to advance any particular defence.¹¹

However, in *R v Tudor*¹² (as in *Clifford*) the Alberta Court of Appeal held that it was open to a trial judge to find that an alibi was fabricated even where it is the Crown that tenders the accused's statement containing the alibi during its case, and the accused does not tender any evidence of alibi.¹³

III. OBLIGATION TO DISCLOSE ALIBI

At trial, the accused is protected by a right to silence. Specifically, they cannot be compelled to testify, and they have a right not to have their testimony used against them in future proceedings. These protections against testimonial compulsion have been constitutionalized in s. 11(c) (right of the accused not to be compelled to testify)¹⁴ and s. 13 (right of witness not to have his or her testimony from one proceeding used to incriminate him or her in a subsequent proceeding)¹⁵ of the *Charter*. When

¹⁰ *R v Hibbert*, [2002] 2 SCR 445 at 62–63, 211 DLR (4th) 223. See also *R v Trochym*, 2007 SCC 6 at para 172, [2007] 1 SCR 239; *R v Tessier* (1997), 113 CCC (3d) 538, [1997] BCJ No 515 (QL) (five-judge panel of the CA); *Oland*, *supra* note 7.

¹¹ In addition, situations may change such that defence counsel becomes ethically prevented from calling alibi evidence in support of an alibi he or she knows or reasonably believes is false based on admissions from his or her client. See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, ch 5.1-1[10] (as amended 14 March 2017), online: <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>>.

¹² *R v Tudor*, 2003 ABCA 352, 26 Alta LR (4th) 27 [cited to ABCA].

¹³ *Ibid* at para 11. See also *R v O'Connor* (2002), 62 OR (3d) 263, 2002 CanLII 3540 at paras 24–33 (CA) [cited to CanLII]; *Clifford*, *supra* note 5.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

¹⁵ *Ibid*, s 13.

combined with s. 11(d) (presumption of innocence),¹⁶ ss. 11(c) and 13 of the *Charter* protect the basic tenet of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond.¹⁷

However, once there is a "case-to-meet" which, if believed, would result in a conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes - in a broad sense - compellable. That is, the accused may have to answer the case against him, or face the possibility of conviction.¹⁸

While the relationship between the case-to-meet principle and the presumption of innocence is altered by such constitutionally permissible reverse-onus provisions, the Supreme Court of Canada has held that such provisions, which violate s. 11(d) of the *Charter*,¹⁹ may nonetheless constitute a reasonable limit, demonstrably justified in a free and democratic society.

For example, the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence.²⁰ However, "this protection against disclosure is not an absolute one, and failure to

¹⁶ *Ibid*, s 11(d).

¹⁷ *R v P(MB)*, [1994] 1 SCR 555 at 580, 113 DLR (4th) 461 [*P(MB)*]. Nevertheless, it is an error to instruct the jury that they are entitled to draw an adverse inference from the failure of the accused to testify in support of his or her alibi defence. See *R v Miller* (1998), 131 CCC (3d) 141, [1998] OJ No 356 (QL) (CA).

¹⁸ *P(MB)*, *supra* note 17. See also *R v Noble*, [1997] 1 SCR 874, 146 DLR (4th) 385 [*Noble*], and *Clifford*, *supra* note 5 at para 9, where the Court stated that "this principle may be traced back in this court to *R v Jenkins* (1908) 14 CCC 221 (BCCA), if not farther." See also *Murray v United Kingdom* (1996), 22 EHRR 297, where the European Court of Human Rights held that drawing an adverse inference "in situations which clearly call for an explanation" is acceptable because "the question whether the right [to silence] is absolute must be answered in the negative."

¹⁹ *Charter*, *supra* note 14.

²⁰ *R v Stinchcombe*, [1991] 3 SCR 326 at 333, 83 Alta LR (2d) 193. Indeed, where the defence is not one of alibi, but evidence is called to show the accused was outside a shed where the offence happened versus inside, it does not have to be disclosed to the prosecution, nor can an adverse inference be drawn because of this as the accused was not "elsewhere." See *R v Taylor*, 2012 NLCA 33, rev'd [2013] 1 SCR 465 but not on this point.

disclose an alibi defence in a timely manner may affect the weight given to the defence.”²¹

As noted by the Supreme Court, “alibi defences create exceptions to the right to silence. For example, while the accused generally has a right to silence during the investigative stage of a criminal proceeding, if an alibi defence is not disclosed in a sufficiently particularized form at a sufficiently early time to permit the police to investigate it prior to trial, the trier of fact may draw an adverse inference from the accused’s pre-trial silence.”²²

This rule has a strong tradition in Canada, and is based upon the relative ease with which an alibi defence can be fabricated. As a result, the potential for the fabrication of alibi evidence allows a negative inference to be drawn against such evidence where the alibi defence is not disclosed in sufficient time to permit investigation.²³

Furthermore, while the failure to testify cannot be used to assess credibility of witnesses, in the case where the defence of alibi is advanced, the trier of fact may draw an adverse inference from the failure of the accused to testify and subject themselves to cross-examination. “While it must be conceded that this exception does undermine the presumption of innocence and the right to silence, it has a long and uniform history pre-dating the *Charter* and must be taken to have been incorporated into the principles of fundamental justice in s. 7.”²⁴

Nevertheless, as noted in *R v Sophonow*:

there is no rule of law or practice which precludes evidence in support of an alibi being tendered in the absence of testimony by the accused. The accused’s right not to testify is absolute and its exercise does not limit his right to call other witnesses. [While] appellate courts have said on many occasions that as a general rule an alibi defence will not be entertained on appeal unless supported by evidence from the

²¹ *P(MB)*, *supra* note 17 at 578. This was reaffirmed in *R v S(RJ)*, [1995] 1 SCR 451 at 517, 121 DLR (4th) 589.

²² *Noble*, *supra* note 18 at para 111. See also *R v Chambers*, [1990] 2 SCR 1293 at 1320, 119 NR 321.

²³ *R v Russell* (1936), 67 CCC 28 at 32. See also *Vézéau v The Queen*, [1977] 2 SCR 277 [Vézéau]; *P(MB)*, *supra* note 17; *S(RJ)*, *supra* note 21; *Noble*, *supra* note 18; *R v Cleghorn*, [1995] 3 SCR 175, 186 NR 49 [Cleghorn].

²⁴ *Noble*, *supra* note 18 at para 113. See also *R v Creighton*, [1995] 1 SCR 858 at 878, 179 NR 161; *Vézéau*, *supra* note 23 at 288.

accused, that does not mean ... that the accused is not entitled, without testifying himself, to set up an alibi defence by calling other witnesses.²⁵

However, where that witness appears for the first time at trial, the weight afforded to that witness's evidence may be significantly reduced and may in fact draw an adverse inference from the Court. As noted by the Supreme Court in *R v Cleghorn*:

Disclosure of an alibi has two components: adequacy and timeliness. This principle was recently reiterated in *R v Letourneau* (1994), 87 CCC (3d) 481 (BCCA), where Cumming J.A. wrote for a unanimous court at p. 532:

It is settled law that disclosure of a defence of alibi should meet two requirements:

(a) it should be given in sufficient time to permit the authorities to investigate: see *R v Mahoney*, *supra*, at p. 387, and *R v Dunbar and Logan* (1982), 68 CCC (2d) 13 at pp. 62-3 (Ont CA);

(b) it should be given with sufficient particularity to enable the authorities to meaningfully investigate: see *R v Ford* (1993), 78 CCC (3d) 481 at pp. 504-5 (BCCA).

Failure to give notice of alibi does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it.²⁶

However, as noted by the Ontario Court of Appeal in *R v Wright*, where the alibi defence is disclosed in time to permit meaningful investigation of the defence, there can be no justification for the adverse inference instruction.²⁷

²⁵ See *R v Sophonow* (1986), 38 Man R (2d) 198 at paras 129-130, 25 CCC (3d) 415, leave to appeal to the SCC refused, [1986] 1 SCR xiii, 44 Man R (2d) 80.

²⁶ *Cleghorn*, *supra* note 23 at 179-180.

²⁷ *R v Wright*, 2009 ONCA 623 at para 20, 98 OR (3d) 665. See also *R v Hogan* (1982), 2 CCC (3d) 557 at 566, [1982] OJ No 189 (QL) (CA). Furthermore, failure to investigate an alibi that has been disclosed carries with it a risk to the Crown of failing to disprove the alibi; however, it does not prejudice the accused, who is in a position to benefit from the Crown's failure to disprove the alibi. See *R v Levesque*, 2003 ABCA 349, [2003] AJ No 1480 (QL).

IV. RIGHT TO SILENCE

While some authors at the time suggested that the Supreme Court had not actually ruled on the constitutionality of the alibi exception with respect to the right to silence enshrined in the *Charter*,²⁸ the Court had already ruled that the imposition of an evidentiary burden on the accused may be justified even though it still impaired the right to be presumed innocent, so long as the burden of proof was not on the accused.²⁹

Furthermore, the Supreme Court did state that the rule “has been adapted to conform to *Charter* norms in that disclosure is proper when it allows the prosecution and police to investigate the alibi evidence before trial.”³⁰ As such it appears that in *R v Cleghorn* the rule did receive some scrutiny by the Court with respect to the *Charter*. In addition, one must consider that the case cited by the Supreme Court (*R v Letourneau*) was actually on leave to the Court at the time of this decision, specifically with respect to the alibi exception and the right to silence.³¹ As such, it cannot be said that the Court did not consider the alibi exception to the right to silence, and as a result I will explore this case further.

In *Letourneau*, the defence gave no alibi notice whatsoever. As a result, the trial judge stated that the jury could take the delay into account, stating “the longer the delay from the time the offence was committed to the time when the accused told the Crown that they were elsewhere on the date it took place, the more suspicious the alibi becomes.”³²

²⁸ Cf John D Craig, “The Alibi Exception to the Right to Silence” (1996) 39:2 CLQ 227.

²⁹ *Laba*, *supra* note 1 at 1011.

³⁰ *Cleghorn*, *supra* note 23 at para 4.

³¹ Leave to appeal the decision in *R v Letourneau* (1994), 87 CCC (3d) 481, [1994] BCJ No 265 (QL) (BCCA), was filed on May 12, 1995 [*Letourneau* cited to BCJ]. One of the issues on appeal was “whether the Court of Appeal erred in holding that the requirement that an accused give notice of an alibi did not violate his s. 7 *Charter* rights.” However, leave to appeal was subsequently dismissed on November 2, 1995, shortly after the decision in *Cleghorn*, *supra* note 18, was released on September 21, 1995. See Supreme Court Bulletins dated July 21 and November 3, 1995, docket 24645.

³² *Letourneau*, *supra* note 31 at para 163, leave to appeal to SCC refused (1996), 102 CCC (3d) vi (2 November 1995). See also *R v Usereau*, 2010 QCCA 894 at paras 96-97, 256 CCC (3d) 499.

As argued by the Crown, it was incumbent upon the defence to disclose their alibi in a timely manner because, “if supported on investigation, [it] demonstrates that the Crown has charged the wrong person...it is a matter of common sense that delay in disclosing alibi leaves the evidence open to suspicion. By its very nature alibi is a defence that has the potential of being a complete answer to a criminal charge, or at least of rendering the accused's participation in the event highly improbable, and thus one would expect the accused to raise the matter at an early time.”³³

On the other hand, defence counsel submitted “that no adverse inference should be drawn, or prejudice to the accused incurred, where the defence determines to exercise the right to silence and elects not to call defence evidence. He therefore submitted that there can be no obligation to disclose a potential alibi defence until the accused forms the intention to rely on that defence at trial [and that] the accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet.”³⁴

He argued that a “determination to disclose a potential alibi may only be meaningfully made when the defence has received full and timely disclosure of the Crown's case. There can be no crystallization of an obligation to disclose an alibi before the defence has been fully apprised of the case to be met without rendering the right to silence meaningless. He submitted that, in this case, the failure by the Crown to make full and timely disclosure of all relevant material effectively negated the imputed defence's obligation to disclose potential alibi evidence in sufficient time for investigation.”³⁵

In response, the Crown submitted that whether or not they had made full disclosure, the appellants knew the nature of the charges they were facing at the time of their arrest. Furthermore, the Crown submitted that by its very nature, alibi is a unique defence that denies any involvement by the accused in the crime alleged, and the Crown's case is irrelevant to the defence of alibi.

The Court agreed with the Crown, stating that:

³³ *Letourneau*, *supra* note 31 at paras 164, 169.

³⁴ *Ibid* at para 173.

³⁵ *Ibid* at paras 174–76.

The so-called rule that an alibi must be disclosed "at a time when an investigation may uncover something" with "full particulars of the defence" is an exception to the general rule of inadmissibility of pre-trial silence.

It is almost inexplicable why two men arrested as suspects in a recent, brutal murder, if innocent, would not immediately disclose the fact that they were elsewhere. It is even more inexplicable that the same two men, facing or following a committal at a Preliminary Inquiry, with competent legal advice, would not explain themselves in order to avoid trial and the risk of being convicted of such a serious offence.

...

In my judgment, an alibi is either true or not true, and, if true, constitutes a complete defence. It is unlike most defences about which an accused can remain silent until he has had an opportunity to assess the Crown's case, the disclosure of which is governed now by *Stinchcombe*, supra. When it comes to factual innocence, however, what the Crown has or has not disclosed, and when, must be irrelevant.³⁶

In reaching their unanimous decision, the Court of Appeal relied on a previous decision of the Court in *R v Ford*.³⁷ In that case the Court held that for an alibi to be investigated, the Crown requires the following from the defence³⁸:

- A) Full particulars of the defence including the names of any witnesses.
- B) Disclosure at a time when an investigation may uncover something.

The Court further noted that considering many criminal trials take two years or more to proceed, disclosure ought to take place at a time before memories of and records of a certain day have failed or been destroyed. For instance, in this case, if the accused's alibi had been disclosed to the police within the first two months, something may have been discovered. However, by waiting nearly 17 months, "what chance would there be of anything being remembered? One cannot follow a cold trail. In the case at bar, the disclosure of alibi was so sparse as not to constitute full and proper disclosure."³⁹

Although the accused is under no legal obligation to cooperate with or assist the Crown by announcing its defence, failure to disclose an alibi in a

³⁶ *Ibid* at paras 178-180, 189 [emphasis added].

³⁷ *R v Ford* (1993), 78 CCC (3d) 481, [1993] BCCJ No 147 (QL) (CA).

³⁸ *Ibid* at para 92.

³⁹ *Ibid*.

timely manner may affect the weight given to it by the jury. In *R v Nelson*,⁴⁰ the court had to decide whether an alibi arising out of cross-examination of the accused qualifies as an undisclosed alibi allowing for an adverse inference, considering he has a *Charter* right to silence until he actually takes the stand:

When arrested shortly after the event, the appellant had told the police that he was at home when Ms. Edwards was attacked. He offered no further details as to his whereabouts and made no reference to his uncle's girlfriend or the two women in the other apartment. These details first emerged during the appellant's cross-examination.

Counsel for the appellant forcefully submitted that the Crown improperly invited the jury to draw an adverse inference from the defence's failure to call witnesses who could, according to the appellant's testimony, account for his whereabouts at the time of the attack on Ms. Edwards and her friend. Counsel further argued that even if the inference could be drawn, the trial judge erred in failing to instruct the jury as to the limited nature of that inference and the caution to be exercised before drawing that inference.⁴¹

On appeal the Crown characterized this as a case of an undisclosed alibi. It was argued that the accused's failure until cross-examination to reveal the identity of witnesses who could confirm his whereabouts amounted to a failure to give timely notice of the essential details of an alibi, and invited an instruction as to the adverse inference, which could be drawn from the failure to give that timely notice.

The Court of Appeal accepted the Crown's submission that the accused's failure to disclose to the prosecution until cross-examination the identity of those who could confirm his whereabouts denied the prosecution the opportunity to effectively investigate the alibi. The Court stated that "in these circumstances, the trial judge should have told the jury that the accused's failure to make timely disclosure...was a factor to be considered in determining what weight should be given to his evidence."⁴²

However, even if the accused notifies the Crown that it intends to raise an alibi defence, the Ontario Court of Appeal has ruled in *R v Witter* that the Crown must wait until the accused actually testifies before it attempts to show the alibi is false, and thus draw an inference of guilt. The Court

⁴⁰ *R v Nelson* (2001), 147 OAC 358, [2001] OJ No 2585 (QL) (CA).

⁴¹ *Ibid* at paras 5-6. See also *R v Hinde*, 2001 BCCA 723 at para 22, 52 WCB (2d) 143 [*Hinde*].

⁴² *Hinde*, *supra* note 41 at para 22.

reasoned that the Crown cannot rebut a defence not called and the accused is under no duty to advance any particular defence.⁴³

V. ALIBI NOTICE AS EVIDENCE

An interesting issue that arose during *Witter* was whether or not an alibi notice was a statement made by counsel as agent for the accused and was, therefore, admissible as a statement made by him in Court, whether or not he actually testified.⁴⁴

In this case, the defence provided written notice to the Crown about ten days before the trial advising that they intended to advance an alibi defence. They provided the Crown with a statement signed by the accused's former girlfriend, which stated that the accused was at her home when the incident occurred. Investigation by the police subsequently determined that the alibi was false and the Crown submitted that the alibi notice was a statement made by counsel as agent for the accused and was, therefore, admissible.

The defence objected to the admissibility of the alibi notice, stating that they could not decide whether to call the alibi evidence referred to in the notice until it had heard the case for the Crown. The defence argued that if the Crown were allowed to tender the alibi notice as part of its case, they would be forced to put forward the alibi defence or risk an adverse inference from its failure to advance that defence before the jury. Furthermore, it was argued that the accused's constitutional right to remain silent and his constitutional protection against self-incrimination precluded the admission of the alibi notice during the case for the Crown.

At trial, the judge held that the alibi notice was in the same position as any other relevant and voluntary statement made by an accused to the police, and the Crown was entitled to put in such a statement as part of their case, whether or not they call evidence to refute it. Further, if the prosecution is able to prove beyond a reasonable doubt that the alibi is false then that may well become a circumstance requiring a judicial instruction to the jury on consciousness of guilt.

⁴³ *R v Witter* (1996), 105 CCC (3d) 44, 1996 CarswellOnt 325 (five-judge panel of the CA) [*Witter*]. However, see *contra R v Gillespie* (1990), 10 WCB (2d) 461, 1990 CarswellOnt 3957; *R v Rossborough* (1985), 81 CR App R 139, [1985] Crim LR 372.

⁴⁴ *Witter*, *supra* note 43 at para 9.

A number of grounds were argued on appeal, including whether or not the notice was in fact a statement of the accused. If so, whether or not it was voluntary considering that it was “coerced” by the common law rule which requires an accused to make timely disclosure of an alibi or risk an adverse instruction based on the failure to disclose that alibi, or if it should have been excluded by a privilege akin to that which protects communications made in pursuit of settlement.

Unfortunately, the Court of Appeal did not rule on any of these grounds stating that “the question of when, if ever, an alibi notice provided to the Crown by an accused's solicitor can be treated as a statement of the accused is an open one [as is] the further question of whether the alibi notice should be admissible as part of the Crown's case even if it is regarded as a statement of the accused as equally open.”⁴⁵ Instead, the Court ordered a new trial on the sole ground that the trial judge had erred in instructing the jury that they could find that the alibi referred to in the notice was concocted by the appellant and could provide a basis for an inference of consciousness of guilt.⁴⁶

While the Court confirmed that an inference of guilt could be drawn from an accused that fabricates an alibi, and thus proves beyond a reasonable doubt that the accused was the person who committed the crime, there must be evidence that the alibi was deliberately fabricated and that the accused was a party to that fabrication – mere rejection of alibi evidence as untruthful or unreliable does not constitute affirmative evidence of guilt. There was, however, no basis for suggesting that the alibi witness deliberately put forward an alibi that she knew was false, or that the accused played any role in authoring it.

However, if the evidence adduced by the Crown is capable of supporting the inference that an accused concocted a false alibi, an alibi notice professing an intention to advance that alibi at trial would be relevant in that it would tend to support the consciousness of guilt inference. Ultimately, although the alibi evidence that was potentially offered by the former girlfriend was found to be untruthful or unreliable, it could not be shown that it was fabricated or concocted by the accused.⁴⁷

⁴⁵ *Ibid* at para 38.

⁴⁶ *Ibid* at para 29.

⁴⁷ However, see *R v Nielsen* (1984), 30 Man R (2d) 81, 16 CCC (3d) 39 (CA), leave to appeal to SCC refused, [1985] 1 SCR xi, and the subsequent re-trial of Jerry Stolar in 1989 where his “alibi” witness (former girlfriend) actually turned out to be a witness for

As such it is possible that a fabricated alibi (although not an alibi that is unreliable or unbelievable) may be tendered as evidence by the Crown, even though it has not been led by the defence, other than by way of a pre-trial notice. While this is generally not the case in the United States, where the Courts have stated that the “prosecution should not be permitted to impeach a defendant who has elected not to present an alibi defence at trial with statements contained in a notice of alibi withdrawn before trial,”⁴⁸ the Courts have held that a prosecutor may use a withdrawn alibi notice, where an entirely different alibi is provided at trial.⁴⁹

VI. AUSTRALIAN EXPERIENCE

As a result of the foregoing it is obvious that an accused has no absolute right to pre-trial silence in Canada if he intends to call alibi evidence. While the failure to disclose an alibi prior to trial does not make it inadmissible, the Court may draw an adverse inference as to its reliability and credibility.

However, in Australia, the courts traditionally viewed the alibi rule differently than in Canada. For example, in *R v Petty and Maiden*, Brennan J. of the High Court held that historically “even where an accused proposes to raise an alibi, there is no common law duty to give the Crown notice of the alibi.”⁵⁰ Furthermore, he stated that:

Unless [the accused] was under a duty to inform the Crown before the trial that he proposed to raise a ‘defence’ ... it was impermissible to draw an adverse inference from the raising of the defence at a stage of the trial which left the Crown with insufficient time to investigate it fully. A criminal trial is the prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by

the Crown.

⁴⁸ *People v Brown*, 98 NY2d 226 at 235 (2002). See also *People v Holland*, 445 NW2d 206 (1989); *People v Hunter*, 291 NW2d 186 (1980); *New Jersey v Gross*, 523 A2d 212 (NJ Super AD 1987).

⁴⁹ See e.g. *People v Von Everett*, 402 NW2d 773 (1986); *People v Malone*, 447 NW2d 157 (1989); *People v Lorenzo McCray*, Mich CA LC #98-001064 (2001). See also *People v Franklin Rodriguez*, 2004 NY Int 147, in which a majority the court (4:3) held that the alibi notice should not have been used as evidence of the suspect’s guilt where there was a plausible basis for abandoning it (the minority held that the alibi notice was properly admitted as evidence). Nevertheless, the majority held that the error was harmless and affirmed the convictions.

⁵⁰ *Petty and Maiden v The Queen*, [1991] HCA 34 at para 6, 173 CLR 95, per Brennan J in a concurring opinion.

pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so far as it reasonably can, any "defence" which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof: *Shaw v The Queen* (1952) 85 CLR 365, at pp 379-380. The Crown obtains no assistance in discharging that onus by pointing to some omission on the part of an accused to facilitate the presentation of the Crown's case or to some difficulty encountered by the Crown in adducing rebuttal evidence which an accused could have alleviated by earlier notice.⁵¹

As a result most Australian states have now legislated a uniform set of rules with respect to alibi disclosure. For example, s. 190 of the Victoria *Criminal Procedure Act 2009*,⁵² states that:

190. Alibi evidence

(1) An accused must not, without leave of the court-

(a) give evidence personally; or

(b) adduce evidence from another witness-

in support of an alibi unless the accused has given notice of alibi within the period referred to in subsection (2).

(2) A notice of alibi must be given by serving the notice on the DPP [Director of Public Prosecutions] within 14 days after-

(a) the day on which the accused was committed for trial on the charge to which the alibi relates; or

(b) if paragraph (a) does not apply, the day on which the accused received a copy of the indictment.

(3) A notice of alibi must be served in accordance with section 392.

(4) A notice of alibi must contain-

⁵¹ *Ibid.*

⁵² *Criminal Procedure Act 2009* (Vic), s 190. See also New South Wales *Criminal Procedure Act 1986* (NSW), s 150 "notice of alibi."

- (a) particulars as to time and place of the alibi; and
- (b) the name and last known address of any witness to the alibi; and
- (c) if the name and address of a witness are not known, any information which might be of material assistance in finding the witness.

(5) If the name and address of a witness are not included in a notice of alibi, the accused must not call that person to give evidence in support of the alibi unless the court is satisfied that the accused took reasonable steps to ensure that the name and address would be ascertained.

(6) If the accused is notified by the DPP that a witness named or referred to in a notice of alibi has not been traced, the accused must give written notice to the DPP, without delay, of any further information which might be of material assistance in finding the witness.

(7) The court must not refuse leave under subsection (1) if it appears to the court that the accused was not informed of the requirements of this section.

(8) If-

- (a) an accused gives notice of alibi under this section; and
- (b) the DPP requests an adjournment-

the court must grant an adjournment for a period that appears to the court to be necessary to enable investigation of the alibi unless it appears that to do so would prejudice the proper presentation of the case of the accused.

In addition, until January 1, 2010 the *Victoria Crimes (Alibi Evidence) Regulations 2003*⁵³ provided the actual format in which alibi disclosure had to be made. The current notice of alibi, now considerably condensed, is found in Rule 4.11 and Form 6-4E of Victoria's *Supreme Court (Criminal Procedure) Rules 2008*. A similar notice of alibi for Country Court is found in rule 2.07 of the *County Court Criminal Procedure Rules 2009*.⁵⁴ Templates for both alibi notices are found in Appendix A.

⁵³ *Crimes (Alibi Evidence) Regulations 2003* (Vic).

⁵⁴ *Supreme Court (Criminal Procedure) Rules 2008*, SR No 12/2008; *County Court Criminal Procedure Rules 2009*, SR No 181/2009.

VII. UNITED STATES EXPERIENCE

Like Australia, most American states have codified the rules regarding alibi disclosure. In essence, the various state governments have legislated the common-law principles that had developed with respect to alibi disclosure, requiring that it should be given in writing to the prosecutor, and with sufficient time (usually 10-14 days after committal) and with sufficient particularity to permit the authorities to investigate (including the name and address of any witnesses). Furthermore, failure to give notice of alibi may result in it being ruled either inadmissible or carrying an adverse inference.

Notice-of-alibi provisions exist in a majority of states, some dating back to early last century. While the Supreme Court of Canada may not yet have ruled officially on the constitutionality of the alibi rule as it applies to an accused's right to silence (excepting the reference to *R v Letourneau* in *R v Cleghorn*) the Supreme Court of the United States first ruled on the issue in 1970.

In *Williams v Florida*,⁵⁵ the U.S. Supreme Court upheld a Florida statute requiring a defendant who intends to rely on an alibi to disclose to the prosecution the names of his alibi witnesses. Failure to comply could result in exclusion of alibi evidence at trial (except for the defendant's own testimony). The Court held that such a rule does not violate the Fifth Amendment privilege against compelled self-incrimination.

Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate ... The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony

⁵⁵ *Williams v Florida*, 399 US 78 (1970).

is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.⁵⁶

As the Florida legislation required reciprocal disclosure from the Prosecution as to what they did with the alibi evidence, the Court did not decide if the defendant enjoyed reciprocal discovery against the State. However that issue was resolved a few years later in *Wardius v Oregon*, when the Court held that reciprocal discovery was required by "fundamental fairness."⁵⁷ Although the Oregon legislation did not require it, the Court stated the State should grant "reciprocal discovery...in the absence of fair notice that petitioner will have an opportunity to discover the State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense."⁵⁸

As such, all states with notice-of-alibi laws require reciprocal disclosure. As an example, the statutory notice-of-alibi rules for the state of South Dakota are reprinted below:

23A-9-1. (Rule 12.1(a)) Time of notice to prosecutor of alibi defense—Contents. Within the time specified in § 23A-8-4 for pretrial motions, upon written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, a defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecuting attorney a written notice of his intention to offer a defense of alibi. The notice shall state the specific place or places where the defendant claims he was at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

23A-9-2. (Rule 12.1(b)) Notice to defendant of rebuttal witnesses on alibi defense. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the

⁵⁶ *Ibid* at 85 [emphasis added].

⁵⁷ *Wardius v Oregon*, 412 US 470 (1973), headnote.

⁵⁸ *Ibid*.

defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

23A-9-3. (Rule 12.1(c)) Notice to adverse party of newly discovered witness on alibi. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under § 23A-9-1 or 23A-9-2, he shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

23A-9-4. (Rule 12.1(d)) Exclusion of testimony of undisclosed alibi witness—Defendant's right to testify. Upon the failure of either party to comply with the requirements of § 23A-9-1, 23A-9-2, or 23A-9-3, the court shall exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This section shall not limit the right of a defendant to testify in his own behalf.

23A-9-5. (Rule 12.1(e)) Exception granted to notice requirements. For good cause shown, a court may grant an exception to any of the requirements of §§ 23A-9-1 to 23A-9-4, inclusive.

23A-9-6. (Rule 12.1(f)) Evidence of alibi notice inadmissible after withdrawal. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.⁵⁹

VIII. WINNIPEG EXPERIENCE

Until 2001, the Winnipeg Police had no specific guidelines regarding the receipt and investigation of alibi evidence that had been disclosed after an accused had been charged. However, in his report regarding the *Inquiry Regarding Thomas Sophonow*, former Supreme Court Justice Peter Cory made several recommendations with respect to how the Winnipeg Police Service, the Department of Justice, and the defence should investigate alibi evidence:

1. The alibi defence should be disclosed within a reasonable time after the Crown disclosure has been completed and the Defence has reviewed it and is in a position to know the case that must be met. When that disclosure should be made by the Defence will vary from case to case. It will obviously depend upon the extent of the Crown disclosure, how long it will take the Defence

⁵⁹ *Statutes of South Dakota*, Criminal Procedure, SD Codified L § 23A-9-1 (2016), Rule 12.1, "Notice of Alibi." See also *Statutes of Michigan*, Code of Criminal Procedure, MI Comp L § 768.20 (2016), regarding the disclosure of alibi defences.

to review that disclosure and how quickly Defence Counsel can prepare the alibi evidence disclosure. To the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses. Alibi evidence may well establish innocence and the Defence should spend all the time and energy required to put forward a complete and detailed position on the alibi evidence.

2. How should the police investigate the alibi evidence? Obviously, it is incumbent upon them to ensure that the alibi defence is credible. However, because of the importance of the evidence, the same care should be taken in interviewing the alibi witnesses as is taken with the interviews of suspect. That is to say, wherever possible, the interview should be videotaped and, if that is not feasible it must, at the very least, be audiotaped. The entire interview must be on tape. Anything which is alleged to have been said that is not transcribed should be considered inadmissible.

The interviewing of alibi witnesses should be undertaken by officers other than those who are the investigators of the offence itself.

It has been suggested that it should be done by members of other police forces. However, this is cumbersome and may be unnecessarily expensive. If the interview is conducted by an officer other than one involved in the investigation of the crime itself and if the interview is videotaped or audiotaped, this will provide sufficient safeguards.

3. The alibi witnesses should not be subjected to cross-examination or suggestions by the police that they are mistaken. The alibi witnesses should be treated with respect and courtesy. They should not be threatened or intimidated or influenced to change their position. However, I agree that it is appropriate for the police to instruct the witnesses that it is essential that they tell the truth and that a statement can be used as proof of its contents. The witnesses should be advised that they should be careful to tell the truth and of the consequences of a failure to do so.
4. If, as a result of the disclosure of the alibi and the interviewing of the alibi witnesses, the Crown deems it appropriate to conduct further interviews of Crown witnesses expected to be called at the trial, a procedure similar to the interrogation of the alibi witnesses should be followed. That is to say, if there is to be a further interview of a Crown witness, it should be conducted by someone other than the investigating officers. The police conducting the interview should make every effort to avoid leading questions or questions which suggest the position of the police on the case.
5. It is essential that any further interviews of Crown witnesses following the disclosure of the alibi evidence should as well be videotaped or, if that is impossible, audiotaped. Every portion of the interview should be transcribed.

Any statement alleged to have been made by the witness and which does not appear on the tape recording should be deemed to be inadmissible.⁶⁰

In November 2006, Legal Counsel for the Winnipeg Police stated before the *Driskell Inquiry* that current police in-service training now addresses issues which often arise in wrongful conviction cases, such as the need to follow-up on all leads, suspects and potential alibis to prevent tunnel vision. The Sophonow investigation was cited as an example used during this training.⁶¹

IX. CONCLUSION

The consequence of the defence failing to disclose an alibi properly to the Crown is that the trier of fact may draw an adverse inference that it has been fabricated. While a delayed defence disclosure does not make it inadmissible, it can weaken alibi evidence. As noted by the Court of Appeal in *R v Letourneau*, an:

alibi constitutes a complete defence to the charge...[and] it is almost inexplicable why two men arrested as suspects in a recent, brutal murder, if innocent, would not immediately disclose the fact that they were elsewhere. It is even more inexplicable that the same two men, facing or following a committal at a Preliminary Inquiry, with competent legal advice, would not explain themselves in order to avoid trial and the risk of being convicted of such a serious offence.⁶²

⁶⁰ Peter D Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001), online: <https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1> [emphasis added].

⁶¹ Patrick LeSage, *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Manitoba Justice, 2007); Winnipeg Police Service, *Response on Behalf of the Winnipeg Police Service to the Systemic Submission Made on Behalf of James Driskell and AIDWYC* at 4-5, online: <www.driskellinquiry.ca/pdf/submission_by_wps.pdf> (accessed 4 November 2017).

See also *Phillion v Ontario (Attorney General)*, 2014 ONCA 567, 121 OR (3d) 289, leave to appeal SCC refused (19 February 2015), Ottawa 36093, regarding whether there was liability for the delay in the Crown disclosing the accused's alibi evidence once Crown disclosure obligations changed after *Stinchombe*.

⁶² *Letourneau*, *supra* note 31. See also *R v Allen*, 2016 MBPC 70 at para 33, 135 WCB (2d) 363, where Corrin PJ drew an adverse inference from the accused's failure to call his alibi witness: "After all, it is only logical that an accused claiming an air-tight alibi that would definitely prove his innocence would call the person who could confirm and corroborate his testimony and thereby assure his acquittal by buttressing his credibility

Although there may be good reason why defence counsel may wish to withhold alibi evidence from the Crown, they risk an adverse inference from the trier of fact which they may not be able to correct later. As noted in *R v Manson* “I agree with the Crown that the defence has created the situation in which he now finds himself. He made a strategic decision not to earlier disclose the alibi defence [and must therefore suffer the consequences].”⁶³

As such, risking an adverse ruling as to the legitimacy of an alibi which is disclosed late, many defence lawyers will disclose an alibi at the earliest convenience. Furthermore, if defence lawyers start to delay in disclosing alibi evidence, they risk having more stringent “alibi-notice-laws” imposed on them by the state, such as those in the U.S. and Australia.

Nevertheless, adopting some of the guidelines established by the courts or legislatures in Australia or the United States, such as the format previously used in Victoria, Australia (see Appendix A), requiring that all alibi evidence be disclosed to the Crown in writing and with sufficient particularity to enable the authorities to meaningfully “uncover something,” may be beneficial to all parties.

This would include the exact time, date and location where the accused was, and the names and addresses of those that can verify it. In addition, to the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses. Alibi evidence may well establish innocence and the Defence should spend all the time and energy required to put forward a complete and detailed position on the alibi evidence.

While there is no requirement that an accused submit to further interrogation by the police and can provide his alibi information via third parties (ie: his lawyer, witnesses, interested parties), there is nothing preventing an accused from waiving his right to silence and participating in such a process. While some police officers may be loath to taking an alibi statement when the accused “already had his chance” to tell his story, they also stand to benefit from a false or fabricated alibi if not clear an innocent person.

on such a key trial issue.” While not disagreeing with this statement, the adverse inference was reversed on appeal as it was conceded by the Crown that the witness would not have been able to state where the accused physically was at the time of the accident. See *Allen* MBCA, *supra* note 4 at paras 8-9.

⁶³ *R v Manson*, 1997 CanLII 3456 at para 14.

Nevertheless, raising alibi can be regarded as a very high risk defence as it can effectively reverse the onus of proof with a jury believing the accused (or his witnesses) has lied to escape conviction. On the other hand, providing it to the Crown or the police in a timely manner could mean, if your client is innocent, the timely dismissal or stay of charges by the Crown.

APPENDIX A

**Supreme Court (Criminal Procedure) Rules 2008
Rule 4.11 and Form 6-4E**

Rule 4.11

FORM 6-4E

IN THE SUPREME COURT OF VICTORIA
AT

The Queen

v

[*name of accused*]

NOTICE OF ALIBI

I, [*name and address of accused*], give notice of alibi in accordance with section 190 of the **Criminal Procedure Act 2009**.

1. Particulars as to time and place of alibi: [*insert details*]
2. Name and last known address of any witness to the alibi: [*insert names and addresses of witnesses to alibi*]
3. *[*If name and last address of any witness to the alibi is not known*] the following information might be of material assistance in finding the witness [*insert details*].

Date:

[*Signature of accused*]

* Delete if not applicable

**The Crimes (Alibi Evidence) Regulations 2003,
S.R No. 2/2003
Passed Pursuant to the Victoria Crimes Act 1958,
Section 399A**

FORM 1

**NOTICE OF PARTICULARS OF ALIBI To the Director of
Public Prosecutions**

Informant: [full name]

Defendant: [full name]

Charge filed on: [date]

Nature of offence: On [date] in the Magistrates' Court at [venue]
the Defendant was committed for trial for the above offence.

Take notice that the Defendant intends to adduce at the trial
evidence in support of an alibi and provides the following
information in support of the alibi: [If space insufficient attach a
separate sheet.]

- (a) [State the name of each witness the Defendant proposes to call];
- (b) [State the current address of each witness, if known to the Defendant];
- (c) [if the name or address of each witness is not known, the Defendant must state all information he or she has which might help locate the witness];
- (d) [State the facts on which the Defendant relies].

This notice to the Director of Public Prosecutions may be given by leaving it at his or her office or by sending it in a registered or certified letter addressed to the Director of Public Prosecutions at his or her office. If the Defendant is in a prison or a police gaol, the officer in charge of the prison or police gaol will arrange for this notice, when completed by the Defendant, to be given or sent to the Director of Public Prosecutions. _____

FORM 2

**NOTICE OF PROVISIONS WITH RESPECT TO ALIBI To
the Defendant [full name]**

Take notice that under section 399A of the Crimes Act 1958 a Defendant is not entitled at his or her trial, without leave of the court, to establish an alibi unless the Defendant gives notice of the particulars of the alibi in court during or at the end of the committal proceedings or in writing to the Director of Public Prosecutions.

Notice must be given within 10 days from the day on which you are given a copy of the statement and particulars of the offence as charged in the presentment. If you were committed for trial on the charge in relation to which the alibi is sought to be relied upon, you must give notice within 10 days from the day on which you were committed. Your attention is drawn to the following matters:

1. Notice of particulars of an alibi must contain the following information in support of the alibi:
 - (a) the name of each witness you propose to call to establish the alibi;
 - (b) the current address (if known to you) of each witness;
 - (c) if the name or address of the witness is not known to you, any information in your possession which might help locate the witness;
 - (d) the facts on which you rely.
2. The address of the Director of Public Prosecutions for service of the notice of the particulars of an alibi is [insert address].
3. Before you give notice of particulars of an alibi which does not include the name or address of a witness, you should first take reasonable steps to ascertain the name or address of that witness.
4. If you are notified by or on behalf of the Director of Public Prosecutions that a witness has not been traced from the

information you have given, you should immediately give the Director of Public Prosecutions notice of any other information you then have which might be of material assistance in finding the witness. If you subsequently receive any such information, you should immediately give the Director of Public Prosecutions notice of that information.

Dated: Director of Public Prosecutions

Note: Notices of alibi can be obtained from registrars of the Magistrates' Court and officers in charge of prisons or police gaols.

ENDNOTES 1. General Information The Crimes (Alibi Evidence) Regulations 2003, S.R No. 2/2003 were made on 22 January 2003 by the Governor in Council under section 399A of the Crimes Act 1958, No. 6231/1958 and came into operation on 1 February 2003. Regulation 10 expired on 31 December 2003: regulation 10(3). The Crimes (Alibi Evidence) Regulations 2003 will sunset 10 years after the day of making on 22 January 2013 (see section 5 of the Subordinate Legislation Act 1994).

2. Table of Amendments There are no amendments made to the Crimes (Alibi Evidence) Regulations 2003 by statutory rules, subordinate instruments and Acts. Where a provision has expired, the provision has been omitted and an explanatory sidenote included.

3. Explanatory Details

1 Reg. 4: S.R No. 178/1992.

S.R No. 2/2003

Crimes (Alibi Evidence) Regulations 2003

Onashowewin and the Promise of Aboriginal Diversionary Programs

CELESTE MCKAY* AND DAVID
MILWARD**

ABSTRACT

This article focuses on the use of Indigenous diversionary programming by Onashowewin, an Indigenous non-profit organization in Winnipeg. An analysis of 100 case files finds a recidivism rate of 30%. That is a very positive outcome, especially when compared to numerous studies that have found high recidivism rates for Indigenous offenders. What is particularly encouraging is the possibility that programs like Onashowewin can lead Indigenous persons to more positive lifestyles after their earliest contacts with the justice system, and thereby avert patterns of reoffending that frequently lead to incarceration in federal penitentiaries. Onashowewin also incorporates Indigenous cultures and spirituality into its programming. Part of Onashowewin's promise is the ability to contribute to cultural revitalization, even if limited in scale. Onashowewin, and other programs like it, can also provide a foundation upon which Indigenous self-determination can eventually be built.

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I. INTRODUCTION

The problem of over-incarceration of Indigenous women, men and youth remains a very serious one in Canada. The phenomenon is a product of a myriad of factors. Some of those factors are systemic to the justice system itself, including over-policing of Indigenous peoples, inadequate legal representation for Indigenous accused, and inadequate correctional services for Indigenous peoples. Other factors pertain to broader patterns of inequality and injustice facing Indigenous people, to a large extent as the consequence of colonialism and discrimination. Those include socio-economic factors such as poverty, substance addictions, and Fetal Alcohol Syndrome Disorder (FASD). They also include the loss of culture, and correspondingly a lack of positive self-esteem. Having entered into the justice system in this way, many Indigenous persons become caught up in lifelong patterns of higher rates of offending or recidivism.

One approach to this problem has been diversionary programs that attempt to resolve offenders' cases without resorting to trial or standardized sentencing processes within the court system itself, with an emphasis on Indigenous culture and spirituality as vehicles of rehabilitation. The usual first step is that a prosecutor approves an offender for participation in a program based on certain criteria such as the offence being a minor one, the offender not having previously been through the program, and whether the accused is willing to accept responsibility for the offence – although many diversionary programs allow an accused to accept responsibility for an offence without prejudicing his or her right to plead not guilty at a later time.¹ The court then typically adjourns the case for a period of months or even in excess of a year. During this time, the offender is required to perform certain tasks or meet conditions with a view towards correcting behaviour. In diversionary programs with an Indigenous emphasis, this can include attending counseling for certain types of behaviour, meetings with the victim(s) under appropriate conditions in order to resolve differences, performing community service hours, participating in cultural activities, and attending meetings with Indigenous Elders for spiritual guidance. If an offender successfully completes the required steps then the prosecutor will withdraw the charge on the next court date. If the accused is unsuccessful

¹ Church Council on Justice and Corrections, *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures* (Ottawa: Church Council on Justice and Corrections, 1996) at 83–102.

and the prosecutor is not willing to extend another chance, the case is returned to the court system.²

The focus of this article is on a specific Indigenous diversionary program offered within Winnipeg. Onashowewin Inc. is a non-profit community based organization, which takes its name from an Ojibwe word that translates to “the way we see justice.”³ Onashowewin’s mandate is to use the principles of restorative justice in its delivery of programs to Indigenous persons living in Winnipeg who have been in conflict with the law.⁴ Programs are designed in a holistic, culturally appropriate and sensitive manner.⁵ The programs focus on repairing the harm caused, dealing with responsibility, learning and healing.⁶ Onashowewin aspires to both break the cycle of recidivism for Indigenous people who become involved with the criminal justice system, and to set them on more positive pathways in life that contribute to their healing.⁷ Both objectives are interrelated.

This article is based on a research project that evaluated and examined the recidivism rates of clients who completed diversion within Onashowewin’s justice circles during the time period of April 1, 2011 to March 31, 2012. These clients included men, women, and youth. Factors such as age, gender, Indigenous identity (Status, Metis, Non-Status, Inuit or other) and number of programs completed were examined, to determine if these variables might have contributed to the success or recidivism of the client. The study measured recidivism based on convictions for new offences following the initial charge that led to the accused becoming a client of Onashowewin.

² Note that this is often, but not always, the case. There are examples of programs where, once a matter is diverted, the offender remains accountable only to members of the Indigenous community while the Crown has no further role. See for example Ted Palys & Winona Victor, “‘Getting to a Better Place’: Qwi:Qwelstom, the Sto:lo, and Self-Determination” in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 12.

³ Erika Miller, “Staying Charges, Changing Lives,” *Community News Commons* (29 November 2013), online: <http://www.communitynewscommons.org/our-city/staying-criminal-charges-changing-lives/> [E Miller].

⁴ Onashowewin Justice Circle, “About” (30 May 2018), online: <onashowewin.com>.

⁵ *Ibid.*, “Workshops.”

⁶ *Ibid.*

⁷ Onashowewin Justice Circle, *supra* note 4.

There are challenges in attempting to measure recidivism. Does one count being charged as recidivism or only conviction? Does one include a revocation of a supervision order, which does not always require a conviction? Any measure chosen will have a substantial effect on the rate of recidivism that is revealed.⁸ Further, no method can account for crimes that go undetected and therefore do not lead to arrest or conviction⁹ or for wrongful arrests and convictions.

Another important question is the length of the follow-up period. A short study period inevitably skews the results.¹⁰ For example, a recidivism study in Norway found that a one-year follow-up period found a reconviction rate of 20.4% while a four-year follow-up period found a reconviction rate of 37.8%.¹¹ However, longer periods require more resources and may end up losing relevancy if the period is too long.¹² A two-year follow-up period was selected for the initial analysis of Onashowewin case files. Two years is a commonly used time period and allows comparison to many other studies.

Whether or not an individual reoffends is itself not a complete picture of their success in rehabilitation. Michael Maltz argues that there are other indicators of success that provide a more complete and nuanced picture. For example, what employment or educational attainments has the accused attained after the initial conviction? What improvements in mental health or emotional well-being has the accused displayed since then?¹³ A qualitative study based on interviews with accused may be better suited to capturing

⁸ Ruggero, Dougherty & Klofas, "Measuring Recidivism: Definitions, Errors and Data Sources" (2015) Center for Public Safety Initiatives Working Paper No 2015/03 at 4-6; Ruben Castillo et al, "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines" (2004) United States Sentencing Commission, Research Series on the Recidivism of Federal Guidelines, Release 1 at 4.

⁹ Alfred Blumenstein & Richard Larson, "Problems in Measuring and Modeling Recidivism" (1971) 8:2 *Journal of Research in Crime & Delinquency* 124.

¹⁰ Harris et al, "A CJA White Paper: Defining and Measuring Recidivism" (2009) Council of Juvenile Correctional Administrators at 10-11; Synøve Nygaard Andersen & Torbjørn Skardhamar, "Pick a Number: Mapping Recidivism Measures and their Consequences" (2017) 63:5 *Crime & Delinquency* 613 at 619-620.

¹¹ Nygaard Andersen & Skardhamar, *supra* note 10 at 623.

¹² *Ibid* at 619-620.

¹³ Michael Maltz, *Recidivism* (Orlando, Fla: Academic Press, 1984) at 23-24.

these nuances, in comparison to the statistical emphasis of measuring recidivism.

Nonetheless, recidivism is a very commonly used success metric. It is often used by organizations providing restorative justice programming, not only to evaluate their own effectiveness, but to also gauge if improvements to programming can be made.¹⁴ That was indeed part of Onashowewin's motivation for commissioning the recidivism data that forms the basis of this article. The hope was to demonstrate a low recidivism rate so as to maintain a confident and positive relationship with Onashowewin's primary funder, the Manitoba Department of Justice.

The other reason to focus on recidivism is that it provides a basis for comparison with other studies. The Onashowewin study found an overall recidivism rate of 30%, which is substantially lower than the rates found in other studies on Indigenous recidivism which we will review in detail. The basis for comparison is admittedly not perfect, since those studies typically involved more serious offences than what Onashowewin deals with. However, consider that Indigenous recidivists very often have lengthy criminal histories preceding their incarceration in the federal penitentiary system. The insight that can be taken from the comparison is that the low recidivism rate shown by Onashowewin holds out the promise of having its clients avoid the sustained patterns of numerous convictions and recidivism that is so often seen with Indigenous prisoners in the federal system. And indeed the two year follow-up period we used is the same as seen in the other studies on Indigenous recidivism, which can make the comparison even more meaningful.

Lastly, while there is a body of literature critiquing efforts to achieve justice for Indigenous peoples within dominant, colonial structures, we would argue that Onashowewin has clearly demonstrated that the use of traditional culture and laws has made a significant difference in setting its clients on better pathways in life. A future qualitative study may be useful in verifying this assertion, but the assertion even now is reasonable. Furthermore, Indigenous self-determination over criminal justice can and will not be realized overnight. Programs that have a positive impact like Onashowewin, and draw upon traditional cultures and laws in doing so, can become at least a partial foundation for Indigenous self-determination

¹⁴ Ruggero, Dougherty & Klofas, *supra* note 8 at 1; Harris et al, *supra* note 10 at 5–6.

going forward. Now we begin with a detailed overview of Indigenous over-incarceration and its numerous causes.

II. INDIGENOUS OVER-INCARCERATION

A. The Numbers

The problem of over-incarceration of Indigenous peoples in Canada remains a very serious one. Indigenous persons as of 2016 represent 26% of admissions to provincial and territorial jails, and 28% of admissions to federal penitentiaries, despite being only 3% of the Canadian population.¹⁵

Most studies suggest that the rates for recidivism for Indigenous persons are also higher than for non-Indigenous persons, although studies vary on the degree of difference. The numbers for Indigenous recidivism, historically and consistently, have been high as well. For example, a 1989 study by James Bonta found almost no difference between Indigenous and non-Indigenous offenders released from provincial jails.¹⁶ In contrast, a 1986 study by Harman and Hann found that Indigenous parolees were almost twice as likely (51% to 28%) to have parole revoked in comparison to non-Indigenous parolees.¹⁷ Indigenous prisoners released from federal penitentiary were 12% to 19% more likely to commit an indictable offence following release in comparison to non-Indigenous prisoners.¹⁸ An analysis of 1993 data for offenders released from federal penitentiaries that included 243 Indigenous offenders and 271 non-Indigenous offenders found that Indigenous offenders had a higher recidivism rate (66%) compared to non-Indigenous offenders (47%).¹⁹

¹⁵ Julie Reitano, “Adult Correctional Statistics in Canada, 2015/2016” 37:1 *Juristat* (Ottawa: Statistics Canada, 2017) at 5.

¹⁶ James Bonta, “Native Inmates, Institutional Response Risk, and Needs” (1989) 31 *Can J Crim* 49.

¹⁷ William Harman & Robert Hann, *Full Parole Release: An Historical Descriptive Analysis* (Ottawa: Solicitor General of Canada, 1986).

¹⁸ *Ibid.*

¹⁹ William Harman & Robert Hann, *Predicting Release Risk for Aboriginal Penitentiary Inmates* (Ottawa: Correctional Service of Canada, 1993) [Harman & Hann, “*Predicting Release Risk*”].

Another study was based on three separate sets of study groups, one each for the years 1994/1995, 1995/1996 and 1996/1997.²⁰ There were 7,343 released offenders in the 1994/1995 year, 7,399 in the 1995/1996 year and 7,259 in the 1996/1997 year.²¹ The study followed up the files for 2,400 non-Indigenous male offenders in each of the latter two years, while following up on 933 male Indigenous offenders for the 1995/1996 year and 1,063 for the 1996/1997 year.²² The study tracked recidivism over a two-year period following release. The recidivism rates for the 1994/1995 cohort were 58.3% for male Indigenous offenders and 42.2% for non-Indigenous male offenders.²³ The recidivism rates for the 1995/1996 cohort were 56.8% for male Indigenous offenders and 41.2% for non-Indigenous male offenders.²⁴ The recidivism rates for the 1996/1997 cohort were 52.7% for male Indigenous offenders and 39.1% for non-Indigenous male offenders.²⁵

A more recent study was based on all offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation, in the 2004 calendar year.²⁶ The sample included 1,274 male Indigenous offenders and 418 female Indigenous offenders.²⁷ The recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders.²⁸ The rates amongst Indigenous offenders by gender were 60.7% for male offenders and 45.9% for female offenders.²⁹

A 1992 study by Bonta, Lipinski and Martin was based on a sample of 282 Indigenous prisoners with a follow-up period of 3 years after having

²⁰ James Bonta, Tanya Ruge & Mia Dauvergne, *The Reconviction Rate of Federal Offenders, 2003–02* (Ottawa: Solicitor General of Canada, 2003).

²¹ *Ibid* at 7.

²² *Ibid*.

²³ *Ibid* at 13.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ J Stephen Wormith & Sarah Hogg, *The Predictive Validity of Aboriginal Offender Recidivism with a General Risk/Needs Assessment Inventory* (Saskatoon: University of Saskatchewan, 2012) at 5.

²⁷ *Ibid*.

²⁸ *Ibid* at 20.

²⁹ *Ibid* at 21.

served time in a federal penitentiary.³⁰ Sixty-six percent had re-offended.³¹ It was found that the most significant predictors of offending were, in order of frequency, previous incarcerations, having committed a break and enter offence, and having been of a younger age on first conviction.³² Recidivism is clearly an important factor in Indigenous over-incarceration. We will now examine other factors that contribute to the problem of over-incarceration.

B. Factors Intrinsic to the Justice System Itself

There are numerous contributors to Indigenous over-incarceration that feature at every stage of the criminal process. It in fact manifests at the very start of the process in the form of discriminatory police attention. This phenomena of increased police scrutiny is described by the term “racial profiling,” the practice of assigning a racial group negative stereotypes that involve increased propensity towards criminal behaviour so as to justify increased surveillance. The practice is by now well known.³³ Official public inquiries have confirmed that Canadian police forces have engaged in discriminatory practices against Indigenous peoples, including increased surveillance on the basis of race.³⁴ A 2008 study by Carol LaPrairie found that Indigenous persons are seven times more likely than non-Indigenous persons to be identified as offenders by the police,³⁵ demonstrating a culture that countenances a lack of respect for Indigenous peoples.

³⁰ James Bonta, Stan Lipinski & Michael Martin, “The Characteristics of Aboriginal Recidivists” (1992) 34:3-4 Can J Crim 517.

³¹ *Ibid* at 518.

³² *Ibid* at 519.

³³ David Tanovich, “Using the Charter to stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall LJ 145; Scot Wortley & Julian Tanner, “Data, Denials, and Confusion: The Racial Profiling Debate in Toronto” (2003) Can J Corr 367; Scot Wortley & Julian Tanner, “Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor’s Critique of Racial Profiling Research in Canada” (2005) Can J Corr 581.

³⁴ Alvin Hamilton & Murray Sinclair, *The Justice System and Aboriginal People: The Report of the Aboriginal Justice Inquiry* (Winnipeg: Indigenous Justice Inquiry, 1991); Justice David H Wright, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatoon: Commission into Matters Relating to the Death of Neil Stonechild, 2004). See also Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Winnipeg: Fernwood Press, 2012).

³⁵ Carol LaPrairie, “The Neighbourhood Context of Urban Aboriginal Crime” (2008) 50:5 Can J Corr 523.

Sentencing principles developed in response to the over-incarceration of Indigenous peoples have provided little, if any, relief for the majority of those charged. Section 718.2(e) of the *Criminal Code* reads in part:

A court that imposes a sentence shall also take into consideration the following principles: ...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders.³⁶

In *R v Gladue*,³⁷ the Supreme Court stated that this provision was enacted in response to alarming evidence that Indigenous peoples were incarcerated disproportionately to non-Indigenous people in Canada.³⁸ Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to reduce incarceration of Indigenous offenders, and seek reasonable alternatives for Indigenous offenders.³⁹ A judge must take into account the background and systemic factors that bring Indigenous people into contact with the justice system, such as poverty, substance abuse, and “community fragmentation,”⁴⁰ when determining sentence.⁴¹ A judge must also consider the role of these factors in bringing a particular Indigenous accused before the court.⁴²

Nonetheless, lower courts following *Gladue* still demonstrated a clear preference for incarceration sentences in order to give effect to deterrence and retribution. Andrew Walsh and James Ogloff analyzed 691 reported sentencing decisions to determine the effects of s. 718.2(e).⁴³ They found that Indigenous status did not have any correlation with receiving either a custodial or non-custodial sentence.⁴⁴ The strongest correlates instead were

³⁶ *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

³⁷ *R v Gladue*, [1999] 1 SCR 688.

³⁸ *Ibid* at paras 58–65.

³⁹ *Ibid* at para 64.

⁴⁰ *Ibid* at para 67.

⁴¹ *Ibid*.

⁴² *Ibid* at para 69.

⁴³ Andrew Walsh & James Ogloff, “Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Indigenous Status in Sentencing Decisions” (2008) 50:4 *Can J Corr* 491.

⁴⁴ *Ibid* at 505.

the presence of standard aggravating or mitigating factors recognized by sentencing law prior to the passing of s. 718.2(e), with the frequent result that aggravating factors rendered an offence too serious for *Gladue* to justify a non-custodial sentence.⁴⁵

The Supreme Court recently attempted to provide a corrective to this trend in its decision, *R. v. Ipeelee*,⁴⁶ stating that offence bifurcation limiting the applicability of *Gladue* to a small range of less serious offences amounted to: "a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."⁴⁷ Unfortunately, the trajectory that was observed with respect to *Gladue* continues with *Ipeelee*. At the time of writing, an examination of cases that have applied *Ipeelee* indicates that the clear majority of these cases have continued to use terms of incarceration, again emphasizing deterrence and retribution as important considerations.⁴⁸ There are cases where courts have applied *Ipeelee* to use a conditional sentence, a term of probation, or a sentence of time served, but these are clearly in the minority.⁴⁹

Furthermore, there are procedural problems with realizing *Gladue*, for which many defence lawyers representing Indigenous accused share responsibility. A key vehicle for implementing *Gladue* is a report that sets out in full detail the life circumstances of an Indigenous accused and any other information the court needs to give full consideration to s. 718.2(e). This represents a considerable burden, which legal counsel may be reluctant to shoulder, for the reasons discussed below. An over-burdened legal aid system is a contributing factor.

A full *Gladue* report requires a more substantial period of preparation in comparison to a standard Pre-Sentence Report (PSR), both because of the greater number of persons to be interviewed, and also the information

⁴⁵ *Ibid* at 503–505.

⁴⁶ *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

⁴⁷ *Ibid* at para 63.

⁴⁸ See e.g. *R v Perrot*, 2015 ABCA 209; *R v Lawson*, 2012 BCCA 508, 105 WCB (2d) 86; *R v HL*, 2012 MBPC 80, 104 WCB (2d) 986; *R v John*, 2012 YKTC 73, 103 WCB (2d) 588; *R v Matte*, 2012 ONCA 504, 111 OR (3d) 791; *R v Scott*, 2014 SKQB 307, 116 WCB (2d) 645; *R v Simon*, 2015 NWTTC 10, 121 WCB (2d) 610; *R v Sack*, 2014 NSPC 107, 118 WCB (2d) 417.

⁴⁹ See e.g. *R v Rockwell*, 2012 MBQB 280, 285 Man R (2d) 290; *R v Key*, 2014 SKPC 122, 448 Sask R 99; *R v Johnson*, 2012 YKTC 75, 103 WCB (2d) 564; *R v FR*, 2012 NWTTC 5, 100 WCB (2d) 734; *R v SG*, 2014 ONSC 6309.

that has to be obtained. Individual interviews often have to be both in-person and lengthier due to the nature of the information being gathered, but also to establish a meaningful rapport with members of the Aboriginal community. A standard PSR tends to limit the background information to interviews with the accused's immediate family, and possibly an employer or a select few other persons close to the accused. A meaningful *Gladue* report requires much more extensive interviewing to understand and locate the accused's background in the context of systemic factors facing Indigenous people generally. Persons who should be interviewed include not just the immediate family, but also the accused's broader relations, as well as other members of the community. A reason for this is to impress upon the court that what is troubling the accused may in fact be troubling the community at large as well. Interviews with the accused's relations must also reach back to previous generations so that the accused's background can be connected to historical phenomena that have acted as oppressive forces on Indigenous peoples generally, such as residential schools or the "Sixties Scoop." Elders or other culturally important members of the community may also have to be interviewed to obtain information about what may be troubling the accused, how the community may want to approach the problem, and what options may be available for dealing with the problem.⁵⁰

A sociology master's thesis by Rana McDonald at the University of Manitoba, which included interviews with several defence lawyers in Manitoba, revealed that they cited s. 718.2(e) and *Gladue* infrequently during sentencing submissions for various reasons. Some of those reasons convinced lawyers that *Gladue* should not even enter into consideration as to how to represent their Indigenous clients.⁵¹ These included:

- (i) A perception that *Gladue* extended a sentencing discount that was inconsistent with the legal system's emphasis on equality.⁵²
- (ii) An uncertainty as to which clients might be Indigenous aside from those living on First Nations reserves.⁵³

⁵⁰ David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 88.

⁵¹ Rana McDonald, *The Discord Between Policy and Practice: Defence Lawyers' Use of Section 718.2(e) and Gladue* (MA Sociology Thesis, University of Manitoba, 2008) [unpublished].

⁵² *Ibid* at 85-92.

⁵³ *Ibid* at 88-90.

(iii) A preference for a "race-neutral" approach to advocacy.⁵⁴

(iv) A belief that the *Gladue* factors described mitigating factors for many offenders irrespective of race and were not necessarily unique to Indigenous offenders.⁵⁵

(v) A belief that the seriousness or violent nature of the offence, and/or the presence of significant aggravating factors, especially a prior record for the same kind of offence for which the accused is being sentenced, will denude *Gladue* of any meaningful practical value during a sentencing hearing.⁵⁶

Even when the defence lawyers in McDonald's study thought that *Gladue* had potential applicability to their clients, they had concerns about practical utility should they attempt to raise *Gladue* in court. These included:

(i) Some lawyers were not convinced that *Gladue* could be an effective "bargaining chip" during plea bargaining with the Crown.⁵⁷

(ii) Some were concerned that seeing through preparation of *Gladue* submissions and information for the Court's consideration would unduly extend the amount of time their clients spent in remand custody.⁵⁸

(iii) At the time of the study, some rehabilitative services grounded in Aboriginal cultures were available in Winnipeg. These include, for example, the Metis Justice Strategy and the Interlake Peacemakers Project. These programs had limited capacity, however, and this often convinced the defence lawyers that they could not make meaningful submissions for non-custodial sentences.⁵⁹

There are also economic disincentives to lawyers in Manitoba making fulsome *Gladue* submissions on behalf of their clients, particularly those related to legal aid funding. By way of background, there is considerable empirical evidence suggesting that guilty pleas by accused persons who are

⁵⁴ *Ibid* at 90-91.

⁵⁵ *Ibid* at 91-94.

⁵⁶ *Ibid* at 95-103.

⁵⁷ *Ibid* at 105-109.

⁵⁸ *Ibid* at 109-114.

⁵⁹ *Ibid* at 114-120.

factually innocent may be a very serious and pervasive problem.⁶⁰ Christopher Sherrin argues that there is a lack of monetary incentive to go ahead with trials, and this can often lead to defence lawyers pressuring clients to plead guilty irrespective of the actual merits of the prosecution's case.⁶¹ This lack of incentive to enter not guilty pleas and go to trial certainly includes Indigenous accused as well, who are also over-represented among wrongful convictions in Canada.⁶² Sherrin recommends increasing available legal aid tariffs so that defence lawyers have the incentive to properly assert their clients' innocence, especially when the case merits it.⁶³

Similar arguments can be extended to *Gladue*. The legal aid tariffs in Manitoba for cases resolved by guilty pleas are set based on the category of offence.⁶⁴ A tariff of \$1,250 is provided for a sentencing hearing for aggravated sexual assault, culpable homicide offences, attempted murder, and organized crime offences.⁶⁵ A tariff of \$860 is provided for a broad category of either indictable offences or hybrid offences.⁶⁶ A tariff of \$450

⁶⁰ At least 20 instances of wrongful convictions stemming from a guilty plea were documented in Samuel R Gross et al, "Exonerations in the United States 1989 Through 2003" (2005) 95 *J Crim L & Criminology* 523 at 533–536. Twenty-three percent of accused persons who had pled guilty and were interviewed by Richard V Ericson and Patricia M Baranek maintained their innocence: see Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 158. Other researchers have found significant numbers of people who have pled guilty while maintaining their innocence: 43 percent in John Baldwin & Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977) at 62–63; 18 percent in Anthony Bottoms & John McClean, *Defendants in the Criminal Process* (London: Routledge & Kegan Paul, 1976) at 120; 44 percent in Susanne Dell, *Silent in Court: The Legal Representation of Women Who Went to Prison* (London: Bell & Sons, 1971) at 30–31; over 51 percent in Abraham S Blumberg, "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1:2 *Law & Soc'y Rev* 15 at 33–35.

⁶¹ Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 *Windsor Rev Legal Soc Issues* 1 at 19.

⁶² Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 *Flinders LJ* 202.

⁶³ Sherrin, *supra* note 61 at 19; see also Andrew D Leipold, "How the Pretrial Process Contributes to Wrongful Convictions" (2005) 42 *Am Crim L Rev* 1123.

⁶⁴ *Man Reg* 225/91, Part 2.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

is provided for all other offences.⁶⁷ It will often be considerably more work for a lawyer to properly make use of *Gladue* in comparison to other cases resolved by guilty plea, as MacDonald's thesis hints. It will often require more research, more preparatory work, advocating for the production of a *Gladue* report, and making more extensive submissions based on the *Gladue* factors and their role in an individual client's case. And yet there will be no tariff adjustments in recognition of the greater amount of work that *Gladue* cases will require.

In the end, the sentencing of Indigenous accused continues to follow a definite trajectory even in the wake of some quite strong statements coming from the highest court in *Ipeelee*. The overall framework for Canadian sentencing law remains fundamentally and heavily tilted in favour of deterrence and retribution. This tilt translates into a certain inertia in sentencing decisions such that any statements the Supreme Court provides, whether it is in *Gladue* or *Ipeelee* or any other case thereafter, will have minimal purchase with lower courts. That in turn means that Indigenous accused continue to be routinely incarcerated for a very wide range of offences.

There are also problems with the correctional system itself, even allowing for the presence of initiatives that are meant to address the needs of Indigenous prisoners. Section 80 of the *Corrections and Conditional Release Act* mandates that Correctional Service Canada (hereinafter the CSC) shall "provide programs designed particularly to address the needs of Aboriginal offenders."⁶⁸ One purpose of this provision is provide services, such as life skills training or substance abuse treatment, which include the inculcation of Indigenous cultural values as part of the treatment or training.⁶⁹ Another mandate is to facilitate prisoner participation in cultural activities, such as training in traditional spiritual practices or sweat lodge ceremonies.⁷⁰ These services are often delivered by Elders or other members of Indigenous communities with similar cultural authority.⁷¹ The rationale behind these

⁶⁷ *Ibid.*

⁶⁸ *Corrections and Conditional Release Act*, SC 1992, c 20, s 80 [CCRA].

⁶⁹ Correctional Service Canada, "Aboriginal Offenders," Commissioner's Directive No 702 (Ottawa: CSC, 12 November 2013).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

approaches is that the CSC identifies the loss of cultural identity as the underlying cause of Indigenous criminality.⁷²

Sections 84 and 84.1 allow Indigenous prisoners to apply for parole and release, typically under supervised conditions, into an Indigenous community with a view towards re-integration with that community.⁷³ Notice to the Indigenous community is required, which provides the Indigenous community an opportunity to propose a plan of supervision and re-integration.⁷⁴

Despite these legislative and programming accommodations, there remain considerable problems with Indigenous prisoners being denied access to meaningful programming and opportunities for parole. In 1996/1997, it was found that Indigenous offenders were granted parole at a rate of 34% in comparison to 41% for non-Indigenous offenders.⁷⁵ A ten-year period from 2007 to 2016 saw non-Indigenous offenders obtain day parole at a rate of 70.1% and full parole at a rate of 26.4%. Indigenous offenders during that same period received day parole at a rate of 66% and full parole at a rate of 17.3%.⁷⁶ In 1998 it was found that Indigenous prisoners waived their right to a parole hearing at a rate of 49% in comparison to 30% for non-Indigenous offenders.⁷⁷ Reasons that have been suggested for these shortfalls include Indigenous prisoners often lacking knowledge of the parole process⁷⁸ and Indigenous prisoners often mistrusting correctional staff such as to lack hope in the process.⁷⁹

One study found that there were too few halfway houses operated by the CSC that provided programming specifically for Indigenous offenders.

⁷² *Ibid.*

⁷³ CCRA, *supra* note 68, ss 84, 84.1.

⁷⁴ *Ibid.*

⁷⁵ Andrew Welsh & James P Ogloff, "Full Parole and the Aboriginal Experience: Accounting for the Racial Discrepancies in the Release Rates" (2000) 42:4 *Can J Crim* 469 at 472.

⁷⁶ Public Safety Canada, *2016 Annual Report: Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety Canada, 2017) at 85.

⁷⁷ Solicitor General of Canada, *Canadian Correctional Release Assessment, 5 Year Review: Indigenous Offenders* (Ottawa: Minister of Supply and Services, 1998).

⁷⁸ JC Johnston, *Northern Aboriginal Offenders in Federal Custody: A Profile* (Ottawa: Correctional Service of Canada, 1994).

⁷⁹ JC Johnston, *Aboriginal Offender Survey: Case Files and Interview Sample* (Ottawa: Correctional Service of Canada, 1997).

For example, there is only one half-way house in Saskatoon that provides such services, an urban centre with a significant Indigenous population.⁸⁰ Another lost opportunity is s. 81 lodges, half-way house facilities that are operated directly by Indigenous communities to meet the needs of Indigenous prisoners. The Correctional Investigator of Canada released a report in 2012 titled *Spirit Matters* that condemns the inadequacy of Canada supporting only four s. 81 lodges, offering a total of 68 available bed spaces.⁸¹ A key reason behind the condemnation was that in 2000, \$11.9 million was allocated for the construction of new s. 81 lodges.⁸² However, the Waseskun House in Montreal was the only new s. 81 lodge to be built under this fund.⁸³ The remainder was instead used to create interventions for Indigenous prisoners inside existing federal penitentiaries.⁸⁴

Even with existing s. 81 lodges, there are real concerns with the amount of support and resources available to them. Crutcher and Trevethan explain:

One of the most pressing concerns noted by all Section 81 healing lodges is the lack of resources. At the basic level, Section 81 lodges are in need of some physical improvements. Furthermore, the lack of funding has affected recruitment, training, and retention of lodge staff. Recruitment is especially difficult as Indigenous people with the required skill sets are in high demand and the lodges cannot afford to pay what the market dictates. In terms of training, most Section 81 lodges do not have the funds to adequately train their staff regarding CSC procedures.

Programming is another area that has been affected by lack of funds. Smaller facilities do not offer structured programs as they do not have the resources to offer programs given the small number of residents who need them.⁸⁵

⁸⁰ *Issues in Urban Corrections for Aboriginal People: Report on a Focus Group and an Overview of the Literature and Experience* (Ottawa: Solicitor General, 1998) at 23; Prairie Region Halfway House Association, “Facility Index” (8 March 2018), online: <<http://halfwayhouses.ca/en/region/prhha/facilities/>>.

⁸¹ Howard Sapers, *Spirit Matters: Indigenous People and the Corrections and Conditional Release Act* (Ottawa: Office of the Correctional Investigator, 2012) at 15-17 [*Spirit Matters*].

⁸² *Ibid* at 15.

⁸³ *Ibid*.

⁸⁴ *Ibid* at 15-16.

⁸⁵ Nicole Crutcher & Shelley Trevethan, “An Examination of Healing Lodges for Federal Offenders in Canada” (2002) 14:3 *Forum on Corrections Research* 52 at 56.

The *Spirit Matters* report also notes the inadequacy of funding. CSC controlled-healing lodges received \$21,555,037 in funding, in comparison to \$4,819,479 in funding for s. 81 lodges.⁸⁶ The report adds:

Chronic under-funding of Section 81 Healing Lodges means that they are unable to provide comparable CSC wages or unionized job security. As a result, many Healing Lodge staff seek employment with CSC, where salaries can be 50% higher for similar work. It is estimated that it costs approximately \$34,000 to train a Healing Lodge employee to CSC requirements, but the Lodge operators receive no recognition or compensation for that expense.⁸⁷

The report calls for more s. 81 lodges, and greater support for s. 81 lodges.⁸⁸ Indeed, the report suggests that financial support should not be any less than an increase of \$11.6 million to reflect the fund that was initially allocated in 2001 for s. 81 lodges, adjusted for inflation.⁸⁹

Even after release, there may be concerns about the lack of available services that can assist Indigenous parolees with effective re-integration. A study by Jason Brown found that Indigenous parolees often faced a lack of adequate housing, or racist discrimination from prospective landlords.⁹⁰ They were therefore vulnerable to residential instability, which increased their risk of re-offending.⁹¹ The study stresses the needs for increased community supports so that Indigenous parolees can find adequate housing.⁹² The *Spirit Matters* report also notes that there have been numerous problems with the implementation of s. 84 of the *Corrections and Conditional Release Act* that is meant to facilitate effective parole and release for Indigenous prisoners.⁹³ The provision has been under-utilized. For example, in 2010-2011 there were 99 s. 84 releases, even though 593 Indigenous offenders had expressed interested in a s. 84 release.⁹⁴ The problems involved include:

⁸⁶ *Spirit Matters*, *supra* note 81 at 20.

⁸⁷ *Ibid* at 4.

⁸⁸ *Ibid* at 34.

⁸⁹ *Ibid*.

⁹⁰ Jason D Brown et al, "Housing for Indigenous Ex-Offenders in the Urban Core" (2008) 7:2 *Qualitative Social Work* 238.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Spirit Matters*, *supra* note 81 at 24.

⁹⁴ *Ibid*.

- (i) There are only 12 Indigenous Community Development Officers who are employed to develop bridges between Indigenous communities and Indigenous prisoners. These face excessive caseloads that often cause them to lose focus on an Indigenous prisoner's individual needs.⁹⁵
- (ii) The process involved with applying for a s. 84 release has become very cumbersome and lengthy, requiring at least 25 tasks for completion.⁹⁶
- (iii) Indigenous communities are often not compensated by the CSC for the costs of programming, or for monitoring or transporting an offender. This leads to resource deficiencies in the implementation of s. 84 release plans.⁹⁷
- (iv) The validity of programs and services under s. 84 release plans, and whether it adequately addresses an offender's needs, are decided by the CSC and not Indigenous communities themselves. This is "viewed as patronizing by many [Indigenous] people and communities."⁹⁸

The report also calls upon the CSC to adjust its policies and resource allocations in order to fully implement Parliament's original legislative intent when the *Corrections and Conditional Release Act* was first passed in 1992.⁹⁹ It is apparent that there are many contributors to Indigenous over-incarceration that are intrinsic to the Canadian justice system itself. It turns out that there are also many extrinsic contributors as well.

C. Loss of Culture

The Truth and Reconciliation Commission of Canada concluded that policies pursued by the Government of Canada in the 19th and 20th Centuries, including the imposition of the federal Indian Act, and the forced removal of children to attend residential schools, "were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will."¹⁰⁰ The

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 25.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid* at 33.

¹⁰⁰ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for*

legacy of this cultural genocide, the TRC wrote, continues to affect the lives of Indigenous persons, families and communities as follows:

It is reflected in the significant educational, income, and health disparities between Aboriginal people and other Canadians—disparities that condemn many Aboriginal people to shorter, poorer, and more troubled lives. The legacy is also reflected in the intense racism some people harbour against Aboriginal people and the systemic and other forms of discrimination Aboriginal people regularly experience in Canada. Over a century of cultural genocide has left most Aboriginal languages on the verge of extinction. The disproportionate apprehension of Aboriginal children by child welfare agencies and the disproportionate imprisonment and victimization of Aboriginal people are all part of the legacy of the way that Aboriginal children were treated in residential schools.¹⁰¹

For Indigenous peoples, loss of culture and language very often leads to low self-esteem and a lack of identity. This in turn can too often lead to unhealthy life style choices that result in conflict with the law. The loss of traditional culture and knowledge includes the loss of customary laws and norms that could have acted as a positive mechanism of restraint against criminal behavior. Carol LaPrairie, for example, explains 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.¹⁰²

Harald Finkler also attributes the dramatic rise of crime and disorder among the Inuit in the Canadian north to the breakdown and erosion of traditional methods of social control, and their displacement by Western institutions.¹⁰³ There are other factors as well.

the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (June 2015) at 3.

¹⁰¹ Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy* (2015) at 3.

¹⁰² Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34 Can J Crim 281 at 287.

¹⁰³ Harald Finkler, "Community Participation in Socio-Legal Control: The Northern Context" (1992) 34 Can J Crim 503.

D. Social and Economic Factors

There are also numerous social and economic factors that contribute to Indigenous over-incarceration. A phenomenon that is distinctive to Indigenous peoples is termed Intergenerational Trauma. What is involved is that many Indigenous children from previous generations were physically and/or sexually abused in residential schools. They also had their self-esteem and identity as Indigenous persons undermined by school practices that denigrated Indigenous culture and punished cultural practices. Those children from previous generations left the schools 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 and those nearest to them, their own family members. The next generation of children would be subjected to physical and sexual violence in abusive 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.¹⁰⁴ Jennifer Kwan estimates that at least 65% of Indigenous people in Canada have been affected to some degree by family violence.¹⁰⁵ She ascribes this rate to factors reflective of post-colonialism, such as poverty, unstable lifestyles, substance abuse and gender inequality.¹⁰⁶

Annie Yessine and James Bonta's study, which compared Indigenous youth under probation in Manitoba compared to non-Indigenous youth, argues that Indigenous youth are incarcerated far out of proportion to their representation in the population because they come from disadvantaged social backgrounds that include poverty, unstable family setting, and negative peer associations (e.g. youth gangs).¹⁰⁷ James Waldram interviewed many Indigenous federal prisoners in the Regional Psychiatric Centre in

¹⁰⁴ Peter Menzies, "Developing an Aboriginal Healing Model for Intergenerational Trauma" (2014) 46:2 *International J Health Promotion and Education* 41; Lloyd Hawkeye Robertson, "The Residential School Experience: Syndrome or Historic Trauma" (2006) 4:1 *Pimatisiwin* 1.

¹⁰⁵ Jennifer Kwan, "From Taboo to Epidemic: Family Violence Within Aboriginal Communities" (2015) 2:1 *Global Social Welfare* 1 at 3.

¹⁰⁶ *Ibid* at 2-5.

¹⁰⁷ Annie K Yessine & James Bonta, "The Offending Trajectories of Youthful Aboriginal Offenders" (2009) 51:4 *Can J Corr* 435.

Saskatoon, the Saskatchewan Penitentiary, and the Stoney Mountain Penitentiary and Rockwood Institution, in his study. Many prisoners in their interviews attributed their incarceration to various contributors, including severe poverty, racial persecution, having been violently and/or sexual abused in their home environments, loss of connection to their own cultures, loss of positive self-esteem as Indigenous persons, and substance abuse.¹⁰⁸

It is this numerous array of contributing factors that Onashowewin seeks to counteract, even if to a limited degree, through the programs and services it offers. A detailed description of Onashowewin and the services it offers now follows.

III. ONASHOWEWIN

Onashowewin is a diversionary program, located near downtown Winnipeg. Its community justice workers and support staff are all Indigenous persons, and its board of directors are representative of Winnipeg's Indigenous communities. It receives diversionary referrals for summary charges from the Crown Prosecutors' office in Winnipeg.¹⁰⁹ Onashowewin's programming implements the traditional laws of Anishnaabe, Ininew, Ojibway-Cree, Dene, Dakota, Inuit and Métis Nations in Manitoba in a meaningful way that addresses the needs of its clients, and by extension also addresses contemporary problems besetting Indigenous communities in Manitoba. In order to resolve charges outside of the formal court system, Onashowewin utilizes a number of processes and programs aimed at addressing the underlying issues which lead to criminal behaviour. These programs are designed to use culturally appropriate techniques to educate, mediate and mend relationships and prevent recidivism. Fundamental to Onashowewin's practice of restorative justice is the creation of individualized case plans for each referral that are designed to address the underlying causes of the criminal activity. The programs recognize that Indigenous crime is often a combination of both significant social stressors and negative choices, and therefore seeks to guide clients towards more positive choices in non-judgmental ways.¹¹⁰

¹⁰⁸ James Waldram, *The Way of the Pipe* (Peterborough, Ont: Broadview Press, 1997) at 44.

¹⁰⁹ E Miller, *supra* note 3.

¹¹⁰ Sarah McCoy, *Indigenous Organizations in Manitoba: A directory of Groups and Programs*

Onashowewin offers the following programs: Mino-Bimadiziwin, Ikwe, Inini, Negative Energy, Sense of Belonging, One Life, Kim-Moo-Tin, Living in Balance and Ways of Being, each of which are described below.¹¹¹ An individual case plan may require a client to take multiple programs, particularly if an accused is facing multiple charges stemming from the same incident or if the charges themselves were more serious. The programs are now summarized just below.

Mino-Bimadiziwin or Healthy Decisions is available in adult and youth formats, in full day workshops or evening sessions. Participants discuss the negative impacts of the poor choices that have led to criminal offences and participants are encouraged to assume responsibility for their actions in an effort to help understand how to make positive and healthy life choices.¹¹² Ikwe derives its name from the Ojibway term for “woman.” This workshop describes women's teachings in a sharing environment and explores the special gifts that only women have and how to respect one’s self physically, mentally and emotionally.¹¹³ The Inini program is a male-oriented counterpart to Ikwe. It focused its teachings on the role of men and their responsibilities and conduct within society. It also addresses the ways in which men should treat women and everybody else.¹¹⁴ Negative Energy is a workshop broken into two two-hour sessions. It primarily focuses on anger and negative reactions to anger. Participants learn how to identify triggers to anger and how to control anger and their reactions to it.¹¹⁵

Sense of Belonging is a two-hour workshop aimed at the appeal of gang life and the many negative aspects gang membership brings. The workshop offers substitutes and resources that help prevent entering gangs and how one can leave the gang environment.¹¹⁶ One Life is a two-hour workshop

Organized by or for First Nations, Inuit and Metis People (Winnipeg: Indigenous Inclusion Directorate, Manitoba Education and Training, 2011) at 120-122.

¹¹¹ Onashowewin Justice Circle, “Onashowewin Brochure” (8 March 2018), online: <<http://www.onashowewin.com/Onashowewin%20Brochure.pdf>>; see also Onashowewin Justice Circle, “Onashowewin Justice Circle – Aanii Kay Achi Mowin” (14 January 2015), online: YouTube <<https://www.youtube.com/watch?v=2Uv6iji6xGc&feature=youtu.be>>.

¹¹² McCoy, *supra* note 110 at 121.

¹¹³ *Ibid* at 121.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at 122.

that addresses the issue of addiction, and seeks to explain its indicators, its impact on life, friends and family, and the resources available to fight addiction.¹¹⁷ Ki-Moo-Tin is designed for participants who have Theft Under 5000-dollar offences. It defines theft, stealing, kleptomania, peer pressure and other aspects related to theft. Participants in this workshop learn about various community resources, employment centres, food banks, budgeting and other valuable tools.¹¹⁸ Living in Balance is designed to promote healthy relationships. It defines and promotes healthy relationships, and how they can be achieved and maintained.¹¹⁹ Ways of Being is a full day workshop in which participants learn how to build a sweat lodge as well as its significance, with the participant having an opportunity to join in a Sweat Lodge Ceremony and Sharing Circle.¹²⁰

Onashowewin requested that a research project be undertaken related to their clients by Celeste McKay Consulting. The objective of the research is to provide an empirical determination of whether the programs and services succeed in its mandate. The results of the study are now summarized below.

IV. RESEARCH METHODOLOGY

The original research project sought to ascertain the level of recidivism of 100 clients who had completed Onashowewin programming during the one-year period of April 1st, 2011 to March 31st, 2012. The 100 cases were selected to provide roughly equal numbers of female youths, male youths, female adults, and male adults. (There were 25 female youth, 25 male youth, 28 female adults and 22 male adults in this sample. This discrepancy in the adult numbers is due to the fact that fewer adult men completed the program.) The Manitoba Justice Department gave special permission to examine its database to determine how many of the individuals had re-offended over a two-year follow-up period since completing the Onashowewin program.

¹¹⁷ *Ibid* at 121.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

V. ANALYSIS OF RESULTS

A. Statistics Related to Offences

The 100 individuals examined in the study had been charged with the following offences:

- There were 37 charges of theft under \$5000, 3 were charged with theft over \$5000, 5 were charged with writing or uttering a forgery, 23 assault and assault related charges, 7 uttering threats charges, 18 mischief under \$5000 charges, 1 mischief over \$5000 charge, 6 charges for possession of control substances of underage alcohol, 7 weapons related charges, 7 break and enters, 4 possession of break and enter instruments charges, 2 robberies, 5 possession of property obtained by crime charges, 2 arsons, 1 obstructing or resisting an arrest charge, and 9 charges of failure to comply. These numbers do not include multiple charges against individuals for the same offence.

B. Programming at Onashowewin

The number of programs completed by each of the participants in Onashowewin is a reflection of their personalized case plan and often the severity of their charges ranging from a single program to 6 programs. The numbers of programs completed are as follows: Of the 100 people sampled 8 completed 1 program, 16 people completed 2 programs, 43 completed 3 programs, 23 completed 4 programs, 8 completed 5 programs and 2 completed 6 programs.

C. Overall Recidivism Statistics

Of the hundred people surveyed, a total of 30 were subsequently charged and convicted of new offences after completing the programme, representing a rate of recidivism of 30%. This finding is quite encouraging, when compared with the studies cited above which found recidivism rates between 50% and 60% for Indigenous men and higher than 45% for Indigenous women.¹²¹ It is important to recognize certain limitations

¹²¹ Harman & Hann, "Predicting Release Risk", *supra* note 19 **Error! Bookmark not defined.**; Bonta, Ruggie & Dauvergne, *supra* note 200; Wormith & Hogg, *supra* note 266.

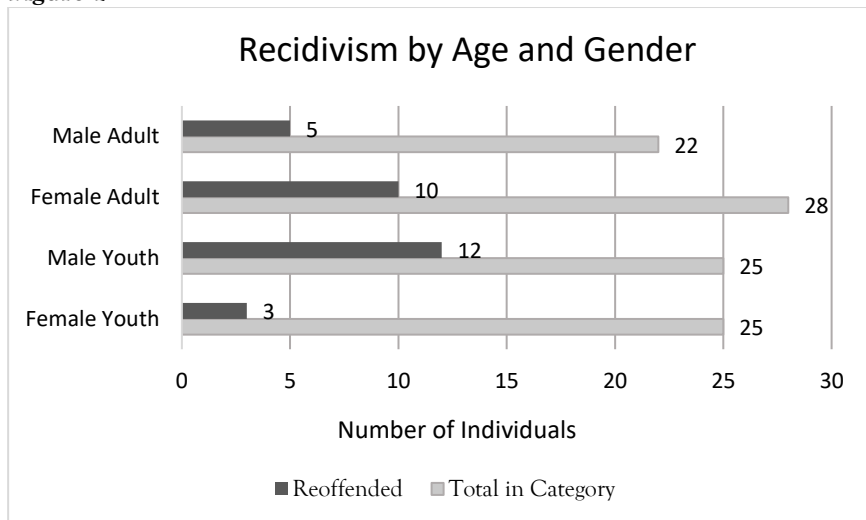
stemming from the study itself. For example, the study did not include a comparison group of Indigenous accused who did not go through Onashowewin programming for the same range of offences. The study itself is not capable of perfect comparisons to previous studies on Indigenous recidivism. Those studies included much larger sample sizes, and usually involved more serious offences. However, we maintain that the overall recidivism rate for Onashowewin clients is encouraging, and is capable of meaningful if not perfect comparisons to the other studies, for reasons that will be explained.

1. Recidivism Based on Age and Gender

Here is a breakdown of recidivism rates in the Onashowewin sample by age and gender:

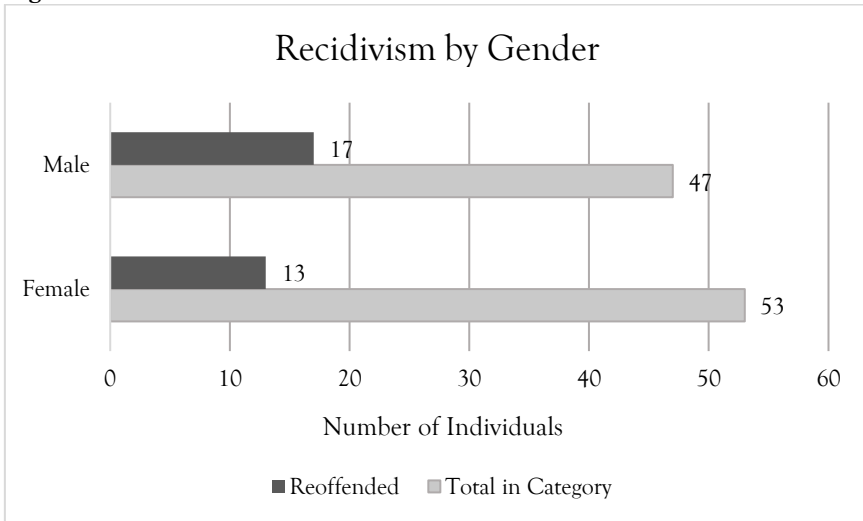
- Out of the 25 female youths who completed the Onashowewin program 3 re-offended, equalling a 12% rate of recidivism.
- Of the 25 male youths who completed the Onashowewin program 12 re-offended, equalling a 48% rate of recidivism.
- Of the 28 female adults who completed the Onashowewin program 10 re-offended, equalling a 36% rate of recidivism.
- Of the 22 male adults who completed the Onashowewin program 5 re-offended, equalling a 23% rate of recidivism.

Figure 1



- The overall recidivism rate for women of all ages was 25%.
- The overall recidivism rate for men of all ages was 36%.

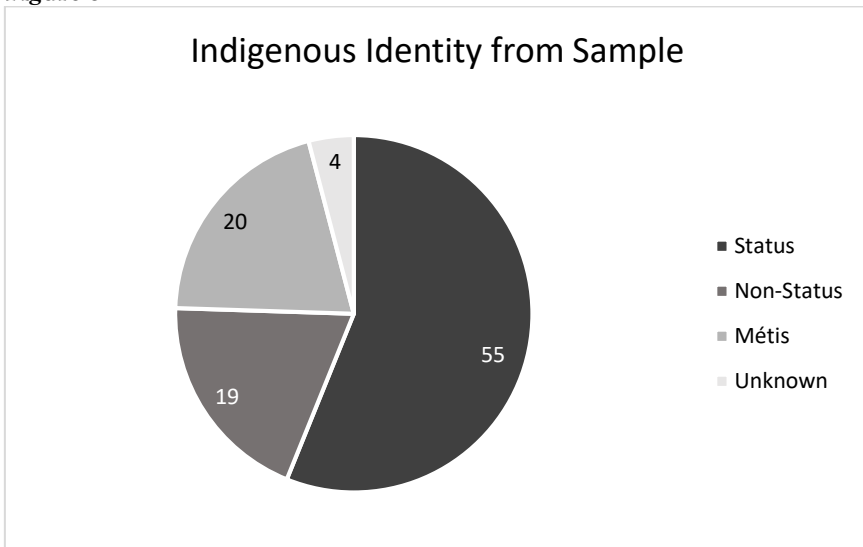
Figure 2



2. *Recidivism Based on Indigenous Identity*

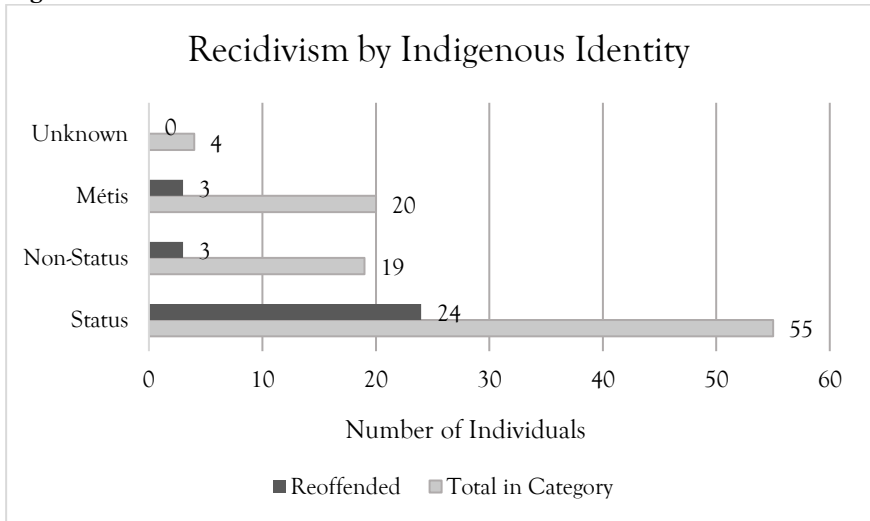
- Of the 100 people surveyed, 55 identified as Status, 19 identified as Non-Status, 20 identified as Métis, and 4 identified as unknown.

Figure 3



- Of the 55 people in the sample who identified as Status, 24 re-offended representing a 44% rate of recidivism in the Status group. Of the 22 who re-offended 11 were male youths, 2 were female youths, 8 were female adults, and 3 were male adults.
- Of the Non-Status group of 19 there were 3 people who re-offended in the Non-Status group. The three Non-Status individuals who re-offended were a male youth, a male adult, and a female adult.
- Of the 20 who identified as Métis, 3 re-offended. The 3 who re-offended were a female youth, a male adult, and a female adult.
- The unknown group contained 4 individuals and saw 0 re-offend.
- The number of Non-Status and Metis participants is not large enough to draw statistical conclusions.

Figure 4



3. Alcohol and Drug Related Charges, Issues, and Programs

Those who completed Onashowewin's programming who had alcohol or drug related charges or personal issues with substance abuse also completed the One Life program.

- Of the 100 people in the sample, 20 people completed the One Life program. Of these 20 people, 8 were female youths, 5 were male youths, 4 were female adults, and 3 were male adults.

- Recidivism amongst those who completed the One Life program was 5 out of 20 representing 25%.

VI. DISCUSSION

A. Recidivism and the Need for Further Research

The overall reduced recidivism rate of those who participate in Onashowewin's programs, 30% of the people who participated in the programming, is promising. As we have previously noted, the results of the Onashowewin study are not capable of perfect comparisons to other studies of Indigenous recidivism rates. And yet what comparisons can be made can reveal important connections. Certainly one important difference between the Onashowewin study and the previous studies is that the previous studies tended to focus on more serious offences. An implication that needs to be considered is the potential for diversionary programs like those offered by Onashowewin to set their clients on more positive paths in life after their earliest contacts with the justice system, thereby avoiding the recurring cycle of incarceration and recidivism seen amongst many Indigenous inmates in the prison system.

Studies have shown that the longer a person goes without re-offending after the first offence, the less and less likely the person will ever re-offend. In fact, there becomes no discernible difference in risk between those who have never been convicted of a crime and those who did offend but go for a significant period of time without re-offending.¹²²

It should not be surprising to learn that many Indigenous offenders in the federal penitentiary system had extensive prior criminal histories. A study by James Moore shows that at least 80% of Indigenous federal prisoners had previously served terms in provincial jails compared to approximately 70% for non-Indigenous prisoners.¹²³ Inuit and First Nations

¹²² Megan C Kurylchek, Robert Brame & Shawn D Bushway, "Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement" (2007) 53:1 Crime & Delinquency 64; Megan Kurlychek, Robert Brame & Shawn Bushway, "Scarlett Letters and Recidivism: Does an Old Criminal Record Predict Future Reoffending?" (2006) 5:3 Criminology & Public Policy 483; Keith Soothill & Brian Francis, "When Do Ex-Offenders Become Like Non-Offenders" (2009) Howard J Crim Justice 373.

¹²³ John-Patrick Moore, *First Nations, Metis, Inuit and Non-Aboriginal Federal Offenders: A Comparative Profile* (Ottawa: Correctional Service of Canada, Research Branch, 2003) at 44.

federal prisoners were more likely to have served a previous adult community supervision sentence, at rates of 87% and 79% respectively, in comparison to 72% for non-Indigenous prisoners.¹²⁴ First Nations and Metis also have greater involvement with the youth justice system. First Nations offenders served terms in closed custody at a rate of 40%, terms in open custody at a rate of 39.5%, and underwent community youth supervision at a rate of 53%.¹²⁵ For Metis offenders, the rates were 45.9%, 42.3%, and 57.3%.¹²⁶ For Non-Indigenous offenders, the rates were 27.5%, 24.9%, and 34%.¹²⁷

A 2014 study by Shanna Farrell MacDonald confirms that this overall trajectory among federal prisoners still persists. The rates for previous youth offences were 68.8% for First Nations, 61% for Metis, 47.7% for Inuit, and 43.9% for Non-Indigenous.¹²⁸ The rates for previous adult offences were 88% for First Nations, 85.9% for Metis, 87.9% for Inuit, and 79.3% for Non-Indigenous.¹²⁹ The rates for ending up in federal custody less than six months since the previous incarceration were 33.1% for First Nations, 28.2% for Metis, 29.8% for Inuit, and 20.8% for non-Indigenous.¹³⁰ The rates for not going at least a full year without crime leading up to the current federal term were 29.4% for First Nations, 24.3% for Metis, 23.5% for Inuit, and 16.7% for Non-Indigenous.¹³¹

It is also possible, but not a given, that programs like Onashowewin could help reduce the costs of incarceration over the long-term. As of 2016 it costs \$203 each day to keep a prisoner in provincial jail, making for a yearly cost of \$74, 095.¹³² It costs \$283 each day to keep a prisoner in federal penitentiary, making for a yearly cost of \$103,295.¹³³ 80% of adult males under the CSC's supervisory mandate were under community supervision

¹²⁴ *Ibid* at 16.

¹²⁵ *Ibid* at 17.

¹²⁶ *Ibid* at 17.

¹²⁷ *Ibid* at 17.

¹²⁸ Shanna Farrell MacDonald, *Profile of Aboriginal Men Offenders: Custody and Supervision Snapshots* (Ottawa: Correctional Service of Canada, 2014) at 10.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

¹³² Reitano, *supra* note 15 at 6.

¹³³ *Ibid*.

(e.g. conditional sentence or probation), while only 20% were in federal or provincial custody.¹³⁴ And yet 80% of the CSC's \$4.6 billion budget in 2016 was spent on federal and provincial custodial services, while 15% was spent on community supervision.¹³⁵

Making a connection between significantly reduced prison expenditures and the results of the Onashowewin study is admittedly speculative, especially given the small sample size of case files. However, if programs like Onashowewin succeed in setting their clients on more positive pathways in life, that can potentially avoid the recurring patterns of incarceration that may otherwise result afterwards. Such programs may require a significant investment at the outset to make them effective, but that may ultimately be more cost effective for the justice systems, provincial and federal, at every level.

Lastly, we acknowledge that the study by Onashowewin is, although hopeful, not definitive either. In order to fully understand all the variables of why persons taking the Onashowewin program may or may not reoffend, it is our opinion that further studies must be undertaken. Another longer-term study with a larger sample size might be considered; perhaps this could include using 400 client cases, with 100 individuals from each of the 4 categories. This is in order to reduce the possibility of skewed data, which may emerge from a sample size of only 100. In addition, it is important to note that the act of re-offending does not in itself conclusively demonstrate that participation in the program was not beneficial, even in relation to involvement with the criminal justice system. It could, for example, have led to improvements in the participants' future healing and healthy lifestyle choices. A larger sample size will also show more definitively the trends present in the data. Other follow up studies might include qualitative interviews with individual clients that include closer examinations of clients' background and socio-economic situation, and reasons for non-compliance for those who do not complete the program. Furthermore, a longer period of study would provide a more accurate analysis of rates of recidivism. Nonetheless, it is hoped that at present, certain insights may be taken from our study.

¹³⁴ *Ibid* at 3.

¹³⁵ *Ibid* at 6.

B. Cultural Renewal

Note previously that we identified the loss of traditional culture and its ability to act as a restraint against criminal behaviour as a contributor to Indigenous over-incarceration. The low recidivism rates of Onashowewin clients may speak to not just the ability to prevent cycles of recidivism, but also the ability to counteract the negative effects of culture loss. It can perhaps be taken further and said that Onashowewin can contribute to cultural revitalization. The use of culturally appropriate delivery of programs may have contributed to client compliance and success in the diversionary programmes offered by Onashowewin, as traditional teachings and ceremonies are incorporated throughout all programs.

We note that there are limitations to making this kind of assertion though. The study itself did not focus specifically on establishing connections between whether clients developed an increased belief in their own cultures and spirituality and subsequent desistance from re-offending. The study was not able to examine many of these issues more closely, given the focus on recidivism rates. However, it would not be a stretch to imply a connection between the cultural content of Onashowewin's programs and the recidivism rate. It is likely that Onashowewin's holistic, culturally relevant programs and services help reduce recidivism by rebuilding positive self-esteem in Indigenous persons who came into trouble with the justice system. The recidivism rate suggests that Onashowewin programs can offer guidance to offenders to set their lives on a better path despite the powerful impetus in the multiplicity of factors behind Indigenous over-incarceration. These kinds of determinants should also be considered for future research.

Another limitation is the small scale of Onashowewin's operations and its client base. The extent of cultural loss for many Indigenous communities may be very significant. Many Indigenous communities, to no small degree, have suffered severe devastation to the extent that traditional laws and justice processes have fallen into disuse over the course of decades.¹³⁶ A program like Onashowewin by itself certainly cannot hope to completely reverse this phenomena on a sufficient scale. One reply to that reality is that Onashowewin still has a positive effect on the lives of its clients, whom we can reasonably conjecture leave Onashowewin with a renewed sense of

¹³⁶ Denis C Bracken, Lawrence Deane & Larry Morrissette, "Desistance and Social Marginalization: The Case of Canadian Aboriginal Offenders" (2009) 13:1 *Theoretical Criminology* 61.

positive self-esteem in themselves as Indigenous persons. That in itself is still a positive outcome, even if the clients themselves are not that numerous in the grand scheme of things. That in turn can amount to a kind of cultural revitalization, even if by itself it is on a relatively small scale.

Imagine, however, if there were many more programs like Onashowewin with the capabilities and resources to provide their services to a greater number of Indigenous clients in need of them. Perhaps the enlarged scale of operations and client servicing in turn leads to cultural revitalization on a larger scale as well. That in turn raises the question of whether programs like Onashowewin can provide at least a partial foundation upon which Indigenous self-determination can be built, which leads to the next series of discussions.

C. Indigenous Self-Determination

A criticism that is frequently made against existing restorative justice programs is that they represent the institutionalization of restorative justice by the state.¹³⁷ Similar criticisms have been made against Indigenous justice initiatives. Chris Andersen argues that contemporary Indigenous justice initiatives in Canada reflect an effort by the Canadian political hegemony to contain Indigenous aspirations for greater control over justice within certain parameters that in substance leave the status quo intact.¹³⁸ In other words, Andersen argues that Indigenous justice initiatives provide a medium that displays a veneer of community empowerment and accommodation of cultural difference. Andersen argues that it is however the Canadian state that provides the funding, and therefore calls the shots and sets the parameters of the justice initiatives.¹³⁹ Those parameters are that Indigenous accused must plead guilty or otherwise accept responsibility (for purposes of diversionary initiatives), and that the justice initiatives will usually only cover the less serious offences that the standard justice system would itself be willing to deal with by community-based sentences (e.g.

¹³⁷ Barbara Hudson, "The Institutionalisation of Restorative Justice: Justice and the Ethics of Discourse" (2007) *Acta Juridica* 56.

¹³⁸ Chris Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31 *Crime L & Soc Change* 303.

¹³⁹ *Ibid* at 313, 319.

probation, conditional sentence) anyway.¹⁴⁰ The Canadian state thus accommodates Indigenous justice initiatives only to the extent that its own interests happen to converge with those of Indigenous communities.¹⁴¹ Once there is no longer that convergence, for example when Indigenous communities may want to apply their own approaches to offences that the standard justice system would want to deal with by incarceration, then the accommodation will stop.¹⁴²

Jesse Sutherland states: "A successful [Indigenous] Justice Strategy must go beyond participatory and indigenised justice processes. Rather, it must support healing and capacity building within First Nations' communities as well as endeavour to decolonize and repair the relationship with the Canadian state."¹⁴³ Taiaiake Alfred is even more scathing in his criticism. In his view, surface Indigenization leads some Indigenous participants into believing they are renewing Indigenous self-determination, when really they end up co-opted by the state apparatus.¹⁴⁴ The status quo ends up perpetuated.¹⁴⁵ These criticisms have also been specifically directed towards diversionary programs with an Indigenous emphasis.¹⁴⁶ Onashowewin's programs could certainly be open to similar criticisms. However, we would argue that there is more to the picture, not just for Onashowewin specifically but likely for other Indigenous-based diversionary programs as well.

It is understandable that some would decry diversionary approaches as inadequate. Those criticisms, however, beg the question of whether Indigenous peoples can afford to wait it out for idealized realizations of Indigenous models of justice, or whether immediate action is needed even if less than ideal for the time being. The problem of Indigenous over-

¹⁴⁰ *Ibid* at 314.

¹⁴¹ *Ibid* at 317–319.

¹⁴² *Ibid*. See also Paul Havemann, "The Indigenization of Social Control in Canada" in Robert A Silverman & Marianne O Neilson, eds, *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Harcourt, Brace & Co, 1992) 113.

¹⁴³ Jesse Sutherland, "Colonialism, Crime and Dispute Resolution: A Critical Analysis of Canada's Aboriginal Justice Strategy" (October 2002), online: <<https://www.mediate.com/articles/sutherlandj.cfm>>.

¹⁴⁴ Gerald R Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont: Oxford University Press, 1999) at 70.

¹⁴⁵ *Ibid*.

¹⁴⁶ Juan Tauri, "An Indigenous Commentary on the Globalisation of Restorative Justice" (2014) 12:2 *British J Community Justice* 35.

incarceration is a serious and pressing one, as we previously described. Part in parcel with that is that Indigenous persons have higher recidivism rates than non-Indigenous persons. Indigenous offenders have been found to be a significantly higher risk to reoffend following incarceration than non-Indigenous offenders.¹⁴⁷ They are also a significantly greater risk of falling into lifelong patterns of offending.¹⁴⁸

Given the extent of cultural loss over decades, it may be unrealistic to expect that, even if Indigenous communities were to be suddenly granted full-determination over justice, that they would overnight be able to exercise that self-determination in such a meaningful and proficient way as though no disruption had ever occurred. The recovery of traditional laws that have been disrupted or fell into disuse is itself a process that takes time.¹⁴⁹ Adapting and implementing those laws and traditions for contemporary use in a changed world must itself be a process that also requires time. And indeed the Royal Commission argues that Indigenous peoples gaining control over criminal justice would not be an overnight affair.¹⁵⁰ There would have to be a transitory phase wherein Indigenous communities would have to remain in partnership with the standard justice system.¹⁵¹ As Indigenous communities become more capable and more accustomed to administering justice, they can gradually assume full control over justice.¹⁵² This is very much paving the way for full self-determination over justice for Indigenous peoples.

VII. CONCLUSION

The 30% recidivism rate for people who go through Onashowewin's programs is encouraging, although we are careful not to overstate its significance. We realize that there was no comparison group against which

¹⁴⁷ Bonta, Ruge & Dauvergne, *supra* note 20.

¹⁴⁸ Yessine & Bonta, *supra* note 107.

¹⁴⁹ Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 17.

¹⁵⁰ Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: National Library of Canada, 1996) at 175-176.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

to directly measure improvement. There are nonetheless significant connections that can be made. The 30% rate is certainly lower than the recidivism rates that have been found in numerous other studies, even if the comparison is not a perfect one. Furthermore, the first few years following a person's first offence are the most crucial in terms of whether the person will desist from further offences, or will continue to offend frequently afterwards. That suggests that Onashowewin can help its clients avoid persisting patterns of incarceration and recidivism seen with many Indigenous accused. The low recidivism rate is cause for optimism, and suggests that Onashowewin's programs may be successful in counteracting the myriad of factors that drive Indigenous over-incarceration.

We would also suggest that Indigenous diversionary programs can provide an immediate and meaningful vehicle for addressing Indigenous over-incarceration, and should not be rejected as simply an accommodation to the colonialist status quo. Onashowewin provides an example where diversionary programs are grounded in Indigenous cultures and in such a way as to offer positive outcomes for clients. Such programs can also provide a foundation for Indigenous communities to develop and practice control over justice, and in turn provide a foundation for greater evolution of self-determination over criminal justice.

Healing Ourselves: Interrogating the underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*

LEAH COMBS*

ABSTRACT

A response to the severe over-representation of Aboriginal persons in federal penitentiaries, ss. 81 and 84 of the *Corrections and Conditional Release Act* (CCRA) sought to enhance Aboriginal community involvement in corrections with the ultimate goal of reducing this representation over time. Though it has been twenty-five years since the CCRA's inception, there has been scarce utilization of the agreements established under these provisions. As a result of their unique histories and positionalities, this underutilization disproportionately impacts federally sentenced Indigenous women. Correctional Service Canada (CSC) policies and practices have contributed to this by way of security overclassification and insufficient application of *Gladue* principles. This underutilization is further traced to the CSC's appropriation of funding ear-marked for these agreements through redirection to their own internal programs. These activities violate the CSC's codified commitment to responding to the needs of Aboriginal persons in custody and goes against the legislative intent. Whether through a claim of discrimination, Commissioner's Directives, a legislative response

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or a constitutional challenge, immediate and thoughtful change must take place so that federally incarcerated Indigenous women and their communities have the resources and tools to heal themselves.

Keywords: prisons; corrections; Indigenous; Aboriginal; women; justice; human rights; prisoners' rights; penal policy; incarceration; healing lodge; security classification; legislative intent

I. INTRODUCTION

Twenty-five years ago, the *Corrections and Conditional Release Act*¹ (CCRA) came into force. Replacing the *Penitentiary and Parole Acts* that had been in use for over 120 years, the CCRA is a comprehensive code that governs federal prisons, parole and the Office of the Correctional Investigator.² The CCRA includes two sections specifically relating to the care, custody, and release of Aboriginal offenders. A response to the severe over-representation of Aboriginal persons in federal penitentiaries, ss. 81 and 84 seek to enhance Aboriginal community involvement in corrections with the ultimate goal of reducing this representation over time.³ As affirmed in a 2012 Report by the Office of the Correctional Investigator, there has been scarce utilization of section 81 and 84 agreements since the CCRA's inception.⁴ Indigenous women incarcerated in federal institutions have felt a disproportionate impact from this underutilization.⁵ Contrary to legislative intent, the Correctional Services Canada (CSC) has impeded access to section 81 and 84 agreements through overclassification, insufficient *Gladue* application and misdirection of funds.⁶ With particular attention to the case of Indigenous women incarcerated in federal

¹ *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

² *Ibid.*

³ Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Final Report) (Ottawa: Office of the Correctional Investigator, 2012) at 13 [*Spirit Matters*].

⁴ *Ibid* at 13-15.

⁵ *Ibid* at 31.

⁶ *Ibid* at 15, 17-18, 28-29.

institutions, the resulting underutilization of these agreements calls for thoughtful and immediate remedy.⁷

This article begins by placing Indigenous women within the criminal justice and correctional systems through examining the legacy of chronic marginalization that has shaped many of their struggles. The failure of the CSC to administer effective correctional policies and programs are illuminated through an analysis of the unique needs of Indigenous women prisoners. The role of ss. 81 and 84 are summarized with focus on how agreements made under them can better meet the needs of federally sentenced Indigenous women. An analysis of the extent to which these sections have been underutilized follows, while directly linking this underutilization to actions taken by the CSC. The legislative intent of these provisions is examined using statutory interpretation and a summary of the *Hansard* evidence. This article concludes by outlining possible remedial approaches to increase the use of section 81 and 84 agreements and better satisfy the legislative intent.

II. INDIGENOUS WOMEN IN CUSTODY

A. Chronic Marginalization

Many Indigenous women's experience of state violence begins long "before the bars"⁸ in the form of a complex set of life circumstances marked

⁷ I will use the terms "offender" and "inmate" only in cases where the piece of writing I am referencing uses these terms. There can be harmful stigmas attached to these terms, as they tend to fundamentalize and dehumanize the lives and experiences of incarcerated individuals. I will also be using the term "Indigenous" to refer to individuals identifying as members of the various Nations that existed on these lands before the assertion of European sovereignty. I recognize that this is an imperfect term, as the shared history of colonization experienced by Indigenous Peoples across Canada reveals only a categorical grouping. The term "Aboriginal" is an organizational term often described as having been imposed on Indigenous peoples by the state, so I will only use it when referring to documents and writings that already use it. I will use the citizenship descriptors Indigenous persons identify with where possible. Although my main arguments refer to a categorical grouping, I recognize that this is only an imagined concept and the diversity of individuals and Nations means that it is impossible for any term to apply generally.

⁸ Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 *JL & Equality* 127 at 153.

with abject poverty and violence.⁹ Since the first arrival of European settlers, political sovereignty has been violently asserted over Indigenous nations through policies rooted in patriarchy and white supremacy.¹⁰ Indigenous persons were forced from the lands they inhabited for millennia and were relocated to reserve lands to live in unnatural, forced communities.¹¹ As Indigenous identity is inextricably linked to land, this dislocation resulted in a disconnection from identity.¹² Racist government policies aimed at ridding Canada of the “Indian problem” imposed a Euro-Christian worldview and further disconnected Indigenous peoples from their identities.¹³

The Residential School System was created to separate Indigenous children from their families and communities, denying entire generations experiences of community attachment and familial socialization.¹⁴ The legacy of these schools and similar discriminatory policies have continued to affect not only those who attended the schools, but Survivors’ children, grandchildren, and their broader communities.¹⁵ Woolford and Gacek discuss how residential schools used entangled modes of genocidal carcerality to destroy indigeneity in Canada.¹⁶ Cycles of violence rooted in the residential school experience has become the reality for many Indigenous communities and has a strong intergenerational effect.¹⁷ Indigenous women were specifically and adversely affected by these policies as women’s traditional roles and places within societies were uprooted.¹⁸

⁹ *Ibid.* See the Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Summary of the Final Report) (Ottawa: Truth and Reconciliation Commission, 2015) [TRC Summary Report].

¹⁰ See TRC Summary Report, *supra* note 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Canada, Indigenous and Northern Affairs Canada, *The Historical Development of the Indian Act* (Report) (Ottawa: Treaties and Historical Research Centre, 1978) at 115.

¹⁴ TRC Summary Report, *supra* note 9; Andrew Woolford & James Gacek, “Genocidal Carcerality in Indian Residential Schools in Canada” (2016) 18:4 Punishment & Society 400 at 404.

¹⁵ TRC Summary Report, *supra* note 9.

¹⁶ Woolford & Gacek, *supra* note 14.

¹⁷ Cynthia C Wesley-Esquimaux & Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004).

¹⁸ Native Women’s Association of Canada, *Culturally Relevant Gender Based Models of*

Settler colonialist policies created gendered harms that disempowered Indigenous women and subjected them to catastrophic rates of exploitation and violence.¹⁹ Violence against women and girls is continually accepted and embedded in Canadian social structures and has permeated relations in Indigenous communities.²⁰

The result of this marginalization is the concentration of various criminogenic factors. Indigenous women's experiences of poverty and violence often shape their propensity for criminalization.²¹ Stephanie Wellman writes that the "crisis of identity is often the force behind [Indigenous individuals'] criminal behaviour."²² Indigenous women experience state violence at heightened levels and state violence affects the crimes Indigenous women commit.²³ Policies such as the war on drugs, gentrification, protection of private property and the criminalization of sex work often channel Indigenous women toward illegal activity from a very young age.²⁴ By the time Indigenous women arrive in the criminal justice system, they are more likely to have survived severe forms of personal violence and sexual abuse than any other demographic grouping.²⁵ Despite

Reconciliation (March 2010) at 10–12, online: Native Women's Association of Canada <<https://www.nwac.ca/wp-content/uploads/2015/05/2010-NWAC-Culturally-Relevant-Gender-Based-Models-of-Reconciliation.pdf>>.

¹⁹ *Ibid* at 12–13.

²⁰ *Ibid*.

²¹ Stephanie Wellman, *Re(claiming) Indigenous Identity within Canada's Prison System* (MA Thesis, University of Ottawa Department of Criminology, 2017) [unpublished].

²² *Ibid* at 6.

²³ Vicki Chartrand, "Landscapes of Violence: Women and Canadian Prisons" (2015) *Penal Field* 12, online: <<https://champpenal.revues.org/9158>>; see also Shoshana Pollack, "Taming the Shrew: Regulating Prisoners Through Women-Centered Mental Health Programming" (2005) 13:1 *Crit Criminol* 71.

²⁴ See e.g. Dean Space, "Intersectional Resistance and Law Reform" (2013) 38:4 *Intersectionality* 1031; Andrea Krüsi et al, "'They Won't Change It Back in Their Heads That We're Trash': the Intersection of Sex-Work Related Stigma and Evolving Police Strategies" 38:7 *Sociology Health & Illness* 1137; Colleen Anne Dell & Jennifer Kilty, "The Creation of the Expected Aboriginal Woman Drug Offender in Canada: Exploring Relations Between Victimization, Punishment, and Cultural Identity" (2012) 19:1 *Intl Rev Victimology* 51.

²⁵ See Canadian Association of Elizabeth Fry Societies, *Fact Sheet on Aboriginal Women Prisoners* (2013), online: <<http://www.caefs.ca/wp-content/uploads/2013/04/Aboriginal-Women.pdf>>.

these findings, Indigenous women are being increasingly criminalized and imprisoned regardless of conditions of endangerment.²⁶

B. Arriving in the Correctional System

Lower rates of education and literacy mean that Indigenous women are disproportionately impacted by the presumption that ignorance of the law is no excuse for criminal behaviour.²⁷ There is little effort by the Courts to accommodate Indigenous persons in their first languages or plain English, leading to misunderstandings of essential court directions and processes.²⁸ Indigenous women are often misunderstood by players of the legal system in return. Police, lawyers, judges and juries often misconstrue their words, demeanor and body language.²⁹ These challenges are compounded by disadvantages by virtue of location and legal resources available. The resulting effect is that Indigenous women are more likely to be charged with more than one offence, more likely to plead guilty and are more likely to be convicted of criminal activity than non-Indigenous women.³⁰ Accordingly, Indigenous women are vastly overrepresented in Canadian prison populations. While Indigenous women compose less than 2% of the general population in Canada, they compose an estimated 33% of women in adult sentenced custody.³¹

²⁶ Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 *Feminist Criminology* 101 at 104.

²⁷ Canadian Association of Elizabeth Fry Societies, *Fact Sheet on Indigenous Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2015), online: <<http://www.caefs.ca/wp-content/uploads/2013/05/FINAL-2015-Fact-Sheet-Indigenous-Women.pdf>>.

²⁸ Manitoba, Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, Chapter 7 (Manitoba: Aboriginal Justice Implementation Commission, November 1999), online: <<http://www.ajic.mb.ca/volume1/chapter4.html>> [*Aboriginal Justice Inquiry*].

²⁹ Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 2002) at 195.

³⁰ See e.g. Office of the Auditor General, *Report 3 – Preparing Indigenous Offenders for Release: Correctional Service Canada* (Ottawa: Office of the Auditor General, 2016) [*Auditor General 2016*]; *Spirit Matters*, *supra* note 3 at 43-44; *Aboriginal Justice Inquiry*, *supra* note 28 at Chapter 4.

³¹ Mandy Wesley, *Marginalized: The Aboriginal Experience in Federal Corrections* (Ottawa: The Correctional Service of Canada, 2011) at 1 [*Marginalized Report*].

C. Indigenous Women in Custody – Distinctive Needs

1. Needs as Women

The 1990 Task Force on Federally Sentenced Women, *Creating Choices*, sought to examine the correctional management of federally sentenced women.³² The Task Force recommendations ultimately resulted in the closure of Canada's only women's penitentiary at the time, the Prison for Women.³³ An evaluation of the therapeutic services available at the federal Prison for Women drew a series of conclusions on what kinds of programs are most effective in meeting the needs of incarcerated women.³⁴ It was found that programs focused on women as victims who need therapy in order to recover from past traumas deny women self-determination and the nuances of their experiences.³⁵ Programs operating within an "expert model" create power imbalances whereby women feel further disempowered and struggle to successfully rehabilitate.³⁶ The 1994 report explains that the most effective programs for women allow high levels of autonomy, emphasize group communication and expression, and prefer community alternatives to imprisonment.³⁷ While the Canadian correctional system is allowing more for such programming options with its new women-centred regime, many of the ideals embodied in *Creating Choices* have been cast aside by the CSC as too ambitious and "not easily operationalized."³⁸

2. Needs as Indigenous Women

Within the chapter on Aboriginal women's critiques of the Task Force, the authors discuss the systemic racism that operates in prisons.³⁹ They argue that this racism creates a situation where federally sentenced

³² The Task Force on Federally Sentenced Women, "Creating Choices: The Report of the Task Force on Federally Sentenced Women" (April 1990) at 2 [*Creating Choices*].

³³ *Ibid* at 3.

³⁴ Kathleen Kendall, "Therapy Behind Prison Walls: A Contradiction in Terms?" (1994) 96 *Prison Service J.*

³⁵ *Creating Choices*, *supra* note 32 at 22.

³⁶ Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60 *McGill LJ* 43.

³⁷ *Creating Choices*, *supra* note 32 at 18.

³⁸ Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001) at 185.

³⁹ *Creating Choices*, *supra* note 32 at 18.

Aboriginal women can only be further harmed.⁴⁰ Programming for Aboriginal women must be tailored to their specific needs and provided in ways that are meaningful to them. Bearing in mind the diversity of Indigenous groups, Aboriginal women tend to not be accepting of hierarchies, value the collective interest over the individual and value the teachings of connection rather than separation.⁴¹ Indigenous women often enter the correctional system with different understandings of family and history.⁴² The Task Force authors insist that control over programs aiming to meet these needs must rest with Aboriginal women and communities in order to be effective.⁴³

3. *Indigenous Women Rising*

It is unlikely that the needs of Federally Sentenced Indigenous women will be met through policies of empowering prisons. *Creating Choices* had a strong, seemingly feminist focus on empowering women prisoners while at the same time asserting that all Federally Sentenced Women have the same experiences of disempowerment. As Kelly Hannah-Moffatt writes, the lure of empowerment discourse allows those already in power the ability to “informally and subtly govern marginalized populations in ways that encourage the latter to participate in their own reform.”⁴⁴

This article does not aim to illustrate the victimization of Indigenous women. Rather, I hope to draw attention to the policies and programs that affect Indigenous women’s freedom to pursue healing paths that they find relevant and effective.⁴⁵ A supplement to *Creating Choices* was a paper written by two Indigenous women who had previously been federally incarcerated. Fran Sugar and Lana Fox wrote about the unaltered truth of their experiences and made recommendations to the Task Force as they saw fit.⁴⁶ The concluding paragraph of this report summarizes their perspective

⁴⁰ *Ibid* at 19.

⁴¹ *Ibid* at 18.

⁴² *Ibid*.

⁴³ *Ibid* at 19.

⁴⁴ Hannah-Moffatt, *supra* note 38 at 168–169.

⁴⁵ See Fran Sugar & Lana Fox, “Nistum Peyako Séht’wawin Iskewwak: Breaking Chains” (1989) 3:2 CJWL 465 at 481.

⁴⁶ *Ibid* at 465.

on the only way correctional programming for Indigenous persons should be carried out:

It is only Aboriginal people who can design and deliver programs that will address our needs and that we can trust. It is only Aboriginal people who can truly know and understand our experience. It is only Aboriginal people who can instill pride and self-esteem lost through the destructive experiences of racism. We cry out for a meaningful healing process that will have a real impact on our lives, but the objectives and implementation of this healing process must be premised on our need, the need to heal and walk in balance.⁴⁷

III. CORRECTIONAL SERVICE CANADA: POLICIES & PROGRAMS

A. Institutional Objectives

The purpose of the federal correctional system, as outlined in s. 3 of the *Corrections and Conditional Release Act*, is to contribute to the maintenance of a just, peaceful and safe society by:

- (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
- (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.⁴⁸

The CSC's paramount consideration in the corrections process is the protection of society.⁴⁹ There are a series of guiding principles listed in the CCRA, one of particular importance is s. 4(g), which states:

correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples...⁵⁰

The recent Supreme Court of Canada decision, *Ewert v Canada*, assessed the CSC's statutory objectives with an aim to illuminate the organization's responsibilities toward Indigenous individuals in their custody.⁵¹ Section 4(g) of the CCRA was a key provision examined over the

⁴⁷ *Ibid* at 482.

⁴⁸ CCRA, *supra* note 1, s 3.

⁴⁹ *Ibid*, s 3.1.

⁵⁰ *Ibid*, s 4(g).

⁵¹ *Ewert v Canada*, 2018 SCC 30, [2018] SCJ No 30 [Ewert].

course of this exercise.⁵² The majority's analysis of the provision's plain meaning was that it requires the CSC "to ensure that its practices, however neutral they may appear to be, do not discriminate against Indigenous persons."⁵³ The decision described the development of s. 4(g), citing a guiding principle similar to this that was among the proposals originally set out in *Directions for Reform*.⁵⁴ The majority described that the shortcomings of the correctional system were found in this report to be particularly acute for "women, Indigenous persons, racialized persons, persons with mental health issues and other distinct groups."⁵⁵ This report, written in the years leading up to the enactment of the CCRA, called for reforms to promote predictability and equity in decisions made about individual offenders. The *Ewert* majority described s. 4(g) as a provision to address the alienation experienced by Indigenous persons from the Canadian criminal justice system that is not limited to the sentencing process.⁵⁶ The majority asserted that the purpose of the correctional system cannot be achieved without giving full, meaningful effect to the principle set out in s. 4(g).⁵⁷ While the majority decision acknowledged that many factors contribute to the broader issues facing Indigenous peoples in the criminal justice system, there are many matters within the CSC's control that could mitigate harms caused.

B. Programming

While there exists a diversity of programming offered across the range of institutions, the CSC aims to satisfy their statutory mandate through providing rehabilitative programs for eligible inmates. Some of these programs target equity-seeking groups such as women and Indigenous persons.

Though CSC policies aimed at female prisoners serving federal sentences have been regarded as progressive and even radical by

⁵² *Ibid* at para 59.

⁵³ *Ibid* at para 54.

⁵⁴ Canada, Department of Justice and Solicitor General, *A Framework for Sentencing, Corrections and Conditional Release – Directions for Reform in Sentencing* (Ottawa: Supply and Services Canada, 1990).

⁵⁵ *Ewert*, *supra* note 51 at para 55.

⁵⁶ *Ibid* at para 57.

⁵⁷ *Ibid* at para 59.

international agencies,⁵⁸ the truth of women-centered programming options is that they continue to respond to criminality with an aim to responsabilize and correct women's individual behavior.⁵⁹ Shoshana Pollack argues that correctional mental health practices privilege a discourse that aims to regulate incarcerated women rather than empowering or supporting them.⁶⁰

The CSC has developed a series of programming options that are designed around the specific needs and circumstances of Aboriginal offenders.⁶¹ While their availability is inconsistent across institutions, the programs offered to some Indigenous women include the *Spirit of a Warrior* program, the *Circles of Change* program, and the *Family Life Improvement* program. Each program focuses to some extent on educating women on Aboriginal history and culture as well as the place of women in traditional Indigenous societies.⁶² While it is important to not disregard the progress some women make through engaging in these programs, they have received criticism. Based on models of pan-Aboriginalism, these programs can emphasize a "manufactured hegemonic 'Aboriginal' culture"⁶³ that is dismissive of diversity and cultural difference.⁶⁴ Another common critique is the form these programs take in maintaining hierarchical structures and the "otherness of Aboriginal peoples."⁶⁵

⁵⁸ Pat Carlen, "Controlling Measures: The Repackaging of Common Sense Opposition to Women's Imprisonment in England and Canada" (2002) 2:2 *Criminal Justice* 155.

⁵⁹ Pollack, *supra* note 23.

⁶⁰ *Ibid.*

⁶¹ Jennifer Dyck, *Stories from the Front: Realities of the Over-incarceration of Aboriginal Women in Canada* (LLM Thesis, University of British Columbia Faculty of Law, 2013) at 28 [unpublished]. The programs available to Aboriginal offenders are listed on the CSC website; see the CSC's strategic plan at Correctional Service Canada, *Strategic Plan for Aboriginal Corrections* (Ottawa: CSC, 2011), online: <<http://www.csc-scc.gc.ca/aboriginal/002003-1001-eng.shtml>>.

⁶² Doris Fortin, *Program Strategy for Women Offenders* (Ottawa: CSC, 2004), online: <http://www.csc-scc.gc.ca/publications/fsw/fsw18/fsw18_e.pdf>.

⁶³ Leanne Simpson, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) at 16.

⁶⁴ See discussion of "pan-Aboriginalism" and its effects in Wellman, *supra* note 21 at 27.

⁶⁵ Joane Martel & Renée Brassard, "Painting the Prison 'Red': Constructing and Experiencing Aboriginal Identities in Prison" (2008) 38:2 *British Journal of Social Work* 340 at 344; see also Dyck, *supra* note 61 at page 29.

The *Aboriginal Pathways* program is characterized by units contained within Federal Institutions that are meant for “offenders who have demonstrated on a continual basis their commitment to traditional healing.”⁶⁶ This program is framed as an alternative for inmates who do not have the option to transfer to a healing lodge due to “their location or their community.”⁶⁷ These initiatives provide Indigenous offenders with intensive one-on-one counselling with Elders, but remain within the typical correctional setting.⁶⁸

C. Section 81

Section 81 addresses the care and custody of Aboriginal offenders through the delivery of a wide variety of custodial services. While the statute does not specify the form of agreements, it has been found to include the transfer of Aboriginal offenders to an Aboriginal community by way of placement in Aboriginal “healing lodges” as well as more general release into the care and custody of Aboriginal communities.⁶⁹

Developed in consultation with Indigenous members of the Task Force on Federally Sentenced Women, one of the recommendations listed in *Creating Choices* is the establishment of a healing lodge for Aboriginal women in one of the Prairie Provinces.⁷⁰ It was recommended that the lodge be premised on principles that promote a safe space for Aboriginal women prisoners, a caring attitude toward self, family and community, and an understanding of the transitory aspects of Aboriginal life.⁷¹ The administration of the Lodge was to be through a non-hierarchical model based on an exchange of learning rather than a fixed structure of reporting relationships.⁷²

⁶⁶ Correctional Service Canada, *Establishment and Operation of Pathways Initiatives* (Ottawa: CSC, 2017), online: <http://www.csc-cc.gc.ca/acts-and-regulations/702-1-gl-eng.shtml#E_Pathways_units_ranges>.

⁶⁷ *Ibid.*

⁶⁸ See *Auditor General 2016*, *supra* note 30 at 3.43.

⁶⁹ Kyle Garnett, Christine A Walsh & Dorothy Badry “Section 84 – Corrections and Conditional Release Act: Recommendations for Reform” (2013) 11:2 *Pimatisiwin* 307.

⁷⁰ *Creating Choices*, *supra* note 32 at 148.

⁷¹ *Ibid.*

⁷² *Ibid* at 150.

Developed twenty-one years after these recommendations were made, the Buffalo Sage Wellness House (BSWH) is the only s. 81 Healing Lodge available for women across Canada and is located in Edmonton.⁷³ It is a sixteen-bed minimum/medium security facility for federally sentenced women.⁷⁴ The BSWH uses a unique model of case management that is based on a culturally informed and Elder-led approach.⁷⁵ Women are guided by the direction and vision of in-house Elders through the lens of an interconnected, Indigenous worldview.⁷⁶ Staff do not interfere with women's healing journeys but focus on providing access to ceremonies and individual guidance from Elders.⁷⁷

D. Section 84

Section 84 of the *Corrections and Conditional Release Act* concerns the creation of focused reintegration plans for Aboriginal offenders.⁷⁸ Section 84 is legislation that places a positive duty on the Service to facilitate a form of consultation with Aboriginal communities with the aim to better meet the specific needs of Aboriginal offenders. The purpose is to collaborate with Aboriginal communities in the prerelease planning for Aboriginal offenders and is premised on the idea that adequate notice will allow communities to create a plan and provide a support network for offenders upon their release. It is meant to promote Aboriginal communities' abilities to successfully reintegrate offenders into the community by allowing for preparation and a strong community focus.⁷⁹

⁷³ Amy Pilon et al, "Buffalo Sage Wellness House (BSWH) Process Review" (Research Report R-371) (Ottawa: CSC, 2015) at 5.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at iii.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 19–22.

⁷⁸ Garnett, *supra* note 69.

⁷⁹ *Ibid* at 309. See also Brown et al, "Housing for Aboriginal Ex-offenders in the Urban Core" (2008) 7:2 *Qualitative Social Work* 238.

E. Funding Misdirection

The CSC was provided with \$11.9M under Public Safety Canada's *Effective Corrections and Citizen Engagement Initiative* in 2001.⁸⁰ The purpose for this initiative was to address the over-representation of Aboriginal offenders in federal prisons through collaboration with Aboriginal communities.⁸¹ To be provided over the course of five years, this funding was explicitly meant for the construction and operation of new community s. 81 Healing Lodges.⁸² There was significant interest on the part of Indigenous communities to enter into s. 81 agreements at the time this funding was allocated.⁸³ In 2001, the CSC reported that two s. 81 agreements were in the final drafting stage, three were in negotiation and 17 others were in the preliminary discussion phase.⁸⁴ However, due to changes in policy direction, the Waseskun Healing Centre was the only new stand-alone s. 81 facility completed using the \$11.9M in funding.⁸⁵ The OCI's investigation found that beginning in 2001-02, the CSC re-profiled funds from the Healing Lodge development to institutional initiatives such as the *Aboriginal Pathways* program.⁸⁶ To explain the policy change toward institutional priorities, the CSC claims that it required those funds to create programs to help Aboriginal offenders "prepare for the healing lodge environment."⁸⁷ The OCI advises as part of the recommendations in *Spirit Matters* that the CSC should seek funding from the Treasury Board or reallocate funds internally to an amount no less than the \$11.6M designated

⁸⁰ *Spirit Matters*, *supra* note 3 at 15. The ECI was originally funded at \$45M over five years, which was to be shared between the CSC (\$30M), the Parole Board (\$6.5M), and Public Safety Canada (\$8.5M). See Public Safety Canada, *Final Report of the 2010-2011 Evaluation of the Effective Corrections and Citizen Engagement Initiatives* (Ottawa: Public Safety Canada, 2011).

⁸¹ *Spirit Matters*, *supra* note 3 at 15.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.* See also Correctional Service Canada, *Aboriginal Issues Directorate: National Action Plan on Aboriginal Corrections* (Ottawa: CSC, 2001) at 3.

⁸⁵ *Spirit Matters*, *supra* note 3 at 15.

⁸⁶ Correctional Service Canada (Evaluation and Review Branch), *Final Report – Effective Corrections Initiative – Aboriginal Reintegration* (Ottawa: CSC, 2004).

⁸⁷ Correctional Service Canada (Aboriginal Initiatives Directorate), *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11* (Ottawa: CSC, 2011) at 7.

in 2001 and adjusted for inflation.⁸⁸ In the five years since this report there is no evidence that these funds have been granted.

F. Security Classification

Indigenous persons incarcerated in federal institutions are more likely than their non-Indigenous counterparts to be classified at higher security levels and referred to correctional programs.⁸⁹ This matters because the initial security placement affects the individual's placement within the institution, the programs they may access and their potential for parole.⁹⁰ Those classified at minimum security are more likely to be granted parole by the time they are first eligible for release than those classified at higher levels.⁹¹ When incarcerated persons are assigned correctional programs they are unlikely to be granted parole until they have successfully completed them.⁹² The systemic over-classification of Indigenous persons in Federal Institutions is amplified in the case of Indigenous women.⁹³

The CSC has developed a security classification tool specifically for women offenders: the Security Reclassification Scale for Women.⁹⁴ Though far from perfect, this tool considers a broader range of factors in women's classification including positive contact with family members and progress in correctional programs.⁹⁵ Nonetheless, the 2017 *Auditor General's Report* on women in corrections found that CSC staff frequently overrode the results indicated by the new classification system.⁹⁶ From the 2014-2015 and 2016-2017 years, staff overrode the recommendations in 37% of reviews,

⁸⁸ *Spirit Matters*, *supra* note 3 at 34.

⁸⁹ *Auditor General 2016*, *supra* note 30 at 3.87.

⁹⁰ *Marginalized Report*, *supra* note 31 at 23.

⁹¹ *Ibid.*

⁹² *Ibid* at 41.

⁹³ Cheryl Webster & Anthony Doob, "Classification Without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2005) 46 *Can J Corr* 395.

⁹⁴ Office of the Auditor General, *Report 5 – Preparing Women Offenders for Release: Correctional Service of Canada* (Ottawa: Office of the Auditor General, 2017) at 5.25 [*Auditor General 2017*].

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 5.26.

which led “to twice as many [individuals] being placed at a higher level of security”⁹⁷ than the scale indicated.⁹⁸

G. Ewert v Canada

In a recent case decided in the Supreme Court of Canada the appellant Jeffrey Ewert, who is an Indigenous man who has spent more than thirty years in federal custody, argued that tools used by the CSC to determine security level in prisons were not valid when applied to Indigenous persons.⁹⁹ The impugned psychological and actuarial tools were used to assess an offender’s psychopathy and risk of recidivism and it was emphasized that these tools were developed and tested on predominately non-Indigenous populations.¹⁰⁰ Ewert argued that the CSC failed to meet their obligations under s. 24(1) of the CCRA as there was no research confirming they were valid when applied to Indigenous persons.¹⁰¹ Section 24(1) requires the CSC to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible. The decision turned on whether the CSC breached its obligation under 24(1) by not taking all reasonable steps to ensure that they did not rely on inaccurate information. The majority decision confirmed the trial judge’s finding that the CSC failed to take any action to confirm the validity of these tools with respect to Indigenous offenders.

Much of the inquiry into what was required of the CSC focused on the backdrop of statutory principles that guide the Correctional Service.¹⁰² The clear direction formed in s. 4(g) of the CCRA, coupled with the rationale for that direction were seen to require the CSC to do more to ensure the risk assessment instruments were valid when applied to Indigenous inmates.¹⁰³ The majority asserted that the use of assessment tools of unclear validity could contribute to “disparities in correctional outcomes in areas in

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ewert, supra* note 51 at para 12.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at para 62.

¹⁰³ *Ibid* at para 63.

which Indigenous offenders are already disadvantaged.”¹⁰⁴ Security overclassification was said to undermine the requirement of the CSC to promote substantive equality in correctional outcomes for Indigenous inmates. Overestimation of risk posed by Indigenous inmates would frustrate the legislated purpose of providing humane custody, assisting in the rehabilitation of offenders and reintegrating them into the community.¹⁰⁵

H. Applying Gladue

Section 4(g) of the CCRA is said to remedy the same issues addressed by the Gladue decision and s. 718.2(e) of the *Criminal Code*, which requires that courts to exercise restraint in imposing imprisonment as sentences for Aboriginal persons.¹⁰⁶ Courts are to pay attention to the unique circumstances of Aboriginal offenders and use “culturally appropriate sanctions”¹⁰⁷ where warranted. It has been reasonably interpreted that in the case of Aboriginal offenders, *Gladue* principles should be applied to all areas of the criminal justice system when liberty is at stake.¹⁰⁸ Commissioners Directive No. 702 recommends that all CSC staff turn to *Gladue* principles and consider an Aboriginal offender’s social history when making decisions that affect their liberty, including their security classification and conditional release.¹⁰⁹ The Correctional Investigator consulted with CSC and Healing Lodge staff to find that CD 702 has been misinterpreted and misunderstood leading to its impact being fundamentally limited.¹¹⁰ Further, a 2016 Auditor General Report examined 44 Indigenous offender files and found that no consideration of their social histories were documented, concluding that that CSC staff had not received adequate guidance or training on how to consider Aboriginal

¹⁰⁴ *Ibid* at para 65.

¹⁰⁵ *Ibid.*

¹⁰⁶ *R v Gladue*, [1999] 1 SCR 688; *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

¹⁰⁷ *Spirit Matters*, *supra* note 3 at 28.

¹⁰⁸ *Ibid.*

¹⁰⁹ Correctional Service Canada, “Aboriginal Offenders,” Commissioner’s Directive No 702 (Ottawa: CSC, 12 November 2013).

¹¹⁰ *Spirit Matters*, *supra* note 3 at para 83–84.

social history in their assessments.¹¹¹ Nine years after the policy was originally published there has been limited evidence that *Gladue* has been properly implemented in sentencing let alone in other areas of the criminal justice system. The capacity for *Gladue* to affect the use of section 81 and 84 agreements is significant, which is principally rooted in its power to ensure inmates are placed an appropriate security level.

IV. SECTION 81 AND 84 UNDERUTILIZATION

A. Section 81 - Underutilization

While 41% of federally sentenced women in custody are Indigenous, in 2017 there were only sixteen s. 81 beds available for women in custody (all at BSWH in Edmonton).¹¹² The Okimaw Ohci Healing Lodge, though not a s. 81 lodge, accommodates 56 women. In each of the past three years these lodges have operated at 90 percent capacity, despite the increase of 16 beds.¹¹³ As in CSC guideline number 710-2-1, inmates will only be eligible for transfers under s. 81 if they are classified as minimum security, or in rare cases medium security.¹¹⁴ The resulting effect is that almost 90% of Aboriginal prisoners are not eligible for these transfers.¹¹⁵

Section 81 healing lodges are funded at much lower levels in comparison to healing lodges operated by the CSC, and at much lower levels than regular federal institutions. The re-direction of funding intended for s. 81 agreements is discussed earlier in this article. As a result of this funding gap, s. 81 healing lodges offer their employees lower wages and few or no benefits, resulting in higher staff turnover and the need to allocate more funds toward retraining employees.¹¹⁶ This can result in less committed, less experienced and poorly trained employees, which in turn

¹¹¹ Auditor General 2016, *supra* note 30 at 3.105.

¹¹² Office of the Correctional Investigator, "Backgrounder: Aboriginal Offenders - A Critical Situation" (Ottawa: Correctional Investigator, 2013), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>.

¹¹³ Auditor General 2017, *supra* note 95 at 5.60.

¹¹⁴ Correctional Service of Canada, "CCRA Section 81: Transfers," Commissioner's Directive No 710-2-1 (Ottawa: CSC, 15 May 2017).

¹¹⁵ *Spirit Matters*, *supra* note 3 at 3-4, 18.

¹¹⁶ *Spirit Matters*, *supra* note 3 at 4, 20-21.

impacts the lodges' abilities to administer programming safely and effectively.¹¹⁷

B. Section 84 - Underutilization

A 2013 study examined the implementation of s. 84 agreements with a focus on Indigenous communities in Alberta.¹¹⁸ Through a series of focus groups, researchers sought to identify barriers to successful s. 84 implementation. The study also examined trends where agreements have been successfully implemented so as to identify areas of possible improvement.

Lack of sufficient knowledge of s. 84 is widely cited as a source for the section's underutilization. Individuals at all levels of involvement have indicated a lack of awareness and understanding about these agreements. Inadequate education on s. 84 results in confusion on who is responsible for implementing these releases.¹¹⁹ Even among those familiar with such releases there is a lack of consensus on whether it is the parole officers or the communities who are to provide the offender's supervision.¹²⁰

Another significant barrier is the lack of resources available for communities to successfully implement s. 84. Financial and workforce resources are lacking while there is a need for addictions support, spiritual ceremonies, counseling, housing and employment. An anonymous participant in the 2013 study commented on this issue: "sometimes the services that they might need, we don't have in our communities."¹²¹ As many Indigenous communities are already deficient in necessary resources, many Nations do not have the capacity to provide the services conditionally released individuals need to successfully reintegrate.¹²²

Geography poses a significant barrier to successful s. 84 implementation where isolation and lack of transportation limit released individuals from accessing the officers and programs required for completing their

¹¹⁷ *Ibid.*

¹¹⁸ Garnett, *supra* note 69 at 311.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid* at 312.

¹²² *Ibid.*

correctional plans.¹²³ Trauma and lateral violence also affect isolated communities' abilities to build the programs and infrastructure needed to facilitate these agreements, which can be aggravated by lack of resources.

Whereas section 81 and 84 agreements are critically underutilized, the 2016 and 2017 *Auditor General* Reports indicate that where agreements have been implemented they have been highly effective. In the 2015-2016 fiscal year 274 Aboriginal offenders were released with a s. 84 release plan, an increase of 143 releases from four years earlier.¹²⁴ Those with s. 84 release plans are more likely to successfully complete their supervision than Indigenous offenders without s. 84 agreements.¹²⁵ Furthermore, Indigenous offenders released from Healing Lodges are more likely to both be granted discretionary release¹²⁶ and successfully complete their supervision than those released from other minimum-security institutions.¹²⁷ The evidence shows that these agreements are more successful in their ability to reintegrate conditionally released individuals back into communities than those who do not have access to such agreements.

V. LEGISLATIVE INTENT

A. Leading up to the *CCRA*

1. *Directions for Reform Report*

The culmination of the public consultation of over 1200 individuals across Canada, Bill C-36 arrived before Parliament in 1989 and eventually became the *Corrections and Conditional Release Act*. Bill C-36 was based on the discussion package *Directions for Reform*, which was assembled by the House of Commons Standing Committee on Justice and the Solicitor General at that time.¹²⁸ Some of the recommendations dealt specifically with the issue of Indigenous individuals in custody, arguing the critical

¹²³ *Ibid.*

¹²⁴ *Auditor General 2016*, *supra* note 30 at 3.70.

¹²⁵ *Ibid.*

¹²⁶ Correctional Service Canada, *The Strategic Plan for Aboriginal Corrections* (Ottawa: CSC, 2013) at Finding 9.

¹²⁷ *Auditor General 2016*, *supra* note 30 at 3.65.

¹²⁸ *Debates of the Senate*, 42nd Parl, 1st Sess, No 161 (23 Nov 2017) at 4221 (Hon Frances Lankin).

importance of meeting Aboriginal offenders' needs both during and after their period of incarceration.¹²⁹

The first part of the report focused on what was wrong with sentencing, corrections, and conditional release systems at the time and focused on the overreliance on incarceration as a source of concern. Referring to a report of the House of Commons Standing Committee, *Taking Responsibility*,¹³⁰ the report explained that a lack of focus on reintegration and alternatives to incarceration resulted in a correctional program that was ineffective in meeting the goals of the criminal justice system.¹³¹ Another source for concern was the need for greater integration among components of the criminal law and its agencies. Whereas judges, prosecuting attorneys, corrections officials and the police all maintain their own priorities, these components were described to operate in too much isolation from each other. Under the section on *Principles for Corrections*, recommendation 2(f) resembles s. 4(g) of the 1992 Act, which requires the CSC to respect and respond to the needs of women and Aboriginal persons among other groups.¹³² This resemblance was discussed by the majority in the *Ewert* decision where the court used the legislative history of the CCRA to interpret s. 4(g) in terms of its direction to the CSC. The majority described that the discussion in *Directions for Reform* supports the view that this provision mandates the CSC to pursue substantive equality in correctional outcomes by respecting the unique needs of certain groups, in particular Indigenous persons¹³³

B. Hansard

Sections 81 and 84 were created as a result of years of effort among governmental, public interest and Indigenous organizations.¹³⁴ The extensive effort associated with putting together Bill C-36 is repeatedly

¹²⁹ Correctional Service of Canada, *Directions for Reform: A Framework for Sentencing, Corrections, and Conditional Release* (Ottawa: CSC, 1990) at 8 [*Directions for Reform*].

¹³⁰ Canada, Standing Committee on Justice and Solicitor General, *Taking Responsibility* (Report) (Ottawa: CSC, 1988) at 233.

¹³¹ *Directions for Reform*, *supra* note 129 at 4, 12.

¹³² *Ibid* at 18.

¹³³ *Ewert*, *supra* note 51 at 55.

¹³⁴ *Ibid* at 8-13.

acknowledged in the House of Commons Debates in 1991 and 1992.¹³⁵ There was a strong focus of the rights and recognition of victims and the Bill was praised for its potential to give victims' voices more legitimacy.¹³⁶ Accordingly, there was much discussion on how the Bill's provisions will affect public protection and safety.

Mr. Tom Wappel for Scarborough West considered the focus on public protection and anticipated how this will be interpreted.¹³⁷ He acknowledged that for some Canadians the "protection of society" could only mean that criminalized individuals are incarcerated and then corrections "throw away the key."¹³⁸ Alternatively, he recognized that for some Canadians the only way to protect society would be the total abolition of prisons.¹³⁹ He asserts that the definition of protecting society should fall somewhere in the middle, or that it would be "a combination of deterrence and rehabilitation."¹⁴⁰

There is also some discussion on security classifications and the capacity of Bill C-36 to revise the model by which inmates receive rehabilitative treatment.¹⁴¹ Members criticize how instead of classifying inmates as maximum, medium, or minimum security institutions themselves have been classified this way.¹⁴² There is hope that Bill C-36 can allow for more individualized treatment in offender rehabilitation.¹⁴³

There was limited discussion on the Aboriginal-specific sections in the Debate record. Some Members generally acknowledged the special recognition of the needs of women and aboriginal offenders.¹⁴⁴ One referred to women and aboriginal offenders as "having great difficulty

¹³⁵ *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 8 (12 May 1992) at 10556 (Hon Doug Lewis). Further discussion of the efforts in assembling C-36 are found at pages 10557, 10560, and 10696 [*House of Commons 1992*].

¹³⁶ *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 4 (4 Nov 1991) at 4434 (Hon Doug Lewis) [*House of Commons 1991*].

¹³⁷ *House of Commons 1992*, *supra* note 135 at 10558-10559 (Tom Wappel).

¹³⁸ *Ibid* at 10559.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at 10560.

¹⁴² *House of Commons 1991*, *supra* note 136 at 4434.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* at 4435.

coping”¹⁴⁵ in the correctional system. Mr. George Rideout argued that initiatives concerning Indigenous persons in prisons were having some success, and they were having success because they were “involving native people in the process.”¹⁴⁶ He also stressed the importance of looking to the causes of crime endemic to society in order to more effectively address correctional programming.¹⁴⁷

As remedial legislation, the CCRA should be interpreted in a fair, large and liberal manner to ensure that its objective is attained according to its true meaning, spirit and intent.¹⁴⁸ The *Hansard* evidence is an important tool for interpreting legislative intent. In no part of the *Hansard*, task forces or recommendations that preceded the Act is there any suggestion that ss. 81 and 84 were only meant to apply to individuals classified as minimum or (in few cases) medium security. There is criticism of the security classification regime and where rehabilitative efforts are focused. The *Hansard* shows a strong focus on maintaining a balanced approach to ensuring public safety that values rehabilitative programming.

The *Directions for Reform* report stressed the importance of providing correctional programming that addressed the specific needs of Aboriginal persons and women. Some guidance for interpreting ss. 81 and 84 may come from looking to the surrounding provisions. Sections 78, 80, 82, 83, and 84.1 of the CCRA also concern Aboriginal persons in custody. Each of these sections work with 81 and 84 with the aim to regularly consult and take advice from aboriginal communities on the provision of services to Aboriginal offenders. These provisions do not imply that any offenders should be outright barred from accessing these services, though some CSC policies create such an effect.

Taking into account the history of the Act, the Commissions that led to it, the *Hansard* and statutory interpretation, it is clear that the intent of Sections 81 and 84 was not followed. These sections were meant to address the over-incarceration of Aboriginal persons. They were constructed in response to feedback that Aboriginal people need more control over their correctional programming. While the CSC has made efforts to strengthen Aboriginal programming that is CSC-controlled, there have been

¹⁴⁵ *House of Commons* 1992, *supra* note 135 at 10560 (Tom Wappel).

¹⁴⁶ *Ibid* at 10594 (George S Rideout).

¹⁴⁷ *Ibid* at 10593-10594.

¹⁴⁸ *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 1 SCR 27 at para 8.

inadequate efforts in accommodating agreements under ss. 81 and 84. Though the process of remedying these harms will likely be complex, an appropriate legal solution may be arrived at through Commissioner's Directives, a claim of discrimination, legislative response or a Constitutional challenge.

VI. LOOKING FORWARD

A. Commissioner's Directives

The simplest way to address the underutilization of ss. 81 and 84 is through clear and specific Commissioner's Directives (CDs). While there are already CDs addressing implementation of these sections, they only set out the process on how these agreements are carried out.¹⁴⁹ While there is a duty on the CSC to be pro-active in efforts to inform communities of the CSC's mandate and agenda, there is no direction on the CSC to be pro-active in ensuring these agreements unfold where there is interest.¹⁵⁰ Even though many CDs recognize Indigenous culture and beliefs and acknowledge the importance of meeting specific needs, it is clear that these guidelines are not being followed. Particularly for Indigenous women in maximum security units, the CSC is not adhering to its own policies and guidelines concerning essential programs and services.¹⁵¹

B. Discrimination

In detrimentally limiting opportunities to access culturally relevant, rehabilitative programming, Aboriginal women have been unjustifiably deprived on the grounds of race and religion. While 'Aboriginality' may not plainly fit into either of these classifications, both race and religion are prohibited grounds under s. 3 of the *Canadian Human Rights Act*.¹⁵² Section

¹⁴⁹ Canada, Correctional Service of Canada, "CCRA Section 84 Application Process," Commissioner's Directive No 712-1-1 (Ottawa: CSC, 19 August 2010); Correctional Service of Canada, "Negotiation, Implementation and Management of CCRA Section 81 Agreements," Commissioner's Directive No 541-2 (Ottawa: CSC, 14 July 2010) [*Directive 541-2*].

¹⁵⁰ *Directive 541-2*, *supra* note 149 at 13.

¹⁵¹ See e.g. SkyBlue Morin "Federally Sentenced Aboriginal Women in Maximum Security: What Happened to the Promises of 'Creating Choices'?" (Ottawa: CSC, 1999) at 22.

¹⁵² *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.

5 of the Act states that to deny access to any good, service, facility or accommodation to any individual on a prohibited ground is a discriminatory practice.¹⁵³ The issue in arguing that Indigenous women have been discriminated against under s. 5 is that it is restricted to opportunities customarily available to the general public.¹⁵⁴ Still, the failure to take positive steps to ensure that groups benefit equally from correctional services may be a successful ground for claiming discrimination.¹⁵⁵ The CSC has been given the capacity to implement the programming that suits the needs of federally sentenced Indigenous women but internal policies and programs vastly limit these women's access to it. Various agencies have given specific instructions on how the CSC can address the underutilization of ss. 81 and 84 but despite these efforts, they have not taken sufficient steps to ensure this happens.

C. Legislative Response

A possible remedy for this underutilization could come in the form of a legislative response. Sections 81 and 84 could be amended to create a positive duty on the CSC to facilitate these agreements and ensure that no Indigenous person is barred from accessing an agreement where there is interest and capacity. While a legislative response could on its face encourage better access to these agreements, for decades those who study prison law have known that a lack of law is not the problem.¹⁵⁶ Louise Arbour remarked in her famous report over twenty years ago, “[t]he Rule of Law is absent, although rules are everywhere.”¹⁵⁷ We might reasonably expect that such a response will include limiting terms that discharge the CSC's responsibility and allow exceptions to be made to the prejudice of those who need the agreements most.

¹⁵³ *Ibid*, s 5.

¹⁵⁴ *Ibid*.

¹⁵⁵ See e.g. *Eldridge v Canada*, [1997] 3 SCR 624 at para 78.

¹⁵⁶ Debra Parkes, “Imprisonment and the Rule of Law” in Janine L’Esperance et al, eds, *Canada and the Rule of Law: 150 Years after Confederation* (Ottawa: International Commission of Jurists, 2017) [Parkes, “Imprisonment”].

¹⁵⁷ The Honorary Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services, 1996), as discussed in Parkes, “Imprisonment,” *supra* note 156 at 129.

D. Constitutional Challenges

In preventing access to rehabilitative programs that better suit the needs of federally sentenced Indigenous women, the CSC's policies contravene s. 4(g) of the CCRA. Section 4(g) imposes a statutory direction on the CSC to ensure that correctional policies, programs and practices respect the differences and respond to the needs of Aboriginal persons in custody.¹⁵⁸ While in *Ewert* it was found that the appellant's *Charter* rights were not violated by the CSC's use of the impugned psychological and actuarial tools, the majority affirmed that the purpose of the correctional system set out in the CCRA cannot be achieved without giving meaningful effect to the guiding principle set out in s. 4(g).¹⁵⁹ The majority held that the CSC must ensure that its policies and programs are responsive to Indigenous offenders' needs and circumstances, including when they differ from non-Indigenous offender populations.¹⁶⁰ The majority urged the CSC to "abandon the assumption that all offenders can be treated fairly by being treated the same way."¹⁶¹

While a *Charter* breach was not made out on the facts in *Ewert*, courts have found that a contravention of s. 4(g) can give rise to breach in inmate's s. 7 rights. In *Chambers*,¹⁶² the Yukon Court of Appeal held that the infringement of s. 4(g), an express statutory direction, constituted a breach of fundamental justice.¹⁶³ Another possible route to a successful constitutional challenge could be by claiming that the CSC's limiting of ss. 81 and 84 through internal policies are unconstitutional as they are inconsistent with the legislative intent.¹⁶⁴

¹⁵⁸ CCRA, *supra* note 51.

¹⁵⁹ *Ewert*, *supra* note 51 at 59.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *R v Chambers*, 2014 YKCA 13, 116 WCB (2d) 555.

¹⁶³ *Ibid* at para 74, cited in *Ewert*, *supra* note 51 at para 95.

¹⁶⁴ Senator Kim Pate, "Remediating Criminal Injustice: Advocating for Decarceration and Substantive Equality" (Presented by the Centre for Feminist Legal Studies at the Peter A Allard School of Law, 17 Nov 2017).

VII. CONCLUSION

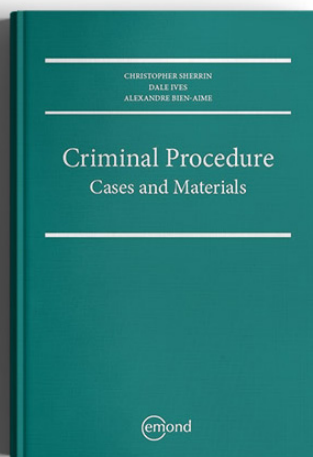
It has been nearly thirty years since Fran Sugar and Lana Fox asserted to those in power that Indigenous people need to be in control of their own correctional programming. CSC policies and practices are marked by overclassification of Indigenous women and the insufficient application of *Gladue* principles. This has resulted in impeded access to section 81 and 84 agreements. Funding ear-marked for these agreements has been redirected by the CSC to their own programs, violating their statutory commitment to respond to the needs of Aboriginal persons in custody. As a result of their unique histories and positionalities, Indigenous women suffer a disproportionate impact from this underutilization. Whether through a claim of discrimination, Commissioner's Directives, a legislative response or a constitutional challenge, immediate and thoughtful change must take place so that federally incarcerated Indigenous women and their communities have the resources and tools to heal themselves.

CANADIAN RESOURCES FOR YOUR CRIMINAL LAW PROGRAM

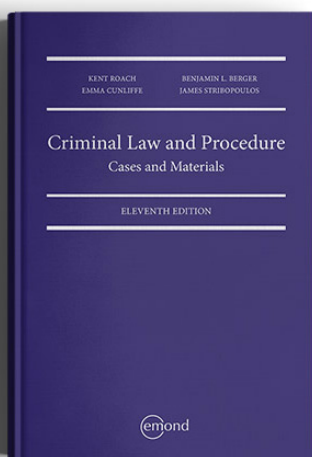
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“Too Bad, So Sad”: Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015

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ABSTRACT

In 1995, significant changes were made to the *Young Offenders Act* (YOA) to address mounting criticisms. However, by 2003 the legislation was repealed and replaced with the *Youth Criminal Justice Act* (YCJA) that was recognized from the outset as a much different and more complicated piece of youth justice legislation. Like its predecessor, after thirteen years in operation, the YCJA has also undergone significant amendments aimed at fixing some of its perceived weaknesses. This article addresses the question of to what extent long-recognized problems with administering youth justice in Canada are now being addressed more effectively with the enactment and amendment of the YCJA and corresponding changes in provincial and territorial youth justice policy and practice that have been introduced over the past two decades. As part of our analysis of outstanding policy challenges, specific attention is given to the findings of research on regional variations in the nature and use of young offender diversion programs,

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remand custody, case outcomes, sentencing practices, and the issue of the disproportionate incarceration of Indigenous youth. Drawing on a wide range of published and unpublished research on the enactment and implementation of the YCJA, we argue that while significant progress has been made on some fronts – including the substantial reduction in the use of custody sentences – other areas of youth justice administration are still sadly in need of repair in Manitoba and elsewhere across Canada.

I. INTRODUCTION

Although much has been made in recent years about needed changes in the way in which we deal with young offenders in Canada, insufficient attention has been given to investigating the changes that have been made and the effects they are having on society and the lives of troubled youth involved in provincial and territorial justice systems. Particularly disturbing in this context is the continued over-representation of Indigenous youth in both remand and sentenced custody despite Supreme Court decisions and explicit legislative provisions designed to reduce this long historical trend.¹ The primary focus of this article is to examine the evolution of and challenges facing youth justice reform in Canada primarily during the tumultuous period from 1995 to 2015. This includes a review of the intense political and policy-related controversies surrounding the demise of the *Young Offenders Act* (YOA),² its replacement with the *Youth Criminal Justice Act*³ in 2002, and more recent amendments of the YCJA. In addition, building on the work of legal scholars⁴ and

¹ In a recent critical analysis of the problem of over-incarceration, Ryan Newell highlights the contested nature of the term “Aboriginal” as “inherently assimilationist” even though the term continues to be used in many sources, including “judicial authorities, research by government commissions, and academic articles by Indigenous and non-Indigenous scholars.” See Ryan Newell, “Making Matters Worse: the Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration” (2013) 51:1 *Osgoode Hall LJ* 199 at 201, 202. Given this sensitive concern, we use the term Indigenous except when citing directly from sources that have made prior use of the term Aboriginal.

² *Young Offenders Act*, RSC 1985, c Y-1 [YOA].

³ *Youth Criminal Justice Act*, SC 2002, c 1.

⁴ Nicholas Bala, Peter Carrington & Julian Roberts, “Evaluating the Youth Criminal Justice Act After Five Years: A Qualified Success” (2009) 51:2 *Canadian J of Criminology & Criminal Justice* 131; Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin, 2012); Sherri Davis-Barron, *Canadian Youth and the*

researchers from other disciplines,⁵ we further explore how much of an impact specific sections of the YCJA had on related provincial/territorial youth justice policies, as well as evidence related to the outcomes of policy changes in provinces/territories, with particular attention given to Manitoba. In order to address these concerns, we review research findings on five essential youth justice outcomes: levels of youth crime and youth charging; the use of young offender diversion programs; youth court processing and case outcomes; remand and sentenced custody; and the issue of the disproportionate incarceration of Indigenous youth. Before undertaking in this review, we first provide a needed discussion of previous historical shifts in youth justice discourse and practice concerning Canada's initial 1908 *Juvenile Delinquents Act (JDA)* and the subsequent lengthy period leading to the eventual enactment of the YOA in 1982.⁶ This historical context is required to contrast the complex defining features of the politics of contemporary youth justice reform with the earlier experience in Canada from the late-19th century to the 1980s. In particular, having knowledge of this historical background enables one to more adequately assess the extent to which long-recognized problems with administering youth justice in Canada are now being addressed more effectively through YCJA and corresponding changes in provincial and territorial youth justice policies and practices, which have been brought into effect over the past two decades. Collectively, our analysis of historical and contemporary Canadian youth justice reform outcomes leads to addressing the critical question of: "Can the system be improved further, and if so, what legal principles and policies need to be considered?"

Criminal Law: One Hundred Years of Youth Justice Legislation in Canada (Markham: LexisNexis Canada, 2009); Newell, *supra* note 1.

⁵ Marc Alain, Raymond R Corrado & Susan Reid, eds, *Implementing and Working with the Youth Criminal Justice Act Across Canada* (Toronto: University of Toronto Press, 2016); Peter J Carrington & Jennifer L Schulenberg, "Structuring Police Discretion: The Effect on Referrals to Youth Court" (2008) 19:3 *Criminal Justice Policy Review* 349; Raymond R Corrado, Sarah Kuehn & Irina Margaritescu, "Policy Issues Regarding the Overrepresentation of Incarcerated Aboriginal Young Offenders in the Canadian Context" (2014) 14:1 *Youth Justice* 40; Jane Sprott & Anthony N Doob, "Gendered Treatment: Girls and Treatment Orders in Bail Court" (2010) 52:4 *Canadian Journal of Criminology and Criminal Justice* 427 [Sprott & Doob, "Gendered Treatment"].

⁶ Enacted as *Juvenile Delinquents Act*, SC 1908, c 40; with minor amendments to the *Juvenile Delinquents Act*, RSC 1970, c J-3.

In addressing this question our analysis points at two enduring problems with youth justice reform across Canada; first, the ongoing challenge faced in balancing the interests and rights of children with the perceived need for criminal accountability and justice; and, second, perhaps the more intractable problem of the variations in the way federal youth justice legislation (from the *JDA* to the *YOA*, and *YCJA*) has been implemented in the provinces and territories, which has resulted in inconsistent and inequitable application of the law. We argue that while the enactment of the *YCJA* and its implementation succeeded in obtaining key policy objectives, mainly the substantial reduction in the use of custody sentences, other youth justice reform priorities have arguably not been achieved. This is reflected in particular in the still dire need of policy and program reform to address issues connected with mental health services, addiction, homelessness, youth gang-involvement, and grossly inadequate program resources in non-urban areas generally. These legal and policy challenges are especially acute in provinces such as Manitoba, in all of the territories, and in Indigenous rural and urban communities. In the concluding section of our article we reflect on the key challenges of striving to create a youth justice system that works for the benefit of all Canadian youth. While acknowledging the promising steps some provinces have taken toward this end, we argue that additional progressive youth justice reform in Canada will require both agreement by politicians to avoid promoting ideological-driven youth justice policy agendas, and more commitment on the part of policy makers and researchers to actively support and engage in evidence-based knowledge production and transfer based on a “best practices” in youth justice model.

II. A SHORT HISTORY OF CANADIAN JUVENILE/YOUTH JUSTICE REFORM TO 1982

The enactment of the *Juvenile Delinquents Act* in 1908 coincided with and was directly influenced by the movement toward enacting similar child-welfare model juvenile justice legislation in other countries, particularly the US.⁷ This radical and innovative movement was led by the Canadian

⁷ Russell Smandych, “From ‘Misguided Children’ to ‘Criminal Youth’: Exploring Historical and Contemporary Trends in Canadian Youth Justice” in John Winterdyk & Russell Smandych, eds, *Youth at Risk and Youth Justice: A Canadian Overview*, 2nd ed (Toronto: Oxford University Press, 2016) 4.

lobbyists J.J. Kelso and W.L. Scott, who travelled to the United States to study the initial state juvenile justice reforms especially in Illinois. They worked together first in Ontario to effectively influence legislators to introduce changes in provincial child welfare and protection legislation. Along with other ‘child savers’, they then shifted their reform efforts to lobbying at the federal level in Ottawa. The *JDA* initially incorporated a mix of Ontario’s policy approach to dependent and delinquent children and the child-welfare model imported from the US.⁸ In other words, the *JDA* represented a fundamental legal philosophical change in juvenile justice administration in Canada from a form of “generalized classical governance.”⁹ under which young offenders were treated more or less like adults, to a form of “modern legal governance,”¹⁰ in which delinquent and dependent children would be dealt with separately from adults and more often through non-custodial child welfare interventions put into place in the community. The *JDA* made the supervision of juvenile offenders in the community a central feature by way of probation and cast a wide jurisdictional net in defining the types of delinquent and dependent children. This unprecedented legal jurisdiction was expanded in the 1924 revision of the Act which introduced ‘status offences’; behaviours that were considered delinquent or criminal only because the person was not yet an adult.¹¹ The *JDA* also introduced other fundamental changes. Most importantly, it provided provincial probation officers, judges, and correctional officers extensive discretionary power. This resulted in considerable variations in provincial laws and policies related to the implementation of the *JDA*. These included: the discretion to sentence children to “indeterminate sentences” of incarceration (to the age of 21); the power to allow provinces to decide on the cut-off age, above 15, at which point a trial involving a young person would be held in adult court; the discretion given to provinces to determine both the timing of the initial

⁸ *Ibid.*

⁹ Bryan Hogeveen, “Winning Deviant Youth Over by Friendly Helpfulness’: Transformations in the Legal Governance of Deviant Children, 1857-1908” in Russell Smandych, ed, *Youth Justice: History, Legislation, and Reform* (Toronto: Harcourt, 2001) 43 at 45 [Hogeveen, “Friendly Helpfulness”].

¹⁰ *Ibid.*

¹¹ *Juvenile Delinquents Act*, RSC 1924, c 53; cited in Davis-Barron, *supra* note 4 at 41.

establishment of juvenile courts; and, the degree to which the *JDA* would be implemented uniformly across a province.¹²

Given these forms of discretionary power, it is not surprising that provincial juvenile courts' procedures and outcomes, including correctional services, varied substantially throughout most of the twentieth century. For example, many rural and remote areas did not have functioning juvenile justice systems well into the 20th century. These provincial/territorial differences, along with variations in the maximum jurisdiction age for juvenile offenders, also contributed to substantial inter-provincial and regional variations throughout the existence of the *JDA*.¹³ Variations in practice were further evident even within provinces. Legal and correctional program resources available in large metropolitan regions were simply less available in small towns and not at all in rural communities. As well, variations were further facilitated because the child-welfare model and legal principles of the *JDA* allowed for informal court proceedings that were closed to the public. Lawyers were discouraged from appearing on behalf of accused young offenders given the then prevailing theoretical assertions or 'accepted wisdom' concerning the need to avoid unnecessary technicalities¹⁴ that would interfere with or delay the treatment considered to be in the child's best interests.

By the 1960s precedent setting US Supreme Court decisions in cases such as in *Re Gault*,¹⁵ started the legal and political movement that

¹² Hogeveen, "Friendly Helpfulness," *supra* note 9; John Hagan & Jeffery Leon, "The Rehabilitation of Law: A Social-Historical Comparison of Probation in Canada and the United States" (1980) 5:3 *Canadian J of Sociology* 235; Alison J Hatch & Curt T Griffiths, "Child Saving Postponed: The Impact of the Juvenile Delinquents Act on the Processing of Youth Offenders in Vancouver" in Russell Smandych, Gordon Dodds & Alvin Esau, eds, *Dimensions of Childhood: Essays on the History of Children and Youth in Canada* (Winnipeg: Legal Research Institute of the University of Manitoba, 1991) 233.

¹³ Joan Sangster, *Regulating Girls and Women: Sexuality, Family, and the Law in Ontario, 1920-1960* (Toronto: Oxford University Press, 2001); Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: University of Toronto Press, 1976).

¹⁴ Nicholas Bala, *Young Offenders Law* (Toronto: Irwin Law, 1997) at 6 [Bala, *Young Offenders*].

¹⁵ *In re Gault*, 387 US 1 (1967); cited in David S Tanenhaus, "The Elusive Juvenile Court: Its Origins, Practices, and Re-inventions" in Barry C Feld & Donna M Bishop, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (New York: Oxford University Press, 2012) at 429. Tanenhaus discusses *In re Gault* alongside other US Supreme Court landmark juvenile justice cases of the period (at 429-433).

questioned key welfare model principles underlying all states' juvenile justice laws and the *JDA*. For example, defence lawyers began to increasingly appear in juvenile courts (usually in major cities) as legal counsel. As well the *JDA* began to be criticized on several of its fundamental legal principles including the informality of proceedings and the lack of due process legal rights for accused youth.¹⁶ Beginning in the mid-1960s and for almost the next two decades, politicians, child and youth advocacy interest groups, lawyers, judges, and criminologists both collaborated and debated several bills to replace the *JDA*. The earlier failure to enact three attempted legislative replacements of the *JDA* finally culminated in the introduction of Bill C-61 in the House of Commons in early 1981, and its subsequent enactment as the *Young Offenders Act* in 1982.¹⁷ In their later 1992 account of events leading to the enactment of the *YOA*, Corrado and Markwart, who were both active earlier in implementing the *YOA* in British Columbia, note that a wide "political consensus about the fundamental direction of juvenile justice reform"¹⁸ emerged both within and outside of Parliament at the time, and "the legal rights orientation of the Bill went virtually unchallenged";¹⁹ as the Bill "eventually passed with the unanimous approval of all three political parties."²⁰

¹⁶ Bala, *Young Offenders*, *supra* note 14.

¹⁷ Raymond R Corrado & Alan Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" in Raymond R Corrado et al, eds, *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992) 137 at 150 [Corrado & Markwart, "Evolution and Implementation"].

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.* More specifically, Corrado & Markwart, "Evolution and Implementation" (at 140) argue that: The key factors in juvenile justice reform in Canada during this period [were] not political ideology, public concerns or the media, but rather the dynamic interplay of federal and provincial politics arising from Canada's unique constitutional arrangements; the role of senior federal and provincial civil servants, who in turn were influenced by criminological/legal theory and research; and, to a lesser extent, professional interest groups.

III. THE SHORT AND TROUBLED LIFE OF THE *YOUNG OFFENDERS ACT (YOA)*

Despite the initial consensus backing the YOA, its relatively short 19-year existence – starting from its implementation in 1984 – was marked with controversy from the outset and it underwent several significant amendments before it was finally replaced in 2003. The YOA did introduce a number of fundamental philosophical procedural changes, many of which have since continued to provide the basis for youth justice in Canada.²¹ However, several of these YOA key principles came under intense scrutiny and attack by public, interest group, and media-based critics of the right (law and order constituency) and left (liberal/“best interests of the child”) orientation. For example, the YOA was criticized from its outset by ‘law and order’ proponents in the public and related ‘not tough enough on crime’ interest groups. These critics focused on the perceived leniency of the YOA, including its short sentences (of 3 to 5 years) for violent offenders and youth convicted of murder and not raised to adult court, along with the apparent lack of individual (convicted) and general deterrence of future serious and violent offenders.²² A competing perspective, which involved primarily lawyers and criminologists, focused on the YOA’s poorly articulated and conflicting principles.²³

²¹ These included: changes concerning *the definition of young offenders* (setting the age range of young offenders at 12 to 17 across the country, and by abolishing status offences); changes concerning *the legal rights of youth* (providing more due process safeguards for accused youth, including an absolute right to a lawyer and a strict prohibition against publicizing the names of accused and convicted young offenders); as well as changes concerning *the sentencing of young offenders* (setting the maximum sentence for a conviction under the YOA at three years, introducing “alternative measures” dispositions for less serious offenders, and making provision for the transfer of young offenders to adult court when it was seen to be in the “interests of society,” having regard to the “needs of the young offender.” YOA, *supra* note 2, s 16(1); see also, generally, Bala, *Young Offenders*, *supra* note 14.

²² Bala, *Young Offenders*, *supra* note 14.

²³ Paul Havemann, “From Child Saving to Child Blaming? The Political Economy of the *Young Offenders Act* 1908–1984” in Stephen Brickey & Elizabeth Comack, eds, *The Social Basis of Law* (Toronto: Garamond, 1986) 225; Paul Havemann, “Crisis Justice for Youth: Making the *Young Offenders Act* and the Discourse of Penalty” in Dawn Currie & Brian McLean, eds, *Rethinking the Administration of Justice* (Halifax: Fernwood, 1992) 86.

As early as 1986, amendments were introduced to address “concerns raised by police and provincial governments about difficulties with implementing the YOA,”²⁴ specifically sections involving “record keeping, breach of probation orders, and publication of identifying information about dangerous persons.”²⁵ These amendments marked the beginning of efforts to ‘add teeth’ to the legislation. It is clear the amendment concerning ‘breaching’ did have this effect. For instance, Doob and Sprott pointed out that by 2000, the new offence of “failure to comply with a disposition”²⁶ was responsible for 23 percent of custodial sentences handed down by judges in young offender cases across Canada. Later major amendments to the YOA followed in 1992 and 1995, which led to raising the maximum sentence for murder available in youth court from 3 to 10 years, making it progressively easier to transfer cases to adult court, and introducing “presumptive” offences for 16 and 17 year olds.²⁷ The latter had enormously controversial implications because it entailed that if a youth of this age was charged with murder, manslaughter, attempted murder, and aggravated sexual assault, they would be “presumptively” transferred to adult court unless legal counsel successfully argued that the transfer should not take place.²⁸ In addition, the length of sentence to parole eligibility was reduced for transferred young offenders who were convicted of homicide in adult court.²⁹ In response to the intense criticism concerning the YOA’s contradictory sentencing principles the newly elected Liberal federal government also introduced a revised and expanded “Declaration of Principle” in the 1995 amendment of the YOA.³⁰

²⁴ Bala, *Young Offenders*, *supra* note 14.

²⁵ *Ibid.*

²⁶ Anthony N Doob & Jane B Sprott, “Youth Justice in Canada” in Michael Tonry & Anthony N Doob, eds, *Youth Crime and Justice: Comparative and Cross-national Perspectives* (Chicago: University of Chicago Press, 2004) 185 at 216 (Table 3) [Doob & Sprott, “Youth Justice in Canada”].

²⁷ See generally, Bala, *Young Offenders*, *supra* note 14.

²⁸ Bala, *Young Offenders*, *supra* note 14.

²⁹ Whereas up to 1992 a youth convicted of first degree murder in adult court was required to serve a minimum of 25 years before being eligible for parole, the parole eligibility date was reduced to between 5 and 10 years from 1992 to 1995 and, in turn, after 1995, to 5 to 7 years for 14 and 15 year olds, and to 10 years for 16 and 17 year olds (Bala, *Young Offenders*, *supra* note 14 at 277, 287).

³⁰ Bala, *Young Offenders*, *supra* note 14 at 35-36.

In addition to the increase in custodial sentences partly brought about by the new offence of failure to comply with a disposition, the YOA and its later amendments had several other and often controversial impacts on the processing of youth through the justice system. Most notably, as discussed below, these included changes in youth apprehension and charging practices, the use of alternative measures, youth custody, and transfers to adult court. Moreover, it soon became unmistakably evident that despite all the philosophical principles designed to protect the rights of “vulnerable” youth that were embedded in the YOA, the overrepresentation of Indigenous youth in youth courts and custody, especially in western provinces, was morally and politically untenable.

A. Youth Apprehension and Charging Practices

From his study of changes in apprehension and charging practices before and after the introduction of the YOA, Peter Carrington showed that the per capita rate of young persons charged increased significantly with the enactment of the YOA until the mid-1990s.³¹ Specifically, he found that while the average rate of youth apprehended by police³² increased 7 percent in the period 1986-96 compared to 1980-83, the average charge rate in the period 1986-96 was 27 percent higher than during 1980-83.³³ However, Carrington also found significant provincial variations in rates of youth charging both before and after the introduction of the YOA.³⁴ He concluded from this that apart from a temporary slight increase in the early nineteen-nineties, the level of police-reported youth crime changed very little since 1980 and that the slight increase that did occur was not likely due to the YOA. However, he did find that with the implementation of the YOA, in four provinces and one territory that had previously low rates of charging youth under the *JDA*,³⁵ charge rates “increased suddenly and substantially, reaching levels similar to those already existing in the other jurisdictions.”³⁶ Police-reported youth crime and court processing data from 1996 to

³¹ Peter Carrington, “Trends in Youth Crime in Canada, 1977-1996” (1999) 41:1 *Canadian J of Criminology* 1.

³² That is, the average rate per 100,000 of police-reported youth crime.

³³ Carrington, *supra* note 31 at 16, 19 (Figures 2 and 3).

³⁴ *Ibid* at 19-20 (Figures 4, 5a, and 5b).

³⁵ Prince Edward Island, Saskatchewan, Nova Scotia, Northwest Territories, and Ontario.

³⁶ Carrington, *supra* note 31 at 2.

1999/2000 showed a continued decline in youth crime (apprehension) and charging rates, and the number of cases that came before youth courts in the last years of the YOA.³⁷ These decreases are particularly important to note in the context of researchers' later attempts to assess differences in charge and custodial sentences patterns between the YOA and the YCJA. Most crucially, they show retrospectively that youth court processing and custody rates already had declined substantially before the YCJA in most provinces, though this trend accelerated after its implementation. As shown in a study by Sprott and Doob,³⁸ in Quebec however, the rate of cases going to youth court remained stable but at a lower rate throughout the 1990s.³⁹

B. Alternative Measures

Under the YOA, "alternative measures" were formalized programs created by individual provinces that allowed young offender cases to be dealt with through non-judicial and community-based alternatives, instead of proceeding to court. Typical alternative sanctions for youth who took responsibility for their offences included community service, personal service or financial compensation to a victim, apologies, or educational

³⁷ Statistics Canada, "Youth Court Statistics, 1999/2000," by Mark Sudworth & Paul deSouza, in *Juristat*, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, 2001) at 3 (Figure 2), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2001003-eng.pdf>> [Statistics Canada, "Youth Court, 1999/2000"].

³⁸ Jane B Sprott & Anthony N Doob, "Two Solitudes or Just One? - Provincial Differences in Youth Court Judges and the Operation of Youth Courts" (2002) 44:2 *Canadian J of Criminology and Criminal Justice* 165 at 166 (Figure 1).

³⁹ Some Quebec scholars, including Jean Trépanier, "What Did Quebec Not Want? Opposition to the Adoption of the *Youth Criminal Justice Act* in Quebec" (2004) 46:3 *Canadian J of Criminology and Criminal Justice* 273, and Marc Alain & Sylvie Hamel, "The Situation in Quebec: 'Vive la Difference?'" in Alain, Reid & Corrado, *supra* note 5, 299, along with others such as Raymond Corrado & Alan Markwart, "Evolution of Juvenile Justice" in Robert A Silverman, James A Teevan & Vince R Sacco, eds, *Crime in Canadian Society* (Toronto: Harcourt, Brace & Janovich, 1997) at 25 [Corrado & Markwart, "Evolution of Juvenile Justice"], assert that since the enactment of the province's *Youth Protection Law* in 1977, the Quebec youth justice system has been based on corporatist model principles. In practice, this model is linked to procedures designed to facilitate the formal administrative diversion processing of nearly all youth apprehended by police other than the extremely few youth charged with the more violent offences and extreme prior charge records. In effect, Quebec constitutes an historical exception regarding the assessment of the impact federal youth justice laws on most of the controversial or unresolved provincial policies discussed above.

sessions. In many provinces, like Manitoba, alternative measures programs were administered primarily through volunteer ‘youth justice committees,’ with support from assigned youth justice and corrections personnel. In 1998-99, 33,173 youth cases reached agreement to participate in alternative measures, a rate of 135/10,000 youth across Canada.⁴⁰ Among provinces, Alberta had the highest rate of youth assigned to alternative measures (384/10,000), while British Columbia (63) and Ontario (66) had the lowest recorded participation rates.⁴¹ In the final few years of the YOA, the recorded use of alternative measures across the country declined by 18 percent from 120 per 10,000 youth in 1999/00 to 98 per youth 10,000 in 2000/01. Throughout the 1990s, Manitoba was one of the leading provinces in making use of alternative measures, ranking from first to fourth each year from 1997 to 2001.⁴²

To better understand both regional differences in the use of alternative measures under the YOA and how the later implementation of the YCJA would affect the use of youth diversion, it is helpful to compare Manitoba to other provinces. During the YOA, the Youth Corrections Branch of Manitoba provided substantial financial and other resources for the use of alternative measures through community-based volunteer youth justice committees.⁴³ In addition, both macro and unique micro (or disaggregated individual case and completion rate) data on the use of alternative across the province was collected and shared.⁴⁴ In 2003, during the transition year

⁴⁰ Statistics Canada, “Alternative Measures in Canada, 1998/99,” by Cheryl Engler & Shannon Crowe, in *Juristat*, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, 2000) at 6 (Table 1), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2000006-eng.pdf>> [Statistics Canada, “Alternative, 1998/99”].

⁴¹ *Ibid.*

⁴² It was third highest in the country, at 201 per 10,000 youth in the population in 1997/98, fourth highest in 1998/99 at 155/10,000, first in 1999/00 at 190/10,000, and fourth again in 2000/01 at 153/10,000. Statistics Canada, “Youth Custody and Community Services in Canada, 2000/2001,” by Julie Marinelli, in *Juristat*, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, 2001) at 4 (see Table: “Youth Participation in Alternative Measures (AM), by jurisdiction, 1997/98 to 2000/2001”), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2002008-eng.pdf>> [Statistics Canada, “Youth Custody, 2000/01”].

⁴³ Russell Smandych et al, “Youth Justice in Manitoba: Developments and Issues under the YCJA” in Alain, Corrado & Reid, *supra* note 5, 88 [Smandych et al, “Youth Justice in Manitoba”].

⁴⁴ In 1998–1999, Manitoba was the only jurisdiction in the country to submit disaggregated micro-data on youth alternative measures to the Canadian Centre for

from the YOA to the YCJA, 57 designated rural and urban-based provincial youth justice committees existed in Manitoba.⁴⁵ Unfortunately, there is now very little publically available information on how youth justice committees are constituted or how they have operated in Manitoba since the implementation of the YCJA. In its 2014-2015 annual report, Manitoba Justice claimed to offer support to 46 community-based “justice committees operating across the province”⁴⁶ with “more than 200”⁴⁷ members who were involved in administering “community justice (extra-judicial) measures”⁴⁸ and providing “crime prevention and community education services in their communities.”⁴⁹ In its 2015-2016 annual report, Manitoba Justice does not provide any information on the membership of justice committees; noting only that the number of committees dropped to 45.⁵⁰ In addition to this official source, data from a range of other sources examined in a preliminary study of the implementation of the YCJA in Manitoba suggests that community justice committees (CJCs) dealing specifically with youth justice cases in Manitoba were, and potentially still are, much less active today than in the past.⁵¹

C. Youth Custody Rates

The high rate of youth incarceration in Canada in the 1990s compared with other western countries was a key rationale of researchers and anti-‘get

Justice Statistics, which enabled more detailed data analysis and comparison. Manitoba data for 1998-1999 show that of the 1,760 alternative measures cases closed, 2,300 interventions were given, and that in these cases, 90 percent were closed as a result of the successful completion of the interventions (Statistics Canada, “Alternative, 1998/99,” *supra* note 41 at 11).

⁴⁵ Canada, Department of Justice, *National Survey of Youth Justice Committees in Canada* (Ottawa: Hann & Associates, 2003) at 5 (Table 1), online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/rr03_yj7-rr03_jj7/rr03_yj7.pdf>.

⁴⁶ Manitoba Justice, *Annual Report 2014-2015* (Winnipeg: Manitoba Justice, 2015) at 30, online: <<http://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1415.pdf>> [*Annual Report 2014-2015*].

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Manitoba Justice, *Annual Report 2015-2016* (Winnipeg: Manitoba Justice, 2016) at 35, online: <<https://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1516.pdf>> [*Annual Report 2015-2016*].

⁵¹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

tough' proponents for the repeal of the YOA. Under the YOA, most cases in youth courts as well as youth sentenced to custody were relatively minor offences. Doob and Sprott's research on cases of youth sentenced to custody in 1999-2000⁵² indicated that three quarters were sentenced for eight less serious offences.⁵³ The *Juristat* data that Doob and Sprott relied on for their study also revealed very importantly that the use of custody sentences varied widely across Canada while at the same time custody sentences (including both open and secure custody) tended to be short, with 77 percent of sentences being three months or less.⁵⁴

In examining Canadian youth custody trend changes it is also important to consider data on the use of remand. In the final year, 2000-2001, in which Statistics Canada reported data on custody and community services under the YOA, sentenced and remand custody admission rates both declined by 6 percent from 1999/00 to 60 admissions per 10,000 youth for sentenced custody, and 65 per 10,000 for remand custody.⁵⁵ In addition, among the eleven reporting provincial jurisdictions, "remand admissions accounted for the largest share (39%) of custodial admissions...while 33% of admissions were to open custody and 29% were to secure custody."⁵⁶ Also, while approximately six in ten custody admissions were remand admissions in the reporting jurisdictions, there was a considerable variation across jurisdictions; i.e. with Manitoba the highest (at 82 percent) and the Northwest Territories the lowest (at 16 percent).⁵⁷ The overall youth incarceration rates in the eleven reporting jurisdictions in 2000/01 ranged from a high of 36 per 10,000 youth in Saskatchewan to a low of 9 per 10,000 youth in British Columbia.⁵⁸

D. Transfers to Adult Court

The 1992 amendment dealing with transfers to adult court had the effect of increasing the number of cases transferred, but with very significant

⁵² Doob & Sprott, "Youth Justice in Canada," *supra* note 26 at 216 (Table 3).

⁵³ *Ibid.* Theft under \$5,000, possession of stolen property, failure to appear, failure to comply with a disposition, other thefts, mischief/damage, breaking and entering, and minor assault.

⁵⁴ Statistics Canada, "Youth Court, 1999/2000," *supra* note 37.

⁵⁵ Statistics Canada, "Youth Custody, 2000/01," *supra* note 42 at 1.

⁵⁶ *Ibid* at 3, 5.

⁵⁷ *Ibid* at 6, 11 (Table 1).

⁵⁸ *Ibid* at 8 (Figure 6).

interprovincial variations. In “the last full year of the 1984 law, a total of 71 out of 116,397 cases were transferred (.06 percent), including 8 of 30 murder charges”;⁵⁹ whereas in the first year the amendment took effect “94 of 115,949 cases were transferred (.08 percent), including 6 of 30 murder charges.”⁶⁰ In subsequent years the number of transfers fluctuated somewhat, declining to 79 of 110,883 in 1997-98, from 92 of 110,065 in 1996-97, but increasing again in 1998-99 to 91 of 106,665.⁶¹ The extent of provincial variation in the use of transfers is quite glaring; most notably in the fact that Manitoba accounted for close to one-third of all transfers annually from 1996 to 1999.⁶² Besides highlighting the ongoing concern regarding the regional inequities in the legal processing and treatment of youth regarding YOA transfer cases to adult court, these data provide for a comparison to the new approach under the YCJA to the trial and sentencing of young persons.

E. Growing Concern with the Overrepresentation of Indigenous Youth

In their book entitled *Tough on Kids: Rethinking Approaches to Youth Justice*,⁶³ published in 2003 as the YCJA was being initially implemented, two Saskatchewan legal-aid lawyers Green⁶⁴ and Healey, lamented that in their experience “criminal justice has become our society’s default system, taking in all those youth that fall between the cracks of other systems and resources.”⁶⁵ In addition, Green and Healey drew attention to the growing crisis of Indigenous youth overrepresentation warning that: “[i]f the current high number of Aboriginal youth already in custody [increased] at the same

⁵⁹ Bala, *Young Offenders*, *supra* note 14 at 278–279; citing Statistics Canada, “Youth Court Statistics, 1991–92,” in *Juristat*, Catalogue No CS85-002 (Ottawa: Statistics Canada, 1993); Statistics Canada, “Youth Court Statistics, 1992/93,” Catalogue No CS85-522-PDF (Ottawa: Statistics Canada, 1994).

⁶⁰ *Ibid.*

⁶¹ Canada, Department of Justice, “Background for YCJA” (Ottawa: Department of Justice, 2016) at Table C1 and C2, online: <<http://www.justice.gc.ca/eng/tp-pr/cj-jp/yj-jj/back-hist/index.html>>.

⁶² *Ibid.*

⁶³ Ross Green & Kearney Healey, *Tough on Kids: Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishing, 2003) 54.

⁶⁴ Ross Green is now a provincial court judge in Saskatchewan.

⁶⁵ Green & Healey, *supra* note 63.

rate as the overall Aboriginal population, the resulting effect [would] be crippling, both within the youth justice system, and within Canadian society as a whole.”⁶⁶ On the eve of the implementation of the YCJA, in 2000-2001, Indigenous youth constituted 5 percent of the youth population across Canada, but accounted for 26 percent of admissions to remand and 24 percent of admissions to sentenced custody.⁶⁷ Even more disconcerting, among the disproportionately higher Indigenous youth involvement in youth justice across western provinces, “Manitoba showed the largest differences between the Aboriginal youth population (at 16%) and Aboriginal sentenced custody admissions (at 82%) as well as remand admissions (at 70%).”⁶⁸

While pointing to criminal justice as a default system that was often used to respond to the multi-serious needs of Indigenous youth (e.g. health, mental health, inadequate housing, insufficient educational assistance, and general poverty related issues), Green and Healey were hopeful that the implementation of the YCJA might approach these youth through a more constructive program approach. Specifically, they recognized that it formalized the range of possible new types of community-based and restorative-justice based approaches that could be developed based on its broad or inclusive definition of “conferencing.” Similarly encouraging, the YCJA contained provisions (in s. 38(2) (d)), modelled on the *Criminal Code* amendment of 1996 and the Supreme Court of Canada decision in *R v Gladue*⁶⁹ requiring that judges give “particular attention to the circumstances of Aboriginal young people”⁷⁰ in their decision making regarding dispositions and sentences. More broadly, this YCJA section appeared to reveal a federal/provincial/territorial policy consensus understanding of the need for the youth justice process to consider the fundamental structural and resources inequities experienced by many if not most Indigenous families and their children across generations, but especially since the introduction of the federal residential schools policies beginning in the late-19th century and ending formally in the last quarter of the 20th century.

⁶⁶ *Ibid* at 91.

⁶⁷ Statistics Canada, “Youth custody, 2000/01,” *supra* note 42 at 5 (Figure 3).

⁶⁸ *Ibid*.

⁶⁹ *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

⁷⁰ Green & Healey, *supra* note 63 at 99.

The question remains though whether there is an empirical basis for the early optimism concerning the potential positive impact of the YCJA on Indigenous youth?

IV. THE *YOUTH CRIMINAL JUSTICE ACT (YCJA)* AND THE NEW POLITICS OF YOUTH JUSTICE REFORM

Unlike in the case of its predecessors, the *JDA* and the *YOA*, the youth justice reform process leading to the enactment of the *YCJA* was markedly politically partisan and publically divisive. In addition to giving rise to the amendments made to the *YOA* in 1992 and 1995, the perceived increase in youth crime and growing disdain in the “get tough” section of the Canadian public for the *YOA* led both federal and provincial governments to appoint various task forces to come up with recommendations for further reforming the youth justice system. At the federal level, in 1997, the House of Commons Standing Committee on Justice and Legal Affairs issued a report on *Renewing Youth Justice*,⁷¹ which contained fourteen recommendations for overhauling the youth justice system, and in the spring of 1998 the government released its report, *A Strategy for the Renewal of Youth Justice*,⁷² recommending that *YOA* be repealed and replaced with a new Canadian *Youth Criminal Justice Act*.⁷³ While both reports recommended that the protection of society should be the main goal of youth justice legislation and that the legislation should be aimed at dealing more severely with violent young offenders, they also recommended strengthening legislative provisions that encouraged taking more preventive, restorative, and rehabilitative approaches to addressing the causes of youth crime and reducing recidivism among first-time and less-serious young offenders.⁷⁴ In

⁷¹ Canada, House of Commons, Thirteenth Report of the Standing Committee on Justice and Legal Affairs, *Renewing Youth Justice* (Ottawa: April 1997), online: <http://www.ourcommons.ca/Content/Archives/Committee/352/jula/reports/13_1997-04/jula-13-cove.html>.

⁷² Canada, Department of Justice, *A Strategy for Youth Justice Renewal* (Ottawa, Ministry of Supply and Services, 1998), cited in Nicholas C Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 22 [Bala, *Youth Criminal Justice Law*].

⁷³ Joanne Minaker & Bryan Hogeveen, *Youth, Crime, and Society: Issues of Power and Justice* (Toronto: Pearson Canada, 2009).

⁷⁴ In summary, key changes introduced in the *YCJA* included: (1) a new “Declaration of Principle” that recognized that the main goal of the *YCJA* was the *protection of the public*, and that this could best be achieved through applying a three-pronged approach, which

their later account of the politics of youth justice reform in Canada in the mid-1990s, Doob and Sprott point to the political expedience of the then federal Liberal government's decision to introduce new youth justice legislation that reflected this bifurcated or two-pronged approach.⁷⁵ Specifically, they argue that the intention of the Liberal government, when it introduced the YCJA, was not to create tougher legislation but simply to make it appear that it was doing so in order to deflect the criticism from political opposition parties that it was too soft on youth crime. According to Doob and Sprott, by formally creating a bifurcated youth justice system, federal government legislative drafters had quite astutely "crafted a law" that offered more opportunities than had existed before to "reduce the level of punitiveness"⁷⁶ of the youth criminal justice system. Thus, in April, 2003, after seven years of debate and planning, followed with three separate drafts and 160 amendments, the YCJA replaced the YOA.⁷⁷

Despite what might have been the intent of its legislative drafters, the introduction of the YCJA did not overcome criticisms from opposition political parties and certain provinces. Given the above discussed long history of Quebec developing its own unique corporatist model of youth justice, the vocal and ongoing opposition to the enactment the YCJA that came from the province of Quebec was not unexpected.⁷⁸ Similarly, the

included *crime prevention*, *meaningful consequences*, and *reintegration*; (2) greater official emphasis on diversion (or "extra-judicial measures"); (3) tougher sentences for "violent offenders"; (4) no more transfer hearings (youth courts would now have the power to impose adult sentences); and (5) greater emphasis on reintegration by requiring that every custody sentence include a period of post-custody supervision in the community.

⁷⁵ Anthony N Doob & Jane B Sprott, "Punishing Youth Crime in Canada: The Blind Men and the Elephant" (2006) 8:2 *Punishment and Society* 223 [Doob & Sprott, "The Blind Men"]. Doob and Sprott's analysis was developed in response to the opposing view argued by Bryan Hogeveen in "'If We Are Tough on Crime, if We Punish Crime, then People Get the Message': Constructing and Governing the Punishable Young Offender in Canada During the late 1990s" (2005) 7:1 *Punishment and Society* 73.

⁷⁶ Doob & Sprott, "The Blind Men," *supra* note 75 at 224. Despite Hogeveen's analysis to the contrary, it may well have been the case that during the period of reform leading to the enactment of the YCJA proponents and drafters of the legislation shared a sense of hope and optimism that the legislation would have this result.

⁷⁷ Minaker & Hogeveen, *supra* note 73; Bryan Hogeveen & Russell Smandych, "The Origins of the Newly Proposed Canadian *Youth Criminal Justice Act*: Political Discourse and the Perceived Crisis in Youth Crime in the 1990s" in Russell Smandych, ed, *Youth Justice: History, Legislation and Reform* (Toronto: Harcourt, 2001) 141.

⁷⁸ Trépanier, *supra* note 39; Alain & Hamel, *supra* note 39.

persistent criticism of the Act that came from the federal Conservative party, along with that of allied provincial conservative parties and governments, was also inevitable based on their long standing criticisms that, like the YOA, the YCJA did not go far enough in punishing and deterring the perceived 'out of control' level of youth crime. This philosophical crime control model perspective on youth justice was immediately evident when the Conservative party led by Stephen Harper was finally elected to power in 2011 with a majority government. One of its first legislative acts was to introduce amendments to the YCJA. The main theme was 'toughening up' the legislation; in part through changing the Act to make "deterrence" and "denunciation" sentencing principles in the legislation, and further by broadening the definition of what constituted a "violent offence."⁷⁹ In addition, even prior to the Conservatives winning a majority government, important, yet quite different, changes were made in the interpretation and application of the Act because of interventions from the province of Quebec and related court decisions.

From the outset, critics including criminologists in Quebec were opposed to the YCJA. First, they asserted that it was unnecessary since the YOA worked well in Quebec and second, the YCJA "would make the situation worse rather than better."⁸⁰ Even before the YCJA was enacted, the province of Quebec had already taken steps to challenge the legislation and minimize the extent to which it might negatively affect the operation of the province's closely integrated youth protection and youth justice systems.⁸¹ The key criticism emanating from Quebec was that the YCJA "was too punitive and insufficiently rehabilitative."⁸² In 2001 the government of Quebec sent a reference to the Quebec Court of Appeal asking it to rule on the constitutionality of the proposed presumptive offence sections of the YCJA which required that, in the case of youth 14 years or older charged with specific serious violent offences, it would be presumed that upon conviction that the youth would be sentenced as an adult. The Quebec Court of Appeal's conclusion in favour of the Quebec government in 2003

⁷⁹ These changes were introduced in Bill C-10, which was passed in April and implemented in October, 2012. See Lee Tustin & Robert E Lutes, *A Guide to the Youth Criminal Justice Act* (Markham: LexisNexis Canada, 2014) 87.

⁸⁰ Trépanier, *supra* note 39 at 283.

⁸¹ Louis-Georges Cournoyer et al, "Quebec's Experience Keeping Youth Out of Jail" in Winterdyk & Smandych, *supra* note 7, 409.

⁸² Alain & Hamel, *supra* note 39 at 313.

was reaffirmed in the 2008 Supreme Court of Canada decision on the case of *R v B(D)*,⁸³ in which it ruled that the reverse onus presumptive offence sections of the YCJA were unconstitutional.⁸⁴ In 2012, in Bill C-10, the Conservative government repealed the presumptive offence sections of the YCJA, and placed the onus on the “Attorney General” of the province, through Crown prosecutors, to make an application for an adult sentence and to justify why a more severe adult sentence is appropriate in each case.⁸⁵ However, the new adult sentencing sections of the YCJA retained the original clause; s. 61 of the YCJA (2002), which states: “the lieutenant governor in council of a province may by order fix an age greater than 14 years but not greater than 16 years”⁸⁶ for applying adult sentences. Although, with the exception of Quebec, most jurisdictions supported “lowering the age for an adult sentence to 14 years,” there is still the potential for youth to be sentenced differently as adults depending on where they live in Canada.⁸⁷

V. IMPLEMENTING AND WORKING WITH THE YCJA: WEIGHING “THE GOOD, THE BAD, AND THE UNADULTERATED”⁸⁸

Again, in order to assess the more current impact of the YCJA on Canadian provincial/territorial youth justice systems, it is necessary to

⁸³ *R v B(D)*, 2008 SCC 25, [2008] SCJ NO 25.

⁸⁴ Cournoyer et al, *supra* noted 81 at 427-428.

⁸⁵ Davis-Barron, *supra* note 4 at 415; Tustin & Lutes, *supra* note 79 at 133.

⁸⁶ YCJA, s 64(1.2), cited in Tustin and Lutes, *supra* note 79 at 133; Bala, *Youth Criminal Justice Law*, *supra* note 72 at 509. Including this clause in the much amended Bill C-68 was one of the concessions made to Quebec, represented in Parliament by the Bloc Quebecois, in response to its vehement opposition to the wording of the original Bill C-68, section 61. See House of Commons Debates, 36th Parl, 2nd Sess, No 121 (25 September 2000) and House of Commons Debates, 36th Parl, 2nd Sess, No 122 (26 September 2000), cited in Russell Smandych, “Canada: Re-penalisation and Young Offenders’ Rights” in John Muncie & Barry Goldson, eds, *Comparative Youth Justice: Critical Issues* (London: Sage, 2006) at 25-26 [Smandych, “Canada”].

⁸⁷ Tustin & Lutes, *supra* note 79 at 134.

⁸⁸ We would like to acknowledge Sanjeev Anand for our borrowing part of the title of his article on “The Good, the Bad, and the Unaltered: An Analysis of Bill C-68, the Youth Criminal Justice Act” (1999) 4 Can Crim L Rev 249. We apply the term “unaltered” here to contrast it with “adulteration,” a concept now used in critical

examine specific outcomes including: youth crime and youth charging; the use of young offender diversion programs; youth court processing and case outcomes; remand and sentenced custody; and the issue of the disproportionate incarceration of Indigenous youth. The empirical analysis undertaken in the remaining sections of this article utilizes aggregate cross-national and regional (provincial and territorial) data drawn from federal-level government reports (including Statistics Canada *Juristat*, and Department of Justice reports), along with research publications and other sources of publically-available data on the implementation of the YCJA. However, these data are not available in all the provinces and territories and consequently only certain provinces and territories are discussed and compared. In addition, given that some of the most intractable policy outcome issues are exemplified in Manitoba, our analysis will focus on this province.⁸⁹

A. Youth Crime and Youth Charging

Youth crime and youth charging rates across Canada generally have decreased uninterrupted steadily since the YCJA.⁹⁰ Police-reported crime

youth justice reform literature to refer to “[t]he dismantling of a distinct system of criminal justice for youth and the re-emerging with systems of justice for adults.” Smandych, “Canada,” *supra* note 86 at 23.

⁸⁹ Parts of the following discussion are drawn from the recently published study of developments and issues related to the implementation of the YCJA in Manitoba completed by Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

⁹⁰ It is important to note that Statistics Canada changed the method it used to measure and record “youth crime” when the YCJA was implemented. Specifically, as explained in its encompassing report on police-reported crime in 2014:

While overall [adult] crime statistics are based on the number of criminal incidents, police-reported youth crime is based on the number of youth, aged 12 to 17 years, accused in a criminal incident. The number of youth accused includes youth who were either charged, or recommended for charging, as well as those who were diverted from the formal criminal justice system through the use of warnings, cautions, referrals to community programs, etc. As such, the rate of youth accused – also referred to as the youth crime rate – and the youth Crime Severity Index are not directly comparable to overall trends in crime.

Statistics Canada, “Police-Reported Crime Statistics in Canada, 2014,” by Jillian Boyce, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 22, online: <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.pdf>> [Statistics

data published in 2015 by Statistics Canada show that of the approximately 94,100 “youth accused of a criminal incident in 2014, 55% were dealt with by other means, while the remaining 45% were formally charge by the police.”⁹¹ In addition, since 2004 “the rate of youth dealt with by other means has continued to be higher than the rate of youth formally charged, although this difference has been narrowing since 2009.”⁹² During the same period, the severity of youth crime across the country, as measured with the Statistics Canada youth crime severity index (CSI), indicates a continuing decrease in the severity of youth crime since around 2009.⁹³

Typically, since 2004 rates of youth crime and youth charging have been higher in Manitoba than all other provinces except Saskatchewan. Consistent with earlier trends under the YOA, in the first year (2003/2004) under the YCJA, the Manitoba rate for youth brought to court was the second highest of the provinces.⁹⁴ Similarly, for the period 2004-2009, Manitoba had among the highest provincial rates of police-reported youth crime and youth charging under the YCJA. Despite the 2014 reported decreases in youth violent crime rates across the provinces, Manitoba still had the second highest youth rates for homicide, robbery, major assault, and property crime.⁹⁵ Very importantly, however, the most comprehensive measure of violence, the youth crime severity index scores reported by province and territory, indicated that, despite a 25 percent decrease from 2013, Manitoba (at 124.4) had the highest violent youth CSI score among all provinces in 2014.⁹⁶

While police-reported rates of youth crime and the severity of youth crime have decreased across Canada over the past decade, they decreased from a higher starting level in Manitoba along with decreasing more slowly, particularly with respect to property-related crimes. In other words, it appears that the media as well as research-based images of Manitoba’s

Canada, “Police-reported crime, 2014”].

⁹¹ *Ibid* at 22.

⁹² *Ibid* at 22-23 (Chart 15), 38 (Table 8b).

⁹³ Compared to 2004, the 2014 youth crime severity index was lower by 40 percent. *Ibid* at 24 (Chart 16), 38 (Table 8a).

⁹⁴ Statistics Canada, “Youth Court Statistics, 2003/2004,” by Jennifer Thomas, in *Juristat*, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, 2005) at 17 (Table 7), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2005004-eng.pdf>>.

⁹⁵ Statistics Canada, “Police-Reported Crime, 2014,” *supra* note 90 at 39 (Table 9).

⁹⁶ *Ibid* at 40 (Table 10).

ongoing youth crime policy challenges under the YCJA, while often exaggerated in the former's 'moral panic' depictions, are supported by the above analysis of youth crime data. Nonetheless, it is important to note that the number of youths involved in extreme and serious offending is very small compared to other provinces as well as national jurisdictions, most obviously, American states. Yet, we will argue that the Manitoba's youth crime severity index scores are indicative of the limited positive impact of the YCJA on the most complex pattern of youth offending. The related policy challenges are enormously complex because to a considerable extent potential solutions require the intensive coordination of a federal criminal law with a wide range of other federal laws (and programs) along with parallel provincial/territorial laws involving health care, mental health, housing, education, and employment. This extreme and historically difficult inter-ministerial and multi-level government coordination is essential because serious and sustained violent offending appears causally embedded in urbanization, rural isolation, discrimination, poverty, and the emergence of major substance abuse in urban as well as in rural contexts. In effect, these violent crime related variables fit virtually all the classic theoretical factors long associated empirically with the emergence of intergenerational gangs, the most enduring organizational basis for violent youth and adult offending.⁹⁷ In addition, Indigenous over-representation in criminal justice is further complicated largely related to the tragic legacy of the colonialization of Indigenous peoples in this province and the initial emergence of intergenerational Indigenous adult/youth gangs in the 1990s.⁹⁸

B. Diversion Programs and Practices

Despite this asserted intractability of the YCJA's limited impact on serious and violent offending, research on diversion programs and practices since 2003 indicate the Canada wide commitment to implement the YCJA provisions involving extra-judicial measures and sanctions. However, in

⁹⁷ Raymond R Corrado, Alan Leschied & Patrick Lussier, "An Overview of Theory, Research, and Policy Relevant to Serious and Violent Young Offenders in Canada" in Raymond R Corrado et al, eds, *Serious and Violent Young Offenders and Youth Criminal Justice: A Canadian Perspective* (Vancouver: SFU Publications, 2015) 1.

⁹⁸ Elizabeth Comack et al, *'Indians Wear Red': Colonialism, Resistance and Aboriginal Street Gangs* (Halifax: Fernwood, 2013).

Manitoba, preliminary document and interview-based data⁹⁹ has indicated a disconcerting trend; the level of community involvement in administering diversion programs, especially youth justice committees, decreased significantly since 2003.¹⁰⁰ While Manitoba youth justice committees still operated on a more limited scale in rural communities (compared to this practice under the YOA), in Winnipeg, youth justice professionals who were interviewed stated that the operation of the youth justice committees was discontinued after the introduction of the YCJA.¹⁰¹ One respondent, who had experience working in the Manitoba youth justice system both before and after 2003, stated that, although under the YOA “Manitoba had a pretty extensive Youth Justice Committee network,”¹⁰² since the enactment of the YCJA, YJCs have appeared to become “somewhat redundant.”¹⁰³

Although more research is needed to determine the extent of and reasons for the apparent general decline of youth-centred community justice committees across most of Manitoba, there are several factors that might explain this decline and their differential use in urban and rural communities. First, both Manitoba government documents and interviewed respondents consulted in the study carried out by Smandych and colleagues suggested a shift away from a community volunteer approach toward a more formal professional agency-based approach to administering extra-judicial measures. For example, in recent years, diversion programs run by prominent non-profit agencies in Winnipeg like Mediation Services, the Salvation Army, and Onashowewin have received funding from Manitoba Justice on a per case basis. In addition, more cases are referred to non-profit agencies directly by Manitoba Prosecution Services. Previously under the YOA, the police and probation officers frequently provided these

⁹⁹ Compiled for the preliminary study completed by Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

¹⁰⁰ In its annual report for 2014–2015, Manitoba Justice stated that there were 46 justice committees operating across the province with a combined total volunteer committee membership of “more than 200.” See *Annual Report 2014–2015*, *supra* note 49 at 30. In its annual report for 2015–2016, Manitoba Justice does not provide any information on the membership of justice committees, noting only that the number of committees dropped to 45. See *Annual Report 2015–2016*, *supra* note 50 at 35.

¹⁰¹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 (information provided by interview respondents).

¹⁰² *Ibid* at 103.

¹⁰³ *Ibid*.

referrals.¹⁰⁴ This shift in practice likely is accounted for by a policy directive issued by Manitoba Prosecution Services in 2004 which stated, in relation to both adult and youth proceedings, “[t]he ultimate decision as to whether a case is referred to a community-based justice program rests with the Crown Attorney.”¹⁰⁵ In effect, like certain other provinces such as British Columbia, key decision making authority under the YCJA continued the YOA trend of moving to youth court related officials away from the community police and probation officers somewhat paradoxically, given traditional diversion models.¹⁰⁶ Nevertheless, in their evaluation of its first five years of operation, Bala, Carrington, and Roberts have concluded more generally that the YCJA “clearly resulted in a significant drop in the number of youth charged by police and an increase in the use of various methods of police diversion,”¹⁰⁷ and, in addition, that it “caused a considerable reduction in regional differences in the use of alternatives to charging.”¹⁰⁸

This conclusion appears to be supported in more recent research on the use of police diversion and extra-judicial measures programs across different provinces and territories. In her review of diversionary measures under the YCJA, Sandra Bell has pointed to similar trends across different provinces and territories in the use of “restorative interventions” that can include a variety of programs, ranging from community and family conferencing to healing circles.¹⁰⁹ Bell also notes the continuity in practice over time since the YOA, pointing out those provincial governments that “managed

¹⁰⁴ *Ibid.* Information provided by interview respondents.

¹⁰⁵ Manitoba, Department of Justice Prosecutions, “Policy Directive Subject: Extra-Judicial Community-Based Justice Programs,” Guideline No 5: COM:1.1 (Winnipeg, Department of Justice, 2004), online: <http://www.gov.mb.ca/justice/prosecutions/policy/pdf/extra_judicial_community_based_justice_alternatives.pdf>.

¹⁰⁶ Raymond R Corrado et al, “Youth Justice in Canada: Theoretical Perspectives of Youth Probation Officers” (2010) 52:4 *Can J of Criminology and Criminal Justice* 397 [Corrado et al, “Theoretical Perspectives”].

¹⁰⁷ Bala, Carrington & Roberts, *supra* note 4 at 139.

¹⁰⁸ *Ibid* at 141. See also Carrington & Schulenberg, *supra* note 5.

¹⁰⁹ Sandra Bell, *Young Offenders and Youth Justice: A Century After the Fact*, 4th ed (Toronto: Nelson, 2012) at 239-240. Specific programs she notes are the Valley Restorative Justice Society in Nova Scotia and Onashowewin in Winnipeg, and the key role played by the RCMP in the implementation of family group conferencing (under the label of “community justice forms”) across the country.

referrals to alternative measures programs”¹¹⁰ under the YOA through either social services or correctional services departments, “are continuing to do so for extrajudicial sanctions.”¹¹¹ She comments further that “[i]n most cases, the programs are implemented by social agencies or specially mandated agencies such as the Community Justice Society and John Howard Restorative Justice Society in Nova Scotia,”¹¹² or alternatively in some provinces, through shared administration between provincial justice and correctional departments and various community-based social service agencies and service providers.¹¹³ In her overview of restorative justice initiatives in Nova Scotia, Diane Crocker notes that it has the most comprehensive restorative justice program in Canada, which since 2007 has been implemented province-wide and operates through eight community-based agencies in different regions of the province and includes one organization that runs restorative justice programs across the province exclusively for Indigenous youth.¹¹⁴ In contrast several provinces, such as Prince Edward Island and Quebec, administer diversion programs through the government. In a recent more general discussion of the use of diversionary measures across different provinces and territories, Reid, Bromwich and Gilliss provide a balanced but largely favourable view of the extent to which police have embraced the concept of extrajudicial measures.¹¹⁵ Specifically, citing the findings of research by Marino and Innocente,¹¹⁶ they concurred that the “most positive finding in the research was that police officers have relatively affirmative opinions about extrajudicial measures and their effectiveness.”¹¹⁷ In turn, they optimistically concluded that “[s]ince the introduction of the YCJA, the use of extrajudicial measures has steadily increased, and with continued police

¹¹⁰ *Ibid* at 239.

¹¹¹ *Ibid* at 240.

¹¹² *Ibid*.

¹¹³ *Ibid*. Bell cites the examples of Alberta, Saskatchewan, British Columbia, Ontario, and Nova Scotia.

¹¹⁴ Diane Crocker, “Balancing Justice Goals: Restorative Justice Practitioner’s Views” (2016) 19:4 *Contemporary Justice Rev* 462 at 465–66.

¹¹⁵ Susan Reid et al, *Youth and the Law: New Approaches to Criminal Justice and Child Protection*, 3rd ed (Toronto: Emond Montgomery, 2015) at 121–123.

¹¹⁶ Voula Marinos & Nathan Innocente, “Factors Influencing Police Attitudes Towards Extrajudicial Measures Under the Youth Criminal Justice Act” (2008) 50:4 *Can J of Criminology and Criminal Justice* 469.

¹¹⁷ Reid et al, *supra* note 115 at 122.

training and beliefs of their effectiveness they will become even more widespread.”¹¹⁸

On the other hand, other researchers have raised significant concerns about the types of diversion programs and practices encouraged by the YCJA.¹¹⁹ Bryan Hogeveen was the first to raise concerns about the effects the implementation of the YJCA might have on Indigenous youth by questioning the “one-size fits all approach to the over-representation of Aboriginal youth in the justice system”¹²⁰ proposed in the legislation in its emphasis on re-involving “communities” in the task of dealing with young offenders.¹²¹ Hogeveen argued there were “compelling reasons to be skeptical”¹²² of this approach given how this obscured “the systemic inequalities and racism”¹²³ that has contributed to the marginalization of Indigenous communities and the disproportionate involvement of Indigenous youth in the criminal justice system. In a similar vein, Russell Smandych raised concerns regarding procedural and jurisdictional factors that could potentially undermine the essential restorative objectives of the YCJA.¹²⁴ The first of these involved the possibility that “volunteer youth justice committees and other community groups that are recruited to carry out ‘conferences’ and impose ‘extrajudicial’ sanctions”¹²⁵ might “become overwhelmed by large caseloads, and hindered by inadequate funding and

¹¹⁸ *Ibid.* For related research findings on police discretion and the role of police training in dealing with accused youth offenders, see Carrington & Schulenberg, *supra* note 5; Jennifer Schulenberg, “Patterns in Police Decision-Making with Youth: An Application of Black’s Theory of Law” (2010) 53:2 *Crime L & Soc Change* 109; Jennifer Schulenberg & Deirdre Warren, “Police Discretion with Apprehended Youth: Assessing the Impact of Juvenile Specialization” (2009) 10:1 *Police Practice and Research* 3.

¹¹⁹ Smandych, “Canada,” *supra* note 86; Bryan Hogeveen, “Toward ‘Safer’ and ‘Better’ Communities? Canada’s Youth Criminal Justice Act, Aboriginal Youth and the Processes of Exclusion” (2005) 13:3 *Critical Criminology* 287; Lorinda Stoneman, *Community-Based Responses to Youth Offending: Politics, Policy and Practice Under the Youth Criminal Justice Act* (PhD Thesis, University of Victoria, 2016) [unpublished]; Lorinda Stoneman & Sibylle Artz, “Canadian Girls and Crime in the Twenty-First Century” in Winterdyk & Russell, *supra* note 7, 171.

¹²⁰ Hogeveen, *supra* note 119 at 289.

¹²¹ *Ibid.*

¹²² *Ibid* at 288.

¹²³ *Ibid* at 289.

¹²⁴ Smandych, “Canada,” *supra* note 86 at 29.

¹²⁵ *Ibid* at 29.

training.”¹²⁶ Second, he asserted “that delegating the power to create guidelines for ‘non-judicial conferences’ to provincial and territorial governments,”¹²⁷ inevitably increased the likelihood “that there will be significant inter-provincial and even local community-by-community variation in the manner in which conferences are carried out.”¹²⁸ Third, he raised the concern that, often based on provincial budget restraints and priorities, there is the not uncommon reality that “resources may simply not be in place at the local level”¹²⁹ to support non-judicial alternatives, which can “lead to more young offenders coming back to court; possibility for the failure to comply with previous non-custodial sentences, or to face more serious charges.”¹³⁰ Like Hogeveen, he pointed out the example of many remote Indigenous communities, cautioning that:

...what we will most likely see is that under-resourced and overburdened ‘communities’, such as many of Canada’s remote Aboriginal communities, will eventually be seen to have failed at developing adequate community-based ‘restorative’ measures for dealing with ‘their’ youth. This in turn may well perpetuate the tragic damaging cycle of individual and institutional racism and recurrent law and-order ‘moral panics’ that have been directed historically at Aboriginal youth, as well as at other most often urban, and more frequently poor, visible minority youth in Canada.¹³¹

Despite the Supreme Court of Canada *Gladue*¹³² precedent and the explicit focus of the YCJA on culturally appropriate presentence alternative options, there is no quantitative evaluation information on the use and outcome of restorative-based extrajudicial measures in Indigenous communities across Canada. However, in a recent insightful qualitative study of community-based responses to youth offending, Stoneman has identified the lack of community-based services for accused and convicted young offenders in communities in British Columbia.¹³³ Drawing on both document-based data and findings from interviews carried out with youth justice and child care professionals, Stoneman analyzed the effects of the implementation of the YCJA on community-based responses to young

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Gladue*, *supra* note 69.

¹³³ Stoneman, *supra* note 119.

offending in British Columbia from 2003 to 2012.¹³⁴ Significantly, while her interview data, on the one hand, pointed out the strong ethos of caring and practices of personal charity reflected in the experiences of the professionals, on the other hand, it highlighted the many obstacles and challenges professionals faced in their efforts to develop effective community-based responses to caring for troubled youth in their communities.¹³⁵ For example, Stoneman found that in some communities “less serious offenders”¹³⁶ were “faced with trying to access non-existent or inappropriate programs in their communities, while more serious offenders were faced with incarceration further away from their families and home communities.”¹³⁷ Stoneman identified the resulting apparently unintended policy outcome phenomenon as “*net narrowing*,” which “occurs when youth who have been diverted, struggle to access adequate resources.”¹³⁸ The outcome of this paradoxical phenomenon was described by some of the youth justice and child care professionals interviewed by Stoneman who explained:

...before they were able to gain access to resources such as clinical assessments, programming, financial assistance, and one-to-one support for their clients, they had to show that these clients were seriously entrenched in the system. This is perhaps the most pressing disadvantage of diversion, since resource allocation only follows after system involvement and is not available if clients are diverted. Paradoxically, then, under these conditions, serious criminal behaviour is almost desirable because it has become one of the keys to unlock desperately needed resources.¹³⁹

With the exception of Stoneman’s study, much of the policy research literature including government-generated data and reports on the YCJA is largely devoid of discussion of the resource problems related to supporting diversion programs. However, one exception to this is the federal-government sponsored roundtable report on issues surrounding the implementation of the YCJA written in 2008.¹⁴⁰ This report summarized

¹³⁴ In her study, Stoneman carried out semi-structured interviews with 14 professionals in the field of youth justice, which included police, youth workers, restorative justice personnel, and probation officers in the regions of Greater Vancouver, the Fraser Valley, and Vancouver Island. *Ibid* at iii.

¹³⁵ *Ibid* at 248–256, 359.

¹³⁶ *Ibid* at 284; cited in Stoneman & Artz, *supra* note 119 at 178–79.

¹³⁷ *Ibid*.

¹³⁸ *Ibid* at 179.

¹³⁹ *Ibid*.

¹⁴⁰ Canada, Department of Justice, *Comprehensive Review of the Youth Criminal*

the outcome of consultations held with youth justice and child welfare professionals from across the country. A common refrain in the report was the concern about the lack of sustainable funding to support restorative justice and diversion programs. Roundtable participants consensually agreed in principle concerning “the need for systems... to be better resourced to support children and families as they enter the youth justice system,”¹⁴¹ while at the same time all of the provinces and territories “identified a lack of local resources, or sustainable resources to implement the programs and services necessary to fully embrace the YCJA.”¹⁴² Pointedly, in one session, “the YCJA was referred to as a Cadillac on a Volkswagen budget.”¹⁴³ The report on the outcome of provincial/territorial roundtables, included provincial/territorial summary statements all reflecting this resource inadequacy theme. The following cited examples illustrate this: in BC, “[t]he inequities of police practices for extrajudicial measures was raised as a serious concern as well as long lists for services and the fact that ‘kids in custody get better services’”;¹⁴⁴ in Manitoba, “[o]n paper the legislation has a lot of options and flexibility but in reality there are no resources on the front end or the back end; they are all in custody”;¹⁴⁵ and in Nunavut, “[r]estorative and rehabilitative aims cannot be realized due to chronic underfunding. The most respected community members are reluctant to participate in restorative justice as they are underfunded and people are embarrassed to be part of the process.”¹⁴⁶ In effect, this report’s key conclusions support Stoneman’s “net-narrowing” concept and point to the wider cross-jurisdictional (provincial/territorial) problem of the lack of adequate resource support primarily involving inadequate funding for front-

Justice Cross Country Roundtable Report (Ottawa: Department of Justice, 2008), online: <<http://www.loosehttp://www.loosefiles.ca/?p=191files.ca/?p=191>> [Roundtable Report]. This report was obtained through Access to Information and posted only by W Campbell, April 4, 2011. This roundtable was initiated by the minority Conservative federal government in 2007 when it announced that the YCJA would undergo a comprehensive review in 2008 following the introduction of Bill C-25. Bill C-25 was later reintroduced as part of Bill C-10 after the Conservative party was re-elected as a majority government in 2011.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

end restorative police diversion extra-judicial measures under the YCJA.¹⁴⁷ In the next section, on youth court processing and case outcomes, we show that Stoneman's "net-narrowing" concept is also helpful in providing a more constructive and critical perspective on the largely unintended policy problem associated with 'breaching' conditions linked to administrative offences or offences against the administration of justice. This problem has been particularly acute for Indigenous youth, especially concerning their frequent culturally inappropriate remand conditions, which may too often result in their being disproportionality remanded into custody.

C. Youth Court Processing and Case Outcomes

Consistent with the continuing decline in the number of youth accused of crime identified in police-reported data, trend data on court case completion rates to 2014-2015 showed an overall continued decline in the number of cases completed in youth court in every province and territory; with some slight variations by jurisdiction from year to year.¹⁴⁸ Notably, five *Criminal Code* offence types constituted 40 percent of all completed youth court cases in 2014-2015.¹⁴⁹ As well, there was a decrease in the number of cases for almost all offence types.¹⁵⁰ In addition, administration of justice

¹⁴⁷ This view is also empirically supported in a recent large-scale survey research study of the use by police of extra-judicial measures provisions of the YCJA in Newfoundland and Labrador (N = 201), which found that while police officers had a good knowledge of the YCJA, "the Act has not been fully implemented here because of resource limitations, which affect an officer's ability to adhere to the YCJA." Rose Ricciardelli et al, "From Knowledge to Action? The Youth Criminal Justice Act and use of Extrajudicial Measures in Youth Policing" (2017) 18:6 *Police Practice & Research* 599.

¹⁴⁸ Statistics Canada, "Youth Court Statistics, 2014/2015," by Zoran Miladinovic, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2016), at 4 (Chart 1), 15-16 (Tables 1 and 2), online: <<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14656-eng.pdf>>. For example, in 2010/2011 Manitoba was the only province in which the number of completed youth court cases had increased, while in 2014-2015, Nova Scotia reported a 2 percent increase [Statistics Canada, "Youth Court Statistics 2014"]. Statistics Canada, "Youth Court Statistics, 2010/2011," by Shannon Brennan, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012), online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11645-eng.pdf>>.

¹⁴⁹ Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 4. Theft (11%), common assault (8%), break and enter (8%), failure to comply with an order (7%), and mischief (6%).

¹⁵⁰ The one exception is attempted murder. Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 5 (Chart 2), 17 (Table 3).

offences decreased at approximately the same rates as other offences.¹⁵¹ By gender, although over the past fifteen years, slightly more than three quarters (77 percent) of accused youth were male, females have been more highly associated with non-violent offences, with prostitution (44 percent), and failure to appear (39 percent) the most common offence types.¹⁵² Again, however, a persistent YCJA policy concern is the greater likelihood that Indigenous females were disproportionately involved in self harming offences such as prostitution largely to finance self-medication with highly addictive substances and/or abuse escaping but high victimization “street” lifestyles.

This theme concerning the vulnerability of female youth more generally might be relevant for understanding that females were involved in nearly one third (29.6 percent or 867 of the 2,928) of cases in which the principle charge was an offence against the administration of justice in 2014-2015.¹⁵³ In addition there appears to be a wide consensus among youth justice officials and researchers that since 2003 cases coming before youth courts are “on average far more serious, complex and lengthier.”¹⁵⁴ However, before exploring further the key issues raised in the controversial policy area of offences against the administration of justice, it is important first to review the importantly related area of sentencing outcomes using recently updated youth court case outcomes trend data. Since the implementation of the YCJA the percentage of cases that ended with a guilty finding¹⁵⁵ has declined slightly; which continued a trend that began in the late 1990s.¹⁵⁶ Nonetheless, there are striking variations between provincial/territorial jurisdictions in the percentage of cases concluded with a finding of guilty;

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 5.

¹⁵³ Numbers obtained from Statistics Canada, “Youth Court Statistics 2014,” *supra* note 148 at 17 (Table 3).

¹⁵⁴ Ruth Mann, “A Specialized Criminal Justice System for Canadian Youth: Critical Overview of Historical and Contemporary Developments in Law and Procedures Governing Young Offending” in Kirsten Kramar, ed, *Criminology: Critical Canadian Perspectives* (Toronto: Pearson, 2011) 57 at 71.

¹⁵⁵ This includes both guilty pleas and findings of guilt by the court.

¹⁵⁶ The percentage of cases ending with guilty findings in 2014-2015 was 57 percent compared with 70 percent in the late 1990s. Statistics Canada, “Youth Court Statistics 2014,” *supra* note 148 at 7 (Chart 4).

with the Yukon being at the low end (40 percent) and New Brunswick at the high end (about 79 percent).¹⁵⁷

Regarding sentencing outcomes, the Statistics Canada *Juristat* report on youth court statistics for 2014-2015 indicated a consistent trend year-to-year with comparable data since 1991/1992. Not unexpectedly, probation was the most common sentence ranging from 43 percent of guilty cases in 1992/1993 to around 57 percent of guilty cases annually from 2003 to 2015.¹⁵⁸ In 2014-2015 as well, probation along with other types of non-custodial sentences were used in 85 percent of guilty cases. Custodial sentences were imposed in 15 percent of guilty youth court cases. Again, as expected under the YCJA, probation also was commonly ordered in conjunction with other sentences; in 2014-2015, it was ordered in 41 percent of guilty cases where youth were sentenced to custody.¹⁵⁹

As we asserted above, a persistent critical theme among youth justice professionals, Indigenous youth advocates, and researchers has been the inappropriate use of provisions of the YCJA dealing with offences against the administration of justice. A particularly disconcerting concern is the common practice of imposing custody sentences on youth found guilty of breaching their probation orders or failing to comply with other orders of the court.¹⁶⁰ This issue arose quickly after the introduction of the YOA when the offence of failure to comply with a disposition was originally introduced in the 1986 amendments. By 2000, this offence was responsible for 23 percent of custodial sentences in Canada.¹⁶¹ As mentioned, a high proportion of females were charged with administrative offences under the YOA and YCJA. In their comparative study of the treatment of girls in the

¹⁵⁷ The percentage of cases ending with guilty findings in 2014-2015 was 57 percent compared with 70 percent in the late 1990s. Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 7 (Chart 5).

¹⁵⁸ Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 11 (Chart 9).

¹⁵⁹ *Ibid.*

¹⁶⁰ Alain & Hamel, *supra* note 39; Sprott & Doob, "Gendered Treatment," *supra* note 5; Stoneman & Artz, *supra* note 119; Jane B Sprott & Anthony N Doob, *Justice for Girls? Stability and Change in the Youth Justice Systems of the United States and Canada* (Chicago: University of Chicago Press, 2009) [Doob & Sprott, *Justice for Girls*]; Jane B Sprott, "The Persistence of 'Status Offences' in the Youth Justice System" (2012) 54:3 *Can J of Criminology and Criminal Justice* 309 [Sprott, "Status Offences"]; Jane B Sprott & Nicole M Myers, "Set up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Can J Corr* 404.

¹⁶¹ Doob & Sprott, "Youth Justice in Canada," *supra* note 26.

youth justice systems of the US and Canada, Sprott and Doob utilized Canadian data from the early 1900s to 2006, which indicated the proportion of girls charged and convicted for failing to comply with a disposition was consistently greater than that for boys.¹⁶² These data also showed that, of those convicted in cases where the failure to comply was the most serious offence, girls were considerably more likely to be sentenced to a custody sentence. For example, in 1999-2000, 23 percent of custody sentences involved failures to comply, yet “around 34 percent of girls’ custodial sentences were for failing to comply, whereas these cases accounted for around 17 percent of boys’ custodial sentences.”¹⁶³

The complex dynamic of administrative offences processing under the YCJA typically involves a revolving door metaphor i.e. once a history of administrative offences is evident, they then inevitably set the stage for more restrictive decision-making outcomes including remand, where highly troubled or multi-needs youth have extremely high likelihoods of failure to comply in most contexts whether community or custody. Sprott and Doob provided further evidence of the “gendered treatment” of youth in bail court.¹⁶⁴ Their data empirically supported the ‘revolving door’ decision-making process where youth courts under the YCJA had to cope with ‘status-type’ offences such as failing to comply with bail or probation conditions oriented to restricting often highly labile or unstable adolescent behaviours. While the YCJA sentencing sections clearly state that custody is most appropriate for more serious and violent offences and, more generally, that minor offences should be diverted “out of the youth justice system,”¹⁶⁵ the dilemma has been evident in the gendered decision-making trends. In their study of the treatment of girls in bail court, Sprott and Doob found that “girls were significantly more likely than boys to be given a bail condition of attending a ‘treatment program,’ especially if the offence was a minor non-violent offence.”¹⁶⁶ Although Sprott and Doob admitted that, given the lack

¹⁶² Doob & Sprott, *Justice for Girls*, *supra* note 160.

¹⁶³ *Ibid* at 144-45 (Figures 6.18, 6.19, 6.20).

¹⁶⁴ Sprott & Doob, “Gendered Treatment,” *supra* note 5; Sprott, “Status Offences,” *supra* note 160. See also Jane B Sprott & Allan Manson, “YCJA Bail Conditions: ‘Treating’ Girls and Boys Differently” (2017) 22:1 CCLR 77.

¹⁶⁵ Sprott, “Status Offences,” *supra* note 160 at 309.

¹⁶⁶ Sprott & Doob, “Gendered Treatment,” *supra* note 5 at 428. Of the 195 bail hearing files involving boys examined, 34 percent were ordered to attend some sort of treatment program, while of the 47 cases involving girls, 51 percent were order to attend a

of detailed information in the bail hearing files they examined, the exact reasons for this gendered differential treatment were unclear.¹⁶⁷ Nonetheless, they argued that bail hearings possibly allowed youth court officials to provide “therapeutic” interventions for girls who were traditionally viewed as needing this resource more often for their safety than boys.¹⁶⁸

Similarly, Sprott in her related study of the persistence of supposedly long abolished ‘status-type’ offences charges in the youth justice system, attributed the prior to 2010 high rate of guilty findings and custody sentences for failing to comply with bail and probation conditions to an informal policy carry-over from the YOA section on failing to comply.¹⁶⁹ This was utilized for a range of early-onset high-needs offenders. This policy focused on youths typically characterized by unfortunate if not tragic histories of biological and sociological ‘immaturity’ related needs including early onset substance abuse and peer influenced or survival involved minor property crimes. In effect, youth court judges, probation officers, Crown prosecutors, and even police utilized the failing to comply offence as a non-punitive opportunity for therapeutic interventions. However, Sprott and other researchers have asserted that a key contributing factor to the increase in girls being charged with failure to comply has been the practice of judges adding “more conditions to probation orders than before.”¹⁷⁰ These conditions have “included mandating girls’ attendance in drug use prevention and intervention programs, attending school, keeping unreasonable curfews, and not associating with certain peers.”¹⁷¹ According to Sprott, “subjecting youths to numerous conditions at bail or at probation may have the unintended consequence of setting youth up to accumulate further criminal charges of failing to comply,”¹⁷² and eventually custody sentences. This perspective also was supported by the Sprott and Myers’ (2011) study of a large youth court in Ontario, which found that “youths who were subjected to numerous bail conditions for an extended period were significantly more likely than those with fewer conditions [to take] less

treatment program (at 433 and 437).

¹⁶⁷ *Ibid* at 432 and 440.

¹⁶⁸ *Ibid* at 432.

¹⁶⁹ Sprott, “Status Offences,” *supra* note 160.

¹⁷⁰ Stoneman & Artz, *supra* note 119 at 178.

¹⁷¹ *Ibid*.

¹⁷² Sprott, “Status Offences,” *supra* note 160 at 321.

time to come back into court for failing to comply with one of the conditions.”¹⁷³ Sprrott concludes that given how “Canada continues to struggle with keeping status-type offences... out of the youth justice system”¹⁷⁴ and absence of any other obvious alternatives to remove these types of offences “from formal youth court processing,”¹⁷⁵ more “legislative change” may be required.¹⁷⁶ In effect, we agree with Sprrott an amendment to the YCJA is needed and suggest the use of a diversion treatment response for failing to comply charges involving vulnerable youth especially girls and Indigenous youth in general.

Youth justice officials in certain provinces such as Manitoba too have expressed concern about the inappropriate and unintended consequences of the application of the failure to comply provisions of the YCJA. Youth justice professionals interviewed for the study carried out in Manitoba by Smandych, Dyck, La Berge, and Koffman¹⁷⁷ stated that a key challenge they faced was that of how to interpret and apply sections of the Act dealing with the ‘breach of conditions’ of court orders and imposed sentences.¹⁷⁸ Interview respondents, for example, asserted that far too many youth were being “breached” for violating conditions attached to probation orders and other community-based sentences, which resulted in more youth in remand custody, and, eventually, sentenced custody.

Though a preliminary study, there appeared to be a consensus among the Manitoba respondents that the frequent ‘breaching’ of youth led to largely unintended criminalization, inappropriate incapacitation of highly vulnerable youth, and youth detention centres being used primarily for holding youth in remand custody. According to one respondent, “the YCJA sets youth up for onerous conditions – sets them up to fail – most kids are in custody for breaches”¹⁷⁹ for failing to meet the increasingly “strict

¹⁷³ Cited in Sprrott, “Status Offences,” *supra* note 160 at 321–22. See also Jane B Sprrott & Jessica Sutherland, “Unintended Consequences of Multiple Bail Conditions for Youth” (2015) 57:1 Can J Corr 59.

¹⁷⁴ Sprrott, “Status Offences,” *supra* note 160 at 309–10.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

¹⁷⁸ YCJA, ss 97(1)–(2), “Conditions to be included in custody and supervision order,” and “Other conditions.” Section 102(1), “Breach of conditions,” legislation cited in Tustin and Lutes, *supra* note 79 at 175–76, 181.

¹⁷⁹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 at 110.

conditions”¹⁸⁰ imposed by judges – “of course they are going to breach.”¹⁸¹ Other respondents echoed these concerns, lamenting that “breaches are massive,”¹⁸² “every kid breaches,”¹⁸³ kids are doing “more community service hours,”¹⁸⁴ and some kids are even doing “community service hours while in custody.”¹⁸⁵ In addition, respondents involved in working in treatment programs noted how frustrating it was to see youth in treatment programs “going in and out of MYC [the Manitoba Youth Centre] for breaches,”¹⁸⁶ and “kids who have a multitude of problems and conditions,”¹⁸⁷ like addictions and FASD, “constantly being recriminalized”¹⁸⁸ and “lumped in”¹⁸⁹ with other youth who “don’t have the same issues.”¹⁹⁰ Smandych et al. noted one tragic case of this inappropriate policy phenomenon that involved a youth with a long history of breaching who was a client of a legal aid lawyer (and later Deputy Child Advocate for the Province of Manitoba) Corey La Berge.¹⁹¹ As reported in the *Winnipeg Free Press* in 2011, this case involved a young girl who suffered from serious mental health issues and was held in remand charged with “a weapons breach after cutting herself with a kitchen knife.”¹⁹² Prior to the weapons breach with the kitchen knife, the youth had been breached on several occasions for violating court conditions related to a conviction for being unlawfully in a dwelling house, as well as the failure to comply with previous court conditions. As her advocate, La Berge argued that his client’s treatment by the youth justice system was “akin to child abuse.”¹⁹³ He asserted further this case constituted another example of how Manitoba

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Gabrielle Giroday, “Girl Who Abuses Self Charged: Lawyer Says Approach Akin to Child Abuse,” *Winnipeg Free Press* (6 January 2011), online: <<https://www.winnipegfreepress.com/local/girl-who-abuses-self-charged-112995454.html>>.

¹⁹³ *Ibid.*

Justice in effect appeared “to be endorsing the criminalization of a young person, a young, vulnerable person for having a disability and mental-health problems.”¹⁹⁴ The problem of finding appropriate resources to help high needs young offenders is not isolated to Manitoba. Key Canadian studies by Cesaroni and Peterson-Badali¹⁹⁵ and Corrado and colleagues,¹⁹⁶ have outlined the array of challenges including complex mental health profiles, major substance use, and abusive family histories youth faced in remand and custody institutions. It simply should not be unexpected therefore that youth with such needs profiles in remand and/or serving custodial sentences then released with stringent conditions of probation have histories of failure to comply.

As is evident in the cross-jurisdictional data surveyed in the edited volume by Alain, Corrado, and Reid,¹⁹⁷ on the implementation of the YCJA, there was considerable variability among the provinces and territories. As has long been evident, Quebec has charted its own course. Not surprisingly, many youth justice professionals in Quebec including police, prosecutors, and judges, have openly criticized “the gradualist approach in responding to minor multiple offending”¹⁹⁸ required by the YCJA because of the restrictions it places on the use of custody sentences. Most eloquently, one of the Quebec judges interviewed by Alain and Hamel in their study, lamented that because the “federal government [in introducing the YCJA] wanted to introduce a much more rigid relationship between the seriousness of the offence and the sentence... it is now so rigid that we cannot pronounce a custody sentence even when we are deeply convinced that it would best serve the youth and his problems.”¹⁹⁹ Because prosecutors were being compelled to consider more severe probation conditions after repeated breaches, high needs youth who might have

¹⁹⁴ *Ibid.*

¹⁹⁵ Carla Cesaroni & Michele Peterson-Badali, “Understanding the Adjustment of Incarcerated Young Offenders: A Canadian Example” (2010) 10:2 Youth Justice 107; Carla Cesaroni & Michele Peterson-Badali, “The Role of Fairness in the Adjustment of Adolescent Boys to Pretrial Detention” (2016) 96:4 Prison J 534.

¹⁹⁶ Raymond R Corrado et al, “The YCJA in British Columbia” in Alain, Corrado & Reid, *supra* note 5, 64 [Corrado et al, “YCJA in BC”]; Adrienne Peters & Raymond R Corrado, “An Examination of the Early ‘Strains’ of Imprisonment among Young Offenders Incarcerated for Serious Crimes” (2013) 2:2 J of Juvenile Justice 76.

¹⁹⁷ Alain, Corrado & Reid, *supra* note 5.

¹⁹⁸ Alain & Hamel, *supra* note 39 at 313.

¹⁹⁹ *Ibid* at 315–16.

benefited from the programs offered in Quebec's rehabilitation-oriented youth detention centres became more deeply entrenched in criminal trajectories. This same judge explained further that:

It's a little like saying to the adolescent: "I cannot give you closed custody anymore, even if this is what you would really need. So I'll submit you to conditions that you will not be able to fulfil, you will fail, and then I'll be in a position to sentence you to the measure you really need."²⁰⁰

Alain and Hamel documented how the required rigid enforcement of the YCJA, along with the complexity of the legislation itself, has had many negative effects on Quebec's highly-integrated child protection and youth justice systems. Again, the central theme they highlighted was the subsequent difficulties encountered by the many agencies from different ministries in providing services to youth involved in youth justice. In other words, there appeared to be less flexibility in responding to the needs of the youth. This trend was seen to be exacerbated in 2012 when the Conservative federal government enacted Bill C-10 to introduce deterrence and denunciation as sentencing principles in the Act. According to Alain and Hamel, "there was a clear consensus in Quebec regarding Bill C-10 that, once again, the so-called 'rest of Canada' was working unanimously against what has been the foundation of the province's way of dealing with its delinquent youth."²⁰¹

D. Remand and Sentenced Custody

As discussed above in several places, youth justice professionals interviewed in Manitoba have expressed the concern that contrary to the restrictions placed on the use of custody (both remand and sentenced custody) by the YCJA, more youth were being remanded because of factors including that there is "nowhere [else] for some kids to go [when] CFS is overloaded,"²⁰² when CFS kids are being placed in hotels, and when kids "can't be let out on bail since they can't go home [and there are] no placements in the community."²⁰³ However, unlike most other provinces where substantial decreases in both youth remand and sentenced custody occurred, the overall youth custody rate increased 38 percent from 2005 to

²⁰⁰ *Ibid.*

²⁰¹ *Ibid* at 327.

²⁰² Smandych et al, "Youth Justice in Manitoba," *supra* note 43 at 110.

²⁰³ *Ibid.*

2011.²⁰⁴ Most disconcerting during this period, Manitoba's youth remand custody rate increased to almost five times the overall national rate.²⁰⁵ This has led to the anomalous situation in 2010-2011 where Manitoba has had by far the highest provincial rate of remand custody and the lowest provincial rate of sentenced youth custody.²⁰⁶

Youth justice professionals interviewed in Manitoba were also asked about this paradoxical policy outcome.²⁰⁷ A common response was that the increase in the use of remand custody was likely explained by the more frequent remanding of youth for 'breaching' previous court conditions received as part of earlier community-based sentences for less-serious offences. Several respondents described the process where young persons who failed to comply with court orders on a repeated basis typically were initially given more strict court-ordered conditions of release. Second, in the context of numerous breaches, each subsequent court order was stricter. Third, many of these youth eventually were remanded in accordance with enabling sections of the YCJA (Sections 39, 97 and 102). Fourth, the next set of breaches completed the cycle of youth being repeatedly remanded, sometimes for only a few days, but sometimes also for many months. A related fifth stage reported was more youth having served time in remand custody in lieu of sentenced custody and community-based court orders.²⁰⁸ Part of the latter dynamic was the acknowledgement among youth justice professionals in Manitoba, including sentencing judges, that the time a youth spend in remand custody awaiting trial and sentencing would be taken into account and deducted at the time of sentencing at a rate of 1.5 days of sentenced custody for every one day of remand custody.²⁰⁹ It was not

²⁰⁴ Statistics Canada, "Youth Correctional Statistics in Canada, 2010/2011," by Christopher Munch, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012) at 3, online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11716-eng.pdf>> [Statistics Canada, "Youth Correctional Statistics 2010"] .

²⁰⁵ *Ibid.* More specifically, the rate of youth in remand in Manitoba in 2010-2011 was 19 youth per 10,000 of the youth population, which was almost five times higher than the overall rate of 4 per 10,000 youth.

²⁰⁶ Manitoba reported the lowest provincial youth sentenced custody rate in 2010-2011 at 7 per 10,000 youth in the population. Statistics Canada, "Youth Correctional Statistics 2010," *supra* note 204 at 13, 14 (Chart 7).

²⁰⁷ Smandych et al, "Youth Justice in Manitoba," *supra* note 43.

²⁰⁸ *Ibid* at 109.

²⁰⁹ *Ibid* at 110.

as surprising therefore that Manitoba had one of the lowest rates of youth sentenced custody in the country.

More recent data on youth remand and sentenced custody rates, as well as trends in the use of remand in Canada from 2004 to 2015, indicate that, while the number of youth in pre-trial detention is falling across the country, in 2015 Manitoba still had the highest youth remand custody rate among all reporting provinces.²¹⁰ The most recent Statistics Canada report on trends in the use of remand notes that, despite these overall declines, “the number of youth in pre-trial detention [still] accounted for a greater share of the total custody population in 2014/2015, than it did in 2004-2005 because the number of youth in sentenced custody fell more (or increased less).”²¹¹ The latest youth correctional statistics released by Statistics Canada in March, 2017, covering 2015-2016, provided more detailed data on rates of youth in correctional services across the country as well as data on the continued overrepresentation of Indigenous youth in the correctional system. In 2015-2016, the overall youth incarceration rate across the country (excluding Quebec) “was 5 per 10,000 youth, down 3 percent from the previous year and 27 per cent from 2011/2012,”²¹² while the rate of youth under community supervision was 43 per 10,000 youth, down 12 per cent from the previous year and 34 percent from 2011/2012.²¹³ Again,

²¹⁰ The latest Statistics Canada report on trends in the use of remand, prior to the publication of the current article, was released in January 2017, and in March 2017 it released its most recent report on youth correctional statistics. These reports indicate that the only jurisdiction that did not make available youth remand custody data for 2014-2015 was Quebec, and that the only jurisdiction that exceeded Manitoba in the use of youth remand custody in 2014-2015 was the Yukon. Statistics Canada, “Trends in the Use of Remand in Canada, 2004/2005 to 2014/2015,” by Correctional Services Program, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14691-eng.pdf>> [Statistics Canada, “Trends 2004-2014”]; Statistics Canada, “Youth Correctional Statistics in Canada, 2015/2016,” by Jamil Malakieh, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.pdf>> [Statistics Canada, “Youth Correctional Statistics 2015/2016”]. The latest pre-publication data reported in Manitoba indicate that the average daily youth custody population in the province (including remand and sentenced custody) decreased from 235 in 2014/2015 to 219 in 2015-2016. See *Annual Report 2015-2016*, *supra* note 50.

²¹¹ Statistics Canada, “Trends 2004-2014,” *supra* note 210 at 3, 9-10 (Chart 5).

²¹² Statistics Canada, “Youth Correctional Statistics 2015/2016,” *supra* note 210 at 3, 12 (Table 1).

²¹³ *Ibid.*

Manitoba, at 163 per 10,000 youth, had the highest rate of youth in correctional services among all reporting jurisdictions. More specifically, Manitoba had both the highest daily rate of youth in community supervision (at 139 per 10,000) and the second highest youth incarceration rate across the country (at 24 per 10,000), exceeded only by the Yukon (at 29 per 10,000).²¹⁴ The most recent data involving Indigenous youth in the youth justice system again found that while Indigenous youth constituted less than one tenth (7 percent) of the Canadian youth population in nine reporting jurisdictions in 2015-2016, they comprised more than one third (35 percent) of admissions to youth correctional services.²¹⁵ In addition, these data showed an increase of 6 percent for Indigenous youth from 2014-2015. As discussed above, a main theme of this article is the attempt to understand the impact of the explicit sentencing principle of the YCJA that mandates youth courts to consider alternatives to custody, with particular attention to the circumstances of Indigenous youth. Yet again, despite the concerted and targeted policy focused on reducing this long acknowledged historical disproportionality, in 2015-2016, 54 percent “of Aboriginal youth admitted to correctional services were admitted to custody whereas the comparable figure for non-Aboriginal youth was 44%.”²¹⁶ These figures represented an increase from 52 percent in 2014/2015, and 48 percent in 2011-2012. In addition, and even more troubling given their needs and vulnerability issues, Indigenous female youth were admitted to correctional services at an even higher rate than Indigenous male youth, and that this rate has also continued an upward climb in recent years.²¹⁷

²¹⁴ The exceedingly high rates of youth under community supervision and in custody in Manitoba are highlighted even more so when contrasted with British Columbia, which has the lowest rates of all reporting jurisdictions at 2 per 10,000 youth in the population (excluding Quebec). *Ibid* at 13 (Table 2).

²¹⁵ *Ibid* at 5.

²¹⁶ *Ibid*.

²¹⁷ In 2015-2016, Indigenous female youth accounted for 43 percent of all female youth admitted to correctional services, up from 38 percent in 2011-2012. Over the same years, the rate for Indigenous male youth increased from 26 percent to 31 percent. *Ibid* at 5.

E. The Issue of Indigenous Youth Overrepresentation: *Gladue* is Not Enough

The most recent Indigenous youth custody profile is obviously upsetting and discouraging especially in the prairie provinces of western Canada. Yet, the explanation or underlying causes of this disproportionality and, equally important, the potential changes in the YCJA and provincial/territorial laws/policies needed to mediate this trend, remain perplexing. More generally, Corrado, Leschied, and Lussier have relied mainly on Canadian research to identify potential changes in youth laws, youth justice models, and complex multi-ministerial policies to address this theme of disproportionately vulnerable youth minorities such as Indigenous youth.²¹⁸ Clearly, their research confirms the enormity of the law and policy challenges. This daunting set of challenges was also illustrated in Smandych and colleagues' Manitoba study which identified the child welfare to youth (and for many, adult) prison pipeline that exists in this province. Drawing on a range of Government of Manitoba data sources available to 2011,²¹⁹ the study showed that Indigenous children were vastly overrepresented in province's child welfare system. Specifically, data showed that the proportion of Indigenous versus non-Indigenous children in care of child welfare agencies increased from 81 per cent to 85 per cent between 2002 and 2011.²²⁰ Of the reported 9,432 children in care in Manitoba in 2011, 6,301 were "status Indian" (66.8 per cent), 877 were "Metis" (9.3 per cent), 32 were "Inuit" (0.3 per cent) and 837 were "non-status" (8.9 per cent).²²¹ Thus, according to the government of Manitoba's own reported data, "Aboriginal children, representing about 25 per cent of the child population in Manitoba, comprised 85 per cent of the children in care population."²²² In

²¹⁸ Corrado, Leschied & Lussier, *supra* note 97.

²¹⁹ Manitoba, Indigenous and Municipal Relations, *Aboriginal People in Manitoba* (2012), online: <<http://www.gov.mb.ca/imr/ir/pdf/pubs/abpeoplembweb.pdf>> [*Aboriginal People*]; Manitoba, Office of the Children's Advocate, "Strengthening Our Youth': Their Journey to Competence and Independence, a Progress Report on Youth Leaving Manitoba's Child Welfare System" (Winnipeg: Children's Advocate, 2012), online: <<http://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=20935&md=1>> [Children's Advocate]; cited in Smandych et al, "Youth Justice in Manitoba," *supra* note 43 at 97-98.

²²⁰ *Aboriginal People*, *supra* note 219 at 55.

²²¹ *Ibid.*

²²² *Ibid.*

2008-2009, 87 percent of males admitted to sentenced youth custody in Manitoba were Aboriginal, while 91 percent of sentenced females were Aboriginal.²²³

In an article published in the *Canadian Medical Association Journal* in 2014 on the overrepresentation of First Nations children in the Canadian child welfare system, Barker et al. document statistics showing that children of Indigenous ancestry, who represent about 5 percent of the youth population, account for “nearly 50 percent of the children and youth under government care” across Canada.²²⁴ Significantly, Barker et al. argue that while “[a] large body of scientific evidence has documented the elevated risk for homelessness, mental health issues, substance use, incarceration and unplanned pregnancies among those previously maltreated and subsequently exposed to the child welfare system,”²²⁵ in Canada “policy-makers have failed to take action to address these outcomes among the children and youth they are obligated to protect”;²²⁶ which include children of Indigenous ancestry.²²⁷ Yet, they pointed out, “it is estimated that three times as many First Nations children are under government care today than during the height of the residential school era.”²²⁸ While the child welfare

²²³ Statistics Canada, “Youth Custody and Community Services, 2008/2009,” by Donna Calverley, Adam Cotter & Ed Halla, in *Juristat*, Catalogue No 850002-X (Ottawa: Statistics Canada, 2010) at 29 (Table 11), online: <<http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.pdf>>. This is the most recent data we have been able to find on the proportion of Indigenous youth admitted to correctional services by provincial/territorial jurisdiction, although it is unlikely the numbers have changed much since 2010.

²²⁴ Brittany Barker et al, “An Uncaring State? The Overrepresentation of First Nations Children in the Canadian Child Welfare System” (2014) 186:14 *Can Medical Association J* E533.

²²⁵ *Ibid* at E553.

²²⁶ *Ibid.*

²²⁷ *Ibid.* This concern is also echoed throughout the final report of Canada’s Aboriginal Truth and Reconciliation Commission, and the many public statements made over the years by its Chair, and now government Senator, Murray Sinclair, who has been cited as stating that “[o]ne of the central problems is the state of the child-welfare system,” and that “[I]ndigenous children continue to be apprehended on the basis that families cannot be trusted, but ... the system often fails to place children in safe environments”; cited in Kristy Kirkup, “Indigenous Youth Overrepresentation in Justice System: Figures from Justice Department Paint Dark Picture of State of Indigenous Incarceration,” *CBC News* (26 April 2016), online: <<http://www.cbc.ca/news/indigenous/indigenous-youth-overrepresented-justice-system-1.3554394>>.

²²⁸ Barker et al, *supra* note 224 at E534.

to prison pipeline phenomenon has been highlighted indirectly in a number of qualitative data based studies related to racialized policing and Indigenous gangs in Manitoba,²²⁹ there is only one Manitoba-based study, carried out before the enactment of the YCJA, that has examined the relationship between child welfare placement and later criminal behaviour.²³⁰ In this study, published in 2001, researchers found that 88 per cent of Indigenous inmates in the correctional system in Manitoba (compared with 63.3 per cent of non-Indigenous inmates) “were living outside their parental home at some point between the ages of 13 and 18 years,”²³¹ and that “Aboriginal inmates were not only more likely to be placed in foster care throughout their childhood years,”²³² but “they were also more likely to have been in a number of foster homes.”²³³

²²⁹ Comack et al, *supra* note 98; Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood, 2012); Kathleen Buddle, “Tagged and Turfless: Neo-liberal Justice and Youth Crime in Winnipeg” (2014) 37:2 MLJ 303; Lawrence Deane, Dennis Bracken & Larry Morrisette, “Desistance Within an Urban Aboriginal Gang” (2007) 54:2 Probation J 125; Jana Grekul & Patti LaBoucane-Benson, “Aboriginal Gangs and their (Dis)placement: Contextualizing Recruitment, Membership, and Status” (2008) 50:1 Can J Corr 59.

²³⁰ Douglas Skoog & Sharon Perrault, “Child Protection and Criminal Involvement: An Empirical Study” (2001) [unpublished report]; cited in Children’s Advocate, *supra* note 219 at 12.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.* However, more research on the child welfare to prison pipeline issue has been completed in other provinces. In a more recent large controlled study of 154 Indigenous and 250 Caucasian young offenders incarcerated in British Columbia, Corrado, Kuehn & Margaritescu, *supra* note 5 at 48, 52, found both that “higher foster care placements” were “strongly predictive of higher frequencies of prison sentences,” and that substantially more Indigenous young people who were later incarcerated lived “in government care (either in foster family care or group homes)”; 71 percent of Indigenous youth versus 57.3 percent of Caucasian youth. In addition, research undertaken in Ontario by Cooke and Findlay has shown that “the problems and hardships” faced in many “economically and socially marginalized families and communities” have “often been exacerbated by intrusive and ineffective child protection interventions,” which provide “a gateway into the youth justice system” (cited in Mann, *supra* note 154 at 71-72). Specifically, Cooke and Findlay found that a third of youth in custody facilities in Ontario had been “in care of the child welfare system,” and half “had child welfare involvement.” See Office of Child and Family Service Advocacy, *Review of Open Detention and Open Custody*, by Diane Cooke & Judy Finlay (Ontario: Child and Family Service, 2007) at 18, online: <<https://provincialadvocate.on.ca/documents/en/Open%20Custody-Open>

Arguably the net result is that, despite the best intentions of the YCJA, the Manitoba youth justice system “by default, exists primarily to deal with Aboriginal youth.”²³⁴ This can be seen in part in the above discussed intensified and exceptionally high disproportionate ratio of Indigenous to non-Indigenous youth in courts and custody in Manitoba since the introduction of the YCJA. The demands placed on youth justice-related professionals in Manitoba because of the overrepresentation of Indigenous youth in the criminal justice system have been acknowledged by Manitoba Justice officials. For example, several of these officials participated in the cross-country consultations on the proposed changes to the YCJA initiated by the minority-Conservative federal government in 2007.²³⁵ Nonetheless, despite this level of sensitivity to the special circumstances and needs of Indigenous youth the Manitoba Justice and government officials in more recent public policy statements on preventing and combating youth crime focus on the already overburdened police and the courts. The police historically have not been able to reconcile their primary public safety role with the added roles of coordinating with other agencies that are supposed to provide services to at-risk children and their families. Similarly, correctional and probation agencies typically have been under resourced especially in rural regions.

Regarding youth courts addressing the disproportionality challenges, the hope obviously occurred with *R v Gladue*. Despite the wide attention given to the *Gladue* decision (1999) and related *Criminal Code* amendments and precedent setting court decisions,²³⁶ youth justice professionals

Detention%20Review.pdf>. Similarly, in a recent critical study of Indigenous youth intervention policies and programs in Saskatchewan, Jaskiran Dhillon extensively documents the persistent and multi-faceted direct and indirect linkages connecting “child welfare apprehension” and “the criminalization of Indigenous youth.” See Jaskiran K Dhillon, *Prairie Rising: Indigenous Youth, Decolonization and the Politics of Intervention* (Toronto: University of Toronto Press, 2017) at 112–119. For a further review of research and recommendations made for improving outcomes for child welfare youth, see Nicholas Bala et al, “Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19:1 Can Crim L Rev 129.

²³⁴ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 at 97.

²³⁵ Roundtable Report, *supra* note 140.

²³⁶ Newell, *supra* note 1; Canada, Department of Justice, “*Gladue* Practices in the Provinces and Territories,” prepared by Sébastien April & Mylene Orsi (Ottawa: Department of Justice, 2013), online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/rr12_11.pdf>; Nate Jackson, “Aboriginal Youth Overrepresentation in

interviewed in Manitoba voiced skepticism about the extent to which the *Gladue* clause included in s. 38(2)(d) of the YCJA has led to significant positive changes in the manner in which Aboriginal youth are treated in the youth justice system.²³⁷ For example, when asked to provide views on the question of how the inclusion of the *Gladue* clause was taken into account by the court at the time of sentencing, one youth justice professional lamented that: “I don’t think it’s done anything. You can add a *Gladue* component to a sentence ... but it doesn’t make any difference ... It doesn’t speak directly to why kids are in the system,”²³⁸ and since almost all of the kids in the system are “Aboriginal,” “judges already know... so it doesn’t need to be spelled out”;²³⁹ while another said: “I haven’t seen it – I’ve heard of programs up North – sentencing circles.”²⁴⁰ In Winnipeg however, “none of the [Aboriginal] kids I’ve worked with have benefited from this part of the YCJA.”²⁴¹ It is also distressing that several interview respondents further pointed out that the *Gladue* component often had no effect except to lengthen the time Indigenous youth spend in remand custody, since it usually took a number of extra weeks for *Gladue* reports to be prepared.²⁴² More generally, and beyond Manitoba, in a recent critical review of case law and research on *Gladue*-related practices in the youth justice system, which bear mostly on sentencing and judicial discretion, Jackson concluded that *Gladue*-related changes have “failed to remedy” the profound crisis of Indigenous youth overrepresentation in the criminal justice system and that a remedy is unlikely to be found under the YCJA unless “special consideration of a youth’s indigeneity *before judicial discretion enters the equation.*”²⁴³ At a minimum, this research suggested that *Gladue* was not enough.

Canadian Correctional Services: Judicial and Non-judicial Actors and Influences” (2015) 52:4 Alta LR 927; Marie Manikis, “Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors” (2016) 21 Can Crim L Rev 173; Kelsey L Sitar, “*Gladue* as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial” (2016) 20:3 Can Crim L Rev 247.

²³⁷ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

²³⁸ *Ibid* at 108.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Jackson, *supra* note 236 at 936 [emphasis in original]. The need for a mindful shift in

VI. CONCLUSION: THE FUTURE OF YOUTH JUSTICE RESEARCH AND REFORM IN CANADA

In this article, we began with a discussion of two enduring problems with Canadian youth justice reform: the first involved balancing the interests and rights of children with the perceived need for criminal accountability and justice; and the second was the intractable problems of variations in the manner in which youth justice legislation (from the *JDA* to the *YOA*, and *YCJA*) have been implemented inequitably across provinces/territories and within their geographic regions. Although through much of the 20th century under the *JDA* juvenile justice law and practice in Canada was clearly premised on a child welfare approach ideally emphasizing the ‘best interests of the child’ philosophical principle, while abrogating the procedural rights principle. The *YOA* and *YCJA* both effected an incremental shift in legislation and practice toward more legalistic ‘justice’ and ‘crime control’ models²⁴⁴ that have given greater priority to the protection of society and making punishment proportionate to the offence. Despite the perhaps credible claim made by some criminologists that the enactment of the *YCJA* in 2003 did not necessarily bring about an intentional ‘punitive turn’ in youth justice in Canada,²⁴⁵ it is clear that today accused and convicted young offenders across most of Canada are treated more like adults than they were in the past.²⁴⁶ Whether one considers this is to be a ‘good’ or ‘bad’ thing, however, very much depends on one’s own ideological stance, rather than on valid and reliable shared evidence about how youth justice is being administered across the many different regions of Canada.²⁴⁷ Similarly, in this context, perhaps

this direction is also advocated by Judah Oudshoorn, *Trauma-Informed Youth Justice in Canada: A New Framework Toward a Kinder Future* (Toronto: Canadian Scholars’ Press, 2015).

²⁴⁴ Corrado & Markwart, “Evolution of Juvenile Justice,” *supra* note 39; Corrado et al, “Theoretical Perspectives,” *supra* note 106.

²⁴⁵ Doob & Sprott, “The Blind Men,” *supra* note 75.

²⁴⁶ Perhaps with the exception of Quebec.

²⁴⁷ As Julian Tanner pointedly notes, “While the province of Quebec and left-wing academics represent the *YCJA* as an undesirable swing of the pendulum towards punishment and just deserts, others feel that the pendulum has not swung far enough in that direction.” See Julian Tanner, *Teenage Troubles: Youth and Deviance in Canada*, 4th ed (Toronto: Oxford University Press, 2015) at 256.

rather than simply pointing to ‘the problem’ of regional variation in the application of youth justice legislation across Canada, researchers, and policy makers might make better progress toward reforming youth justice in Canada by undertaking the research needed to answer questions like what are the various ways in which different provincial and territorial jurisdictions administer youth justice, and what might we be able to learn from one another. Indeed, it may well be the case that whether or not regional variation is perceived to be a problem depends on which side of the fence you view it from. For example, recent research published on the manner in which British Columbia and Quebec have adapted their youth protection and justice systems to formally align with the YCJA, suggested that these two provinces have taken quite different paths along the road to youth justice reform than other provinces and territories, and that in some areas the impacts of the YCJA may be “overstated.”²⁴⁸

In this light, it seems imperative that in order to effect genuine progress in the field of youth justice reform in Canada we must design a much better organized, transparent, and non-partisan entity or system, perhaps along the lines of an independent national research network or clearinghouse, that would have the mandate to foster cross-national and international knowledge sharing and transfer on youth crime and youth justice system developments and reform.²⁴⁹ Ideally, this collective venture would be guided by discussion among participants on how to implement changes based on a

²⁴⁸ Corrado et al, “YCJA in BC,” *supra* note 196; Alain and Hamel, *supra* note 39.

²⁴⁹ A small but significant step in this direction in the Canadian context is the recent book edited by Alain, Corrado & Reid, *supra* note 5, which contains chapters written on youth justice developments in eleven Canadian provinces and territories. However, there are also more developed models of youth justice knowledge sharing and policy transfer that can be drawn on from other countries. See, for example, Franklin E Zimring, Máximo Langer & David S Tanenhaus, eds, *Juvenile Justice in Global Perspective* (New York: New York University Press, 2015); Stephanie Rap & Ido Weijers, *The Effective Youth Court: Juvenile Justice Procedures in Europe* (The Hague: Eleven International Publishing, 2014); Scott H Decker & Nerea Marteache, eds, *International Handbook of Juvenile Justice*, 2nd ed (Cham, Switzerland: Springer International Publishing Switzerland, 2017); Ineke Pruin & Frieder Dünkel, *Better in Europe? European Responses to Young Adult Offending, Full Report* (Greifswald, Germany: University of Greifswald, Department of Criminology, 2015). Michael Tonry & Colleen Chambers, “Juvenile Justice Cross-Nationally Considered” in Barry C Feld & Donna M Bishop, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (New York: Oxford University Press, 2012) at 871.

broadly agreed upon “best practices” in youth justice model.²⁵⁰ In the more short-term horizon, it is also imperative that Canadian criminologists and youth justice policy makers move on their own toward a more open and transparent evidence-based dialogue aimed at sorting out and dealing collectively with the obstacles that stand in the way of making youth justice in Canada work for the benefit of all Canadian youth.²⁵¹ Toward this end, it is our hope that the data and arguments we have presented here on the potential impact of the YCJA on key outstanding youth justice policy issues will contribute further to this needed cross-national discussion. Not surprisingly given our geographically vast country and diverse cultures, how this will unfold perhaps very much depends on the particular province/territory.

²⁵⁰ Admittedly, criminologists and youth justice policy-makers and reformers have a considerable amount of work ahead of them to reach wide agreement on how we can use evidence-based research to fairly evaluate and rank “best practices” in youth justice, especially in light of the currently frequent disagreement and debate among researchers on the utility of following more narrow risk assessment and statistical approaches to program implementation and evaluation. For different perspectives in this ongoing debate, see Michele Peterson-Badali, Tracey Skilling & Zohrah Haqanee, “Examining Implementation of Risk Assessment in Case Management for Youth in the Justice System” (2015) 42:3 *Criminal Justice and Behavior* 304; Stephen Case & Kevin Haines, “Risk Management and Early Intervention: A Critical Analysis” in Barry Goldson & John Muncie, eds, *Youth Crime and Justice*, 2nd ed (London: Sage, 2015) 100; Gavin Turnbull & Jean Spence, “What’s at Risk? The Proliferation of Risk Across Child and Youth Policy in England” (2011) 14:8 *Journal of Youth Studies* 939; Ross Fergusson, “Making Sense of the Melting Pot: Multiple Discourses in Youth Justice Policy” (2007) 7:3 *Youth Justice* 179; Jeffery A Butts and John K Roman, “Better Research for Better Policies” in Francine T Sherman & Francine H Jacobs, eds, *Juvenile Justice: Advancing Research, Policy, and Practice* (Hoboken, NJ: John Wiley & Sons, 2011) 505. For access to more comprehensive resources on evidence-based research, see Juvenile Justice Information Exchange, “Evidence-Based Practices,” online: <<http://jjie.org/hub/evidence-based-practices/>>.

²⁵¹ For a starting point for this endeavour, see the thoughtful discussions of youth justice reform in Corrado, Kuehn & Margaritescu, *supra* note 5; Dhillon, *supra* note 233; Jackson, *supra* note 236; Mann, *supra* note 154; Newell, *supra* note 1; Oudshoorn, *supra* note 243; Tanner, *supra* note 247.

Challenging Infanticide: Why Section 233 of Canada's *Criminal Code* is Unconstitutional

S C O T T M A I R *

ABSTRACT

In the early twentieth century, Canadian juries were reluctant to convict mothers who had murdered their newly born children (children who are under one year of age) and would acquit them despite their obvious guilt. In 1948, Parliament tried to remedy this by adding s. 233 to the *Canadian Criminal Code*, creating the offence of infanticide. With a maximum penalty of five years imprisonment, juries would be more willing to convict these mothers. As of this writing, s. 233 is still in force.

In this article, I will argue that s. 233 is unconstitutional because it violates the equality rights of newly born children under the *Canadian Charter of Rights and Freedoms*. Specifically, I argue that the punishments a society gives for murder reflects the value it places on human life. Section 233's mandatory lesser punishment for mothers who kill (or even premeditatedly murder) their newly born children communicates that they are less worthy as members of Canadian society than those who are at least one year of age. Furthermore, with its low maximum penalty and a broad definition of disturbed mind, s. 233 trivializes the killing of the newly born children. I then argue that these infringements cannot be justified. Lastly, I will outline how to constitutionally challenge the law. In the section about why s. 233 cannot be justified, I will also discuss a possible replacement for s. 233: a defence of diminished responsibility that applies regardless of the gender of the perpetrator or age of the victim. This would allow flexibility

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in the sentencing of mentally ill but legally sane defendants without discriminating against a newly born child because of his or her age.

Keywords: criminal law; infanticide; disturbed mind; jury nullification; *Criminal Code*; *Charter of Rights and Freedoms*; discrimination; equality; diminished responsibility

I. INTRODUCTION

Section 233 (s. 233) of the *Canadian Criminal Code* details the offence (and the partial defence) of infanticide.¹ It applies to mothers who kill their newly born children while suffering from a “disturbed mind”.² If convicted, the mother faces a maximum of five years imprisonment.³ Some believe that it should be abolished.⁴ Others believe that legislators in other countries should use it as a template when adopting similar legislation.⁵ Some suggest changing the definition of “disturbed mind”⁶ or expanding the provision’s scope to include adoptive parents and fathers.⁷ Judges have also discussed the legislation’s constitutionality when determining if it is the Crown or the defence who has the burden of proving the state of the woman’s mind during the killing.⁸ There are no articles, however, which specifically detail the impact s. 233 has on the rights of newly born children. Nor has any article discussed s. 233’s constitutionality in this context.

¹ *Criminal Code*, RSC 1985, c C46, s 233. Section 233 will also be referenced as “the infanticide provision” or “Canada’s infanticide provision” or “the provision” unless otherwise noted throughout this article. I will use the term “newly born child” to describe a child who is less than one year of age.

² *Ibid.* See also Eric Vallillee, “Deconstructing Infanticide” (2015) 5:4 *Western J Leg Studies* 1 at 1.

³ *Criminal Code*, *supra* note 1.

⁴ Vallillee, *supra* note 2 at 9.

⁵ Margaret Ryzner, “A Crime of Its Own? A Proposal for Achieving Greater Consistency in Neonaticide and Infanticide Cases” (2013) 47:3 *USF L Rev* 459 at 478.

⁶ Vallillee, *supra* note 2 at 8.

⁷ Sanjeev Anand, “Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code’s Child Homicide Offence” (2010) 47:3 *Alta L Rev* 704 at 728.

⁸ *R v LB*, 2011 ONCA 153 at paras 85–88, 270 CCC (3d) 208 [LB].

In this article, I will rectify this. I will argue that s. 233 is unconstitutional because it violates a newly born child's right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms*⁹ and cannot be demonstrably justified in a free and democratic society. Specifically, I will argue that by mandating a lesser punishment for the killing of a newly born child, s. 233 demeans his or her dignity by communicating (intentionally or not) that its life is of lesser value than those older than them. Also, this infringement cannot be justified under s. 1 of the *Charter*.

This article has five parts. Part two looks at s. 233's history and how it has been interpreted by Canadian courts. Part three details how the provision violates a newly born child's right to equality under s.15 of the *Charter*. Part four details why this violation cannot be upheld under s. 1 of the *Charter*. Part five details how to constitutionally challenge s. 233.

II. THE HISTORY AND JURISPRUDENCE OF SECTION 233

A. The Provision's Text and History

Section 233 of the *Criminal Code* reads:

A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.¹⁰

Parliament added s. 233 to the *Criminal Code* in 1948. Traditionally, many mothers who killed their newly born children were poor and unable to raise them.¹¹ They were often raped or seduced by their employers or their employer's relatives and fired once their pregnancy became known.¹² Juries were reluctant to convict these mothers of murder as that meant an

⁹ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, s 15 [*Charter*]. I recognize that challenges under Section 15 of the *Charter* rarely succeed, but I believe the evidence I present will show that section 233 is unconstitutional on this basis.

¹⁰ *Criminal Code*, *supra* note 2, s 233.

¹¹ Constance B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34:4 UTLJ 447 at 457-458.

¹² *Ibid.*

automatic death sentence. Thus, juries would nullify and acquit these women even if they were clearly guilty.¹³

Sympathy was not the only reason for acquittals, however. Many infanticides were actually maternal neonaticides: the killing of a newly born child “immediately following, or within a few months, of its birth by [its] biological mother”.¹⁴ To convict these mothers, the Crown had to prove the infant had been “born-alive.” A child was deemed born-alive when it had taken its first breath.¹⁵ This was hard to prove and led to many proper acquittals and jury nullifications.¹⁶

In 1948, Parliament tried to remedy this via enacting s. 233, which allowed juries convict these mothers of the lesser offence of infanticide. Parliament hoped that the lenient maximum penalty of three years (later raised to five years)¹⁷ imprisonment would prevent jury nullification.¹⁸

B. Jurisprudence

*R v Marchello*¹⁹ is the first case to outline infanticide’s elements. To be guilty of infanticide:

- (a) the accused must be a woman; (b) she must have caused the death of a child;
- (c) the child must have been newly born;²⁰ (d) the child must have been a child of the accused; (e) the death must have been caused by a wilful act or omission of the accused; (f) at the time of the wilful act or omission the accused must not have fully recovered from the effects of giving birth to the child; and (g) by reason of giving birth to the child the balance of her mind was then disturbed.²¹

¹³ *House of Commons Debates*, 20th Parl, 4th Sess, Vol V (June 14, 1948) at 5187 (Hon John Deifenbaker) [House of Commons Debates].

¹⁴ Kristen Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: UBC Press, 2005) at 197, n 7.

¹⁵ *Ibid* at 32.

¹⁶ Anand, *supra* note 7 at 708, n 8.

¹⁷ *Ibid* at 715, n 41.

¹⁸ House of Commons Debates, *supra* note 13 at 5184 (Hon James Lorimer Isley, Minister of Justice).

¹⁹ *R v Marchello*, [1951] 4 DLR 751, 1951 CarswellOnt 8 at para 14 [Marchello].

²⁰ A newly born child is defined as a child less than one year of age. See *R v Smith* (1976), 24 Nfld & PEIR 161 at para 11, 32 CCC (2d) 224 [Smith].

²¹ *Marchello*, *supra* note 19 at para 14.

To establish the *actus reus* of infanticide, the Crown must prove that a woman caused the death of her child through a wilful act or omission. The woman must also have a disturbed mind due to not fully recovering from the effects of childbirth or lactation.²² The act or omission need not be the result of the woman's disturbance. The woman's mind only has to be disturbed because of the effects of giving birth or lactation when she causes the death of her biological child.²³

Initially, the *mens rea* for infanticide was the same as the *mens rea* for murder. The Crown had to establish that the woman intended to kill her child.²⁴ For example in *Smith*²⁵ a mother was charged with infanticide after smothering her infant son. The judge acquitted her because he had reasonable doubt about whether she intended to kill her son.²⁶

This changed in 2011 when the Ontario Court of Appeal held the *mens rea* for infanticide is the same as the *mens rea* for manslaughter.²⁷ To have the *mens rea* for manslaughter, the accused must intend to commit an unlawful act and there must be "objective foreseeability of the risk of bodily harm that is neither trivial nor transitory in the context of a dangerous act."²⁸ That is, a reasonable person should have known that by committing the act they were exposing others to the risk of bodily harm. Also, the accused's unlawful act must be a significant contributing cause to the victim's death.²⁹ The *mens rea* for murder (including premeditated murder) also suffices.³⁰ A mother may be convicted of infanticide if she harms her infant intending to cause its death.³¹

Originally, the Crown also had to prove that a woman was suffering from a disturbed mind when she killed her child. If the defense could show the woman's mind was not disturbed or create reasonable doubt about this,

²² *R v Borowiec*, 2016 SCC 11 at para 13, [2016] 1 SCR 80 [*Borowiec*].

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Smith*, *supra* note 20 at para 29.

²⁶ *Ibid* at para 35.

²⁷ *LB*, *supra* note 8 at para 114.

²⁸ *R v Creighton*, [1993] 3 SCR 3 at 44-45, 105 DLR (4th) 632.

²⁹ *R v Maybin*, 2012 SCC 24 at para 1, [2012] 2 SCR 30.

³⁰ *LB*, *supra* note 8 at para 36.

³¹ *Criminal Code*, *supra* note 1, s 229(a).

the accused would be acquitted. Once acquitted, the principle of double jeopardy prevented these women from being convicted of murder or manslaughter.³² For example, in *R v Jacobs*³³ a woman was acquitted of infanticide because she had no disturbance of the mind after giving birth.³⁴ Ironically, a law meant to make convicting defendants easier almost guaranteed their acquittal.

Parliament remedied this in 1955 by passing s. 662 of the *Criminal Code*. This allows for a conviction if the Crown proves every element of infanticide except the existence of a disturbed mind, unless the actions causing the infant's death were not wilful.³⁵ From then on, defendants could be convicted of infanticide, even if there was reasonable doubt about whether their minds were disturbed. A disturbed mind was no longer an essential element of the offence. In fact, it soon became an element that the Crown had to disprove to convict a woman of murder.

Indeed, in addition to being a criminal offence, a mother can raise infanticide as a partial defence to murder or manslaughter if the victim is her newly born biological child.³⁶ The burden of proof remains with the Crown. Once each element of the defence is found to have an air of reality to it, the Crown must disprove one of the elements beyond a reasonable doubt. If they cannot, the accused will be acquitted of murder (or manslaughter) but convicted of infanticide.³⁷ This process was affirmed by Canada's Supreme Court in *R. v Borowiec*.³⁸

C. The Definition of “Disturbed Mind”

All infanticide-related jurisprudence has held that the definition of a “disturbed mind” under s. 233 is distinct from the mental state required for

³² Kramar, *supra* note 14 at 74–75.

³³ *R v Jacobs* (1952), 105 CCC 291, [1952] OJ No 542 (QL) [*Jacobs* cited to OJ No].

³⁴ *Ibid* at para 3.

³⁵ *Criminal Code*, *supra* note 2, s 663.

³⁶ *Borowiec*, *supra* note 22 at para 17.

³⁷ *LB*, *supra* note 8 at paras 139–140.

³⁸ *Borowiec*, *supra* note 22 at para 17.

insanity.³⁹ The threshold is much lower than what is required to find a defendant not criminally responsible by reason of mental disorder.⁴⁰

The Supreme Court of Canada has held that under s. 233, a disturbed mind is a mind that is “mentally agitated,” “mentally unstable,” or is undergoing “mental discomposure.”⁴¹ A woman’s disturbance “need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder...or amount to a significant impairment of [her] reasoning faculties.”⁴² The disturbance must “be present at the time of the act or omission causing the...child’s death.”⁴³ It must also be because “the accused [has] not fully recovered from the effects of giving birth or...lactation consequent on the birth of the child.”⁴⁴

In every case after s. 662 came into force and where infanticide could be raised as a defence, the accused was found to have a disturbed mind or alternatively, pled guilty to infanticide.⁴⁵

The definition of disturbed mind is quite broad. A “disturbed mind” can be a psychiatric illness that amounts to insanity. For example in *R v. Szola*,⁴⁶ a woman with postpartum psychosis accidentally killed her newly born son after dropping him on the floor to quiet him. While she pled guilty to infanticide, the Ontario Court of Appeal ruled the woman was legally insane when she killed her child.⁴⁷ While the court could not find her insane due to her guilty plea, they reduced the sentence to a conditional discharge and compulsory psychiatric treatment.⁴⁸ Another case, *R c*

³⁹ *Borowiec*, *supra* note 22 at para 28.

⁴⁰ *Ibid* at para 34.

⁴¹ *Ibid* at para 35.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ For guilty pleas see *R v Kang*, 2008 BCPC 511 (a severely depressed woman who drowned her child was given a conditional sentence of two years less one day and three years’ probation); *R v APP*, [1992] OJ No 1626 (QL) (a woman in a dissociative state who killed her newborn son by throwing him out a window was given three years’ probation). For a disturbing case, see *R v Wood*, [1999] OJ No 5042 (QL) (a woman who was in good mental health and killed her child by leaving him to die of exposure was given two years’ probation and required to perform 200 hours of community service).

⁴⁶ *R v Szola* (1976), 33 CCC (2d) 572, [1976] OJ No 1229 (QL) [*Szola* cited to OJ No].

⁴⁷ *Ibid* at para 2.

⁴⁸ *Ibid* at para 6.

Valiquette,⁴⁹ concerned a woman who suffered from a similar mental illness and killed her newly born child. Her sentence of ten years imprisonment for manslaughter, was reduced to three years' probation and compulsory psychiatric treatment on appeal.⁵⁰

In other cases, however, the “disturbed mind” was due to anxiety over the disapproval the woman would incur from her family if the birth were discovered. In *R v Gorill*⁵¹ a woman who killed her newly born child immediately after birth was found to have a disturbed mind, because she was worried she could not keep the birth a secret from her family.⁵² In *R v Leung*⁵³ a woman was convicted of the killings of two of her newly born children. One of the children was killed on April 2, 2009, shortly after his birth.⁵⁴ The second child was intentionally suffocated to death on March 7, 2010.⁵⁵ The second killing occurred while police were investigating the accused for killing the first.⁵⁶ The defendant killed her children because they were born out of wedlock and she feared the scorn of her family if they were to discover them.⁵⁷

Most troubling of all, sometimes the ordinary difficulties of motherhood are enough to constitute a disturbed mind. In *R v Del Rio*,⁵⁸ a woman was found guilty of infanticide after killing her newly born daughter. The accused said the victim was a pain and she “didn’t want it after it was born.”⁵⁹ Several witnesses testified that whenever the child cried or needed food, the accused “would slap her [in] the mouth and tell her to go to sleep.”⁶⁰ She would also forcefully drop the child into her crib, slap her, and

⁴⁹ *R c Valiquette* (1990), 60 CCC (3d) 325 at para 2, 1990 CarswellQue 27 (QCCA).

⁵⁰ *Ibid* at paras 27–28.

⁵¹ *R v Gorill* (1995), 139 NSR (2d) 191, 26 WCB (2d) 476 (CA).

⁵² *Ibid* at para 49.

⁵³ *R v Leung*, 2014 BCSC 1894, 116 WCB (2d) 548 [*Leung*].

⁵⁴ *Ibid* at paras 1, 23.

⁵⁵ *Ibid* at paras 1, 37.

⁵⁶ *Ibid* at para 26.

⁵⁷ *Ibid* at para 41.

⁵⁸ *R v Del Rio*, [1979] OJ No 16 (QL) (SC) [*Del Rio*].

⁵⁹ *Ibid* at para 15.

⁶⁰ *Ibid*.

repeatedly told her daughter that if she “didn’t shut up” she would kill her.⁶¹ On the night of her daughter’s death, she was having trouble feeding the child.⁶² When the child had trouble swallowing the mother said “You’re not going to live long if you keep this up. Do you want to die?”⁶³ The next day the daughter was found dead. The cause of death was a beating by her mother. The mother was not mentally ill, only stressed about her daughter’s crying.⁶⁴ Yet she still had a disturbed mind under s. 233 and was found guilty of infanticide.⁶⁵

The only time when a woman has been unsuccessful in arguing infanticide is when the victim is older than one year of age. In *R v Fujii*⁶⁶ a woman with severe postpartum depression accidentally allowed her children to die of dehydration and starvation. One was newly born while another was older than one year of age. The judge said the infanticide defence was available for the newly born child only.⁶⁷ She was sentenced to eight years in jail. After deducting time already served she was given a prison sentence of five and half years.⁶⁸

While it may seem strange that women who were not mentally ill could have a disturbed mind, it makes sense when one examines the social consensus when s. 233 was passed. In 1948, the struggles associated with giving birth and lactation that was said to constitute a disturbed mind often involved socioeconomic conditions rather than psychiatric ones. The “disturbances” that led mothers to kill their infants, were often poverty, the shame of giving birth to an illegitimate child, and the difficulty of raising such a child.⁶⁹ When asked why they killed their newly born child women discussed their difficult socioeconomic status. As Constance Backhouse writes:

One told of her terror at contemplating the shame that would come to herself and her family from an illegitimate birth. Another recounted the impossibility of

⁶¹ *Ibid* at paras 15, 30.

⁶² *Ibid* at para 36.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at para 55.

⁶⁶ *R v Fujii*, 2002 ABQB 805, 323 AR 261 [*Fujii*].

⁶⁷ *Ibid* at para 46.

⁶⁸ *Ibid* at para 55.

⁶⁹ Backhouse, *supra* note 11 at 448, 477.

surviving as a single woman attempting to raise a child. Still another referred to her stark poverty...they resorted to infanticide as a final, desperate measure.⁷⁰

Canadian society was very sympathetic to these mothers. They were portrayed as desperate women driven to kill their infants by poverty or a noble desire to conform to social expectations.⁷¹ While some of these mothers were mentally ill or insane, most were in difficult economic circumstances.⁷² As sociologists Kristen J. Kramar and William D. Watson write:

Medical experts were as likely as jurors to account for infanticide in socioeconomic terms although...they had a somewhat different population in mind from the “traditional” young, unwed defendants who were so hard to convict. The interpretation of responsibility underlying the English Infanticide Act 1922, an interpretation adopted in the Canadian legislation of 1948, was thus at variance with the categories of contemporary medical knowledge. “Lactational insanity” and “exhaustion psychosis,” as understood by medical specialists, offered a challenge to fundamental legal doctrines in association with infanticide since the impetus to commit infanticide was explained mainly by socioeconomic factors external to the individual perpetrator-mother, extending responsibility to “society” and the experience of “working-class motherhood.”⁷³

Other studies also support the finding that the disturbances contemplated by supporters of s. 233 were socioeconomic, not psychiatric.⁷⁴ These socioeconomic circumstances were simply given a psychiatric veneer. Psychiatry was used to help fit the law into the current societal consensus.

This societal consensus, including the way society views children, the challenges of single motherhood, and the role a parent is supposed to play in a child’s life, have changed a great deal since 1948. This is especially true of the role the law is to play in protecting and denouncing violence against children. Canadian law has changed as well. All laws must conform to the *Charter* and all individuals, including newborns, are guaranteed to equal treatment under the law. I will now turn to why s. 233 violates this guarantee and must be struck from the *Criminal Code*.

⁷⁰ *Ibid* at 458.

⁷¹ Kramar, *supra* note 14 at 7.

⁷² *Ibid* at 93.

⁷³ Kristen J Kramar & William D Watson, “Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate” (2008) 33:2 *Can J Sociology* 237 at 249 [emphasis added].

⁷⁴ Backhouse, *supra* note 11 at 462-463; Anand, *supra* note 7 at 715; Kramar, *supra* note 14 at 74-75.

III. SECTION 233 VIOLATES A NEWLY BORN CHILD'S RIGHTS UNDER SECTION 15 OF THE *CHARTER*

A. The Test for an Infringement of S. 15(1)

Section 233 violates a newly born child's equality rights under s. 15(1) of the *Charter*. Section 15(1) reads:

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...based on race, national or ethnic origin, colour, religion, sex, age or physical or mental disability.⁷⁵

To prove a violation of s. 15(1), a claimant must show the law at issue subjects them to differential treatment by withholding a benefit or imposing a burden and that the differential treatment is based on an enumerated or analogous ground listed in s. 15(1).⁷⁶ They must then prove that such treatment is discriminatory. They must show the challenged law reflects or promotes the notion they are less worthy of recognition or value as human beings or as members of Canadian society.⁷⁷ To be discriminatory, a law must demean the claimant's dignity.⁷⁸ Section 233 meets all of these criteria.

1. *Differential Treatment*

Under, s. 233 mothers who kill their infants must be sentenced to no more than five years in prison.⁷⁹ If a mother kills her child and the child is at least one-year old, she may (and often must) be punished with life imprisonment. Section 233 mandates that the killings of newly born children by their mothers be punished differently than those older than them. Thus s. 233 subjects newly born children to differential treatment.

While one could argue that s. 233 treats the perpetrator of the crime differently after the victim has been murdered, this does not mean that such legislation does not also subject the victim to differential treatment. For example, consider *McClesky v Kemp*⁸⁰ a case decided by the United States

⁷⁵ *Charter*, *supra* note 9 at s 15(1) [emphasis added].

⁷⁶ *Law v Canada*, [1999] 1 SCR 497 at para 30, 170 DLR (4th) 1.

⁷⁷ *Ibid* at para 51.

⁷⁸ *Ibid* at para 75.

⁷⁹ *Criminal Code*, *supra* note 1, s 237.

⁸⁰ *McClesky v Kemp*, 481 US 279 (USSC 1987) [*McClesky*].

Supreme Court. Warren McClesky, a black man sentenced to death for the murder of a white police officer, claimed that Georgia's death penalty statute was unconstitutional.⁸¹ He claimed the statute violated the equal protection guarantee under the Fourteenth Amendment of the United States Constitution.⁸² This claim was based on a study which showed that, in Georgia, people who kill white victims are more likely to be sentenced to death than those who kill black victims, sending the message black lives were less valuable than white lives.⁸³

A majority of the United States Supreme Court rejected McClesky's challenge as he could not show that he (or blacks as a whole) was deliberately discriminated against by the law.⁸⁴ Most importantly, however, the challenge failed because every death penalty case had to involve a statutorily listed aggravating factor and even when such a factor was found, juries could still sentence the defendant to life imprisonment.⁸⁵ As every trial (and every capital murder) is different, juries could impose a sentence that was tailored to the circumstances of the defendant.⁸⁶

While the claim may have centred on the differential treatment of a murderer after his or her victim has been killed, it also dealt with how the lives of victims were treated by the justice system. By allegedly treating the murder of a white person as a graver crime than the murder of a black person, the lives of black people were being devalued.⁸⁷

Indeed, McClesky's lawyer compared Georgia's death penalty statute to the "black codes" of antebellum Georgia.⁸⁸ Under these laws, free blacks were second-class citizens and black slaves were deemed to be their masters' property. These laws explicitly discriminated against them in many ways, including punishment. Courts had to give lower penalties if victims were

⁸¹ *Ibid* at 282–283.

⁸² See *ibid* at 286.

⁸³ *Ibid* at 291–292. For more information about this claim see Frank Baumgartner, Amanda J Gregg & Alisa Maestro, "#BlackLivesDon'tMatter: Race of Victim Effects in US Executions, 1976–2013" (2015) 3:2 *Politics, Groups, and Identities* 209 at 211.

⁸⁴ *McClesky*, *supra* note 80 at 292–293.

⁸⁵ *Ibid* at 302–303.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at 336 (Brennan J, dissenting).

⁸⁸ Transcript of oral argument at 1 US 279 (1987) (no 84-6811). Many of these codes were also in force in other southern states.

black (and higher penalties if they were white).⁸⁹ For example free blacks who assaulted whites could be whipped, banished, or executed.⁹⁰ Whites who assaulted free blacks, however, could only be imprisoned for up to ten years.⁹¹ Whites who killed slaves often went unpunished.⁹² This two-tier system of punishment reflected the belief in the inferiority of black slaves and black lives.⁹³

After the passage of the fourteenth amendment of the United States Constitution, such statutes were voided as they violated the right to equal protection under the law.⁹⁴ These statutes subjected blacks to differential treatment and the mandatory lesser punishment was part of this treatment. One can constitutionally challenge such laws whether it is the perpetrator or the victim who is treated differently.

While the ground being discussed is race rather than age, and the infringement comes from the maximum punishment being too low, the same can be argued about of s. 233. While it may treat a perpetrator differently after a newly born child has been murdered, it also treats the newly born child's killing differently. If an unknown woman with a disturbed mind as a result of giving birth enters the mother's home and intentionally kills the newly born child, the killing is considered murder and the perpetrator is liable to life imprisonment. If the child's biological mother does so, the justice system treats the infant's killing as a less serious infanticide punishable by no more than five years in jail. While s. 233 treats the perpetrator differently, newly born children are also treated differently under Canada's legal system.

This claim is stronger than Warren McClesky's. Under Georgia's death penalty law, the judge or jury may also decide to sentence a defendant to life imprisonment instead. While the study at issue showed that people were more likely to be sentenced to death for killing whites, judges and juries

⁸⁹ Ursula Bentele, "Race and Capital Punishment in the United States and South Africa" (1993) 19:2 *Brook J Intl L* 235 at 267.

⁹⁰ A Leon Higgenbottom Jr & Anne F Jacobs, "The 'Law Only as an Enemy'; The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia" (1992) 70:4 *NCL Rev* 969 at 1055.

⁹¹ *Ibid.*

⁹² *Ibid* at 1044.

⁹³ Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1998) at 30.

⁹⁴ Bentele, *supra* note 89 at 255.

were not forced to impose a death sentence based on the victim's race. They had to impose a sentence based on the facts of each case. Section 233, by contrast, mandates a lesser punishment for mothers who kill their newly born children. Newly born children will automatically be treated differently when their mother kills them. Canada's Supreme Court recognized that a different punishment for the murder of specific Canadians amounts to treating those Canadians differently. Consider *Miller et al v the Queen*.⁹⁵ In this case a mandatory death sentence for murdering a police officer or prison guard while they were performing their duties was challenged under the *Canadian Bill of Rights*. The court upheld the sentence. One reason for this was because the need to protect the lives of police officers and prison guards. Since they worked in jobs that put them at a greater risk of murder than other Canadians, they were treated differently when they were murdered while performing their duties. As Chief Justice Bora Laskin wrote:

I do not think, however, that it can be said that Parliament, in limiting the mandatory death penalty to the murder of policemen and prison guards, had only vengeance in view. There was the consideration that persons in such special positions would have a sense of protection by reason of the grave penalty that would follow their murder and, further, that the mandatory penalty would be, to some extent at least, a deterrent as, for example, to a prison inmate already serving a life sentence but tempted to escape even if this meant committing murder.⁹⁶

Under the law, the lives of police officers and prison guards were given additional protection (and thus subject to differential treatment) by a law that mandated a harsher punishment for someone who murdered them. Newly born children are also subjected to differential treatment by s. 223 which mandates a lesser punishment when their mother kills them. They are subjected to differential treatment for the purposes of s. 15(1).⁹⁷

⁹⁵ *Miller et al v the Queen*, [1977] 2 SCR 680, 321 DLR (4th) 577 [Miller].

⁹⁶ *Ibid* at 696 [emphasis added]. While the death penalty had been abolished for all civilian crimes before the decision was released, the matter was not moot because the statute was constitutional. Appellants would have to serve at least 25 years in prison before being eligible for parole. See *ibid* at 712–713.

⁹⁷ While I argue that section 233 discriminates against newly born children by mandating a lesser punishment for their intentional killing, I do not argue that all statutorily required lesser punishments will always be discriminatory. My argument is that mandatory lesser punishments that demean a person's dignity on a ground enumerated in section 15(1) are unconstitutional. As occupation is not an enumerated ground, laws that impose additional penalties for the murder of police officers and prison guards are

2. *Based on an Enumerated Ground*

Moreover, the differential treatment is imposed on the basis of age. A mother can only be convicted of infanticide rather than murder or manslaughter if she kills her child and her child is less than one year of age. Therefore, the differential treatment is based on an enumerated ground.

In response, one might argue that the lower penalty is because of a woman's disturbed mind and not the age of the victim. They are incorrect because for the partial defence of infanticide to succeed, the victim must be less than one year of age. Consider a mother who has two children. One is two years old and the other is eight months old. She is experiencing a disturbed mind after giving birth to her eight-month old child. She intentionally kills both children. She can only use infanticide as a partial defence for the killing of the eight-month old. The killing of the two-year old must be classified as either murder or manslaughter and can be punished with life imprisonment.⁹⁸ Indeed, this is akin to what happened in *Fujii*.⁹⁹ Furthermore just because the woman must have a disturbed mind to be convicted of infanticide does not mean s. 233 does not make a distinction based on age. Consider s. 43 of the *Criminal Code*. It allows parents, teachers, and guardians to use reasonable force to discipline children in their care.¹⁰⁰ When the law was challenged under s. 15 of the *Charter*, the Attorney General argued that the differential treatment was due to the relationship between the parties.¹⁰¹ While s. 43 only applies to defendants who have a particular relationship with a child, the court still

constitutional. If a lesser punishment is not administered in a discriminatory manner (for example, it applies to every crime victim, not just those of a certain race) it will not offend section 15(1). This stipulation ensures that the invalidation of section 233 will not lead to an "opening of the floodgates" where every mandatory lesser punishment is struck down via section 15(1). For example, laws that mandate lesser sentences for "crimes of passion" regardless of the victims' characteristics do not necessarily violate section 15(1) based on the arguments in this article regarding section 233.

⁹⁸ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) at 117–118

⁹⁹ *Fujii*, *supra* note 66 at para 46. Fortunately for the defendant, however, the judge did not sentence her to life in prison but to eight years in prison. After receiving credit for time already spent in custody, the judge reduced her sentence to five years, six months. See para 55.

¹⁰⁰ *Ibid.*

¹⁰¹ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].

found that the differential treatment was based on age.¹⁰² Only those with a chronological age less than 18 years were covered. Those over 18 could not be assaulted by their caretaker or teacher as a punishment, even if they had the mental age of someone much younger.¹⁰³ The court ruled requirement of a particular relationship did not change the fact that s. 43 treated children differently based on age.¹⁰⁴ The same is true of s. 233's differential treatment of newly born children. The relationship between the perpetrator and victim does not change the fact that, as a group, newly born children are treated differently when they are killed by their mothers.

B. Section 233 and Section 15(2) of the *Charter*

Before determining if s. 233 is discriminatory, one must answer another question: can s. 233 be shielded from the scrutiny of s. 15(1) by s. 15(2) of the *Charter*?¹⁰⁵ Section 15(2) reads:

Subsection [15](1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or ...disability.¹⁰⁶

At least one woman's rights group has argued that s. 233 responds "to the social context of women's inequality."¹⁰⁷ Namely, only women can give birth or lactate and experience the difficulties associated with those activities. By passing s. 233 Parliament chose to respond to the "unique stressors accompanying the reproductive and caregiving roles ascribed to women."¹⁰⁸ As it stated in its intervener's factum in *R v Borowiec*:

¹⁰² *Ibid* at paras 1, 222, 232.

¹⁰³ *Ogg-Moss v R*, [1984] 2 SCR 173 at 186, 11 DLR (4th) 549.

¹⁰⁴ *Canadian Foundation*, *supra* note 101 at para 222 (Deschamps J dissenting but not on this point).

¹⁰⁵ I am determining if section 233 is an ameliorative program before explaining why it is discriminatory. This is in line with the Supreme Court of Canada's ruling in *R v Kapp*, 2008 SCC 41 at para 56, [2008] 2 SCR 483 [*Kapp*].

¹⁰⁶ *Charter*, *supra* note 9, s 15(2).

¹⁰⁷ *R v Borowiec*, 2016 SCC 11, [2016] 1 SCR 80 (Factum of Women's Legal Education Action Fund Inc at para 10), online: <www.scc-csc.ca/WebDocuments-Documents-Web/36585/FM040_Intervener_Womens-Legal-Education-Action-Fund.PDF> (accessed 21 August 2017) [*Borowiec* LEAF factum].

¹⁰⁸ *Ibid* at para 8.

Parliament's reasons for enacting the infanticide provision remain pressing social concerns. The motivating concerns that underpinned the enactment of s. 233 – based as they were upon a compassionate understanding of the unique inequalities experienced by women during pregnancy, childbirth and child-rearing – are not anachronisms...Women continue to disproportionately experience the negative effects of continuing inequality in relation to childbirth and child-rearing [and s. 233 is meant to remedy this].¹⁰⁹

According to this group, Parliament recognized that women often killed their newly born children due to their disadvantaged position in regard to giving birth or raising children. Section 233 was meant to mitigate the consequences for mothers who killed their children under these circumstances. Thus, s. 233 honours the principle of substantive equality which requires that laws do not worsen “a group’s historical disadvantage or vulnerability.”¹¹⁰ According to this view, it cannot be struck down as a violation of s. 15(1).

C. The Definition of Affirmative Action Program

After examining relevant jurisprudence and history, however, it is evident that s. 233 is not an affirmative action program. To be considered an affirmative action program, the stated purpose of the “law, program, or activity” must be to ameliorate the conditions of a disadvantaged group.¹¹¹ Also, the means used to achieve amelioration must be rationally connected to its stated purpose.¹¹² While s. 233 benefits a historically disadvantaged group - women in general and poor women in particular - its purpose is not to ameliorate their condition. It is to make it easier to convict women who kill their newly born children.

Transcripts of the House of Commons debate over s. 233 prove this. John Diefenbaker, then the Member of Parliament for Lake Centre Saskatchewan, stated s. 233’s purpose when he said:

Experience has shown, of course, the necessity for a clause such as this; for in a great number of cases in which a woman finds herself in the position of having on her hands a newborn child, loses her power of control, and the child dies in consequence of some act on her part, over and over again juries have refused to convict, regardless of the evidence. I presume that the reason for this amendment

¹⁰⁹ *Ibid* at para 9.

¹¹⁰ *Ibid* at para 1.

¹¹¹ *Kapp, supra* note 105 at paras 41-42.

¹¹² *Ibid* at para 48.

is to make it easier to get a conviction for the offence of homicide short of murder or manslaughter.¹¹³

Minister of Justice, James Lorimer Isley agreed. Parliament had to pass the law because:

[T]here are cases where a mother kills her newborn child, and...it is useless to lay a charge of murder against the woman, because invariably juries will not bring in a verdict of guilty. They have sympathy with the mother because of the situation in which she has found herself...To a minor extent this brings the law into disrepute, because the offence is murder; that is unless the woman is insane.¹¹⁴

E. Davie Fulton, then the Member of Parliament for Kamloops, also felt its purpose was not to help women but to make it easier for judges and juries to convict those women of killing their newly born children. As Fulton said:

[W]hat is actually being done [through this legislation] is to change the law in order to permit convictions being made. From what the minister [of Justice] said I take it the feeling is that the present penalty is such that the juries do not convict and that, therefore, that the crime is being made subject to a little less severe penalty in the hope that juries will convict. I wonder if perhaps that is not the wrong principle to follow in amending the criminal code?¹¹⁵

In 2016, the Supreme Court of Canada held s. 233 was enacted to prevent jury nullification in cases where mothers killed their newly born children.¹¹⁶ Neither, can one argue that s. 233 has a renewed legislative objective. Canada's Supreme Court rejected that a shifting purpose can be manifested in unbridled fashion by courts in *R v Zundel*.¹¹⁷ As Madam Justice Beverly McLachlin (as she then was) wrote:

In determining the objective of a legislative measure...the [Supreme] Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision. Although the application and interpretation of objectives may vary over time, new and altogether different purposes should not be devised.¹¹⁸

¹¹³ House of Commons Debates, *supra* note 13 at 5184 (Hon John Diefenbaker) [emphasis added].

¹¹⁴ *Ibid* at 5185 (Hon James Lorimer Isley, Minister of Justice) [emphasis added].

¹¹⁵ *Ibid* at 5186–5187 (Hon E Davie Fulton) [emphasis added].

¹¹⁶ *Borowiec*, *supra* note 22 at para 27.

¹¹⁷ *R v Zundel*, [1992] 2 SCR731 at 761, 95 DLR (4th) 202.

¹¹⁸ *Ibid* [citations omitted].

Some scholars, however, see s. 233 in a different way. One scholar suggests that one of s. 233's purposes was to create a new offence that would exempt desperate women who killed their newly born children from a mandatory death sentence.¹¹⁹ It was meant to account for the social context that surrounded these killings. There are also many well-written works about infanticide in Canada that view the issue from a feminist perspective (many are cited in this article).¹²⁰ Section 233 is seen as a women's rights issue and the lesser punishment reflects the demeaned position of lower-class women who commit infanticide.¹²¹ Thus, s. 233 has an ameliorative purpose and is entitled to s. 15(2) protection from s. 15(1) scrutiny.

These are interesting ways to view s. 233. When debating s. 233, legislator John Diefenbaker expressed sympathy for a woman who finds herself "alone in the world and fearful of the consequences of going out into a society with a stigma [from single motherhood] upon her."¹²² These sentiments, however, do not indicate that sparing poor woman the death penalty for killing their newly born children was the legislation's stated purpose. It simply notes the sentiments that juries had about mothers on trial for killing their newly born children and that these sentiments would lead to acquittals no matter how strong the evidence of that mother's guilt was.¹²³ Indeed, when answering a criticism of s. 233 from Member of Parliament Fulton, Diefenbaker says the legislation will either make the killing of newly born children by their mothers "punishable with some penalty, or almost every person committing the crime will escape. That I believe is what impelled the [Minister of Justice] to introduce this amendment."¹²⁴

The Minister of Justice himself said s. 233 was first proposed by provincial attorneys general because juries would not convict women for killing their newly born children.¹²⁵ Isley stated:

¹¹⁹ I thank an anonymous reviewer for suggesting this argument.

¹²⁰ See Kramar, *supra* note 14; Backhouse, *supra* note 11; *Borowiec* LEAF Factum, *supra* note 107.

¹²¹ I would again like to thank Professor Richard Jochelson for providing me with this insight.

¹²² House of Commons Debates, *supra* note 13 at 5187 (Hon John Deifenbaker).

¹²³ *Ibid.*

¹²⁴ *Ibid* [emphasis added].

¹²⁵ *Ibid* (Hon James Lorimer Isley, Minister of Justice).

They [the attorneys general] do not like to have to prefer a charge that does not charge a crime, and that is what they have to do [in these cases]...Otherwise nothing happens. They make charges once in a while of manslaughter, but generally of a charge of what is [known as] concealment of birth because that is a charge on which they can get a conviction. It is a most undesirable situation that our law should be such that nobody will apply it properly. [By passing s. 233] we are meeting not only public opinion as shown by the indisposition of juries to convict, but also the wishes of experienced prosecuting departments who want a law that is susceptible of application.¹²⁶

In other words, Parliament passed s. 233 because it was almost impossible to convict women of killing their newly born children because of jury nullification. Prosecutors then had to bring a charge that did not acknowledge that the victim had died at the hands of their mother. In their view this made a mockery of justice. Section 233's purpose had nothing to do with sparing women the death penalty and everything to do with preventing jury nullification and ensuring that mothers who were guilty of killing their infants were convicted of something. While the bleak socioeconomic circumstances of a women on trial for killing their newly born children may have caused juries to nullify, s. 233's objective was not to ameliorate these conditions. While s.233 may have had such an effect, this was not its purpose, and it is the purpose of the legislation that must be ameliorative (not its effect) for it to be covered under s. 15(2).¹²⁷

Furthermore, even if one could demonstrate that Parliament's intention in drafting s. 233 was to ameliorate the condition of women, this would not save the legislation from scrutiny via s. 15(2). This is because Canada's Supreme Court has ruled that laws that are designed to punish or restrict behaviour are not considered to have an ameliorative purpose.¹²⁸ While the maximum punishment enumerated in s. 233 is much less than that of other homicide offences, s.233 is still a criminal law statute meant to punish women who kill their newly born children.

To be considered a criminal law, the legislation must have a valid criminal law purpose backed by a prohibition and a penalty.¹²⁹ Section 233 has a criminal law purpose: to provide a unique framework to prevent jury nullification and punish the killings of newly born children at the hands of

¹²⁶ *Ibid.*

¹²⁷ *Kapp, supra* note 105 at para 47 [emphasis added].

¹²⁸ *Ibid* at para 54.

¹²⁹ *R v Marmo-Levine*, 2003 SCC 74 at para 74, [2003] 3 SCR 571.

their mothers. It also prohibits the killings of infants and imposes a penalty of five years imprisonment on those who violate it. Section 233 is a statute that is meant to punish behavior; even if one feels that the maximum punishment is inadequate. By definition, s. 233 does not fall within s. 15(2) mandate and thus, is not protected by it.

Lastly the argument that s. 233 is an affirmative action program to help infants also fails. This is because s. 233 imposes a disadvantage. It denies infants equal status under the criminal law. Such statutes cannot have an ameliorative purpose and are not immune from s. 15(1).¹³⁰

D. Section 233 and the Demeaning of a Newly Born Child's Dignity

As s. 233 has no ameliorative purpose, one must determine if it is discriminatory and thus a violation of s. 15 of the *Charter*. In doing so, one must adopt the view of a reasonable person acting in a newly born child's best interest.¹³¹ He or she would find that, intentionally or not, s. 233 promotes the idea that newly born children are less worthy than those who are older than them.

A law and the differential treatment it imposes, may not have a discriminatory purpose, but can still be deemed discriminatory if the effects demean a person's dignity.¹³² For example, Canada's Supreme Court ruled that excluding sexual orientation from Alberta's *Individual Rights Protection Act (AIRPA)*, which prohibited discrimination in employment, housing and other areas, discriminated against the s. 15 rights of homosexuals. Since the objective of the *AIRPA* was to protect the dignity and inalienable rights of Albertans through the elimination of discriminatory practices, excluding homosexuals from this protection was discriminatory even if the legislature did not intend such discrimination.¹³³ The same is true of s. 233. In passing s. 233 Parliament did not intend to discriminate against newly born children, but s.233's effects are discriminatory.

¹³⁰ *Kapp*, *supra* note 105 at para 53, citing *R v Music Explosion Ltd* (1990), 68 Man R (2d) 203, 59 CCC (3d) 571 (CA). How section 233 denies the newly born equal status will be explained in the section discussing if it is discriminatory.

¹³¹ *Canadian Foundation*, *supra* note 101 at para 53.

¹³² *Vriend v Alberta*, [1998] 1 SCR 493 at para 93, 156 DLR (4th) 385.

¹³³ *Ibid* at paras 95-99.

One may question how a potential lesser punishment for perpetrators implicates a homicide victim's dignity and denies them equal status under the law.¹³⁴ The answer is that s. 233 does not allow for a lesser punishment for a specific group of homicide victims, it mandates it. A judge could not sentence a woman who has committed infanticide to more than five years imprisonment, even if the circumstances of the crime demanded it.

This discriminatory nature of such a mandate becomes clear when one examines the role criminal sentencing plays in denouncing crime. For example, the mandatory minimum sentence for murder is meant to reflect the seriousness of intentionally and unlawfully taking a person's life.¹³⁵ The higher parole ineligibility period for first-degree murder is meant to show that it is more serious than second-degree murder.¹³⁶ By contrast, manslaughters are punished more leniently because they often involve unintentional killings while murders involve deliberate killings.¹³⁷ Punishment plays a major role in reflecting the seriousness of a crime. As Dennis Prager writes:

The punishment for a crime is the most convincing way society teaches its members how serious the crime is. This is easily demonstrated. Imagine a society that meted out the same punishment to murderers as to those who had parked their car in a no-parking zone. That society would obviously be communicating that it regards murder as no more serious a crime than it does illegal parking.¹³⁸

The harsh sentences available for punishing those who unlawfully take innocent life is, at least in part, meant to communicate how much society values human life. This is a common moral argument of those who wish to retain the death penalty for murder. Human life is so precious that at least some people who unlawfully take it should forfeit the right to their own lives.¹³⁹ Even in Canada, which does not have the death penalty, a similar reasoning is used to justify life sentences with mandatory parole ineligibility

¹³⁴ I would like to again thank an anonymous reviewer for this assertion.

¹³⁵ *R v Latimer*, 2001 SCC 1 at para 86, [2001] 1 SCR 3 [*Latimer*].

¹³⁶ *R v Luxton*, [1990] 2 SCR 711 at 720-721, 58 CCC (3d) 449.

¹³⁷ Kent Roach, "The Problematic Revival of Murder Under Section 229(c) of the *Criminal Code*" (2010) 47:3 *Alta L Rev* 675 at 700.

¹³⁸ Dennis Prager, *Still the Best Hope: Why the World Needs American Values to Triumph* (New York: Broadside Books, 2012) at 360.

¹³⁹ *Ibid.* See also Edward Feser & Joseph M Bessette, *By Man Shall his Blood Be Shed: A Catholic Defense of Capital Punishment* (San Francisco: Ignatius Press, 2017) at 63-65.

periods for murder.¹⁴⁰ This is meant to reflect that human life is so valuable and that the culpable taking of an innocent human life is so grave. One who does this may be subject to a long term of imprisonment and the possibility of losing their liberty for the rest of their life.¹⁴¹ This punishment is, at least in part, supposed to send a message about how valuable human life is. Indeed, “one of society’s most basic tasks is that of protecting the lives of its citizens, and one of the most basic ways in which it achieves the task is through criminal laws against murder.”¹⁴² Lower punishments for similar *actus reas* could convey that the victim’s life was of a lower value.

Consider examples from history. The “black codes” in the antebellum United States mentioned earlier in the article is a good example of how a required lower punishment demeans the dignity of a homicide victim.

Another example is found in the Ottoman Empire (and Islamic Spain). In these places, non-Muslims (called dhimmis) were considered inferior to Muslims.¹⁴³ To enforce this inferior status, (and humiliate them) dhimmis were subject to discriminatory laws and taxes.¹⁴⁴ This discrimination extended to the justice system. The value of a male dhimmi’s life was considered to be half that of a Muslim’s (a female dhimmi’s life was valued at one-quarter of a Muslim man’s and half that of a man’s in general).¹⁴⁵ To enforce the dhimmi’s lesser value, the law declared that a person who murders a Muslim can (and sometimes must) be executed. If a Muslim murders a non-Muslim, the state cannot execute the Muslim because the law considers the value of a Muslim’s life to be of greater value than the victim’s.¹⁴⁶ Also, any compensation or fine that the Muslim had to pay for their crime was limited to half of what a dhimmi would have to pay for killing a Muslim.¹⁴⁷ The lesser punishment for Muslim killers of non-

¹⁴⁰ *Latimer, supra* note 135 at paras 80–82.

¹⁴¹ *Ibid* at paras 5, 80–84, 86.

¹⁴² *Gregg v Georgia*, 428 US 153 at 226 (USSC 1976) (White J concurring).

¹⁴³ Efraim Karsh, *Islamic Imperialism: A History* (Connecticut: Yale University Press, 2007) at 25–26.

¹⁴⁴ *Ibid* at 26.

¹⁴⁵ Bat Ye’or, *Eurabia: The Euro-Arab Axis* (New Jersey: Fairleigh Dickinson University Press, 2005) at 192.

¹⁴⁶ Dario Fernandez-Morera, *The Myth of Andalusian Paradise: Muslim, Christians and Jews Under Islamic Rule in Medieval Spain* (Delaware: ISI Books, 2016) at 210–211.

¹⁴⁷ *Ibid* at 211.

Muslims was designed to reflect that their victims were less worthy of recognition than they were.

Similar laws were in place in feudal Tibet where people divided people into distinct social classes. Buddhist monks and nobles were at the top of this hierarchy while serfs were at the bottom.¹⁴⁸ If a member of one of the higher classes was murdered, the perpetrator had to pay the victim's family gold equivalent to the victim's weight. If a serf was murdered, however, the perpetrator only had to provide the victim's family with a "hayband," a rope that Tibetans used to bury their dead.¹⁴⁹ The inferior value of the serf's life compared to that of a noble was enforced by the mandated lesser punishment given to a serf's murderer.¹⁵⁰

Similarly, Canada's infanticide law, intentionally or not, holds that a newly born child's life is less valuable than the life of an older child. The penalty for a mother who kills her newly born child cannot exceed five years imprisonment. Once he or she reaches one year of age, however, a mother can (and sometimes must) be sentenced to life imprisonment, even if she has a disturbed mind (as long as the disturbed mind does not amount to insanity). While not intended to humiliate, s. 233 communicates the message that a newly born child's life is considered less worthy of recognition by the Canadian justice system than the lives of older children or adults.¹⁵¹ This demeans a newly born child's dignity and violates his or her rights under s. 15(1) of the *Charter*.

This noted, some people may still argue that a deceased victim cannot be discriminated against by a mandatory lesser punishment upon conviction because in Canada, crimes are considered to be wrongs against the state, not the victim.¹⁵² While the assertion that crimes are considered wrongs against the public rather than the victim may be true, it is ultimately irrelevant when determining s. 233's constitutionality. Even when viewed in this light, s. 233 demeans a child's dignity. Under this view, crimes "are a breach and violation of the public rights and duties, due to the whole community,

¹⁴⁸ Li Sha, "Contribution of 'Abolishment of Serf System' in Tibet to Human Rights Campaign—In Memory of the Fiftieth Anniversary of Democratic Reform in Tibet" (2009) 1:2 *Asian Culture and History* 45 at 46–47.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Backhouse, *supra* note 11 at 463.

¹⁵² I thank an anonymous reviewer for this insight.

considered as community, in its social aggregate capacity.”¹⁵³ In other words crimes are punished because they injure the community as a whole. Murder is punished ‘not just because of what happened to the victim’ but also because of the community’s loss of one of its members and the murderer’s disparagement of the community’s teaching that murder is immoral”¹⁵⁴ Punishments are in part a reflection of society’s values and punishments for murder reflects society’s value for the lives of its members.

When it was passed, s.233 was reflective of Canadian society’s belief that the lives of newly born children were inferior to those of adults.¹⁵⁵ At the time:

[T]he killing of a child did not create the same feeling of alarm as other forms of murder, at least in the perceptions of the adults who applied the criminal law...The lenience may also have been related, in part, to the quasi-property status that children still held in the eyes of the law. Parents were almost never prosecuted for disciplining their children, even when this resulted in severe physical injury...[C]hildren were often viewed as the property of their parents, rather than as individuals in their own right.¹⁵⁶

Similar views of children as inferior were one of the reasons for Britain’s infanticide legislation, upon which s. 233 was based. In calling for such legislation:

There was a general feeling emphasized in the evidence [presented to the legislature] that child murder is not so heinous as other forms of murder because of the nature of the victim. A child could not be regarded in the same light as a grown-up person; the loss to the child itself could not be estimated; “it were as if the child never came into the world than that, having come into it, it was murdered.”¹⁵⁷

Also, Canada’s Supreme Court has ruled that criminal penalties available are, in part, a communication of society’s values. As Chief Justice Antonio Lamer (as he then was) wrote:

[A] sentence should also communicate society’s condemnation of that particular offender’s conduct. In short, a sentence with a denunciatory element represents a

¹⁵³ William Blackstone, *The Oxford Edition of Blackstone’s Commentaries on the Laws of England: Book IV: of Public Wrongs* (Oxford: Oxford University Press, 2016) at 27.

¹⁵⁴ Adam J MacLeod, “All for One: A Review of Victim-Centric Justifications for Criminal Punishment” (2008) 13:2 Berkeley J Criminal L 31 at 34.

¹⁵⁵ Backhouse, *supra* note 11 at 463.

¹⁵⁶ *Ibid* [emphasis added].

¹⁵⁷ D Seaborne Davies, “Child-Killing in English Law” (1937) 1:3 Mod L Rev 203 at 221.

symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law...Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated...judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.¹⁵⁸

Moreover, in addition to communicating societal values, sentences also play a role in shaping the values of the community. In a 2016 study, researchers found that the punishment of a crime against a victim correlated with the social standing the victim had within the community. In all cases where the guilty perpetrator was punished the victim's social standing was increased. When a guilty perpetrator went unpunished, however, the social standing of the victim decreased.¹⁵⁹ Another study by researchers from the University of Chicago found the same thing. In most samples, whether a guilty perpetrator was punished correlated with whether people viewed the action as harmful. The researchers also speculated that this could lead to a lower opinion of the victim in the eyes of the public.¹⁶⁰ Even when wrongs are seen as wrongs against the community, a mandatory lesser punishment for crimes against newly born children demeans their dignity. It signals that the community values these lives less.

E. Does the *Charter* Guarantee the Right to Equal Punishment?

One might object that s. 233 does not violate the *Charter* because there is no *Charter* right to equal punishment for victims of serious crimes. Parliament has the right to create different penalties for different crimes because of social context.¹⁶¹ They are partly correct. Victims do not have freestanding right to a specific punishment for wrongdoing under the *Charter*.¹⁶² The state is able to determine criminal sanctions and it is

¹⁵⁸ *R v M(CA)*, [1996] 1 SCR 500 at para 81, 105 CCC (3d) 327 [emphasis added].

¹⁵⁹ Kenworthy Bilz, "Testing the Expressive Theory of Punishment" (2016) 13:2 J Empirical Leg Stud 358 at 371-375.

¹⁶⁰ Jessica Bregant, Eugene M Caruso & Alex Shaw, "Expressing What? Evaluating the Expressive Value of Punishment" (2016) SSRN Paper at 35, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816543>.

¹⁶¹ This insight was also provided to me by Professor Jochelson.

¹⁶² *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 116-118, 157-167, [2014]

permissible for them to limit the redress victims receive. Civil redress is restricted via limitation periods¹⁶³ and criminal punishments are restricted via maximum penalties.

This does not, however, mean s. 233 is not discriminatory. In setting criminal penalties, Parliament must respect the *Charter* right to equality. It cannot, for example legislate that murders be punished more harshly when committed by men.¹⁶⁴ While Parliament can assign lesser penalties for killings where a perpetrator's conduct is considered less morally blameworthy, it cannot pass laws that have the effect of deeming conduct to be less blameworthy because of the victim's age. Parliament may legislate that provocation by a victim makes a crime against them less blameworthy. They cannot pass laws that, in effect, deem particular conduct to be provocative because of discriminatory beliefs about women.¹⁶⁵ The same prohibition applies to sentencing. A judge cannot give a male perpetrator a more lenient sentence simply because his female victim was provocatively dressed.¹⁶⁶ This would violate the s.15 (1) equality guarantee.¹⁶⁷

Section 233 violates a newly born child's equality rights in a similar way. It mandates that the killings of newly born children be punished much less harshly than those of older children. This is in accordance with the ageist stereotype that the unlawful killings of newly born children are not as serious as the unlawful killings of others. It holds that their lives are less valuable and less worthy of recognition as members of Canadian society than the lives of those older than them. It is just as unconstitutional to have legislation that has the effect of making a killing less morally blameworthy due to the victim's age as it would be to have legislation that has the effect of holding that a murder less morally blameworthy because of the victim's gender.

3 SCR 176.

¹⁶³ *Ibid* at para 160.

¹⁶⁴ *R v Hess and Nyugen*, [1990] 2 SCR 906 at 928, 119 NR 353.

¹⁶⁵ *R v Humaid* (2006), 81 OR (3d) 456, [2006] OJ No 1507 (QL) at para 93 provides an example about how cultural beliefs about the inferiority of women were used to advance a provocation defence. This submission was rejected as these beliefs were in conflict with both constitutional and Canadian values.

¹⁶⁶ *R v Sandercock*, 1985 ABCA 218 at para 29, 62 AR 382.

¹⁶⁷ *R v Ewanchuk*, [1999] 1 SCR 330 at para 97, 169 DLR (4th) 193 (L'Heureux-Dube J concurring).

While the *Charter* does not guarantee the right to specific punishments, it forbids setting or administering them in a discriminatory manner. Section 233 breaches this prohibition and is thus unconstitutional.

F. Does Section 233 Correspond to a Newly Born Child's Circumstances?

One may also object that age is unlike gender and can be a factor when determining punishments.¹⁶⁸ Courts routinely consider a perpetrator's age when determining the length of a sentence. Perpetrators who are under eighteen years of age are assumed to be less culpable than adults. Rather than being discriminatory, this distinction is a principle of fundamental justice.¹⁶⁹ Laws will not be deemed discriminatory under the *Charter* if they corresponds to the capacities and circumstances of Canadians.¹⁷⁰ For example laws that mandate a harsher punishment for the murder of an on-duty police officer or prison guard are not discriminatory because they correspond to those victims' circumstances.¹⁷¹ On-duty Police officers or prison guards are at a greater risk of being murdered by criminals or inmates and thus laws that mandate a harsher punishment for such murders are meant to correspond to this. Some argue that since newly born children cannot contemplate approaching suffering or death, society does not suffer as great of a loss than when someone older is killed.¹⁷² Therefore s. 233 corresponds to the circumstances of newly born children and is not discriminatory.

While age can be a factor in criminal sentencing, this alone does not prove that s. 233 corresponds to a newly born child's circumstances. While minors are entitled to a presumption of diminished culpability, that presumption is rebuttable. A young person can receive an adult sentence if the government can rebut the presumption and establish that a youth sentence would be incapable of holding them accountable for their

¹⁶⁸ Pnina Alon-Shenker, "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" (2012) 25:2 Can JL & Jur 243 at 243. See also *Gosselin v Quebec*, 2002 SCC 84 at paras 31–32, [2002] 4 SCR 429.

¹⁶⁹ *R v DB*, 2008 SCC 25 at paras 46–69, [2008] 2 SCR 3.

¹⁷⁰ *Canadian Foundation*, *supra* note 101 at para 57.

¹⁷¹ Miller, *supra* note 95 **Error! Bookmark not defined.** at 696.

¹⁷² Backhouse, *supra* note 11 at 463. See also Peter Singer, *Practical Ethics*, 3rd ed (Cambridge: Cambridge University Press, 2011) at 151–152.

actions.¹⁷³ Youths can receive life sentences for murder.¹⁷⁴ Under s. 233, the harshest penalty a mother can get for killing her newly born child is five years imprisonment, no matter how culpable she is or how heinous the killing. The sentencing regime for young offenders corresponds to a youth's capacity and circumstances because there is a range of proportionate sanctions available. This same is not true of s. 233.

The argument s. 233 responds to the circumstances of the victim also fails. Society does not automatically reduce the sentences of those who kill people unable to contemplate approaching death. Canadian law does not require a lower penalty for murder of comatose or brain damaged victims. On the contrary, the victims' vulnerability will be an aggravating factor in sentencing.¹⁷⁵

Also, the realities of infancy show that s. 233 does not correspond to a newly born child's capacities, and circumstances. These children are incredibly vulnerable and must rely on others to survive. They cannot resist the mildest of assaults. In England, which has a law like s. 233, newly born children are three to four times more likely to be killed than any other age group.¹⁷⁶ The threshold for a disturbed mind, however, is absurdly low. In *R v Coombs*,¹⁷⁷ anger from childbirth was held to suffice.¹⁷⁸ Other courts have set similar thresholds.¹⁷⁹ As Heather Leigh Stangle writes:

In Canada, a woman does not need to prove that her actions *resulted* from mental defect; she need only prove that she suffered from some type of general mental disturbance...As is the case in England, a Canadian mother's burden of proof is very low; her word is all that the law requires. The government, on the other hand, must prove beyond a reasonable doubt that a woman had fully recovered from childbirth at the time of the killing...As this burden is nearly impossible to meet, the Canadian Act effectively excuses all acts of [murderous] maternal aggression during the first year following childbirth.¹⁸⁰

¹⁷³ *Youth Criminal Justice Act*, SC 2002, c 1, ss 72(1)(a)-(b).

¹⁷⁴ *R v Ellacott*, 2017 ONCA 681 at paras 7-8, 141 WCB (2d) 552.

¹⁷⁵ *Latimer*, *supra* note 135 at para 85.

¹⁷⁶ Heather Leigh Stangle, "Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide" (2008) 50:2 *Wm & Mary L Rev* 699 at 723, n 150.

¹⁷⁷ *R v Coombs*, 2003 ABQB 818, 343 AR 212.

¹⁷⁸ *Ibid* at para 85.

¹⁷⁹ *R v Effert*, 2011 ABCA 134 at para 24, 502 AR 276 [*Effert*].

¹⁸⁰ Stangle, *supra* note 176 at 718 [emphasis added].

This means that nearly any mother who kills her newly born child will benefit from infanticide's lesser penalty. This makes infants particularly vulnerable to murder by their mothers. With a maximum penalty of five years, there is much less disincentive for a mother to kill her newly born child if she finds childrearing too difficult. One legislator acknowledged this problem when s. 233 was first being debated. Member of Parliament Fulton pointed out that:

What you [the legislators] are actually doing [by passing this legislation] is making a crime, which is most shocking if committed, subject to a less heavy penalty...[W]hy make it [killing a newly born child] a lesser penalty and thus run the risk of encouraging persons to commit the crime? So long as they might be convicted of murder, they would be less inclined to commit the crime, but if they knew they could get a maximum of only three years, those who might be tempted might yield to the temptation to commit the crime?¹⁸¹

Laws that mandate harsher punishments for the murder of on-duty police officers and prison guards are meant to correspond to their vulnerability when they are performing their duties.¹⁸² Newly born children are even more vulnerable to murder and s. 233 increases their vulnerability. Therefore, it does not correspond to their needs, capacities, and circumstances.

G. Is a Constitutional Challenge to Section 233 too Novel?

Lastly, one might claim that this analysis of s. 233 is too novel and has no legal precedent under Canadian law.¹⁸³ There are many cases where a criminal statute has been deemed unconstitutional because its penalty was too harsh. There is no case law where a statutory offence or sentencing regime has been found unconstitutional because its penalty is too lenient. An argument's newness, however, does not necessarily undermine its validity. Canada's Supreme Court takes novel approaches in certain circumstances. Also, many arguments about *Charter* rights were once novel. Just because an argument is novel does not mean it is meritless.

Another version of this claim comes in the form of a question: if s.233 is unconstitutional why was there no constitutional challenge to the

¹⁸¹ House of Commons Debates, *supra* note 13 at 5187.

¹⁸² Miller, *supra* note 95 at 696.

¹⁸³ I thank Professor Richard Jochelson of the University of Manitoba for this observation.

legislation in *Borowiec*?¹⁸⁴ The answer is that there was no constitutional challenge because no party critical of s. 233 could constitutionally challenge the legislation. While the Crown can suggest interpreting legislation in accordance with *Charter* values,¹⁸⁵ it cannot constitutionally challenge legislation that is before the courts.¹⁸⁶ The Crown's inability to mount a constitutional challenge to legislation because of the role it plays in a criminal trial does not mean that the legislation at issue is constitutional.

IV. IS SECTION 233 A “REASONABLE LIMIT” ON AN INFANT’S RIGHTS?

All this noted, a law that infringes upon a constitutional right will still be upheld if it can be justified under s. 1 of the *Charter* which states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁸⁷

To justify an infringement upon a constitutional right, the government must meet the criteria detailed in *R v Oakes*.¹⁸⁸ The infringing legislation must have a pressing and substantial objective that justifies limiting the right in question.¹⁸⁹ The infringement upon the right must also be rationally connected to the legislation's objective and impair the right as little as reasonably possible to achieve its objective.¹⁹⁰ Lastly, the legislation's harms cannot outweigh its benefits.¹⁹¹ The infanticide provision is not a reasonable limit. While the objective of preventing jury nullification is pressing and substantial, the legislation does not satisfy the rest of the criteria.

¹⁸⁴ I would like to thank an anonymous reviewer for providing this insight.

¹⁸⁵ *R v JA*, 2011 SCC 28, [2011] 2 SCR 440 (Factum of the Appellant) at para 8, online: Supreme Court of Canada <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/33684/FM010_Appellant_HerMajesty-theQueen.pdf>.

¹⁸⁶ *Borowiec* LEAF Factum, *supra* note 107 at para 16.

¹⁸⁷ *Charter*, *supra* note 9, s 1.

¹⁸⁸ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

¹⁸⁹ *Ibid* at 138–139.

¹⁹⁰ *Ibid* at 139.

¹⁹¹ *Ibid* at 139–140.

A. Pressing and Substantial Objective

In *R v Morgentaler*,¹⁹² Chief Justice Brian Dickson summed up the dangers of jury nullification well when he wrote:

[T]hat a jury may...ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of [jury nullification].¹⁹³

Preventing such occurrences and ensuring guilty mothers are punished for killing their newly born children instead of being acquitted via nullification is a pressing and substantial objective.

B. Rational Connection

Section 233, however, is no longer as necessary to achieve the objective of jury nullification avoidance. Juries will no longer nullify on the basis of a potential death penalty since Canada abolished the death penalty in 1976.¹⁹⁴ To found a rational connection, in this case, would mean that an infant's rights would be limited "where there is no countervailing right [or interest] and hence no reason to limit them."¹⁹⁵ Is the stigma of being labelled a murderer or manslaughterer enough to sustain a rational connection? This seems unlikely. Today's social landscape is much different from the one in 1948. The circumstances that earned a jury's sympathy are

¹⁹² *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

¹⁹³ *Ibid* at 77.

¹⁹⁴ *United States v Burns*, 2001 SCC 7 at para 33, [2001] 1 SCR 283.

¹⁹⁵ *R v NS*, 2012 SCC 72 at para 51, [2012] 3 SCR 726. Some may argue that section 233 is still necessary because Canada has mandatory minimum sentences for first-degree murder and second-degree murder (life without parole for at least 25 years for the former and life without parole for at least ten years for the latter). See *R v Tran*, 2010 SCC 58 at para 22, [2010] 3 SCR 350 where similar reasoning is applied in the context of the provocation defence. I will respond to this point when I discuss whether section 233 minimally impairs a newly born child's rights.

much less common. When s. 233 was passed, women who killed their newly born children were often too poor to raise them or coerced into sex by their employers or their employer's relatives.¹⁹⁶ Presently, single motherhood is morally acceptable. Canada's welfare system has made giving a child up for adoption viable for those who cannot raise children.¹⁹⁷ As Sanjeev Anand writes "[t]he conditions that created a sympathetic response to young women facing unwanted children...no longer exist, at least to the same extent."¹⁹⁸

Evidence also suggests s. 233's infringements undermine its goal. Presently, s. 233 may also lead to a different type of jury nullification. Juries may think five years imprisonment is too lenient a punishment. Thus, a jury may find such women guilty of murder even though all the elements of infanticide are present and she is legally entitled to "a verdict of not guilty of murder but guilty of infanticide."¹⁹⁹ This is called reverse jury nullification. It is where a jury convicts a defendant even though the law entitles him or her to an acquittal or a conviction on a lesser charge.²⁰⁰ Some jurors may feel the crime a defendant has been charged with is so heinous that a guilty verdict is necessary to vindicate the victim even if there is reasonable doubt about the defendant's guilt.²⁰¹ For example, one study found that sample juries aware of their power to nullify would always convict a defendant accused of impaired driving causing death (called reckless vehicular homicide in the study) even if the prosecution had not proven the defendant's guilt beyond a reasonable doubt.²⁰² They did this because they want to morally condemn impaired drivers who cause death through their negligence (even if the defendant was not one of those drivers).²⁰³

¹⁹⁶ Backhouse, *supra* note 11 at 457.

¹⁹⁷ Anand, *supra* note 7 at 718.

¹⁹⁸ *Ibid.*

¹⁹⁹ Borowiec, *supra* note 22 at para 17.

²⁰⁰ Saul M Kassan & Lawrence S Wrightman, *The American Jury on Trial: Psychological Perspectives* (New York: Taylor & Francis, 1988) at 161.

²⁰¹ Travis Hreno, "Jury Nullifications and the Bad Faith Juror" (2013) 1:1 L Ethics & Philosophy 53 at 60.

²⁰² *Ibid* at 62-63.

²⁰³ *Ibid.*

Section 233 encourages such jury nullification. Since any disturbance from the effects of giving childbirth, however slight, meets the requirement of a disturbed mind for infanticide, almost no mother who kills her newly born biological child can be convicted of murder.²⁰⁴ This would be true even if she fully appreciated what she was doing, or planned the killing far in advance.²⁰⁵ A woman who the jury believes is factually (and morally) guilty of murder (and would be guilty of murder as a matter of law but for s. 233) must be found guilty of infanticide and sentenced accordingly. Presently, Canadian juries are mindful of society's interest to protect children from violence by their caretakers (and to morally condemn such violence).²⁰⁶ Like the sample juries in the above study, a jury may engage in reverse nullification and convict a mother who kills her newly born child of murder even if she is legally entitled to an acquittal on that charge.

Indeed, such reverse jury nullification may have already occurred. Consider the Katrina Effert case. In 2005, Effert gave birth to a son. A few hours later, she strangled him to death with her underwear.²⁰⁷ She was charged with second-degree murder.²⁰⁸ Though all of the elements of infanticide were present, the jury convicted her of second-degree murder.²⁰⁹ Eventually, the Alberta Court of Appeal set aside her murder conviction and substituted a conviction for infanticide.²¹⁰ She received a three-year suspended sentence.²¹¹ The Alberta Court of Appeal said "it is impossible to say that there was not at least a reasonable doubt [that infanticide had been disproven] present on this record."²¹² They held that the jury must not have been acting judicially when they convicted Effert because they were

²⁰⁴ *R v Borowiec*, 2016 SCC 11 at para 13, [2016] 1 SCR 80 (Factum of the Appellant) at para 3, online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36585/FM010_Appellant_Her-Majesty-the-Queen.pdf> [*Borowiec* Appellant's Factum].

²⁰⁵ *LB*, *supra* note 8 at paras 35–36.

²⁰⁶ *Borowiec* Appellant's Factum, *supra* note 205 at para 70.

²⁰⁷ *Effert*, *supra* note 179 **Error! Bookmark not defined.** at para 2.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at para 7.

²¹⁰ *Ibid* at para 31.

²¹¹ *Leung*, *supra* note 53 at para 62.

²¹² *Effert*, *supra* note 179 at para 29.

“distracted by the tragic circumstances of the death of a newborn infant.”²¹³ Section 233 lead to reverse jury nullification in this case.

One of Chief Justice Dickson’s concerns about jury nullification is that juries would convict a defendant they disliked even if the law required an acquittal. Section 233’s goal was to prevent jury nullification, now it is likely to cause it. This shows that there is no longer a “rational connection” between its objective and the infringement of a newly born child’s rights.

C. Minimal Impairment

Neither is s. 233 a minimal impairment of an infant’s rights. One could prevent jury nullification without such a low standard for a disturbed mind or such a low maximum punishment. Consider the proposal of Eric Vallillee who writes that s. 233’s goals could be achieved by:

[A] modernized partial defence of infanticide should require the following: (1) that the mother be clinically diagnosed with a post-childbirth psychological disorder, and (2)...the disorder substantially reduced her ability to make a reasonable decision about the care of her newborn child. What constitutes “substantially” should be a question of fact left to the jury. This is similar to the defence of mental disorder, but it requires a lower threshold.²¹⁴

The maximum penalty for infanticide could be the same as the one for manslaughter. This would prevent nullification by allowing juries to show mercy if warranted. The threshold for a disturbed mind would not be so low as to “disrespect the [infant’s] memory.”²¹⁵

Another way to accomplish this goal is to enact a statutory defence of diminished responsibility that would reduce murder to manslaughter. The defence would be distinct from other partial defences like provocation and intoxication. It would be available in cases where a defendant’s reasoning skills or ability to appreciate their actions is impaired, but not absent. This could be due to a medical condition that falls short of insanity or a significant stress that goes beyond the ordinary tribulations of life.²¹⁶ Its

²¹³ *Ibid* at para 30.

²¹⁴ Vallillee, *supra* note 2 at 11.

²¹⁵ *Borowiec*, *supra* note 22 at para 34.

²¹⁶ Mark Gannage, “The Defence of Diminished Responsibility in Canadian Criminal Law” (1981) 19:2 *Osgoode Hall LJ* at 303. This solution would also allow mothers who kill their newly born children while they are affected by a serious mental illness but are not legally insane to be shown mercy without discriminating against newly born children on the basis of age.

availability would not depend on the victim's age. The accused would have to prove diminished responsibility on a balance of probabilities.²¹⁷ A manslaughter conviction does not usually require a minimum sentence.²¹⁸ The maximum penalty for manslaughter, however, is life imprisonment.²¹⁹ Mothers who kill their infants might, but would not have to be, sentenced to at least ten or twenty-five years in prison. With the main reason for jury nullification resolved, s. 233 becomes unnecessary. Jury nullification can be avoided without legislation that demeans an infant's dignity. Section 233 does not minimally impair an infant's rights.

D. Costs and Benefits of Section 233

Lastly, s. 233's harms outweigh its benefits. The benefit of preventing jury nullification is dwarfed by the damage s. 233 does to a newly born child's dignity. It leaves him or her vulnerable to murder by its mother and cheapens its life. The infanticide provision cannot be justified under the *Charter*.

V. CHALLENGING CANADA'S INFANTICIDE LEGISLATION

A person or organization could challenge s. 233 by filing a statement of claim with a local superior court. For the court to agree to hear the claim the claimants must have standing. People automatically have private standing when their private rights are at stake or they are impacted by a decision's outcome to a greater extent than the general public.²²⁰ This is to ensure that judicial resources are used properly, avoid frivolous litigation, and maintain the judiciary's proper role in government.²²¹ It is unlikely someone with private standing will challenge s. 233.

²¹⁷ Anand, *supra* note 7 at 727.

²¹⁸ There is a mandatory minimum sentence of four years imprisonment for those who commit manslaughter with a firearm. See *Criminal Code*, *supra* note 1, s 236. Parliament could legislate that this mandatory sentence would be waived when diminished responsibility has been proven.

²¹⁹ *Criminal Code*, *supra* note 1, s 236(b).

²²⁰ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 1, [2012] 2 SCR 524 [*Downtown Eastside*].

²²¹ *Ibid*.

There are, however, parties who could be granted public interest standing to challenge it. Public interest standing arises from the principle of legality.²²² This principle requires state action to conform to the *Charter* and that there must be a viable way to challenge state action.²²³ To be granted this standing, a claimant must have a genuine interest in the litigation at hand, their claim must raise a serious constitutional issue, and there must be no other reasonable or effective way to bring the matter before a court.²²⁴ Claimants can also satisfy the third criterion by showing a constitutional challenge is a reasonable or effective way of bringing the issue before a court.²²⁵ There are individuals and organizations that have a genuine interest in s. 233's constitutionality. Pro-life groups could challenge the law as they often see infanticide as an "after-birth abortion."²²⁶ Child welfare charities also have an interest in s. 233. One of their mandates is to protect children from physical abuse, neglect, and death at the hands of their parents.²²⁷ It is suggested that s. 233 makes such deaths more likely, and thus, these organizations have an interest in challenging its constitutionality.

A legal challenge to s. 233 also raises a serious constitutional issue: whether the infanticide violates the equality rights of newly born children.²²⁸ The third requirement is met regardless of the standard applied. A constitutional challenge from the above parties is both a reasonable and effective way of bringing the matter before the courts and the *only* reasonable and effective way to do so. Newly born children cannot sue on their own behalf. Action from litigation guardians is also unlikely, as mothers who benefit from such legislation have no reason to challenge it. Challenges

²²² *Ibid* at para 31.

²²³ *Ibid*.

²²⁴ *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 575 at 597–598, 130 DLR (3d) 588 [Borowski].

²²⁵ *Downtown Eastside*, *supra* note 220 at para 2.

²²⁶ Alberto Guiblini & Francesca Minerva, "After Birth Abortion: Why Should the Baby Live?" (2013) 39:5 J Medical Ethics 261 at 261. See also Steve Weatherbe, "After-Birth Abortion? Judge Lets Woman Walk After Drowning Her Newborn," *Lifesite News* (2 December 2016), online: <<https://www.lifesitenews.com/news/after-birth-abortion-judge-lets-woman-walk-after-drowning-her-newborn>>.

²²⁷ Jonathan Herring, *Family Law: A Very Short Introduction* (Oxford: Oxford University Press, 2014) at 84–85. See also *Canadian Foundation*, *supra* note 101 at para 69.

²²⁸ *Borowski*, *supra* note 224 at 581, 597.

from other members of the newly born child's family are also ineffective as they will not know if a mother is likely to commit infanticide. Any constitutional challenge will need to come from another party.²²⁹

VI. CONCLUSION

Section 233 has been in the *Criminal Code* for almost 70 years. When it was first passed, all those convicted of murder were sentenced to death. Women who killed their infants were often poor, coerced into sex by employers, and wanted to conform to social norms. There were very few social services and putting a child up for adoption was not a viable alternative.²³⁰ This made juries extremely reluctant to convict these mothers, even if they were clearly guilty. Section 233 created the lesser offence of infanticide to prevent this jury nullification.

Things are different today. Canada has no death penalty, the social stigma arising from the antiquated conception of illegitimacy has abated, and there is a social system that makes adoption of children much easier.²³¹ Canada also has a constitution that guarantees everyone, including infants, equality before the law. Section 233 violates this guarantee by mandating that all mothers who kill their biological infants be given no more than five years of imprisonment. This is true even if the murder was premeditated²³² or committed after the mother has been abusing the child for months.²³³ Yet if she kills her child and that child is more than one year of age, she faces a possible life sentence. This sends the message that the killing of an infant is less heinous than the murder of someone who is at least one-year-old. This is destructive of an infant's dignity. Preventing jury nullification is admirable, but this objective could be achieved by creating a partial defence of diminished responsibility that can be put forward regardless of a victim's age.

²²⁹ When section 233's challengers file their claim, they must also file and serve a Notice of Constitutional Question to Canada's Attorney General at least fifteen days before the case is heard. If they do not, their case may be dismissed regardless of its merits. *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at para 5, 142 DLR (4th) 385. See also *Courts of Justice Act*, RSO 1990, c C.43, ss 109(1), 109(2.2).

²³⁰ Anand, *supra* note 7 at 718.

²³¹ *Ibid.*

²³² *LB*, *supra* note 8 at para 26.

²³³ Kramar, *supra* note 14 at 121-122. See also *Del Rio*, *supra* note 58.

What may have been constitutional in 1948 may be unconstitutional in 2018. This is the case with Canada's infanticide provision. It must be challenged and struck down.

Remedying the Remedy: *Bedford's* Suspended Declaration of Invalidity^{*}

CAROLYN MOULAND^{**}

ABSTRACT

Undoubtedly, *Bedford v Canada's* doctrinal renovations and innovations are reshaping the future of *Charter* enforcement. However, the applause for *Bedford's* progress in assessing *Charter* violations falls flat when it comes to remedying *Charter* violations. With an eye to reform, this article probes the regressive result of *Bedford's* remedy, the suspended declaration of invalidity, which kept the unconstitutional prostitution prohibitions in force for one year. Part I will depict how *Bedford's* remedy frustrated three remedial objectives: 1. promoting the public interest by maintaining the rule of law, public safety, and equality; 2. facilitating institutional dialogue between judges and legislators about rights and freedoms; and 3. fostering consultative dialogue between marginalized groups and the government. On top of the ongoing injustice of enduring another year of “fundamentally flawed laws” held to aggravate the risk of disease, violence, and death, rights-bearers endangered by the s. 7 violation faced procedural harm during Parliament's fast-tracked, fractured reply to *Bedford's* ruling.

To remedy *Bedford's* remedy and suspended declarations writ large, Part II advances “deliberate remedial procedure,” which configures whether and how long to suspend declarations of invalidity. Bookended by classic and contemporary Supreme Court of Canada jurisprudence, including the *Reference re Manitoba Language Rights* and *Carter v Canada*, the mainstays of

^{*} This article was adapted from an earlier paper prepared for a course in Advanced Constitutional Law co-taught by Professor Kent Roach and the Honourable Justice John Norris, now of the Federal Court of Canada. Their seminar provided the inspiration and forum to develop these ideas. I am grateful for their wisdom and expertise. I am also indebted to Professor Hamish Stewart for his insightful comments and support.

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deliberative remedial procedure are a separate remedial hearing, retaining jurisdiction, broader participation, enriched evidence, and interim measures (such as guidelines and constitutional exemptions) to mitigate damage to individual rights. Deliberative remedial procedure calls upon the judiciary's traditional role to protect minorities, enlists the modern movement of access to justice, and is inspired by society's demand for evidence-based justifications.

Keywords: *Bedford v Canada*; right to life, liberty, and security of the person; constitutional remedies; suspended declarations of invalidity; rule of law; *Charter* dialogue; meaningful consultation; litigation procedure; retaining jurisdiction; constitutional exemptions; s. 24(1) of the *Canadian Charter of Rights and Freedoms*, s. 52(1) of the *Constitution Act, 1982*; prostitution; sex work; law reform

I. *BEDFORD* AND BILL C-36

When the Supreme Court of Canada unanimously held in *Bedford v Canada*¹ that prohibitions against keeping bawdy-houses, living on the avails of prostitution, and publicly communicating for prostitution² unjustifiably infringed s. 7 of the *Canadian Charter of Rights and Freedoms*,³ an interested bystander might have tallied the case as a triumph for sex workers.⁴ Despite precedent holding that the impugned laws passed constitutional muster, richer evidence and new legal argument established that the *Criminal Code* prevented prostitutes from taking safeguards to protect themselves while partaking in (what was then) a lawful activity.⁵

¹ *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], rev'g in part 2012 ONCA 186, 109 OR (3d) 1 [*Bedford ONCA*], aff'g in part 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford ONSC*].

² *Criminal Code*, RSC 1985 c C-46, ss 197(1), 210, 212(1)(j), 213(1)(c).

³ *Canadian Charter of Right and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁴ Where capitalized, "Court" refers to the Supreme Court of Canada. "Prostitution" and "sex work" are used interchangeably, according to each term's historical legal context.

⁵ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123, [1990] 4 WWR 481.

It would be reasonable to expect that prostitutes and society would be cured of those unconstitutional laws. After all, the *Charter* is part of Canada's Constitution, and the Constitution empowers judges to strike down unconstitutional laws.⁶ Once laws are found unjustifiable in Canada's free and democratic society, read literally, s. 52(1), the Constitution's supremacy clause, leaves no time to wait:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁷

Plus, invalidating unconstitutional legislation is more than just a reasonable expectation of the citizenry. To the judiciary, the supremacy clause entrusts a power and an obligation. As a duty bestowed upon unelected judges by Parliament, s. 52(1) legitimizes judges' work "to ensure that the constitutional law prevails."⁸ So, when *Bedford's* immediate result allowed the unconstitutional laws to temporarily prevail, it is hardly surprising that people would feel puzzled at this paradox. What would happen to a prostitute on probation who heard the news of *Bedford*? What if that person did not wait before jumping into the car of a violent perpetrator, for fear of a police officer rounding the corner?⁹ Individuals selling sex would have to wait a whole year for Parliament to make new laws. Although the Court found that safeguards (such as drivers, bodyguards, and screening clients) would reduce the daily dangers of prostitution, the Court kept the unconstitutional laws in force, citing public concern, and that Parliament deserved time to "devise a new approach."¹⁰ By enacting the new

⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 52.

⁷ *Ibid*; *R v Ferguson*, 2008 SCC 6 at paras 64–65, [2008] 1 SCR 96 [*Ferguson*]; Kent Roach, "Principled Remedial Discretion Under the *Charter*" (2004), 25 SCLR (2d) 101 at 105 [Roach, "Principled Remedial Discretion"]; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book, 2014) at 3.210, 14.40 [Roach, *Constitutional Remedies*].

⁸ *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, [1985] SCJ No 36 (QL) at 745 [*Manitoba Language Rights*]; *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 at 143 per Dickson CJC. On section 52(1)'s legitimating function, see Hon Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 *Alta L Rev* 540 [McLachlin, "A New Role"] at 554.

⁹ This hypothetical comes from *Bedford*, *supra* note 1 at para 158.

¹⁰ *Bedford*, *supra* note 1 at para 165.

offence of purchasing sexual services, Parliament's swift response made prostitution a de facto crime for the first time in Canadian history.¹¹

For Valerie Scott, one of *Bedford's* three applicants, the Court's delivery of the final judgment marked "the best of day of [her] life."¹² Yet that victory was tempered with trepidation at the government's impending response: "Amy and I were worried,"¹³ she explained. "We didn't expect it to be this bad. We didn't expect it to be simply rewriting the laws in different language."¹⁴ Regardless of any final legislative response, real people like Valerie Scott have real expectations to be freed from unconstitutional laws violating their rights. They expect the Court's remedy to cure the harm they have suffered, not aggravate it. Suspending a declaration of invalidity defeats this expectation, and the text of the Constitution. If the Court has a duty to uphold the *Charter*, then how could, and why should, *Charter*-infringing laws remain on the books?

These social and political problems are also legal problems perturbing lawyers and scholars. Suspended declarations of invalidity have attracted censure from commentators who have rallied against their routine use. This remedy has been accused of contravening the formal dictates of the Constitution, tantamount to abdicating the judicial office,¹⁵ contracting the vindication of individual rights, and lulling legislatures into lethargic constitutional minimalism – all without satisfactory justification.¹⁶ Paying

¹¹ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 ["Bill C-36"]; Department of Justice Canada, "Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act*" (2015), online: <<http://www.justice.gc.ca/eng/rp-pt/other-autre/protect/p1.html>> [Technical Paper].

¹² Erika Tucker, "Why Ex-Sex Worker Calls Prostitution Law Consultation 'Ridiculous,'" *Global News* (30 April 2014), online: <<http://globalnews.ca/news/1301781/why-ex-sex-worker-calls-prostitution-law-consultation-ridiculous/>>.

¹³ Ella Bedard, "The Failures of Canada's New Sex Work Legislation," *Rank and File* (7 April 2015), online: <<http://rankandfile.ca/the-failures-of-canadas-new-sex-work-legislation/>>.

¹⁴ *Ibid.*

¹⁵ Bruce Ryder, "Suspending the *Charter*" (2003), 21 SCLR (2d) 267 at 282.

¹⁶ Sarah Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" (2015) 78 Sask L Rev 201; Grant Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity" (2011) 49 Alta L Rev 107; Ryder, *supra* note 15; Lorraine Weinrib, "Suspended Invalidity Orders Out of Sync with Constitution," *Law Times* (14 August 2006), online: <<http://www.lawtimesnews.com/200608211268/headline-news/>>

particular care to *Bedford*, Robert Leckey has diagnosed harms of remedial discretion, without prescribing any new cures.¹⁷ In excavating *Bedford*'s aftermath, I magnify the extent of those harms, and unearth new ones.

Nevertheless, suspended declarations may possess salvageable worth. Promising doctrinal proposals, including parlaying proportionality into remedial discretion, as Bruce Ryder and Grant Hoole have pitched, can strengthen suspended declarations' weaknesses.¹⁸ Developments offered by Kent Roach, such as "declarations plus"¹⁹ and two-track remedies, can provide individual and systemic relief.²⁰ The reform I advance, which I call "deliberative remedial procedure," complements these valuable contributions, but is distinct by fixing upon procedure. It is grounded in retaining jurisdiction, a separate remedial hearing, and interim measures to minimize damage to individual rights.

Beginning with the suspended declaration's genesis, Part I explores its three primary functions to discuss why it is a useful remedy: to promote the public interest, facilitate institutional dialogue between judges and legislators, and foster inclusive consultative dialogue between marginalized people and the government. Theoretically, I presume these functions are constitutionally legitimate. Turning to *Bedford*, I scrutinize each function against the government's reply to the Court. This post-mortem forms the impetus for Part II's deliberative remedial procedure. With suggestions for alternatives to *Bedford*'s remedy, Part II draws from seminal constitutional cases, including *Reference re Manitoba Language Rights*, *Doucet-Boudreau v Nova Scotia*,²¹ and *Carter v Canada*,²² and compares Canadian and South African approaches. To remedy the remedy, deliberate remedial procedure

suspended-invalidity-orders-out-of-sync-with-constitution>.

¹⁷ Robert Leckey, "The Harms of Remedial Discretion" (2016) 14 ICON 584 [Leckey, "Harms"]; Robert Leckey, "Enforcing Laws that Infringe Rights" [2016] PL 206 [Leckey, "Enforcing Laws"]; Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015) [Leckey, *Bills of Rights*].

¹⁸ See especially Hoole, *supra* note 16; Ryder, *supra* note 15. See also Burningham, *supra* note 16.

¹⁹ Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response" (2016) 66 UTLJ 3 [Roach, "Polycentricity"].

²⁰ *Ibid*; Roach, *Constitutional Remedies*, *supra* note 7 at 12.700–12.820.

²¹ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [Doucet-Boudreau].

²² *Carter v Canada* (AG), 2015 SCC 5, [2015] 1 SCR 331 [Carter 2015].

figures whether and how long to suspend declarations of invalidity. Deliberative remedial procedure marries the judiciary's traditional role to protect minorities with the contemporary concern for access to justice, and is inspired by society's demand for evidence-based justifications.

A. The Genesis of the Suspended Declaration

A judicial invention synonymously called the suspended declaration, delayed declaration, delayed nullification, and temporary invalidity generates the power to keep unconstitutional laws in force.²³ This invention operates like a snooze button on an alarm clock: while the Court's declaration lies dormant, the Legislature rises to the task of constitutional compliance. The suspended declaration emerged nearly three decades before *Bedford*, in *Reference re Manitoba Language Rights*.²⁴ The Court postponed invalidating Manitoba's unilingual statutes to allow the Legislature time to correct a mass translation omission. Unlike laws invalidated for breaching substantive *Charter* rights, the constitutional infirmity did not stem from overt governmental action, nor an intentionally enacted legislative provision. Instead, the defect was a procedural failure to meet constitutional criteria for legislation's manner and form. Had the Court immediately invalidated the English-only statutes, a state of lawless disorder would have ensued, with all provincial government institutions rendered inoperative, the Legislature's composition erased, and all legal rights and duties under provincial law impugned.

To avoid a legal vacuum while Manitoba enacted bilingual statutes, the Court kept the unilingual statutes temporarily valid. In doing so, the Court observed that s. 52 merely continued the preexisting jurisprudence under colonial legislation.²⁵ Instead of s. 52 providing the solution, the Court identified s. 52 as precisely part of the problem: "[i]ndeed, it is because of the supremacy of law over the government, as established in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect."²⁶ Rather than reading in a power to suspend under s. 52,

²³ For clarity, I use "suspended declaration" and "suspension" but maintain the synonyms where quoted *verbatim*.

²⁴ *Manitoba Language Rights*, *supra* note 8.

²⁵ *Ibid* at 745-746. The disposition did not cite section 52.

²⁶ *Ibid* at 748-749.

the Court identified a series of common law doctrines to justify temporary validity. The *de facto* doctrine, *res judicata*, mistake of law, and the doctrine of necessity stood in “to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.”²⁷ So, although the suspended declaration did not materialize until after the Constitution’s patriation and the *Charter*’s entrenchment, the power to suspend invalidity was inaugurated by unwritten constitutional principles.

Comparatively, South Africa’s Constitution explicitly confers the power to suspend invalidity. Section 172 empowers judges to make “any order that is just and equitable, including...an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”²⁸ South African jurisprudence lends an alternative angle for examining suspended declarations’ place in Canadian law. Tracing the remedy’s provenance in Canada is important for its legitimacy. True, suspending invalidity is an implied power synthesized by the judiciary, but it was not conjured out of thin air. Its ingredients were gathered from principles that are the “lifeblood” of the Constitution.²⁹ For legitimacy’s sake, however, these exigent, implicit origins enhance the need to explicitly justify suspended declarations when there is no constitutional emergency. Next, we will see why and how that emergency use became augmented.

B. Three Functions of the Suspended Declaration: *Schachter*

From the jurisprudence trailing *Manitoba Language Rights*, scholars charted two functions of suspended declarations: promoting the public interest; and “remanding” matters from the Court to the government.³⁰ Promoting the public interest focuses on the relationship between the

²⁷ *Ibid* at 766–768.

²⁸ *Constitution of the Republic of South Africa, 1996, No 108 of 1996*, s 172.

²⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 51 [*Secession of Quebec*].

³⁰ Kent Roach, “Remedial Consensus and Dialogue Under the *Charter*” (2002) 35 UBCL Rev 211 at 219 [Roach, “Remedial Consensus”]; Ryder, *supra* note 15 at 279 calls these “balancing of interests” and “legislative choice” rationales. Hoole, *supra* note 16 calls this first objective the “public interest” and characterizes the second objective as “institutional considerations.” See also Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ at 17–18.

government and the citizenry. As a key determinant for suspending declarations, *Manitoba Language Rights*' rule of law concern was enveloped and expanded into three categories - all concerned with the public interest - in *Schachter v Canada*,³¹ discussed below. By remanding policy issues from judges to politicians, the second dialogic function concentrates on the relationship among the judicial, legislative, and executive branches. Neither of these two functions served an immediate use for individuals selling sex who were affected by *Bedford*. This raises a third, undervalued function: fostering consultative dialogue between rights-bearers and the government.

1. *First Function: Promoting the Public Interest*

Preventing lawlessness is one among multiple public interests at stake when judges immediately invalidate legislation. The Court issued a suspended declaration following *R v Swain*'s³² successful *Charter* challenge to the *Criminal Code*'s power to automatically detain "insanity acquittees"³³ at the Lieutenant-Governor's pleasure.³⁴ To avoid compelling judges "to release into the community all insanity acquittees, including those who may well be a danger to the public,"³⁵ the majority suspended the declaration of invalidity for six months.³⁶ Despite the ss. 7 and 9 *Charter* violations, the public safety concern outweighed the detainees' rights, but only temporarily. By setting transitional guidelines to release acquitted detainees, the majority abated the continuing violation of the detainees' rights while Parliament worked at bettering the laws.

After *Swain*, the equality rights decision in *Schachter v Canada* carved a wider place for suspended declarations.³⁷ At *Schachter*'s time, the unemployment insurance scheme excluded biological fathers from parenting benefits. That exclusion could not be rectified by severing the defective provision from the Act, nor by reading paternal benefits into the Act. Since all existing beneficiaries would lose their benefits if the laws were immediately invalidated, the Court suspended its declaration. Building

³¹ *Schachter v Canada*, [1992] 2 SCR 679, [1992] SCJ No 68 (QL) [*Schachter*].

³² *R v Swain*, [1991] 1 SCR 933, 5 CR (4th) 253 [*Swain*].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* at 1021 per Lamer CJ.

³⁶ *Ibid* at 1021-1022 per Lamer CJ.

³⁷ *Schachter*, *supra* note 31.

from *Swain and Manitoba Language Rights*, Lamer CJ enumerated three categories necessitating a suspended declaration: where immediate unconstitutionality would pose a danger to the public, threaten the rule of law, or where the unconstitutionality came from an under inclusive benefits provision.³⁸ With an abundance of caution, Lamer CJ impressed the serious impact of these circumstances from two perspectives, the *Charter* applicants and Parliament:

A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. [It] allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation...

To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature.³⁹

These fears spurred Lamer CJ to caveat that suspended declarations “should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations...relating to the effect of an immediate declaration on the public.”⁴⁰ Despite Lamer CJ’s efforts to leash the suspended declaration to exceptional circumstances, in the post-*Schachter* era, it assumed the very habitual role that he warned against: setting priorities and deadlines for the Legislature. *Bedford’s* 12-month suspended declaration is a vivid example.

i. The Justification for *Bedford’s* Suspended Declaration

Bedford’s perfunctory remedial reasons were fraught with equivocation. Immediate invalidity could have purportedly left “prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it.”⁴¹ Noting that “few countries leave it entirely unregulated,”⁴² the judgment stated, “how prostitution is regulated is a matter of great public concern.”⁴³ Picking up the thread from earlier

³⁸ *Ibid* at 719.

³⁹ *Ibid* at 716–717.

⁴⁰ *Ibid* at 717.

⁴¹ *Bedford*, *supra* note 1 at para 167.

⁴² *Ibid*.

⁴³ *Ibid*.

opponents to suspended declarations who called for *Schachter*'s revival,⁴⁴ Robert Leckey has criticized *Bedford* for departing from *Schachter*, lamenting that "the fundamental rights of a class of rights holders"⁴⁵ are outweighed by "deference to the judge's conjecture about many Canadians' 'great concern' and to Parliament's role in tackling a policy issue."⁴⁶ Conceptually, Leckey claims suspended declarations degrade *Charter* rights to soft constitutional directives, placing constitutional supremacy under strain.⁴⁷

Schachter did garner an allusion in *Bedford*. The Court conceded: "[w]hether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v Canada*), may be subject to debate."⁴⁸ However, like Leckey, I am bothered that Canadians' "great concern"⁴⁹ outweighed the proven, ongoing jeopardy to prostitutes' safety. I also take issue with the inconspicuous way that *Bedford*'s suspended declaration was reasoned. Paying lip service to *Schachter*, without analyzing why *Schachter*'s factors are now debatable, does not clarify remedial doctrine for lower courts and prospective litigants. Equally important, *Bedford*'s remedial discussion does little to explain the outcome to the litigants and provide transparency to the public, which are rationales for giving adequate reasons in criminal and administrative dispositions.⁵⁰

⁴⁴ In addition to Hoole, *supra* note 16, over a decade ago, both Weinrib, *supra* note 16, and Ryder, *supra* note 15, called for *Schachter*'s resurrection. Both Hoole and Ryder advanced expansions to *Schachter*'s categories.

⁴⁵ Leckey, *Bills of Rights*, *supra* note 17 at 141.

⁴⁶ Leckey, *Bills of Rights*, *supra* note 17 at 141. Conjecture may be an overstatement. *Bedford*'s trial record included a 2006 Parliamentary study that discussed public perceptions about prostitution, which had heard directly from some members of the public. See *Bedford* ONSC, *supra* note 1, citing Standing Committee on Justice and Human Rights and Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws: Report of the Standing Committee on Justice and Human Rights* (Ottawa: Communication Canada, 2006).

⁴⁷ Leckey, "Harms," *supra* note 17 at 602–603.

⁴⁸ *Bedford*, *supra* note 1 at para 167.

⁴⁹ *Ibid.*

⁵⁰ On trial judges' duty to give reasons, see *R v REM*, 2008 SCC 51 at paras 11–12, [2008] 3 SCR 3. In administrative law, see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 37–39. Though not endorsing "a general duty to give reasons," see also *Reference re Remuneration of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 156 Nfld & PEIR 1 at paras 181–182 per Lamer CJ.

In one sense, it seems obvious that the public would be concerned about any Charter challenge invoking the right to life, liberty and security that has reached the uppermost echelon of the justice system. If the nature of the Charter right and gravity of the violation captivate the public, then *Bedford* might augur a trend to suspend declarations when s. 7 is violated.⁵¹ If not, then *Bedford* begs the question of what constitutes and measures public concern when judges exercise remedial discretion. Must public concern be proven at trial? Or is judicial notice sufficient? This is problematic, for as Leckey has raised, an offence that has “succumb[ed] to constitutional attack likely no longer represents social consensus.”⁵²

It is also troubling that *ex ante* concern about prostitution in general, devoid of factual context, could rationalize an ongoing danger caused by laws now publicly ventilated as “fundamentally flawed”⁵³ and “inherently bad”⁵⁴ - for defying basic values of justice and rationality, no less.⁵⁵ Knowing the public is generally concerned about how prostitution is regulated is one thing. But taking the existence of public concern to justify jeopardizing anyone’s safety is another. Irrespective of the public’s disagreement on whether and how to control prostitution, many concerned Canadians would not want their personal opinions taken as justifications for endangering anyone, for any amount of time. Moreover, the *ex post* knowledge imparted by the Court’s analysis of how the prohibitions are constitutionally corrosive to vulnerable individuals can inform the public, and consequently may alter public concern. In turn, this would fuel democratic debate to improve Parliament’s legislated response. Besides, even if it is acceptable to situate abstract public concern on the same wavelength as a concrete security risk to vulnerable individuals, sanctioning a temporary departure from the constitutional imperative not only

⁵¹ In addition to *Swain*, *supra* note 32, see *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 [*Demers*]; the 12-month suspension in *Carter* 2015, *supra* note 22, and 4-month extension in *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter* 2016]; *Charkaoui v Canada*, 2007 SCC 9, [2007] 1 SCR 350; and *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 (12-month suspension after partial rehearing (4 August 2005), 29272 (SCC)). But see *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 at paras 31–32.

⁵² Leckey, “Harms,” *supra* note 17 at 595.

⁵³ *Bedford*, *supra* note 1 at para 105.

⁵⁴ *Ibid* at para 123.

⁵⁵ *Ibid* at paras 105, 123; Leckey, “Harms,” *supra* note 17 at 592.

presumes Parliament's competency and capacity to address prostitution - it also presumes Parliament will address prostitution in a democratically legitimate manner. Before observing how Bill C-36's institutional and consultative dialogue destabilized that presumed democratic legitimacy, we will scan how *Bedford*'s suspension fared against factors that the Court did explicitly mention. On this score, by superficially citing *Schachter* with public concern, *Bedford* conflates public interest with an interested public. The public interest, itself a porous concept, is nevertheless a paramount justification for government decisions across all branches of government.⁵⁶ The public interest encapsulates the rule of law, public safety, and equality concerns at *Schachter*'s heart.⁵⁷

ii. *Bedford* and the Public Interest

a. Public Safety

On the public safety plank of the suspension's public interest function, it is perplexing that the Court in *Bedford* concluded that immediate invalidity would leave prostitution totally unregulated.⁵⁸ Granted, the evidence did show that most Western democracies have mechanisms to control prostitution, as even decriminalized jurisdictions transitioned to regulatory regimes.⁵⁹ But what should have been more compelling were the numerous measures remaining within Canadian law to respond to concerns for the safety of prostitutes and the public. Visiting the trial decision adds to this perplexity.

⁵⁶ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 34-42, Abella J (connecting the duty of public actors to act in the public interest to protect values of equality and human rights) at paras 326-340, Côté and Brown JJ (in dissent, asserting that the public interest is served by accommodating difference); see also *R v Morales*, [1992] 3 SCR 711, 17 CR (4th) 74 per Gonthier J (+L'Heureux-Dube J), (dissenting in part on the term as a criterion for bail, but remarking that generally, "[p]ublic interest is at the heart of our legal system and inspires all legislation as well as the administration of justice" at 755-756). As McLachlin CJ wrote regarding defamation in *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640 at para 102, "the public interest is not synonymous with what interests the public."

⁵⁷ Hoole, *supra* note 16 at 133-134, 139, also advocated for the public interest to justify suspended declarations, but joined it with institutional considerations to claim there is a public interest "in the pursuit of an optimal remedy."

⁵⁸ *Bedford*, *supra* note 1 at para 167.

⁵⁹ *Bedford* ONSC, *supra* note 1 at paras 185-213.

Based on the law and the evidentiary record before her, Himel J had reached the opposite conclusion: a legal vacuum would not have ensued from immediate invalidity, and the public would not be threatened.⁶⁰ Notwithstanding the declaration, all concordant child prostitution and exploitation provisions were intact.⁶¹ Procuring offences and prohibitions against impeding traffic were unscathed.⁶² To protect individuals and communities, law enforcement could use existing provisions for combating street disturbances, simple nuisance, indecent exposure, public nudity, and harassment.⁶³ To fight exploitation, prosecutors could have recourse to general criminal offences. Himel J cited successful prosecutions of pimps and clients for uttering threats, intimidation, assault, kidnapping, forcible confinement, sexual assault, and other violent offences, as well as human trafficking prohibitions.⁶⁴ Clients had been punished for theft, robbery, and extortion.⁶⁵ Evidence also showed that police often ignored or were unwilling to use these alternative charges.⁶⁶ This rare and ineffective enforcement of the living on the avails and bawdy house prohibitions, along with the nuisance abatement aim of the communicating prohibition, meant there was no palpable public safety risk outweighing the concrete, continuing security risk of maintaining the trifecta of *Charter*-infringing laws.⁶⁷

Given these considerations, Himel J did not suspend her declaration. Yet when the Court suspended their declaration, they failed to identify any error of law or principle in Himel J's decision. This failure departs from the Court's deferential standard of review for *Charter* remedies.⁶⁸ Since Himel J found adequate regulatory mechanisms existed to address prostitution's safety concerns, the suspended declaration is hardly justifiable. On the

⁶⁰ *Ibid* at paras 535–536.

⁶¹ *Ibid* at para 516 [citations omitted].

⁶² *Ibid* at paras 514–515 [citations omitted].

⁶³ *Ibid* at paras 519–523 [citations omitted].

⁶⁴ *Ibid* at paras 524–534 [citations omitted].

⁶⁵ *Ibid* at paras 530–531 [citations omitted].

⁶⁶ *Ibid* at para 521.

⁶⁷ *Ibid* at paras 536–538.

⁶⁸ *R v Bellusci*, 2012 SCC 44, [2012] 2 SCR 509 at para 30; *Doucet-Boudreau*, *supra* note 21 at para 87: “A reviewing court should only interfere where the trial judge has committed an error of law or principle.”

dimension of the rule of law that requires maintaining a body of laws to ensure public order, no legal void nor societal disarray would have arisen.⁶⁹ As we will now see, additional rule of law dimensions connected to the remaining two *Schachter* categories were also frustrated by *Bedford*'s suspended declaration.

b. Rule of Law and Equality

Immediate or suspended, a declaration of invalidity precipitates legal change. This change's timing is precarious because "the rule of law...requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."⁷⁰ Denoting "horizontal inequality"⁷¹ as a harm of suspended declarations that "will magnify differences amongst members of the litigant's class,"⁷² Robert Leckey has importantly hypothesized that a suspension's time period may harbor arbitrary outcomes for accused under constitutionally infirm provisions.⁷³ Effectively, the likelihood of conviction depends upon how early into the suspension an accused is arrested and enters a plea.⁷⁴ This discord is compounded by socioeconomic status. Those without access to sound legal advice who are prepared to enter guilty pleas (for speedy disposition) may be unaware that they could escape conviction by waiting until the suspension expires.⁷⁵

Moving from Leckey's hypothetical into real prosecutions post-*Bedford* confirms that the rule of law's embrace of certainty and stability was shaken.⁷⁶ One example is *R v Moazami*,⁷⁷ which involved almost a dozen

⁶⁹ *Manitoba Language Rights*, *supra* note 8 at 724.

⁷⁰ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*, [1975] AC 591 at 638 (HL) cited in *R v KRJ*, 2016 SCC 31, [2016] 1 SCR 906 at para 23.

⁷¹ Leckey, "Harms," *supra* note 17 at 590.

⁷² *Ibid* at 592.

⁷³ *Ibid* at 592–593.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Secession of Quebec*, *supra* note 29 at paras 70–71. See also Hon Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171 at 173 [McLachlin, "Maintaining the Rule of Law"].

⁷⁷ *R v Moazami*, 2014 BCSC 261, [2014] BCJ No 297 (QL) (application) [*Moazami*]; 2014 BCSC 1727, [2014] BCJ No 2303 (QL) (trial); 2015 BCSC 2055, [2015] BCJ No 2441

underage victims.⁷⁸ The British Columbia Supreme Court refused to quash five counts of living on the avails of prostitution, rejecting the accused's argument that invalidity had to be determined on a case-by-case basis, and that *Bedford's* suspension was severable from the judgment.⁷⁹ The application was heard less than two months into *Bedford's* suspension, the trial was held three months' before the suspension was set to lapse, and then Moazami was sentenced after Bill C-36 entered into force.

The uncertainty surrounding the *Moazami* case in British Columbia was muddled further by differences between Manitoba and Alberta. In 2017, the Manitoba Court of Appeal upheld a conviction for living on the avails of prostitution. For a unanimous panel in *R v Ackman*,⁸⁰ Cameron JA opined that when Bill C-36 came into force, the new material benefit offence under s. 286.2 pre-empted *Bedford's* declaration of invalidity from taking effect.⁸¹ Yet on the eve of argument before the Alberta Court of Appeal in *R v LRS*,⁸² the Crown conceded that a conviction for living on the avails of prostitution entered one-month after *Bedford* should be overturned due to *Bedford*.⁸³ However, pending Bill C-36's entry into force, Alberta's Prosecution Protocol had directed that it would generally be in the public interest to proceed with prosecuting outstanding cases of exploitation, and

(QL) (sentence).

⁷⁸ *Ibid.* See also Leckey, "Harms," *supra* note 17 at 594 (citing *Moazami's* application at 594, but not the subsequent proceedings); *R v AlQaysi*, 2016 BCSC 937, [2016] BCJ No 1072 (QL) at para 19 (stating that *Moazami* is pending appeal. As of January 3, 2018, there was no record at the Court of Appeal's online registry).

⁷⁹ *Moazami*, *supra* note 77.

⁸⁰ *R v Ackman*, 2017 MBCA 78, 141 WCB (2d) 426.

⁸¹ *Ibid.* at paras 48-51. See also *R v AlQaysi*, *supra* note 78. The conduct precipitating the charge of communicating for the purpose of prostitution had occurred in August 2013, before *Bedford's* final judgment, but the trial did not begin until August 2014, nearly eight months into *Bedford's* suspension. *Bedford* was not cited at trial, which was adjourned until spring 2015. By then, Bill C-36 had entered into force. The accused was convicted and sentenced under the repealed provision. Leave to appeal was denied. Alternatively, based on the *Interpretation Act*, RSC 1985, c 1-21, Bowden J validated the conviction under the former communicating offence, holding that the gravamen of the offence was substantially similar enough to establish the new communicating offence.

⁸² *R v LRS*, 2016 ABCA 307, [2016] AWLD 5025.

⁸³ *Ibid.* The Crown also conceded that a conviction for procuring illicit sexual intercourse should be overturned due to *Bedford*.

to lay new charges.⁸⁴ Meanwhile, Ontario took New Brunswick's cue post-*Bedford* to terminate nearly all prosecutions under the unconstitutional prohibitions, and to advise police against laying new charges.⁸⁵

By bringing to light how difficult it is to predict the legal consequences of suspended declarations, these cases on *Bedford*'s heels make the Court's equivocation about endangering public safety and imperiling the rule of law all the more tenuous. By making law's operation contingent on geography, these inconsistent prosecutorial and police policies perpetuated uncertainty during already ineffective enforcement. Suspending invalidity with dispatch, without evidence of clear necessity or public danger, also means that the original public interest function does not fully explain why judges use suspended declarations. This brings us to the second function: facilitating institutional dialogue about fundamental rights and freedoms.

2. *Second Function: Institutional Dialogue*

i. Collaboration Among the Constitutional Institutions

A peppering of cases that flouted *Schachter*'s warning against forcing Parliament's hand have been well-documented by opponents and proponents of suspended declarations alike.⁸⁶ Chief among this research is a 1997 study conducted by Peter Hogg and Allison Bushell Thornton, who introduced the term "*Charter* dialogue"⁸⁷ to capture the most common and contentious function of suspended declarations. The authors described *Charter* dialogue by characterizing the judicial decision as a prompt for debate:

⁸⁴ Alberta Justice & Solicitor General, *Prosecution Service Practice Protocol: Prostitution Offences* (4 February 2014), online: <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Documents/RvBedfordpracticeprotocol.pdf>

⁸⁵ Bobbi-Jean MacKinnon, "Ontario Joins N.B. in Move Away from Prostitution Prosecutions," *CBC News* (6 February 2014), online: <<http://www.cbc.ca/news/canada/new-brunswick/ontario-joins-n-b-in-move-away-from-prostitution-prosecutions-1.2521133>>.

⁸⁶ Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter* of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 *Osgoode Hall LJ* 75; Hogg, Bushell Thornton & Wright, *supra* note 30; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34 *International Political Science Review* 39; Ryder, *supra* note 15.

⁸⁷ Hogg & Bushell, *supra* note 86.

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision.⁸⁸

This description encompasses acceptance as dialogue, but subscribers of coordinate constitutional construction, such as Christopher Manfredi and James Kelly, exclude tacit legislative approval from *Charter* dialogue.⁸⁹ Their narrower definition requires legislators to revise or reverse judicial rulings, after first conceiving a distinct interpretation of *Charter* rights, independent from the Court's interpretation.⁹⁰ Although normative accounts of what qualifies as *Charter* dialogue remain contested, for now, we need not rehash the debate. To see how suspended declarations are used, the more germane question is why they have principled, pragmatic appeal to the judiciary as a dialogic device.⁹¹

Permitting a less dramatic, more moderate result than immediate invalidity, suspended declarations can strengthen constitutionalism by distributing institutional labour.⁹² A decade after *Schachter*, Sujit Choudhry and Kent Roach illuminated how suspended declarations allow courts and legislatures to share the chore of constitutional compliance, while respecting each institution's traditional role:

The suspended declaration... can be viewed as a form of legislative remand, whereby unconstitutional legislation is sent back for reconsideration in light of the court's judgment. At the same time, however, the court does not abdicate the

⁸⁸ *Ibid* at 79.

⁸⁹ Dennis Baker & Rainer Knopf, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 2 Windsor Yearbook of Access to Justice 347; Christopher Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) Osgoode Hall LJ 37(3): 513. For a discussion of contending positions on using dialogue to justify deference to legislatures, see Kent Roach, "Dialogic Judicial Review and Its Critics" (2004), 23 SCLR (2d) 49 [Roach, "Dialogic Judicial Review"].

⁹⁰ Manfredi & Kelly, *supra* note 89.

⁹¹ Hogg, Bushell Thornton & Wright, *supra* note 30; Roach, "Dialogic Judicial Review," *supra* note 89 at 89-90; Macfarlane, *supra* note 86 at 41.

⁹² Roach, "Remedial Consensus," *supra* note 30 at 220; Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 SCLR (2d) 205 at 233.

responsibilities of judicial review. It formulates a remedy that will come into effect should the legislature not enact constitutional legislation by the court's deadline.⁹³

The Court's deference comes from respect, not subordination, for it is yielded from more than institutional roles. Capacity and competency also make suspended declarations attractive. The legislature is a forum structured for more expansive debate than courtroom, and can provide remedies that the judiciary cannot.⁹⁴ For example, in *Dixon v British Columbia*,⁹⁵ McLachlin CJ (then of the British Columbia Supreme Court) delayed declaring electoral district laws invalid to prevent the crisis that could have transpired if a change in government were to arise.⁹⁶ During the suspension, the legislature created an apportionment scheme that better reflected rural population density, which the judiciary could not have accomplished through a court order.⁹⁷ The government abided her *obiter dictum* on what reasonable limits could be imposed when it enacted legislation expediently. When McLachlin CJ later remarked upon Canada's collaborative constitutional legacy, she regarded *Dixon* as emblematic of how each branch "acting within the bounds of its proper constitutional responsibilities and each accepting its different constitutional responsibility, can efficaciously resolve a difficult issue."⁹⁸ The cooperative utility of the suspended declaration demonstrates that as a remedial tool, it can maximize each institution's strengths, while minimizing their weaknesses. Turning now to what the Court said (and did not say) in *Bedford*, we shall find that *Bedford's* suspended declaration induced a prompt, yet frustrating reply.

ii. Bill C-36's Institutional Dialogue

Mapping *Bedford's* attempt at stimulating dialogue on constitutional values requires visiting paragraph 165 of the judgment, which elicited quotes and quarrels among parliamentarians:

That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house,

⁹³ Choudhry & Roach, *supra* note 92.

⁹⁴ Roach, "Dialogic Judicial Review," *supra* note 89 at 65.

⁹⁵ *Dixon v British Columbia* (AG) (1989), 37 BCLR (2d) 231, 60 DLR (4th) 445 [*Dixon*].

⁹⁶ *Ibid* at 448.

⁹⁷ *Ibid*, discussed in Roach, "Remedial Consensus," *supra* note 30 at 221-222, citing McLachlin, "A New Role," *supra* note 8.

⁹⁸ McLachlin, "A New Role," *supra* note 8 at 558.

living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure – for example, permitting prostitutes to obtain the assistance of security personnel – might impact on the constitutionality of another measure – for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.⁹⁹

Paragraph 165 was parsed apart by all political stripes to support and oppose Bill C-36. Quoting *verbatim* at the second reading, the Justice Minister reiterated that the Court had told Parliament “to devise a new approach.”¹⁰⁰ Another parliamentarian claimed the Chief Justice’s words imposed an “obligation to propose a new way of dealing with the issue of prostitution.”¹⁰¹ On the other hand, the Opposition’s Justice Critic emphasized that the Court merely confirmed Parliament could “impose limits on where and how prostitution may be conducted”¹⁰² but that if Parliament did choose to act, its limits must not endanger the health and safety of sex workers.¹⁰³

One such new limit Parliament imposed is the new material benefit offence. By codifying exemptions to the former living on the avails offence, Parliament ostensibly responded to the Court’s overbreadth concerns. True, these exemptions nominally take up the Court’s suggestion to allow “prostitutes to obtain the assistance of security personnel.”¹⁰⁴ However, when it comes to real democratic dialogue, Parliament’s dithering over the Court’s expectations choked genuine debate about the *Charter* values *Bedford* embraced: the autonomy and dignity flowing from psychological and physical integrity.

⁹⁹ *Bedford*, *supra* note 1 at para 165.

¹⁰⁰ *House of Commons Debates*, 41st Parl, 2nd Sess, No 44 [Hansard] (11 June 2014) at 1700 (Hon Peter MacKay).

¹⁰¹ House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, Debates, 41st Parl, 2nd Sess, No 44 [Committee Proceedings] (15 July 2014) at 0930 (Hon Bob Dechert).

¹⁰² Hansard, (12 June 2014) at 1540–1545 (Hon Françoise Boivin).

¹⁰³ *Ibid.*

¹⁰⁴ *Technical Paper*, *supra* note 11, citing *Bedford*, *supra* 1 at para 165. For an explanation of Bill C-36’s incoherent policy objectives, see Hamish Stewart, “The Constitutionality of the New Sex Work Law” (2016) 54:1 *Alta L R* 69.

The NDP and Liberals wanted to clarify *Bedford* by referring Bill C-36 back to the Court.¹⁰⁵ The Justice Minister, who owes a statutory duty to alert the House to bills inconsistent with the *Charter*,¹⁰⁶ rebuffed the reference requests, as well as entreaties to engage external legal counsel, and to disclose his internal legal opinion.¹⁰⁷ Since the Court's ambiguous words culminated into foiled requests for legal clarity, *Bedford's* institutional dialogue was at best, fractured. At worst, *Bedford's* institutional dialogue uncovers a lack of policy deference on the Court's behalf, and disrespect on the government's behalf. Here, we will see "the devil is [not just] in the details"¹⁰⁸ of the reasons for the suspension, the devil is also in the duration.¹⁰⁹

a. The Devil in the Details

A detailed look at paragraph 165's ambiguity is warranted. Initially, it sounds as though the Court proposed to tweak the unconstitutional prohibitions as "limits on where and how"¹¹⁰ prostitution may occur.¹¹¹ Yet in the same breath, "devis[ing] a new approach"¹¹² infers substantially more work with a fresh start.¹¹³ The Court said "regulation of prostitution,"¹¹⁴ when it could have said "criminalization of prostitution."¹¹⁵ Such diction could have galvanized criminal law as the sword to conquer the unconstitutionality, for regulation does not necessarily entail criminalization. Indeed, Christopher Manfredi deciphered paragraph 165 as the Court hinting that "the criminal law might simply be too blunt a

¹⁰⁵ See, for example, Hansard, (11 June 2014) at 1720 (Hon Francoise Boivin, Hon Sean Casey); Hansard, (12 June 2014) at 1157 (Hon Wayne Easter).

¹⁰⁶ Section 4.1 of *Department of Justice Act*, RSC 1985, c J-2, s 4.1; *Statutory Instruments Act*, RSC 1985, c S-22, ss 3(2), 3(3).

¹⁰⁷ Hansard, (12 June 2014) at 1250-1310 (Hon Sean Casey).

¹⁰⁸ *Doucet-Boudreau*, *supra* note 21 at para 91 per LeBel and Deschamps JJ (dissenting on remedy, but not on remedial principles).

¹⁰⁹ *Ibid.*

¹¹⁰ *Bedford*, *supra* note 1 at para 165.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid* [emphasis added].

¹¹⁵ *Ibid* [emphasis added].

regulatory instrument”¹¹⁶ for such a “complex and delicate matter.”¹¹⁷ However, under Lisa Dufraimont’s interpretation, *Bedford* wedged an opening for an outright criminal prohibition of prostitution.¹¹⁸ Of course, the Court also contemplated that Parliament might not respond at all. Or, as Himel J surmised, the Court may have feared that unlicensed brothels would pop up before Parliament could act.¹¹⁹ Speculation aside, paragraph 165 sends a series of mixed messages that could have sustained a range of constitutional replies, from complete silence to a totally new criminal regime. From this range, we can infer that the Court presupposed that immediate invalidity would have constricted the number of constitutional solutions. But without articulating these presumptions or making their specific concerns transparent, the reasons for the suspension are inscrutable. Alas, there is mischief in the (lack of) details.

b. The Devil in the Duration

Viewed broadly, this mind-reading exercise traces the Court skating around Parliament’s policy sphere, which would signify respect for distinct institutional roles. Thus, on one level, *Bedford*’s remedial ambivalence may bulwark the Court from what Alexander Bickel famously coined as the “counter-majoritarian difficulty”:¹²⁰ a democratically unaccountable judiciary should not have the final word on the citizenry’s rights.¹²¹ Expressing openness to so many responses would shift blame to Parliament for any unanticipated harm caused by new, untested laws. But on a deeper level, the duration is problematic. For if recognizing an array of constitutional policy responses is deferential to Parliament, then for that

¹¹⁶ Christopher Manfredi, “Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006–2015” (2015) 52:3 Osgoode Hall LJ 951 at 967.

¹¹⁷ *Ibid*, citing *Bedford supra* note 1 at para 165.

¹¹⁸ Lisa Dufraimont, “*Canada (Attorney General) v. Bedford* and the Limits on Substantive Criminal Law under Section 7” (2014), 67 SCLR (2d) 483 at 501–502.

¹¹⁹ *Bedford* ONSC, *supra* note 1 at para 539.

¹²⁰ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed (New Haven: Yale, 1986) at 16.

¹²¹ *Ibid* at 16–17. For an argument that numerous legislative choices should not alone justify a suspension in South Africa, see Michael Bishop, “Remedies” in Stu Woolman & Michael Bishop, eds, *Constitutional Law of South Africa*, 2d ed (Cape Town: Juta, 2008) at 9-118–9-120.

deference to be purposeful and productive, the Court would also have to allow Parliament capacity to make an informed choice among those responses - with adequate time to study and prepare. Since the amount of time and preparation is commensurate with the complexity of a particular policy, *Bedford's* 12-month suspension arguably truncated the complexity and creativity of the ultimate policy response.

This truncation had real consequences for institutional relations. The government attributed their extremely difficult position to the Court's deadline. On a time allocation motion to constrict debate, the Justice Minister urged Bill C-36 "needs to proceed because of the timelines and the pressure we are under, placed on us by the Supreme Court."¹²² Wanting "time to do a good job,"¹²³ members suspicious of Bill C-36's constitutionality cited its legal complexity to oppose the motion.¹²⁴ Likewise, in *Bedford*, the Attorney General had sought an 18-month suspension because "new laws in this area are bound to raise complex issues, and the government should receive adequate time to draft laws, and Parliament afforded adequate time to consider them."¹²⁵

So while *Bedford's* suspended declaration did prompt legislating *per se*, to the extent it encouraged what Jeremy Waldron has dubbed "hasty lawmaking,"¹²⁶ the suspended declaration's cooperative, efficacious rationale was defeated.¹²⁷ It is in no one's interest - government or citizen - to ram a regime intended to resolve a "complex and delicate matter"¹²⁸ through a small window.¹²⁹ Since *Bedford's* reasons were silent on whether a 12-month period would be adequate, plausibly, the Court subliminally told the government that it did not expect nor desire significant change. If fixing the time fastens the range of policy choices, then to truly meet the anti-majoritarian challenge, a truly deferential dialogue would allow elasticity on the suspension's duration.

¹²² Hansard, (12 June 2014) at 1145-1150 (Hon Peter MacKay).

¹²³ *Ibid* at 1145 (Hon Hélène Laverdière).

¹²⁴ *Ibid* at 1145; 1155 (Hon Wayne Easter).

¹²⁵ *Bedford*, *supra* note 1 (Factum of the Appellant at para 138).

¹²⁶ Jeremy Waldron, "Principles of Legislation" in *Political Political Theory* (Cambridge: Harvard, 2016) [Waldron, "Principles of Legislation"] at 155.

¹²⁷ *Ibid* at 156-157 (outlining a duty of care owed by legislators).

¹²⁸ *Bedford*, *supra* note 1 at para 165.

¹²⁹ *Ibid*.

Given it is the Court who sets the deadline, it is difficult to argue they are irreproachable for the result of such haste, which may very well be unconstitutional legislation. The Justice Minister accepted a high level of constitutional risk, having admitted that Bill C-36 infringed at least one *Charter* right, as s. 1 was “very much ultimately the determining factor.”¹³⁰ The implications of the government’s response to *Bedford*, slammed in commentary as “fling[ing] the ruling back in the Court’s face,”¹³¹ were astutely forewarned by Brian Slattery during the *Charter*’s infancy. Slattery observed the Court’s institutional limitations for evaluating government policy:

[F]or a government to adopt the attitude of “pass now, justify in court later” would not only be an abdication of its *Charter* responsibilities, but in fact would undermine the foundations of judicial respect for the decisions of coordinate branches of government.¹³²

Thus, if deference to Parliament’s policy expertise is to remain a rationale for suspending declarations of invalidity, and the basis for that deference is respect and cooperation, then the approach to suspending declarations of invalidity needs to change. Otherwise, Canada’s constitutional legacy of collaborative responsibility for constitutional rights is at risk of devolving into defiance.

¹³⁰ Committee Proceedings (7 July 2014) (Hon Peter MacKay) at 1000 (rejecting a reference of Bill C-36, denying a request to disclose the results of an online public consultation in time for the Committee’s study, while also stating “the likelihood that it will be challenged is very real”), 1030–1033 (discussing the level of constitutional risk).

¹³¹ Andrew Coyne, “We Once Had to Wait Weeks for a New Harper Abuse of Power: Now We’re Getting Them Two or Three Times a Day,” *National Post* (6 June 2014), online: <<https://nationalpost.com/opinion/andrew-coyne-we-once-had-to-wait-weeks-for-a-new-harper-abuse-of-power-now-were-getting-them-two-or-three-a-day>>. See also John Ivison, “MacKay’s Weak Defence of His Prostitution Law Implies It Won’t Survive the Courts,” *National Post* (7 July 2014), online: <<http://news.nationalpost.com/full-comment/john-ivison-mackays-weak-defence-of-his-prostitution-law-implies-it-wont-survive-the-courts>>.

¹³² Brian Slattery, “A Theory of the *Charter*” (1987) 25:4 *Osgoode Hall LJ* 701 at 714.

3. *Third Function: Consultative Dialogue with Rights-Bearers and Citizens*

i. Remedial Potential of the Democratic Process: *Corbiere*

In the institutional debate between courts and legislatures, important voices - belonging to the very people who started that debate - have often gone unheard. Beyond the suspended declaration's two predominant uses of promoting the public interest and facilitating institutional dialogue, there is a third, oft-neglected, but equally important function, which tunes into people directly affected by unconstitutional laws. This consultative function is epitomized by *Corbiere v Canada*.¹³³ In *Corbiere*, Aboriginal Band members residing off-reserve launched a successful *Charter* challenge to the *Indian Act* for excluding them from Band elections. The Court found the residency-based exclusion infringed s. 15's equality guarantee. To remedy the violation, the Band requested a "reporting period,"¹³⁴ which would enable negotiations on new voting rules.¹³⁵ Although the Court explicitly predicted legislative inaction could be troublesome, it ordered an 18-month suspended declaration.¹³⁶

Writing for a concurring minority of four (differing on s. 15), L'Heureux-Dube J pronounced that the remedy had to account for the nature of the *Charter* violation.¹³⁷ In appreciating Parliament's role, as *Schachter* exhorted that declarations must do, *Corbiere's* emphasis on the nature of the violation added two dimensions to *Schachter*: first, novel *Charter* infringements may orient the remedial process; and second, considering who bears the immediate brunt of the Court's decision may impact how the remedial process occurs.

First, on novelty, by recognizing an entirely new type of equality violation, *Corbiere* forecasted that a suspended declaration is likely where a case significantly alters *Charter* doctrine, or applies existing doctrine to an entirely novel situation. If laws breach the *Charter* in an unprecedented way, such as in *Bedford*, then it follows that the process of undoing them may

¹³³ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

¹³⁴ *Ibid* at para 109.

¹³⁵ *Ibid*.

¹³⁶ *Ibid* at para 23.

¹³⁷ *Ibid* at para 114.

entail more work, thus necessitating more time to respond. Second, on *Corbiere's* impact, the immediate consequences of invalidity were borne most by the Band, not the government. Attending to the party (i.e., the applicants or government) who feels the remedy's most acutely underscores that deference to Parliament should be rationalized by individual concerns, as well as institutional ones.¹³⁸ Thus, by requiring two layers of justification, *Corbiere* texturizes *Schachter's* caution to respect the separation of powers.

It is Parliament's job to formulate a legislative response not merely because policy is Parliament's domain, but also because Parliament's democratic process can help redress the impact of the suspended declaration on the litigants. This therapeutic potential of the democratic process streams from L'Heureux-Dube's observation that "[b]ecause the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it."¹³⁹ The need to include those most affected by law into the process for curing it is tethered to the principle of democracy, which "requires a continuous process of discussion"¹⁴⁰ to properly function.¹⁴¹ *Corbiere* therefore engrafts a remedy that functions as a conduit between the courtroom and legislature, propelling the applicants forward into the process for creating law.

Extolled as "one of the important factors guiding the exercise of a court's remedial discretion,"¹⁴² *Corbiere* establishes that dialogue between courts and legislatures should "encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation."¹⁴³ When a court "consider[s] the effect of its order on the democratic process,"¹⁴⁴ however, regular Parliamentary debate alone may not accomplish inclusive dialogue.¹⁴⁵ *Corbiere* affirms that democracy that is more than majority rule. A truly democratic process "requires that legislators take into account the

¹³⁸ For a detailed analysis of the legislative response to *Corbiere*, see Roach, "Remedial Consensus," *supra* note 30 at 243–248.

¹³⁹ *Corbiere*, *supra* note 133 at para 116.

¹⁴⁰ *Ibid*, citing *Secession of Quebec*, *supra* note 29 at para 68.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at para 116.

¹⁴³ *Ibid*, citing Hogg & Bushell, *supra* note 86.

¹⁴⁴ *Ibid* at para 116.

¹⁴⁵ *Ibid*.

interests of majorities and minorities alike, all of whom will be affected by the decisions they make.”¹⁴⁶ When suspended declarations are ordered to conduct “extensive consultations and respond to the needs of the different groups affected,”¹⁴⁷ the Court’s remedial power becomes indispensable to the cooperative, whole of government approach embraced by McLachlin CJ: the judiciary, the executive and Parliament all share responsibility to fix the injustice of unconstitutional laws.¹⁴⁸ Probing deeper into Bill C-36’s production will now convey that *Corbiere*’s aspiration for inclusive consultative dialogue was unrealized.

ii. Bill C-36’s Consultative Dialogue

Not all individuals who sell sex were able to voice their reactions to Bill C-36, nor do those individuals necessarily organize together or identify themselves as “sex workers.” It is, of course, a democratic deficit that we do not know their views on whether and how the law should have responded to *Bedford*. Those who do affiliate with the sex work movement, however, (as well as *Bedford*’s litigants), condemned Bill C-36’s legislative input and the resulting output. By marshalling in a paradigm shift from blaming prostitutes as nuisances to protecting them as victims, yet also aiming to treat them with dignity and equality, Bill C-36’s preamble displays an abrupt about-face from the government’s defence in *Bedford*.¹⁴⁹ While preambles are instruments of institutional dialogue for prescribing limits on *Charter* rights,¹⁵⁰ Bill C-36’s preamble does not reflect the individualized perspectives of many diverse people whose rights it now limits. Many sex workers find the preamble’s rhetoric of victimization and protection offensive and oppressive. To them, manufacturing “the language of feminist intervention and humanitarianism”¹⁵¹ into a brand of empowerment belies

¹⁴⁶ *Ibid*, citing *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 at para 176.

¹⁴⁷ *Ibid* at para 118.

¹⁴⁸ *Dixon*, *supra* note 95; McLachlin, “A New Role,” *supra* note 8 at 557–558.

¹⁴⁹ Bill C-36, Preamble, *supra* note 11; *Technical Paper*, *supra* note 11; *Bedford*, *supra* note 1 at paras 79–83 (part of the government’s defence was that prostitutes’ “choice – and not the law – is the real cause of their injury”); Angela Campbell, “Sex Work’s Governance: Stuff and Nuisance” (2015) 23 *Fem Legal Stud* 27 (arguing that Bill C-36 reinforces a nuisance abatement policy).

¹⁵⁰ Roach, “Dialogic Judicial Review,” *supra* note 89 at 57–58.

¹⁵¹ *Bedard*, *supra* note 13.

a narrative of patriarchal subjugation.¹⁵² Many sex workers are doubly or triply marginalized as impoverished racial and gender minorities. For them, pre-existing stigma led the government to misconstrue their needs, undermine their dignity and autonomy, and aggravate their vulnerability to violence.¹⁵³

The scorn at Bill C-36's content only partly depicts the democratic deficits after *Bedford*. At Parliament, the Justice Minister cited input from consultations for the *Canadian Victims Bill of Rights*¹⁵⁴ to support Bill C-36.¹⁵⁵ Yet those consultations were conducted before *Bedford*'s final judgment was even rendered.¹⁵⁶ And prostitution, though "intertwined"¹⁵⁷ with victims' rights, was not the focus of those face-to-face discussions before *Bedford*.¹⁵⁸ As for consultations after *Bedford*, three months before Bill C-36's introduction, the government held private consultations decried as "false" and "token" because eleven of the sixteen groups did not represent sex workers.¹⁵⁹ Later, when Bill C-36 was already before Parliament, the Justice Minister held invite-only, *in camera* roundtables with criminal justice

¹⁵² *Ibid*; Committee Proceedings (9 July 2014) at 1624 (testimony of Sheri Kiselbach); Ainsley Doty, "After *Bedford*: What's Next for Canada's Sex Industry," *GUTS* (6 May 2014), online: <<http://gutsmagazine.ca/Bedford-whats-next-canadas-sex-industry/>>; Naomi Sayers & Sarah Hunt, "Abolition of Sex Work Won't End Violence Against Native Women" *Globe and Mail* (22 January 2015), online: <<http://www.theglobeandmail.com/opinion/abolition-of-sex-work-wont-end-violence-against-native-women/article22572753/>>.

¹⁵³ *Ibid*.

¹⁵⁴ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

¹⁵⁵ Hansard, (12 June 2014) at 1154, 1205 (Hon Peter MacKay).

¹⁵⁶ Canada, Department of Justice, "Minister of Justice Concludes Cross-Country Consultations on Victims Bill of Rights," News Release (Ottawa: DOJ, 25 September 2013), online: <<http://news.gc.ca/web/article-en.do?nid=775479>>.

¹⁵⁷ Hansard, (12 June 2014) at 1205 (Hon Peter MacKay).

¹⁵⁸ *Ibid*.

¹⁵⁹ Committee Proceedings (7 July 2014) at 1310 (testimony of Émilie Laliberté, Spokesperson, Canadian Alliance for Sex Work Law Reform: "Only three sex workers were at the table when Minister MacKay held private consultations on March 3. The minister made it very clear that he did not intend to consult with Canada's sex workers."); Selena Ross, "Sex Worker Bill Built on 'False Consultation'" *Chronicle Herald* (14 June 2014), online: <<http://thechronicleherald.ca/metro/1215019-sex-worker-bill-built-on-false-consultation>>.

stakeholders.¹⁶⁰ While a pro-abolitionist happily tweeted a selfie with the Justice Minister, people currently working in the sex industry were not invited, and disclosure requests for the invite list were refused.¹⁶¹

One might object that this perceived prejudice during informal consultations was mollified by the fact that activists later testified formally before Parliament. After all, consultations have limitations that make them inadequate substitutes for Parliamentary deliberation. Debates outside of the very institution officially devoted to democratic deliberation are not forcefully held to account by a rigorous opposition mandated to test proposed policies.¹⁶² Unlike Parliamentary and adjudicative procedures, and apart from a soft policy commitment to broadly and transparently consult, there are no normative standards for conducting consultations.¹⁶³ However, whether the government actually muted sex workers is not the point. What matters is that the post-*Bedford* consultations incubated an impression of bias against individuals who, for a range of different reasons, sell sex – individuals who are ostracized and unpopular, and whose entrenched right to security hinged upon the government’s (in)action. Through *Corbiere*’s lens, the dialogic purpose of those consultations was to rectify the chronic harm which *Bedford* held the state had caused. It is no wonder then that sex workers would interpret the mere appearance of unequal participation as illegitimate. As we know from natural justice principles, appearance is integral to maintaining trust in our legal and political institutions.¹⁶⁴ To be clear, I do not claim that comprehensive consultation and increased democratic deliberation should or would have

¹⁶⁰ Kady O’Malley, “Peter MacKay’s Justice Roundtables Didn’t Set a Place for Sex Workers,” *CBC News* (27 August 2014), online: <<http://www.cbc.ca/news/politics/peter-mackay-s-justice-roundtables-didn-t-set-a-place-for-sex-workers-1.2747403>>.

¹⁶¹ *Ibid*; Megan Walker, “Selfies at Community Meeting with @MinPeterMacKay @EdHolder_MP @Sextrade101 Discussing #c36 and #justice Issues” (13 August 2014 at 10:25am), online: Twitter <<https://twitter.com/meggiewalk/status/499622732091625472>>.

¹⁶² Waldron, “Principles of Legislation,” *supra* note 126.

¹⁶³ Canada, Department of Justice, *Policy Statement and Guidelines for Public Participation* (Ottawa: DOJ, 2016), online: <<http://www.justice.gc.ca/eng/cons/pol.html>>. According to the Department of Justice, the policy in place between *Bedford*’s decision and Bill C-36’s Royal Assent is exactly the same as the current policy, apart from one minor grammatical correction.

¹⁶⁴ *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624.

grounded the right to a particular substantive outcome (i.e., decriminalization). Rather, the ability to have a meaningful exchange about sex work was illusory. Besides, even if sex workers had to rely on parliamentarians as proxies in that exchange, plenty of the precious 12-months allocated by the Court, which was supposed to serve the *Charter* rights of the successful applicants, was instead winnowed away on emotional pandering that digressed to extraneous issues.

Subjective perceptions aside, the issues debated inside and outside Parliament ran on an entirely different track than *Bedford*. Tangential topics of human trafficking and underage prostitution comprised much of the content.¹⁶⁵ Although these are immensely important issues, human trafficking and child exploitation were not the thrust of the offences struck down in *Bedford*, nor did they form the crux of the litigants' dispute.¹⁶⁶ Surely, widening the debate to consider incidental problems is democratically desirable when crafting policy and law. The government should not have to wait for the judiciary's alarm to rouse them to action. But there is an essential difference between enriching debate and entirely changing the debate. Largely, Bill C-36's debate ignored the contextual injustice to adults who consensually sell sex, yet were not trafficked or exploited as children.

When legislating to redress *Charter* infirmities, the government should not lose sight of the very people whose needs fomented the legislation in the first place – people whose *Charter* rights were unjustifiably violated. When the invite list for informal consultations is cloaked in Cabinet confidence, and the official witness list at Parliament is piloted by Parliamentary privilege, there is no guarantee for diverse representation of Canadians, let alone those most affected by the agenda. Take the proven fact in *Bedford* that prostitution disproportionately affects Indigenous peoples.¹⁶⁷ Yet Monica Forrester, the sole Indigenous transgendered sex worker scheduled to testify before the House of Commons Standing

¹⁶⁵ See especially interventions by Hon Joy Smith: Hansard, (12 June 2014) at 1321, 1346, 1548; Ross, *supra* note 159.

¹⁶⁶ *Bedford* ONSC, *supra* note 1 at para 183: “incidental” issues included “human trafficking, sex tourism and child prostitution. While important, none of these issues are directly relevant to assessing potential violations of the *Charter* rights of the applicants.”

¹⁶⁷ *Bedford* ONSC, *supra* note 1 at paras 90, 165, 174.

Committee could not attend.¹⁶⁸ The abiding irony is the reason for Monica's absence. Monica was serving as a surety for a colleague - who had just been arrested under the communicating offence that *Bedford* struck down, then suspended.

On this front, it is noteworthy that *Bedford's* applicants did testify before Parliament.¹⁶⁹ Terri-Jean *Bedford* was escorted out of Senate after exceeding her allotted time, and insinuating she knew politicians partaking in prostitution.¹⁷⁰ However, glimpsing at a Committee Member's questioning of a former sex worker—who supported Bill C-36—shows how non-judicial government procedures can disrespect individuals and undermine remedial potential. After recounting a traumatic rape by three men, Timea Nagy expressed the need to create safe, supportive environments and viable exit options, which she believed Bill C-36 could achieve.¹⁷¹ A Committee Member, Robert Goguen, then posed the following hypothetical:

You were describing a scenario where you were being raped, I believe, by three Russians. Let's suppose that the police authorities had broken in and rescued you. Would your freedom of expression have been in any way breached? You couldn't possibly have been doing it freely.¹⁷²

The audacity to ask such a question is offensive in itself - but the Committee Chair's failure to intervene is also disquieting. The irrelevant, inflammatory examination permitted by parliamentary privilege, which governs legislative procedure,¹⁷³ would not be countenanced in court. We might therefore be tempted to chalk up this exchange to distinct

¹⁶⁸ Committee Proceedings (7 July 2014) at 1627 (Testimony of Chanelle Gallant).

¹⁶⁹ Committee Proceedings (9 July 2014) at 0950–1005 (Testimony of Valerie Scott, Amy Lebovitch).

¹⁷⁰ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 2nd Sess, No 16 (10 September 2014) at 15:189 (Terri-Jean *Bedford*), online: <<https://sencanada.ca/Content/SEN/Committee/412/LCJC/pdf/15issue.pdf>>.

¹⁷¹ Committee Proceedings (7 July 2014) at 1437–1441 (Hon Robert Goguen, testimony of Timea E Nagy).

¹⁷² *Ibid.* Nagy, explaining that “English is my second language still,” apologized for misunderstanding the question. Goguen reframed his assertion, telling Nagy, “You don’t get it. Okay.” Nagy then acknowledged Goguen’s claim that “If you were rescued, you wouldn’t feel that your rights were violated.”

¹⁷³ Audrey O’Brien & Marc Bosc, “Committees” in *House of Commons Procedure and Practice*, 2nd ed (Toronto: Carswell, 2009), online: <<http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=DC42FA65-ADAA-426C-8763-C9B4F52A1277&sbdidx=1&Language=E&Mode=1>>. See especially witness testimony.

institutional roles. It is not the Court's job to enforce Parliamentary decorum. But the disrespectful question Robert Gougen asked of Timea Nagy is just one example of how the Court's remedy fell short of *Corbiere's* remedial aims. If *Corbiere's* goal to include rights-bearers within the democratic process is to be fulfilled, then the Court must also consider the barricades of misunderstanding and inequity hindering meaningful participation.

Viewed alone and abstractly, these political problems may appear peripheral to suspended declarations. Cardinaly, it is Parliament's domain, not the judiciary's, to make laws "through a procedure dedicated publicly and transparently to [lawmaking]."¹⁷⁴ The acumen of South African law, however, lends an intriguing angle. In *Doctors for Life International v Speaker of the National Assembly & Others*, the applicant's "repeated and persistent" efforts to be heard during the legislative process for two significant healthcare statutes "were in vain."¹⁷⁵ The Constitutional Court held the National Council of Provinces in breach of its express constitutional obligation to facilitate public involvement in the legislative process, thereby rendering both Acts invalid.¹⁷⁶ As in *Manitoba Language Rights*, the constitutional infirmity was framed as a procedural omission of the prerequisites for legislation's manner and form.¹⁷⁷ Insisting that the separation of powers "cannot be used to avoid the obligation of a court to prevent the violation of the Constitution,"¹⁷⁸ the Court suspended invalidity for 18-months, expounding the relationship between participation and legitimacy with the following:

Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective...is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it

¹⁷⁴ Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1 *Legisprudence* 91 at 99.

¹⁷⁵ *Doctors for Life International v Speaker of the National Assembly & Others*, 2006 (6) SA 416 (CC) at 216 [*Doctors for Life*], invoking s 72(1) of the *Constitution of the Republic of South Africa*, *supra* note 28. See also s 59.

¹⁷⁶ *Doctors for Life*, *supra* note 175 at para 216.

¹⁷⁷ *Ibid* at paras 208–209.

¹⁷⁸ *Ibid* at para 200.

also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.¹⁷⁹

Of course, Canada has no concordant statutory requirement for public participation in lawmaking. Outside of Aboriginal law's duty to consult, the Court has refused to enforce any legal duty for participation in the lawmaking process.¹⁸⁰ Notably, though, none of those precedents invoked individual *Charter* rights, nor did they involve declarations of constitutional invalidity, nor any delayed remedy whatsoever.¹⁸¹ What is more, the shared values of a free and democratic society embroider the constitutional fabric of both Canada and South Africa. Measured against those values, which include, "faith in social and political institutions which enhance the participation of individuals and groups in society,"¹⁸² the treatment of sellers of sex during Bill C-36's creation casts doubt upon its legitimacy.

Thus, viewed cumulatively and contextually, Bill C-36's constellation of procedural defects distorts the values underlying Canada's constitutional order – values that the judiciary is charged to defend. When Bill C-36 was devised, historically ostracized individuals tried to engage with the very authority legally declared to have contributed to that ostracization by violating their security. Although rights-bearers stepped into the legislative process victorious on the merits, their steps began from a deeply entrenched position of subordination with limited bargaining power. Such deep-seated oppression cannot be undone in a single day by a single court decision, no matter how monumental. It would also be naïve to think that decriminalization would have followed from better consultation. Meaningful engagement with sex workers might nevertheless have produced similar legislation. Yet if the process for creating law is democratic and inclusive, the ultimate result may be more palatable. In a lecture about the

¹⁷⁹ *Ibid* at paras 205.

¹⁸⁰ *Authorson v Canada*, 2003 SCC 39, [2003] SCR 40 [Authorson]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473; *Reference re Canada Assistance Plan*, [1991] 2 SCR 525, 83 DLR (4th) 297 at 559–560; *Wells v Newfoundland*, [1999] 3 SCR 199, 180 Nfld & PEIR 269 at para 59 [Wells].

¹⁸¹ For an argument distinguishing *Authorson* and *Wells* from constitutional rights, see Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the *Charter*" (2013), 63 SCLR (2d) 377 at 399–400.

¹⁸² *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 per Dickson CJ at para 64.

administrative law process, McLachlin CJ poignantly professed this procedural dimension of the rule of law:

Without knowing the basis for a decision or without feeling that she has been heard by all persons participating in the decision-making process, how can a citizen honestly be told that the resolution of her problem is binding and legitimate? In the absence of a meaningful opportunity to be heard or to understand the justification for this exercise of public power, in whatever form that it may take in the circumstances, that person will feel that the Rule of Law failed in her case.¹⁸³

As for the legislative and adjudicative processes, advocates and analysts have also pressed the legal ramifications of defective political processes. Alan Young, who represented Terri-Jean *Bedford*, warned that any fouls against basic democratic norms will bear on the government's attempted justification in a future *Charter* challenge.¹⁸⁴ On remedies more generally, Bruce Ryder and Grant Hoole forged a link between s. 1's proportionality principles and suspended declarations. They connected the values of a free and democratic society to *Schachter's* three categories of promoting the rule of law, the public interest, and equality.¹⁸⁵ Ensuring that *Charter* applicants are genuinely heard in the democratic process is further compelling, for as Lorraine Weinrib observed, more nuanced and dramatic law reform can actually come from immediate declarations.¹⁸⁶ Relatedly, the Court's remedy should also address its impact on the democratic process, because as Jeremy Waldron raised, the general citizenry, as opposed to judicial elites, may actually have greater empathy for "discrete and insular minorities."¹⁸⁷ This insight, however, presumes the Legislature is fully functioning - and as we saw earlier, by Waldron's own standards, Parliament's consideration of Bill C-36 was democratically dysfunctional. So what, if anything, should judges should do about that democratic dysfunction?

¹⁸³ McLachlin, "Maintaining the Rule of Law," *supra* note 76 at 188. Outside of administrative decision-making, for a similar expression regarding legislation, see Waldron, "Principles of Legislation," *supra* note 126 at 158.

¹⁸⁴ O'Malley, *supra* note 160 (see Alan Young's comments regarding arbitrariness).

¹⁸⁵ Hoole, *supra* note 16 at 139; Ryder, *supra* note 15 at 283.

¹⁸⁶ Weinrib, *supra* note 16 (discussing abortion and marriage).

¹⁸⁷ Waldron, "The Core of the Case Against Judicial Review" in *Political Political Theory*, *supra* note 126 at 243 [Waldron, "Against Judicial Review"].

Before *Bedford*'s final appeal, Alana Klein proposed a way for judges to account for institutional capacity and democratic legitimacy.¹⁸⁸ Outlining a principled differentiation between proportionality under ss. 7 and 1, Klein explained, "section 1 is explicitly concerned with tempering judicial overreach in light of the legislature's presumed democratic legitimacy,"¹⁸⁹ whereas s. 7 "is a substantive, individual right."¹⁹⁰ From this distinction, she proposed that s. 7 should ground a right to proportionate lawmaking, for "[t]he proportionality norms ... vindicate the dignity of human beings and arguably rule of law by protecting against overweening majoritarianism - majoritarianism that takes insufficient account of the needs of those whose interests may be excluded from or harmed by law and policy."¹⁹¹ However, Klein conceded that affixing political marginalization into s. 1 may not be doctrinally viable.¹⁹² Given that *Bedford* then transformed the relationship between ss. 7 and 1, in my view, it instead may be more feasible to empirically account for political marginalization through the Court's remedial power.¹⁹³ To be frank, reform to judicial remedies is not a panacea for democratic illegitimacy. But procedural reform is not a placebo either - because it can bypass normative barriers to revamping rights doctrine, remedial procedure could have a salient effect. As Part II will now show, some constitutional cases in South Africa and Canada telegraph that some judges are already steering towards this direction.

II. DELIBERATIVE REMEDIAL PROCEDURE

Surveying *Bedford*'s aftermath has demonstrated that three functions for suspending declarations were frustrated: promoting the public interest, facilitating institutional dialogue about constitutional values, and fostering consultative dialogue. It would be shortsighted, however, to conclude that *Bedford*'s suspended declaration alone caused this frustration, and should

¹⁸⁸ Klein, *supra* note 181.

¹⁸⁹ *Ibid* at 396.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid* at 398.

¹⁹² *Ibid* at 400-401.

¹⁹³ For an analysis of *Bedford*'s changes to proportionality under ss 7 and 1 that engages with Klein's proposal, see Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill L J 575.

therefore be discarded. Nor does it follow that the Court ought to have immediately struck down the prostitution offences. The consequences of immediate invalidity could have been even worse than those stemming from the suspension. Perhaps pressure to instantly reply would have incited Parliament to explicitly override *Charter* rights via the notwithstanding clause.¹⁹⁴ As for reverberations for the judiciary, Leckey reckoned that suspended declarations may have “emboldened Canadian judges to find rights violations from which they would otherwise shrink.”¹⁹⁵ Under Leckey’s claim, since rights and remedies are intertwined, eschewing suspended declarations could counteract recognizing future *Charter* violations.¹⁹⁶ Still, warts and all, suspended declarations’ have a positive prognosis. Their mounting frequency,¹⁹⁷ export into other jurisdictions,¹⁹⁸ and the government’s propensity to voluntarily abide by declarations,¹⁹⁹ are realistic signs that this remedial tool is unlikely to become obsolete. If we accept the reality that suspended declarations are likely here to stay, then it is pragmatic and prudent to address their associated harms. With *Bedford* in the background, I will now sketch how deliberative remedial procedure can contribute to this broader remedial project.

Two constitutional authorities set the parameters for deliberative remedial procedure. First, recall there is no explicit textual power to suspend declarations of invalidity. Section 52(1) of the *Constitution Act* mandates:

¹⁹⁴ *Charter*, *supra* note 3. Section 33 allows Parliament and Legislatures to declare that an “Act or provision shall operate notwithstanding a provision included in section 2 or sections 7 to 15” for a renewable period of five years. For a discussion of section 33 as a dialogic device, see Roach, “Dialogic Judicial Review,” *supra* note 89.

¹⁹⁵ Leckey, “Enforcing Laws,” *supra* note 17 at 9.

¹⁹⁶ Leckey, “Harms,” *supra* note 17 at 605.

¹⁹⁷ Ryder, *supra* note 15 at 292–293 (the Court suspended 57% of its declarations); Hoole, *supra* note 16 at 114 (from Ryder’s 2002 article until May 2010, the Court suspended 73% of its declarations).

¹⁹⁸ Hong Kong also utilizes suspended declarations. See for example, *Hong Kong Koo Sze Yiu v Chief Executive of the HKSAR*, [2006] 3 HKLRD 455. Contrast with the United Kingdom’s “declarations of incompatibility,” which lack binding force under section 4 of the *Human Rights Act 1998* (UK), 1998 c 42.

¹⁹⁹ *Doucet-Boudreau*, *supra* note 21 at para 32; Roach, “Remedial Consensus” *supra* note 30; McLachlin, “A New Role,” *supra* note 8.

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.²⁰⁰

As a general remedy for enactments unconstitutional in purpose or effect, s. 52(1) is distinct from the *Charter's* unique grant of remedial discretion, which is the second authority for deliberative remedial procedure.²⁰¹ Section 24(1) explicitly provides a personal remedy for unconstitutional government actions:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.²⁰²

Both ss. 52(1) and 24(1) are instrumental to the deliberative remedial procedure proposed below, which addresses the relationship between these provisions to suggest alternatives to *Bedford's* remedy. The procedural apparatus I propose is constructed from a separate oral hearing dedicated to remedies. It bears resemblance to American decree hearings, and Canadian criminal sentencing procedure.²⁰³ Deliberate remedial procedure has the following components:

- I. Fully-articulated reasons;
- II. Evidence adduced on remedial issues;
- III. Participation by stakeholders who can inform the Court and the litigants;
- IV. Focused remedial argument and potential joint submissions;
- V. Setting a suspension's duration by retaining jurisdiction and motions for extensions; and
- VI. Mitigation measures to ameliorate the risk of irreparable harm to *Charter* rights.

²⁰⁰ *Constitution Act, 1982*, *supra* note 6 at s 52(1).

²⁰¹ *Ferguson*, *supra* note 7 at paras 58–65; *Doucet-Boudreau*, *supra* note 21 at para 87; *Charter*, *supra* note 3.

²⁰² *Charter*, *supra* note 3 at s 24(2).

²⁰³ *Criminal Code*, *supra* note 2, Part XIII; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281; Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1.

A. Reasons

As the former Chief Justice McLachlin has remarked, lawyers and judges are often so fixated with rights doctrine that remedies manifest almost as an afterthought, receiving “whatever space and energy is left over.”²⁰⁴ *Bedford*’s scrimpy remedial reasons (3 of the 169 paragraphs) join a string of suspended declarations suffering from what Grant Hoole calls “inadequate reasoning.”²⁰⁵ As Part I highlighted, the Court acknowledged in *Bedford* that keeping the prohibitions in force left “prostitutes at increased risk for the time of the suspension - risks which violate their constitutional right to security of the person.”²⁰⁶ Yet, other than undefined public concern, the reasons did not identify any negative impacts of immediate invalidity on competing third party *Charter* rights, nor upon the justice system, either or both of which could have rationalized the suspension.²⁰⁷

As for the suspension’s duration, *Bedford*’s judgment did not explain why 12-months is an appropriate period to cure three invalid laws - despite the government seeking 18-months,²⁰⁸ and despite the Court of Appeal’s estimation that 12-months was necessary to redress only one invalid law (the bawdy-house provision).²⁰⁹ Interestingly, *Bedford*’s 12-month suspension also stands in stark contrast to a lengthy suspension in *S v Jordan*.²¹⁰ To correct South Africa’s prostitution offences, a formidable dissent of the Constitutional Court, citing Canadian research, would have suspended invalidity for 30 months.²¹¹

²⁰⁴ Hon Beverley McLachlin, “Rights and Remedies - Remarks” in RJ Sharpe & Kent Roach, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) at 22.

²⁰⁵ Hoole, *supra* note 16 at 118.

²⁰⁶ *Bedford*, *supra* note 1 at para 168.

²⁰⁷ Hoole, *supra* note 16 at 134-135, accepts third-party interests may make “perfect vindication of an impinged right” impossible; Roach, “Polycentricity,” *supra* note 19 at 46 (“judges should hesitate to order immediate remedies with wide systemic and perhaps unanticipated effects”); Roach, *Constitutional Remedies*, *supra* note 7 at 3.840-3.900.

²⁰⁸ *Bedford*, *supra* note 1 (Factum of the Appellant at para 138).

²⁰⁹ *Bedford* ONCA, *supra* note 1 at para 326.

²¹⁰ *S v Jordan and Others*, 2002 (6) SA 642.

²¹¹ *Ibid.* Like *Bedford*, Jordan’s dissent accepted that suspending invalidity would prolong prostitutes’ exposure to adverse conditions, but the nature of the violation urged a

The Court's lack of deference to Himel J's remedy and factual findings is also bewildering. In Part I, I suggested that *Bedford's* suspension contradicted the Court's own precedent on appellate standards of review. The stated reasons seem premised upon exaggerated assumptions that enforcement during the suspension would be effective - assumptions which were unsupported by the trial record.²¹² The Court did not make any discernible effort to justify those assumptions on the case's facts. This is concerning not just for the parties and the public - it is concerning for the Court's legitimacy. A robust remedial framework begins from the footing that clear, full explanations are imperative for remedial decisions.

Meagre reasoning is not just an issue of rhetorical fatigue. It is also a procedural problem. If judges do not receive persuasive evidence and argument on remedial issues, then it is unreasonable to demand clearer justification for remedial decisions. A distinct procedural framework for remedial discretion would anchor remedies at the forefront of lawyers' and judges' consciousness to give remedies the space and energy they deserve. In this aim, to achieve meaningful, effective outcomes for their clients, litigators should pitch more specific and innovative relief. This requires lawyers to shift their minds towards long-term implications of the relief they request.²¹³ Even if courts deny pleas for imaginative remedies, thorough remedial pleadings could cue judges to thoroughly explicate their chosen result.

B. Evidence

To articulate rational justifications for suspended declarations, it is axiomatic that the Court's logic be bounded by concrete facts. Applicants must prove they are entitled to constitutional remedies by establishing a sufficient factual basis.²¹⁴ That said, relevant evidence often lies outside of the applicants' hands for at least three reasons: first, deferring the ultimate

carefully measured response by the legislature.

²¹² See Part I, Section B.1.ii., "*Bedford* and the Public Interest," *above*.

²¹³ Roach, "Remedial Consensus," *supra* note 30 at 262 (suggesting *Charter* applicants should seek more than declaratory relief, and judges can adjourn requests for mandatory remedies pending government compliance with declarations).

²¹⁴ *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385; *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3; Roach, *Constitutional Remedies*, *supra* note 7 at 5.480-5.490.

remedy to the other branches of powers calls for speculation about future political events; second, litigation tactics on the merits might have presented a partial picture of the scope of the violation; and third, *Charter* rights of third parties may be at stake. Additional evidence directed to these remedial issues can therefore assist the Court.

When it comes to the future, suspended declarations contemplate, but do not compel government action because of the purpose underlying declaratory relief. By its nature, declaratory relief is designed to attain future compliance; by extension, declarations are influenced by the government's history of voluntarily following court orders.²¹⁵ Naturally, anticipating future government action requires forward-looking appraisals. To build a precise calculus for these estimations, evidence from the rights violation is still important. However, the existing record is insufficient because it is concerned with past actions.²¹⁶ For future contingencies, additional facts should be adduced about the government's willingness and ability to promptly respond to a declaration of invalidity, the need for additional research and study,²¹⁷ the complexity and variety of possible responses,²¹⁸ and the breadth of consultation (if any) to occur. Fetching this information will not be instantaneous. Criminal procedure suggests that a brief adjournment of no more than 30 days would suffice on a standard of "as soon as practicable."²¹⁹ By then, a suspension might become moot - on second thought, a government may opt not to legislate at all.

On the merits, evidence from s. 1 justifications is pertinent to remedial issues. There is an intuitive allure to importing proportionality analysis to suspended declarations, especially because legislative facts pertain to causes

²¹⁵ Roach, "Remedial Consensus," *supra* note 30 at 237, 242; "Dialogic Judicial Review," *supra* note 89 at 65.

²¹⁶ Roach, *Constitutional Remedies*, *supra* note 7 at 5.510.

²¹⁷ *Jordan*, *supra* note 212 at paras 127-128 (the dissent's 30-month suspension was based on the need to further study prostitution and the complex options available); *Dawood & Another v Minister of Home Affairs and Others*, 2000 (3) SA 936 (CC) [*Dawood*] at para 65 (the government's publication of a White Paper on Immigration was calibrated into the two-year suspension for it "suggest[ed] that a fundamental review of the legislation...is in train").

²¹⁸ *R v Smith*, *supra* note 51 at para 32; *Minister of Home Affairs and Another v Fourie and Another*, 2006 (1) SA 524 (CC) at paras 139-148 per Sachs J (noting multiple legislative options) [*Fourie*]; Hoole, *supra* note 16 at 145-146.

²¹⁹ *Criminal Code*, *supra* note 2 at s 720.

and effects of legislated issues. So, a sizeable portion of the s. 1 record remains relevant to deciding whether to suspend a declaration, particularly legislative aims, and any minimally impairing alternatives. For overbroad criminal prohibitions, such as living on the avails of prostitution, enforcement difficulties could be material proof for balancing public concern with individual rights.²²⁰ But relying on proportionality evidence risks overlooking important issues. Litigation tactics demonstrate that evidence fielded from the s. 1 record is inadequate. An informed remedial decision depends upon full analysis of the violation and a comprehensive attempt to justify that violation under s. 1. As Lamer CJ admonished in *Schachter*, when the record is scant on these issues, the Court is “...in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate...”²²¹ In situations like *Schachter*, where the government concedes the violation, or later concedes the violation is unjustifiable under s. 1, the Court “respond[s] to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.”²²² It is therefore possible that *Bedford*'s skeletal s. 1 analysis (neither Attorney General “seriously argued”²²³ the laws were justified) may partly explain *Bedford*'s cursory remedial reasons, and may also have hampered the Court from considering a different suspension period.²²⁴ However, since *Bedford*'s analysis collapses the issues of whether and how long to suspend a declaration into a single determination, we can only guess.

Evidence should also have a principal place in remedial discretion to address competing rights and interests. There should be a wide berth for rebuttal evidence when considering suspended declarations, regardless of whether the parties or the judiciary propose the suspension. In advancing a balancing of interests approach to suspended declarations, Bruce Ryder

²²⁰ *Bedford*, *supra* note 1 at paras 113, 144.

²²¹ *Schachter*, *supra* note 31 per Lamer CJ at 695.

²²² *Ibid* per LaForest (+ L'Heureux-Dube J, concurring in result) at 727. The minority adopted a narrower approach to reading in due to the “unsatisfactory” presentation of the case to the Court.

²²³ *Bedford*, *supra* note 1 at para 161.

²²⁴ *Ibid* at paras 161, 163.

underlined how information that the suspension would irreparably damage the applicants' (or other similarly-situated individuals') rights, or conversely, facilitate the positive exercise of competing *Charter* rights, could be vital to attaining an effective remedy.²²⁵ Admittedly, it may seem cumbersome to track how many similarly-situated individuals are at risk during a suspension. With the advent of case management software, however, it would be relatively easy to ascertain caseload statistics for active criminal charges under infirm provisions. That evidence could prevent abstracting about horizontal inequity among accused during the suspension, plus pacify concerns for administrative resources, which could then persuade judges to also hear interim s. 24(1) applications. In this way, deliberative remedial procedure can also harness Kent Roach's "declarations plus" and two-track remedies. These doctrinal developments, which can secure general and personal relief in parallel, map pathways to systemic justice that can reconcile deference to Parliament with vindicating individual rights.²²⁶ Furthermore, deliberative remedial procedure can soften the charge of judicial activism - that setting the suspension's duration is an "essentially political"²²⁷ decision²²⁸ because it inputs facts regarding the benefits and costs of suspended declarations to individuals and groups. Such facts are material if, as *Corbiere* propounded, the Court is to heed the remedy's impact on the democratic process. Making room for remedial evidence can therefore guard against insolent majoritarianism and populism to advance *Charter* values and democracy.

Finally, since remedial decisions are discretionary, rigid burdens of proof may also be unworkable.²²⁹ Given that a suspended declaration deviates from the constitutional default of immediate invalidity, it may seem logical to allocate the burden of proving that a suspension is necessary to

²²⁵ Ryder, *supra* note 15 at 284.

²²⁶ Roach, "Polycentricity," *supra* note 19; Roach, *Constitutional Remedies*, *supra* note 7 at 12.700-12.835.

²²⁷ Leckey, "Harms" *supra* note 17 at 597 (citing monetary costs of retrospective invalidity and Parliament's schedule as political factors).

²²⁸ *Ibid* at 596-597.

²²⁹ Roach, *Constitutional Remedies*, *supra* note 7 at 12.700-12.835, fn 134, discussing *M v H* (1994), 17 OR (3d) 118, [1994] OJ No 146 (QL) (SC) per Epstein J at 131: "the court itself determines the appropriate remedy; the party challenging the constitutional validity of legislation does not carry the onus of establishing which remedy the court should order."

the government, who apparently stands to benefit most directly from the temporary deprivation of rights.²³⁰ Yet because the Court might also suspend invalidity on its own motion,²³¹ imposing a justificatory burden for suspended declarations may not succinctly fit within a government defendant's evidentiary burden under s. 1. It is also myopic to assume that the government is the sole party who could benefit from a suspended declaration.²³² Along with *Corbiere*, at first instance, the plaintiffs in *Carter v Canada*'s assisted suicide suit requested a suspended declaration to enable Parliament's response.²³³ Intervenors might also support a suspended declaration, and as we will now see, their positions can help inform the Court for a variety of reasons.

C. Participation

Participation is the means to furnish the Court with evidence and argument on whether and how long to suspend a declaration. Information germane to the remedy may be within the direct knowledge and means of stakeholders who did not litigate the merits, but who may later be encumbered with or benefitted by the case's result.²³⁴ If the decision to

²³⁰ According to Bishop, *supra* note 121 at 9-126, this is South Africa's evidentiary burden for suspending declarations. Though not distinguishing between evidentiary and justificatory burdens, Hoole, *supra* note 16 at 144-145 argues judges should bear the onus of justification. Ryder, *supra* note 15 at 284 proposes that both the evidentiary and justificatory burdens should fall to the government.

²³¹ Hoole, *supra* note 16 at 145, fn 144.

²³² Roach, "Remedial Consensus," *supra* note 30 at 223 (observing the courts' assumption that governments benefit from the opportunity "to devise for themselves the details of their response").

²³³ *Corbiere*, *supra* note 133 (the applicants requested a "reporting period" to enable negotiations); *Carter v Canada* (AG), 2012 BCSC 886, 287 CCC (3d) 1 [*Carter* 2012] at paras 27-28, 1394-1397. Both the plaintiffs and the federal Attorney General requested a suspended declaration, disagreeing only on its duration. However, the declaration was coupled with an exemption under section 24(1) to allow one of the plaintiffs to seek physician-assisted death in the interim. British Columbia's Attorney General also gave submissions on the necessity and capacity to legislate.

²³⁴ For an example of an extended suspended declaration that arose because the federal government, as the party ultimately responsible for addressing unconstitutional aquaculture legislation, was absent from the decision on the merits, see *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 92 BCLR (4th) 314, *aff'd* on other grounds 2009 BCCA 481, 97 BCLR (4th) 103. With the benefit of concerns raised by an intervenor, Hinkson J narrowed the scope of the one-year suspension when he

suspend is briefly adjourned, it allows time to consider whether other skilled, interested players should participate in the remedy.²³⁵ Without this breathing room, a government striving to fill a legal void is less likely to consider local alternatives that could creatively respond to intricate issues. Indirectly, suspended declarations presuppose that the level of government who defends the defective law should be the same level of government that redresses it. Hence, suspended declarations may discourage cooperative federalism and the subsidiarity principle that “power is best exercised by the government closest to the matter”²³⁶ - which the Court has endeavored to foster when criminal law and health converge.²³⁷

Depending on which right(s) and constitutional powers are engaged, it may be constitutionally efficacious (and administratively and financially efficient) for the Federal government to defer to (or collaborate with) the provinces. For instance, if the Federal government had opted for a labour and health policy response to *Bedford*, in lieu of (or alongside) its criminal response, each province’s constitutional authority would be directly implicated beyond administering justice. Provinces and communities are diverse in their local experience of prostitution as a socioeconomic and cultural issue. Across municipal and provincial jurisdictions, law enforcement’s means and resources vary widely, as well as governmental capacity to develop policy and law. Beyond untying the legal knots, coordinating multiple positions and different legislative capacities takes longer than a single government’s response.

From Quebec’s intervention in the *Carter* litigation, we can distil some advantages and disadvantages of using a separate remedial hearing to engage multiple governments on polycentric issues.²³⁸ In 2015, the Court

extended it for another year at Canada’s request: 2010 BCSC 100, 2 BCLR (5th) 306.

²³⁵ Roach, “Polycentricity,” *supra* note 19 at 11.

²³⁶ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 at para 69.

²³⁷ *Ibid* at paras 69–72 (per McLachlin CJ (+3)), at para 273 (per LeBel and Deschamps JJ (+2), disagreeing on subsidiarity’s application to the Reference); *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 63 [PHS]; *Carter* 2015, *supra* note 22 at paras 49–53.

²³⁸ Polycentricity, a classic structural problem of adjudication, involves distributing limited resources among multiple contending stakeholders who may lack standing to litigate. See Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353, as explained in Roach, “Polycentricity,” *supra* note 19 at 5, 9.

suspended its declaration that the *Criminal Code*'s blanket ban on physician-assisted death violated s. 7 of the *Charter*.²³⁹ Since Quebec had begun studying assisted death well before the *Carter* suit, Quebec's intervention enriched the deliberation about respecting the rights of individuals seeking end-of-life assistance. In 2016, the Court struck a separate oral hearing to determine whether the suspension's duration should be extended. At that time, Quebec's intervention enabled the province to enact its own assisted death legislation, as the Court exempted Quebec from the four-month extension. Unfortunately, the courtroom debate did not translate to the brief judgment for the extension, but submissions on the impact and role of other stakeholders such as medical professionals and the provinces featured prominently at the hearing.²⁴⁰ To be sure, looking short term, a separate remedial hearing could be undesirable because additional participants might slow down the time for closing cases. In the long term, however, a separate remedial hearing could remit some intervention from the merits to the remedy - if intervenors have a proximate interest in the ultimate legislative response. There is no guarantee that a separate hearing would save time, but if a more informed remedial decision can prevent relitigation by fostering collaboration and consultation, then benefits abound.

Taking stock of deliberative remedial procedure also requires acknowledging that governments, accountable to Parliament and voters, are always free and capable of acting on their own without the judiciary prodding them to confront complex problems.²⁴¹ This is theoretically and historically true, yet it also overestimates legislators' capacity, and underestimates complex government affairs. It may seem obvious, but many parliamentarians are sheltered from the first-hand impacts of the policies they champion, and many lawmakers are not lawyers. For example, amidst much bewilderment during the Standing Committee's study of Bill C-36,

²³⁹ *Carter* 2015, *supra* note 22; Leckey, "The Harms," *supra* note 17 at 597, fn 73 (noting that the length seemed short, citing Quebec's study).

²⁴⁰ *Carter* 2016, *supra* note 51 (Oral Hearing). Interestingly, Wagner J (as he then was) asked the appellant's counsel whether the suspension ought to have been issued in the first place.

²⁴¹ For example, the failed attempt to pass new abortion laws following the immediate declaration in *R v Morgentaler*, [1988] 1 SCR 30, [1988] SCJ No 1 (QL); Roach, "Remedial Consensus," *supra* note 30 at 249; Hoole, *supra* note 16 at 120-121, 134; Ryder, *supra* note 15 at 281; Weinrib, *supra* note 16.

the Parliamentary Secretary to the Minister of Justice actually requested a memo from the Justice Department on whether summary conviction offences would be registered on a criminal record.²⁴² Since even legally-trained parliamentarians may be unacquainted with the consequences of criminal liability, let alone *Charter* jurisprudence, deliberative remedial procedure could foster due attention to the legal ramifications of new policy approaches. It would do so by creating a space to consider how forthcoming legislative remedy directly affects individual rights.

Waiting for the government to initiate action on unpopular issues also presumes that lawmaking is parliamentarians' primary task. As Jeremy Waldron has observed, politicians may regard lawmaking as the least prestigious among their many occupations, which include "the mobilization of support for the executive, the venting of grievances, the discussion of national policy, the processes of budgetary negotiation, the ratification of appointments, and so on."²⁴³ Outside of Parliament, unlike judges, politicians are distracted with reelection and pleasing their constituents. Geographic and sociocultural idiosyncrasies mean those constituents may not represent (let alone understand) vulnerable, disenfranchised people relying on *Charter* litigation to protect their rights and advance their interests. Furthermore, because unpopular reform would rattle discord into an otherwise complacent electorate, as Roach has noted, politicians facing reelection are loath to spearhead systemic change to an unprincipled status quo.²⁴⁴ Such danger may have been reified in *Bedford's* context because the government responsible for Bill C-36 was elected through a tough-on-crime platform,²⁴⁵ and marketed Bill C-36 in a package with its *Victims Bill of Rights*.²⁴⁶ It would therefore be fatuous to expect the Federal government of the day to voluntarily introduce decriminalization. While *Charter* remedies should not endow successful litigants with a policy veto, as Roach has emphasized, provoking and providing time and space to debate policy

²⁴² Committee Proceedings (8 July 2014) at 1300 (Hon Bob Dechert).

²⁴³ Waldron, "Principles of Legislation," *supra* note 126 at 156.

²⁴⁴ Roach, "Dialogic Judicial Review," *supra* note 89 at 75.

²⁴⁵ Roach, "Dialogic Judicial Review," *supra* note 89 at 96 (noting the influence of crime agendas on voting patterns and "neglect[ing] the rights of minorities and the unpopular).

²⁴⁶ See Part I, Section 3.ii., "Bill C-36's Consultative Dialogue," *above*.

options can be within the judiciary's bailiwick.²⁴⁷ For suspended declarations to be prosperous for democracy, however, jurists must pay closer attention to the risk of democratic deficits during debate, including the ability of affected individuals to participate.

The changing dynamic of institutional actors also makes inclusive remedial participation important. Globally, scholars have flagged accelerating public/private governance partnerships for blurring legal, political, and social boundaries. Through decentralized hybrid governance, burdens traditionally borne by the state are reallocated to non-state actors, often without stringent oversight.²⁴⁸ Domestically, after exiting the courthouse, successful claimants treading through political quicksand may also face unanticipated obstacles of bargaining with non-state actors to access beneficial services that can redress rights violations. Although *Bedford's* remedy remitted prostitution's harms to Parliament to "devise a new approach"²⁴⁹ that new approach enlisted social organizations to the frontlines of sex work. As part of the new policy aim to eradicate prostitution, administrators allotted funding for support services to social organizations subscribing to abolitionist ideology.²⁵⁰ This deferral of state responsibility may disadvantage sex workers who seek support and safety-enhancing benefits, but resist victimization.

Consequently, over and above civil society's contributions to jurisprudence and legislation, civil society's intervention in *Charter* litigation can bring normative implications for individuals that actualize long after

²⁴⁷ Roach, "Dialogic Judicial Review," *supra* note 89.

²⁴⁸ Kerry Rittich, "Out in the World: Multi-Level Governance for Gender Equality" in Ashleigh Barnes, ed, *Feminisms of Discontent: Global Contestations* (Oxford: Oxford University Press, 2015) at 57-59.

²⁴⁹ *Bedford*, *supra* note 1 at para 165.

²⁵⁰ Canada, Department of Justice, "Measures to Address Prostitution Initiative: Call for Proposals - NGOs & Governmental Organizations" (Ottawa: DOJ, deadline January 30, 2015), online: <<http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/ngo.html>>. Selection criteria to receive funding included having "existing networks with various support services for individuals wishing to exit prostitution." See also Public Safety Canada, Crime Prevention Action Fund, "Measures to Support Exiting Prostitution," Call for Letters of Intent (Ottawa: PSC, deadline January 30, 2015), online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/fndng-prgrms/crm-prvntn-ctn-fnd-eng.aspx>>. Funding was available to "support a range of tailored and comprehensive approaches to assist individuals who want to exit prostitution."

courts and legislatures finish their work.²⁵¹ That those implications can transpire in unchecked ways redoubles the need for remedies to recognize the manifold ways in which social justice is purveyed. Theoretically, this flexible approach to participation would harmonize remedial responsibility with the flexible causation test which (thanks to *Bedford*'s doctrinal feats) now applies to assessing responsibility for *Charter* violations. Since "government action or law"²⁵² need not "be the only or the dominant cause of the prejudice suffered by the claimant,"²⁵³ appreciating the confluence of state and non-state conduct in curing that prejudice would unite remedial practice with doctrinal progressions on accountability for *Charter* breaches.²⁵⁴ Within this holistic frame, inclusive participation in *Charter* remedies marks a modern, realistic recognition of the influence (both good and bad) that civil society exerts in justice.

D. Argument and Agreement

Along with facilitating an informed, inclusive constitutional solution, bifurcating the rights adjudication from the remedial decision can facilitate joint positions. Recall that in *Bedford*'s final appeal, the Court acknowledged the need for temporary validity was debatable - yet the Court did not invite any debate.²⁵⁵ By then, the parties had agreed that the Court of Appeal's remedy was inappropriate: the applicants "join[ed] forces with ...Canada, who vigorously argue[d] that [the] reading-in of 'circumstances of exploitation' [was] an unworkable and inappropriate remedy for the living on the avails offence."²⁵⁶ However, on their face, the applicants' written

²⁵¹ Rittich, *supra* note 248 at 58-60 (discussing complications arising from norm authorship via private/public partnerships). A similar argument is raised to critique feminist approaches to law in Carolyn Moulant, "Are Feminists Their Own Worst Enemy?" (2017) Faculty of Law, University of Toronto (Paper, Alternative Approaches to Legal Scholarship) [unpublished].

²⁵² *Bedford*, *supra* note 1 at para 76.

²⁵³ *Ibid.*

²⁵⁴ *Ibid* at para 80.

²⁵⁵ *Ibid* at para 167; see Part I, Section B.1.i., "The Justification for *Bedford*'s Suspended Declaration," *above*.

²⁵⁶ *Ibid* (Factum of the Respondent at paras 117-118). In *Carter* 2012, *supra* note 233 at paras 1394-1397, the plaintiffs and Canada had both requested the suspension, disagreeing only on its duration.

submissions did not look beyond invalidation to clearly oppose Canada's proposed suspension, nor to anticipate what consequences a suspension could catalyze.

Although it is incumbent upon applicants to seek the remedy they feel is just and appropriate, the nature of the power to suspend invalidity - as an implied exception to the dictate of s. 52(1) - implies that reciprocal latitude to the parties is warranted. To avoid unfairly blindsiding the parties, the Court's capacity to suspend declarations on its own initiative also militates towards a separate hearing, especially because procedural prejudice and a sufficient record are prerequisites for an appellate court to raise a new issue.²⁵⁷ Additionally, if parties have not addressed material remedial issues in their submissions, then fairness - a recognized remedial principle - supports granting them that opportunity.²⁵⁸ On this point, Himel J's approach in *Bedford* is instructive. She stayed her judgment for 30 days "to enable the parties to make fuller submissions"²⁵⁹ on potential public harm from brothel operations.²⁶⁰

At any rate, if the parties cannot reach remedial consensus, then a short pause could still be beneficial by encouraging them to narrow areas of contention. In promoting a better understanding of the scope of the infringement, breaking to review the Court's adjudication of the violation may encourage a change of heart in the government defendant. Think about how *Bedford's* endorsement of safe houses (dismantled by the bawdy-house offence) could have facilitated negotiations for a creative remedy consistent with remedial principles.²⁶¹ If the Court's assessment of the merits had been a springboard for remedial negotiations, it could have propelled the parties to negotiate a restitution-oriented remedy for Grandma's House, which was raided and charged during Robert Pickton's perpetrations.²⁶² Such a remedy could have vindicated past harm and prevented that harm's future

²⁵⁷ *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689.

²⁵⁸ *Doucet-Boudreau*, *supra* note 21.

²⁵⁹ *Bedford* ONSC, *supra* note 1 at para 539.

²⁶⁰ *Ibid.*

²⁶¹ *Bedford*, *supra* note 1 at para 64.

²⁶² *Ibid.* Charges were not stayed until four years after its closure. Standing issues aside, an exemption from the bawdy-house provision would also have been required if safehouses were re-established during the suspension. The Court's previous remedy in PHS, *supra* note 237, which involved a safe drug injection site, could have been a useful precedent.

replication. And if counsel first propose creative remedies in joint submissions, it could overcome judicial reticence to dynamic remedies. Those remedies would have a consensual element from joint submissions, rather than being invented and unilaterally imposed by a judge.

Even failed attempts at negotiating a joint submission have advantages that promote *Charter* values. A process that provides space for the wrongdoer to offer routes of redress, and for the sufferer to accept, reject, or counteroffer can empower individuals and educate the government. Three parliamentarians from three parties heralded this message when recently advancing democratic reform, stating that: "...presence matters not just for what is said, but for the added power that comes when words come from the lips of those who have been affected or will be affected by government policies."²⁶³ This political sentiment suggests that time to negotiate may create a more restorative remedy by giving rights-bearers a fair opportunity to explain why a proposed legislative solution is inappropriate.

Capacity for fuller negotiations also allows the defendant's tone to change from forceful denial to repentant responsibility. Deliberative remedial procedure can therefore lend credibility to policy pendulums. Prior to stepping out into the policymaking and lawmaking stages, the tempo and topics ripe for upcoming deliberations could already be set. Deeper debate about changes that respect *Charter* rights could already have begun. Even if the Court does not retain jurisdiction, or later denies structured relief, a separate remedial hearing can gear the parties towards meaningful consultation because it inscribes a structured process to unpack the rights' violation into remedial deliberations. Indeed, the timing of rights-bearers' dialogue with the Executive may be crucial. Lori Sterling asserted that the "real," "robust" *Charter* dialogue actually occurs before a bill is ever tabled into the House, through a confidential risk assessment during the drafting phase.²⁶⁴ Considering that the Justice Minister admitted

²⁶³ Michael Chong, Scott Simms & Kennedy Stewart, *Turning Parliament Inside Out: Practical Ideas for Reforming Canada's Democracy* (Madeira Park: Douglas & McIntyre, 2017) at 6.

²⁶⁴ Lori Sterling, "The *Charter's* Impact on the Legislative Process: Where the Real 'Dialogue' Takes Place" (2007) 23 NJCL 139 at 148. The constitutionality of that risk assessment procedure is now under challenge: *Schmidt v Canada (AG)*, 2016 FC 269, [2016] 3 FCR 477 (appeal pending) (1 April 2016), Ottawa, FCA-105-16 (Notice of Appeal), heard on February 8, 2017.

that s. 1 was the ultimate determinant for Bill C-36's constitutionality,²⁶⁵ constitutional risk-taking underscores that a deliberative mechanism during legislative drafting could prove critical to meeting the needs of those whose rights have been violated. Most of all, then, if an inclusive, informed remedial process can begin at the Court, the overall gains for justice are invaluable.

E. Duration by Retaining Jurisdiction

1. *The Duration Dilemma*

When setting a deadline for Parliament, judges walk a tightrope between two pitfalls: condone legislators' dawdling, or trigger a reckless, shotgun sprint to the Queen's Printer. Before delving into how the Court should compute a suspension's duration, it is useful to compare precedents.

In *Swain*, only three extra months from the initial six-month suspension sufficed to compose the *Criminal Code*'s new Part XX.1, with significant procedural and substantive changes for mentally disordered accused.²⁶⁶ Yet against the years Quebec spent studying assisted death, *Carter*'s total 16-month suspension likely cut too short.²⁶⁷ Contrast also the paradigm shift plowed through Bill C-36's 12-month deadline with the 30-months allocated to encourage "comprehensive and integrated"²⁶⁸ prostitution laws in *S v Jordan*.²⁶⁹ Although fixing an impractically short timeline can increase the hazard of a poor response, if *Bedford*'s suspension had been 30-months, there is no guarantee the government would have used that time efficiently

²⁶⁵ See Part I, Section B.3.ii., "Bill C-36's Institutional Dialogue," *above*; Committee Proceedings, *supra* note 131.

²⁶⁶ *Swain*, *supra* note 32 (28 October 1991), 19758 (SCC) (motion for directions granted until February 5, "with the proviso that for whatever reason the parties may reapply"), online: <<http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=19758>>; *An Act to Amend the Criminal Code (mental disorder)*, SC 1991, c 43. The regime, most of which was proclaimed into force on February 4, 1992, was upheld in *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 175 DLR (4th) 193.

²⁶⁷ Leckey, "Harms," *supra* note 17 at 597, fn 73. Compare also Quebec's response to *Chaoulli v Quebec*, *supra* note 51, discussed in Roach, "Polycentricity," *supra* note 19 at 39-40.

²⁶⁸ *S v Jordan*, *supra* note 212 at para 128.

²⁶⁹ *Ibid*; Bill C-36, Preamble, *supra* note 11; *Technical Paper*, *supra* note 11.

and effectively.²⁷⁰ But remembering *Bedford's* s. 7 infringements came from “fundamentally flawed”²⁷¹ laws indicates that the nature of the constitutional infirmity should weigh towards greater time to respond.²⁷² As posited when discussing *Corbiere*, if laws breach the *Charter* in unprecedented ways, then it may take longer to remedy that breach with new policy and legislation. This logic is strengthened by mechanics of legislative drafting, which involves an internal risk assessment by government counsel on Cabinet’s behalf.²⁷³ If governments draft bills because landmark cases dramatically change the law, it follows that governments face a greater constitutional risk in legislating. Prudence counsels careful, comprehensive consideration to manage that higher risk to individual rights.

At the same time, if courts habitually issue long suspensions at a ruling’s outset, without proof of how much time is necessary and feasible, governments are less incentivized to act forthwith. The suspension works as a sedative, not a stimulant; an unconstitutional status quo persists longer than necessary, to only then produce the bare constitutional minimum.²⁷⁴ This reductive risk came to fruition in *Corbiere's* 18-month suspension. Nearly seven months elapsed before the government even announced a plan, never mind commencing consultations.²⁷⁵ Aside from prompting follow-up litigation, *Corbiere's* legislative sequel lacked the complexity and breadth that the Court imagined.²⁷⁶ When it comes to lengthy suspensions, Hoole has alerted that constitutional minimalism is an unfortunate risk and consequence often borne by marginalized individuals.²⁷⁷

Without any interim remedy to mitigate the potential irreparable harm to prostitutes’ safety during *Bedford's* suspended declaration, 12-months was far too long. On the other hand, the democratic deficits extracted from Bill C-36’s legislative process make it plain that 12-months was also sorely too short. In my view, the dilemmatic risks of unduly short and unnecessarily

²⁷⁰ Roach, “Remedial Consensus,” *supra* note 30 at 242, 246.

²⁷¹ *Bedford*, *supra* note 1 at para 105

²⁷² *Ibid* at para 123; Leckey, “Harms,” *supra* note 17 at 592.

²⁷³ Sterling, *supra* note 264 at 150.

²⁷⁴ Roach, “Remedial Consensus,” *supra* note 30 at 242.

²⁷⁵ *Ibid* at 244.

²⁷⁶ *Ibid* at 244–245.

²⁷⁷ Hoole, *supra* note 16 at 127.

long suspensions can be averted by harkening back to first principles and practices, and acclimating to modern complexities. A detour to case law before and after *Bedford* will now help explain how retaining jurisdiction can resolve the duration dilemma.

2. *Reviving Doucet-Boudreau*

In *Manitoba Language Rights*, the suspended declaration was ushered through separate hearings facilitated by retaining jurisdiction. To “fix some arbitrary period”²⁷⁸ when the reference was decided was unsatisfactory to the Court, because there was “no factual basis”²⁷⁹ to determine how long it would take to enact curative legislation.²⁸⁰ Instead, the Court adjourned for 120 days before reconvening for a special hearing to determine the minimum time for constitutional compliance, with submissions from intervenors as well.²⁸¹ The Court was ultimately seized with the matter for nearly 7 years while Manitoba translated its statutes.²⁸² Thus, from the suspended declaration’s very beginning in *Manitoba Language Rights*, it symbolized a tradition of judicial and legislative cooperation in pursuit of a common goal: reaching a just, constitutional solution. Since *Manitoba Language Rights* did not invoke the *Charter*, and as a reference, it was an unbinding, advisory opinion,²⁸³ it should therefore be all the more

²⁷⁸ *Manitoba Language Rights*, *supra* note 8 at 769.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid* at 768–769.

²⁸¹ *Ibid.*

²⁸² *Manitoba Language Rights*, *supra* note 8; *Ref Re Manitoba Language Rights*, [1985] 2 SCR 347, 26 DLR (4th) 767; *Manitoba Language Rights Order (Re)*, [1990] 3 SCR 1417, 1990 CarswellNat 749F; *Reference re Manitoba Language Rights*, [1992] 1 SCR 212, 2 WWR 385. The parties’ agreement on duration was adopted by the Court. The suspension was again extended in 1990, pending a second reference, which resulted in the parties’ second agreement in April 1992.

²⁸³ *Secession of Quebec*, *supra* note 29 at paras 8–9, 15. Unlike a *Charter* application, as an exercise of original, rather than appellate jurisdiction, references are not adversarial in nature, nor are they legally binding – the opinion is purely advisory. That said, this procedural distinction is more of a technical than controlling difference; like complying with declarations, following reference advice also happens to be customary of Canadian governments: *Bedford*, *supra* note 1 at para 40. See also *Ref re Remuneration of Judges of Prov Court of PEI*, [1998] 1 SCR 3, 161 Nfld & PEIR 125. To inoculate Provincial Court decisions from a flood of *Charter* challenges, three Attorneys General sought additional remedies at a rehearing after a reference on the remuneration of provincial judges held

legitimate to retain jurisdiction in *Charter* challenges because of s. 24(1)'s express, expansive remedial provision, and the principles that fortify the *Charter*'s remedial power.

Rooted in the same background of protecting minorities, *Doucet-Boudreau v Nova Scotia* grounded the foundational principles guiding remedial discretion under the *Charter*.²⁸⁴ After ruling the Nova Scotia government had violated s. 23 of the *Charter*, LeBlanc J retained jurisdiction over the parties. His order mandated Nova Scotia to use its "best efforts" to construct previously-promised Francophone schools by stipulated deadlines, and to reappear for progress reports. The final appeal edified that remedial discretion under the *Charter* can only be restrained by constitutional principles, which require:

1. A meaningful and effective remedy that vindicates the claimant;
2. Respects the separation of powers and institutional relationships;
3. Invokes the functions and powers of a court; and
4. Is fair to the party against whom the order is made.²⁸⁵

The bench fissured on how these principles applied, with five judges upholding LeBlanc J's remedy. The minority scolded the order as vague and procedurally unfair, and criticized the managerial style of the reporting hearings for tangling the branches of power.²⁸⁶ These concerns are important reminders to broach the retention of jurisdiction delicately. Yet through a static stance on judicial functions, the minority strictly cordoned off the branches of powers in a way that undercuts collaboration in stable good governance. This rigidity depreciated the urgent context posed by the language right, which was atrophying; the circumstances of the infringement, which was historical and ongoing; and the reality that only one solution could effectively redress the infringement: building the schools straightaway. While the minority's objections are formidable, they are somewhat paradoxical. If, out of purported fairness to the government, judges must always impose terms sufficiently detailed for contempt, it can

that the three provinces unconstitutionally interfered with judicial independence. Amid uncertainty about its original disposition, the Court imposed a suspension and retained jurisdiction to allow the parties and intervenors to seek further directions.

²⁸⁴ *Doucet-Boudreau*, *supra* note 21.

²⁸⁵ *Ibid* at paras 55–58.

²⁸⁶ *Ibid* at paras 103, 120–121. For a recent critique of the minority's approach, see Roach, "Polycentricity," *supra* note 19 at 30–31.

antagonize institutional relationships by anticipating that the government will defy the court. If clarity begets fairness to the government, yet there is only one solution capable of meaningfully remedying the breach, then the only conceivable way to respect the branches of power is to identify that one solution, then defer on the precise details of its implementation.

Importantly, *Doucet-Boudreau*'s minority did not object to retaining jurisdiction in all circumstances. Here, it is noteworthy that the injunctive, jurisdictional remedy did not invalidate any legislation. To the minority, retaining jurisdiction in *Manitoba Language Rights* - which did invalidate legislation - was legitimate because the purpose of the procedure was "to ask for the government's assistance in fashioning [the remedy]."²⁸⁷ Thus, if courts retain jurisdiction to scaffold their suspended declaration to the government's impending response, then retaining jurisdiction remains a judicial remedy fitted to the adjudicative role. And if a suspended declaration is ordered in tandem with other features of deliberative remedial procedure, then judges will not become *functus*: adjudicative issues are left outstanding (e.g. the suspension's total time, individual remedies), to be decided following evidence and adversarial argument. In this vein, retaining jurisdiction provides a soft *ex ante* incentive for compliance (having to justify inaction with evidence), rather than a hard *ex poste* penalty for defiance.

Retaining jurisdiction can also achieve clarity because it is impossible to predict uncertain legal consequences (eg. enforcement) and events beyond all parties' control (eg. elections, crises). Kent Roach had such considerations in mind on the brink of *Doucet-Boudreau*'s final appeal, when he supported retaining jurisdiction (with extension motions) to address timing and interpretive disputes during suspended declarations.²⁸⁸ His recent insights draw an affinity between LeBlanc J's remedy and a "declarations plus" approach, which "maintains the virtue of general declarations that leave governments room to decide the precise means to comply,"²⁸⁹ while simultaneously "counteract[ing] the vice of... costly new litigation if there are ongoing problems of compliance."²⁹⁰ Moreover, the Court's departure from *Schachter*'s categories to defer to Parliament's

²⁸⁷ *Ibid* at para 144.

²⁸⁸ Roach, "Remedial Consensus," *supra* note 30 at 256-259.

²⁸⁹ Roach, "Polycentricity," *supra* note 19 at 33.

²⁹⁰ *Ibid*.

capacity and competency, plus recent combinations of individual and declaratory relief,²⁹¹ transmit *Doucet-Boudreau*'s principles to constitutional remedies at large, including suspended declarations. Roach elucidated that "principles of effective remedies and proper institutional role"²⁹² figured centrally in *Schachter* when the Court "articulated helpful and workable principles to guide judges."²⁹³ In other words, the explicit principles espoused in *Doucet-Boudreau* were already implicit in *Schachter*. Principled remedial practice can therefore embed *Doucet-Boudreau*'s principles within suspended declarations.

3. *Supervising Suspended Declarations*

A recent addition to the rare line of cases on retaining jurisdiction came with *Thibodeau v Air Canada*,²⁹⁴ which restrained retaining jurisdiction to "compelling circumstances"²⁹⁵ - at least when language rights are violated.²⁹⁶ In overturning a structural order for fixing a systemic breach of Air Canada's bilingualism obligations, *Thibodeau* reaffirmed that retaining jurisdiction remains within s. 24(1)'s remedial arsenal. However, *Thibodeau* cautioned that structural remedies must be handled "with special care"²⁹⁷ because potentially vague wording can pique disputes about compliance.²⁹⁸ Certainly, judges should draft clear orders so that parties can move forward. Yet in confining judicial supervision to compelling circumstances - circumstances which the Court did not specify - *Thibodeau* underappreciates the dexterity of trial judges, and the responsiveness of both modern and equitable practice. In civil procedure, judges are continuously involved in implementing resolutions.²⁹⁹ Judges commonly order mandatory

²⁹¹ See Part II, Section F., "Mitigation by Interim Remedies," *below*.

²⁹² Roach, "Principled Remedial Discretion," *supra* note 7 at 137-138.

²⁹³ *Ibid* at 141.

²⁹⁴ *Thibodeau v Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

²⁹⁵ *Ibid* at para 128.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid* at para 126.

²⁹⁸ *Ibid*.

²⁹⁹ *Doucet-Boudreau*, *supra* note 21 at para 71; Roach, *Constitutional Remedies*, *supra* note 7 at 13.50-13.80, 13.1300-13.1350; "Remedial Consensus," *supra* note 30 at 264; "Polycentricity," *supra* note 20 at 32-33; Nova Scotia, *Nova Scotia Rules of Civil Procedure* at rr 4.13, 10. Rule 1.01 states, "These Rules are for the just, speedy, and inexpensive

mediation, convene date assignment conferences, and supervise settlements for speedy and just resolutions. Judges also have statutory powers to supervise criminal case management for fairness and efficiency.³⁰⁰ Thus, a procedurally vigorous approach to remedial discretion unites constitutional remedies with the movement of modern legal practice. But even accepting that retaining jurisdiction should be a last resort, if redressing harm to politically and socially marginalized people would not count as compelling circumstances distinguishable from *Thibodeau*, then it is hard to imagine what would. That one of judicial review's most staunch opponents, Jeremy Waldron, admits the value of judicial intervention in situations of prejudiced minorities and dysfunctional lawmaking suggests that *Bedford* could have fit the mold.³⁰¹

When governments are capable of addressing the legal and operational fallout from the declaration, evidence of readiness to respond, plus good faith steps towards a constitutional solution should justify granting or extending a suspension - as long as harm to individual rights can be allayed in the interim.³⁰² Retaining jurisdiction during a suspension can benefit successful claimants and other affected stakeholders, who can rebut proposed extensions with evidence of heel-dragging, and raise concerns for

determination of every proceeding.”

³⁰⁰ *Criminal Code*, *supra* note 2 at ss 551.1–551.7.

³⁰¹ Waldron, “Against Judicial Review,” *supra* note 187 at 243. For an example of how retaining jurisdiction on clearly stipulated terms can prevent future disputes during a suspended declaration, see *Catholic Children’s Aid Society of Hamilton v GH*, 2016 ONSC 6287, 83 RFL (7th) 299 at para 110 [GH]. Chappel J promoted meaningful consultation by insisting that an extension of the suspension would only be granted with detailed evidence of steps taken and estimations of extra time needed.

³⁰² Roach, “Remedial Consensus,” *supra* note 30 at 243. But see *Procureure générale du Canada c Descheneaux*, 2017 QCCA 1238 at paras 39–83, [2017] QJ No 10959 (QL), outlining a four-factor framework for extending suspended declarations. When the Federal Government failed to promptly respond to a section 15 violation caused by gender discrimination in the *Indian Act*, RSC 1985 c I-5, the Court of Appeal drew four factors from prior suspended declarations, including *Carter* 2016, *supra* note 51: changed circumstances, reasons for ordering the initial suspended declaration, the likelihood of remedial legislation being passed during the suspension, and impacts on public confidence in the administration of justice. However, the Court of Appeal did not cite *Morton*, *supra* note 234 at para 17, nor *GH*, *ibid*, which both establish that the government’s ability to anticipate and plan measures to mitigate the impact of the suspension, and willingness to engage in good faith consultations, can support extending the suspension without discounting the rights of affected parties.

irreparable harm without shouldering the costs of fresh litigation. By employing the Court's role to protect minorities, retaining jurisdiction has flexibility for governments to independently devise policy, and can foster democratic dialogue.³⁰³ As a dispute resolution mechanism, retaining jurisdiction is also important because barriers of inequity and misunderstanding must be leveled before meaningful deliberation about the range and merits of policy options can even take place.³⁰⁴ To be sure, if the Court facilitates the means and opportunity to engage with the government, that interruption to the elected branches may entice objections of judicial activism. But there is an essential difference between interposing to balance an inequity of bargaining power in a particular process (tied to a systemic violation of a historically oppressed group) and intruding to impose a single policy result. The Court's capacity to see that the parties engage fairly within the policymaking sphere does not direct a particular policy outcome,³⁰⁵ but instead preserves the government's independence in reaching whatever result it chooses, and ensures that result is informed by a process that listens to the voices of those affected by it.

If this distinction between process and result animates judicial discretion, then judges should not balk at retaining jurisdiction to secure an appropriate and just remedy. Including applicants' viewpoints within the policymaking sphere matters because governmental responses to unconstitutional laws may not always result in new legislation. As Roach has pressed, since "there is no guarantee that the successful *Charter* applicant will even be consulted or kept informed about the policy process",³⁰⁶ incremental supervision over a suspended declaration can achieve transparency and accountability through an adversarial process that behooves the judiciary. It can keep the Court, participants, and public abreast of developments towards curing the violation, what has yet to be

³⁰³ *Ibid* at 242–243, 266–267.

³⁰⁴ *Ibid* at 240. See also Sandra Liebenberg, *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta, 2010) at 434–437. In South Africa, judicial interventions to redress poverty, homelessness, and infection are also grounded in these concerns.

³⁰⁵ Liebenberg, *supra* note 304 at 412 (courts' institutional characteristics render them "well placed to detect the impact of general legislative and executive acts and omissions on particular individuals and groups").

³⁰⁶ Roach, "Remedial Consensus," *supra* note 30 at 224–225; *Constitutional Remedies*, *supra* note 7.

implemented, and why those items are outstanding. The mere prospect of airing unfulfilled undertakings on the record can spark governments to action, and can kindle democratic debate about the rights and values at stake.³⁰⁷

In summary, if evidence and argument warrant a suspended declaration, the Court should retain jurisdiction for the entire suspension. Depending on the invalid law(s)' complexity and multiplicity, and the government(s)' readiness to respond, the suspension should first be fixed for an initial 3-to-6-months, which would encourage a productive start. To avoid the perils of slipshod decision-making, if the government returns to court with proof of good faith steps towards a solution and meaningful consultation with the applicants, subject to rebuttal, the suspension could continue. At the same time, a short initial suspension could avoid subjecting rights-bearers to prolonged unconstitutional harm. The Court would be available to clarify any interpretive disputes regarding its ruling on the breach,³⁰⁸ remain open for rights-bearers and participants to seek interim relief and to apprise the Court of new issues that surface after the ruling.

F. Mitigation by Interim Remedies

When used to brace suspended declarations with interim remedies, retaining jurisdiction can also mitigate irreparable damage to *Charter* rights during suspensions, reduce horizontal inequity occasioned by disparate enforcement, and ward off legal uncertainty plaguing the rule of law. Precedent in this area is averse, but not adverse. Depending on each case's facts, policy reasons against concurrent remedies may chafe against access to justice, and run counter to longstanding constitutional rules.

1. *Reconceptualizing Concurrent Remedies*

Although *Doucet-Boudreau* treated retaining jurisdiction as a s. 24(1) remedy, given the *Charter* was not invoked in *Manitoba Language Rights*, it should be logically and doctrinally sound to treat retaining jurisdiction over a suspended declaration as an inherent judicial power, rather than pinning

³⁰⁷ Roach, "Polycentricity," *supra* note 19 at 30, on *Doucet-Boudreau*, *supra* note 21: "fidelity to adjudication facilitated adversarial and public debate about the significance of the information contained in progress reports."

³⁰⁸ *Ref re Remuneration of Judges of Prov Court of PEI*, *supra* note 283.

it to either ss. 24(1) or 52(1).³⁰⁹ Mitigation via interim relief, limited to the suspension only, does not necessarily have to be ordered under s. 24(1).³¹⁰ Regardless of which peg we hang these remedies on, some judges have resisted pairing declaratory relief under s. 52 with individual relief under s. 24(1).

To see why interim relief should be considered when courts invalidate criminal offences, we first need to investigate judges' aversion to concurrent remedies. *Schachter* refused concurrent remedies to avoid exorbitant budgetary repercussions and expenditures on monetary damages in civil cases.³¹¹ Yet in the context of criminal offences, Lamer CJ dialled back *Schachter* to dissent in *Rodriguez*³¹² he would have ordered a constitutional exemption for assisted suicide simultaneously with a suspended declaration. He qualified that suspended legislation "will not necessarily be left operative in all of its violative aspects... the Court has jurisdiction under s. 52 to make the declaration subject to such conditions as it considers just and necessary to vitiate the impact of the violation during the period of the suspension."³¹³ Despite Lamer CJ's significant qualification of *Schachter*, *R v Ferguson* cemented *Schachter*'s objections to concurrent personal and general remedies. *Ferguson* denied constitutional exemptions to remedy cruel and unusual punishment inflicted by mandatory minimum penalties. Because exemptions contradicted Parliament's expressed intent to oust sentencing discretion, the Court regarded exemptions as more intrusive to Parliament than invalidation.³¹⁴ Additionally, because citizens and the government relied upon laws "on the books" to govern their conduct, the Court forebode that case-by-case exemptions disrupt the rule of law.³¹⁵

There are both principled and factual bases to surmount *Ferguson* if we distinguish *Bedford*'s unconstitutional prohibitions from *Ferguson*'s

³⁰⁹ *Manitoba Language Rights*, *supra* note 8.

³¹⁰ For example, individual exemptions for assisted death following *Carter* 2016, *supra* note 51 would fall under section 24(1), but Quebec's exemption was not a personal remedy.

³¹¹ *Schachter* *supra* note 31; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 SCR 405.

³¹² *Rodriguez v British Columbia (AG)*, [1993] 2 SCR 519, 107 DLR (4th) 342.

³¹³ *Ibid* at 571–572 (dissenting, citing *Swain* as precedent under section 52 for vitiating a suspension. Three other dissenters agreed with Lamer CJ's remedy).

³¹⁴ *Ferguson*, *supra* note 7 at paras 52–56.

³¹⁵ *Ibid* at para 69.

penalties. When respecting institutional roles, there are elemental distinctions between exempting overbroad mandatory sentences post-conviction versus relieving overbroad prohibitions during a suspended declaration. Although Parliament has mandated that convictions for certain offences receive the same minimum sentence, Parliament has not mandated that every alleged commission of every offence be prosecuted. Since Parliament has not ousted discretion to charge and prosecute offences, Parliament has therefore accepted inevitable incidental uncertainty when those offences are enforced. The prostitution prohibitions' very existence, and the general prospect of arrest and charge thereunder (rather than a specific application of a sentence) spawned the *Charter* violations in *Bedford*.³¹⁶

The limited temporal effect of interim remedies is another distinction. Unlike exemptions for mandatory sentences, exemptions for unconstitutional prohibitions can be made on an interim basis. Roach delineated this difference to critique *Carter 2016*'s minority, who, echoing *Ferguson*, opposed exemptions during the unanimous extension of the suspended declaration.³¹⁷ *Carter 2016*'s minority missed the fine distinction that *Ferguson* barred permanent, not temporary exemptions. Technically, a permanent exemption is final; but a temporary exemption (and any uncertainty it produces) lasts only as long as the suspension. In this way, temporary exemptions quarantine individuals susceptible to harm. When the suspension and exemptions expire, the final cure, administered by either the Court's declaration or Parliament's new legislation, applies universally.

Although *Ferguson* held that ss. 24(1) and 52(1) serve separate remedial purposes, the case unanimously affirmed that s. 24(1) remedies can be unusually ordered in conjunction with s. 52(1) when an applicant would otherwise be deprived of effective relief.³¹⁸ While s. 24 provides discretionary personal remedies for unconstitutional actions, and s. 52 mandates general relief for unconstitutional laws, these two remedial

³¹⁶ *Carter 2016*, *supra* note 51 at para 10. Interestingly, the minority's objection to exemptions in *Carter 2016* was informed by the fact that Quebec's Justice Minister had issued a directive against prosecuting physicians during the suspension. Principled executive discretion by the Justice Minister might have obviated the need for judicial discretion to maintain the rule of law.

³¹⁷ Roach, *Constitutional Remedies*, *supra* note 7 at 14.1811–14.1813.

³¹⁸ *Ferguson*, *supra* note 7 at para 63, citing *Demers*, *supra* note 51.

purposes need not be mutually exclusive.³¹⁹ As LeBel J exalted through his dissent against a prospective stay of proceedings in *R v Demers*, individual and public interests can coalesce with concurrent remedies, for “the constitutional rights and freedoms of all citizens are enhanced”³²⁰ when violations of individuals’ rights are vindicated by immediate relief.³²¹

Constitutional rules also fortify the principled use of concurrent remedies. Using s. 52(1) as a machete to undercut s. 24(1)’s more precise scalpel is a disproportionate result – one that is antithetical to the rule that “no part of the Constitution can abrogate or diminish another part of the Constitution.”³²² By foreclosing personal remedies from people unable to bring a challenge, narrowly and disharmoniously construing ss. 52(1) and 24(1) diminishes the *Charter*’s dual purposes to fully benefit and protect rights-holders.³²³ Denying individual remedies also departs from the Court’s general rule to immediately apply the ruling to successful claimants.³²⁴ The scope of this ongoing injustice might not have appeared obvious in *Bedford* because the applicants, who sought only to invalidate unconstitutional laws under s. 52(1), were not charged under the unconstitutional prohibitions during the challenge.

That said, the Court’s “slavish adherence”³²⁵ to one remedial track can create a pyrrhic victory for similarly situated individuals that public interest standing should help, not hinder.³²⁶ The absence of other individuals’ names from *Bedford*’s application did not remove the urgency to uphold their rights. Access to justice therefore calls for harmony between ss. 52(1) and 24(1). Although *Bedford*’s applicants had no outstanding charges, at the time, there were people selling sex who were accused under the infirm prohibitions, yet were unable to launch their own challenge.³²⁷ In fact, the

³¹⁹ *Ferguson*, *supra* note 7 at paras 59–61, 64–65.

³²⁰ *Demers*, *supra* note 51 at para 99 per LeBel J (dissenting).

³²¹ *Ibid.*

³²² *Doucet-Boudreau*, *supra* note 21 at para 42.

³²³ *Ibid* at para 23.

³²⁴ *Demers*, *supra* note 51 at paras 102–103 per LeBel J (dissenting).

³²⁵ *Ibid* at para 96.

³²⁶ *Ibid*; *GH*, *supra* note 301 at para 107; Roach, *Constitutional Remedies*, *supra* note 7 at 14.1812–14.1813.

³²⁷ *Bedford*, *supra* note 1 at para 123 affirmed that a hypothetical violation of anyone’s section 7 interest can breach the *Charter*. Since Amy Lebovitch was actively engaged in sex work

Court had just recognized the difficulty of hoisting direct challenges to the prostitution prohibitions the year before *Bedford* when it granted public interest standing to the Downtown Eastside Sex Workers United Against Violence Society.³²⁸ In determining that the Society's suit was a reasonable and effective means of bringing the issues forward under s. 52, Cromwell J highlighted social, practical, and personal barriers to justice. Those multifaceted barriers included inevitable public exposure from controversial litigation, which stirred fears for lost safety, privacy, clients, families, and educational opportunities.³²⁹ It therefore falls to public interest litigants and intervenors to remind the Court of third parties at risk of irreparable harm during a suspension. Unless and until unconstitutionality is proven, those most directly impacted by the result may be unable to step forward to seek relief under s. 24(1). Those individuals should not endure a lost personal remedy because civil society accessed justice instead. The Court's pragmatic attention to reasonable, effective standing at its entrance should be matched with meaningful, effective remedies at its exit. Retaining jurisdiction over a suspended declaration can therefore reinforce access to justice by keeping the Court open to mitigate ongoing injustice to individuals.

2. *Precedent for Interim Remedies*

Taking care to avoid commandeering the domain of the executive and Parliament, judges in Canada and abroad have already maneuvered over hurdles erected by resistant precedent and rigid branches of powers.³³⁰

when the application was initiated, she had direct, private interest standing. Terri-Jean Bedford and Valerie Scott were not working in the sex industry then, but because they planned to return, Himel J concluded there was no meaningful difference for assessing standing under section 52(1): all three had standing as of right (*Bedford* ONSC, *supra* note 1 at para 55). Alternatively, she found that Bedford and Scott would not have public interest standing (*Bedford* ONSC, *supra* note 1 at paras 60–62). The Court of Appeal declined to address the issue. Lebovitch's private standing made Bedford and Scott's standing irrelevant (*Bedford* ONCA, *supra* note 1 at paras 48–50). Standing was not revisited in Bedford's final appeal.

³²⁸ *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 64.

³²⁹ *Ibid* at para 71.

³³⁰ For a recent Canadian example of concurrent remedies, see *GH*, *supra* note 301. Numerous possibilities for resolving the unconstitutional definition of "Native" in child welfare legislation necessitated consultation, but Chappel J adverted that her 10-month suspended declaration did nothing to assist the Métis child in the proceedings before her, who was excluded from the definition. To ensure he would receive the same

South Africa's remedial approach is a helpful model. During the two-year suspended declaration in *Dawood and Another v Minister of Home Affairs*, O'Regan J buffered the uncertainty from potentially arbitrary applications of broad immigration criteria.³³¹ By fashioning a "good cause"³³² test for refusing temporary permits, the applicants and similarly situated individuals would not be denied immediate relief whilst the legislature worked on "a range of possibilities."³³³ Despite the remedy touching upon the executive sphere, limiting interim guidelines to the suspension's duration was the "best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other."³³⁴ O'Regan J's words evoke how a suspended declaration, coupled with temporary guidelines for administrative discretion, can consummate the principles of vindicating rights and respecting institutional roles.³³⁵

Swain's suspended declaration exhibits the efficacy of setting a short suspension at the outset, braced with interim guidelines, and amenability to adjusting for changing needs. Lamer CJ prepared directions for lower courts to provide clarity and quell fears for public safety from the impending release of automatically-detained mentally disordered accused. During the 6-month suspension, interim detention orders would last 60 days maximum, failing which *habeas corpus* would provide a default saving

protections as non-Métis Aboriginal children, she undergirded the declaration with a section 24(1) remedy, directing that the child be treated as a Native child in both present and future proceedings. In retaining jurisdiction, her principled order was fair to the government, as the terms outlined when and how to extend the suspension, yet she also fulfilled the judiciary's duty to enforce the constitution and protect the rights of the child without delay.

³³¹ *Dawood*, *supra* note 217.

³³² *Ibid* at para 67.

³³³ *Ibid* at para 64.

³³⁴ *Ibid* at para 68. See also Bishop, *supra* note 121 at 9-123-9-126.

³³⁵ Leckey, "Harms," *supra* note 17 at 591. Though not citing *Dawood*, *supra* note 217, Leckey also sees South Africa's interim orders as "an important middle ground." See also Leckey, *Bills of Rights*, *supra* note 17 at 105-106. Leckey's view accords with O'Regan J's dissent in *Fourie*, *supra* note 218 at para 170 (the separation of powers cannot "be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint"). See also Bishop, *supra* note 121 at 9-73-9-74.

grace.³³⁶ The Court remained open to recalibrating those transitional guidelines, as well as the suspension's duration (subsequently extended by 3-months), with affidavit evidence showing cause for the adjustment.³³⁷ Swain's remedial compromise was dynamic and anticipatory, establishing that fairness does not always equate with finality at the earliest stage.

Carter also portrays the Court's competency and capacity to draft guidelines for alleviating damage to *Charter* rights during a suspended declaration, without overrunning Parliament's turf.³³⁸ Evincing how litigators can fine-tune suspended declarations with their pleadings, the Plaintiffs originally requested guidelines to ensure legal certainty and to inform the legislative process.³³⁹ Smith J acknowledged it was Parliament's "proper task ...to determine how to rectify"³⁴⁰ unconstitutional legislation, yet she reconciled the separation of powers with the principles of vindication and fairness.³⁴¹ Since "the unconstitutionality ar[ose] from the legislation's application in certain specific circumstances,"³⁴² it was "incumbent on the Court to specify...those circumstances."³⁴³ Thus, rather than muddling the clarity required by the rule of law, interim guidelines can heed *Ferguson's* instruction that "[l]egislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to

³³⁶ *Swain*, *supra* note 32 at 1021. See also *R v Bain*, [1992] 1 SCR 91, 87 DLR (4th) 449 at 104. A six-month suspended declaration was issued when prosecutorial stand-by provisions breached section 11(d)'s trial fairness guarantee. *Bain* predated *Schachter*, but there was no public safety issue, nor long queue of cases that would jeopardize the rule of law or equality. Interim remedies were available by challenging the stand-by provisions in ongoing proceedings.

³³⁷ *Swain*, *supra* note 32 at 1022, *supra* note 266 (discussing motion for directions).

³³⁸ For a recent 12-month suspended declaration which offered detailed guidelines to legislators for redressing a violation of section 2(b) of the *Charter* under freedom of information legislation, see *Toronto Star v Ontario (AG)*, 2018 ONSC 2586 at paras 130–142. Although not a declaration of invalidity, to brook an onslaught of systemic repercussions for violations of the right to be tried within a reasonable time, a 5:4 majority formulated exceptional transitional criteria for stays: *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 at paras 93, 95–104.

³³⁹ *Carter* 2012, *supra* note 233 at para 28.

³⁴⁰ *Ibid* at para 1386.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

remedy legislation that is found to be constitutionally infirm.”³⁴⁴ Although the final criteria set for exemptions during *Carter 2016*’s extended suspension were less detailed than Smith J’s,³⁴⁵ the majority did recognize that interim relief “ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.”³⁴⁶ Certainly, there is a risk that judicial guidelines or exemptions may stymie innovative reform by giving Parliament a ready-made constitutional template. But Parliament’s reply to *Carter* actually restricted access to assisted death to narrower circumstances than the Court’s guidelines.³⁴⁷ Regardless of that reply’s wisdom, at bottom, Parliament’s deviation from the Court’s criteria signals that Parliament’s autonomy was preserved, and that interim relief can respect the separation of powers.

The separation of powers can also be respected through other features of remedial procedure. With cogent reasons and fuller submissions from participants, judges can avoid becoming draftspersons. If the Court’s reasons stress the temporary, minimal character of interim guidelines, and indicate that a menu of responses (including more intricate ones) exist, then it could avoid unbridled trespassing onto Parliamentary and Executive territory. If the Court is considering interim relief, then participants could draft and submit proposed options. Transitional guidelines that the parties have a hand in drafting are less intrusive than the interpretive remedy of reading in, where the Court unilaterally takes responsibility to rewrite unconstitutional laws, eliminating any need for government action.³⁴⁸ Accounting for the separation of powers also raises an important distinction between endorsing untested, permanent solutions (especially when unbidden) and outlining transitional guidelines to protect the rule of law

³⁴⁴ *Ferguson*, *supra* note 7 at para 73.

³⁴⁵ Cf *Carter 2015*, *supra* note 22 at para 127 with *Carter 2012*, *supra* note 233 at paras 1387–1392.

³⁴⁶ *Carter 2016*, *supra* note 51 at para 6. Like the new sex work laws, the new regime for end-of-life assistance is mired in controversy. A constitutional challenge to new legislation for medically-assisted death is underway in *Lamb v Canada (AG)*, 2017 BCSC 1802, 5 BCLR (6th) 175.

³⁴⁷ *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3.

³⁴⁸ *Schachter*, *supra* note 31. For a bold example of reading in, see *Canadian Foundation for Children, Youth, and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 at paras 36–40.

and grant effective but temporary relief to individuals. Advising that a range of possible constitutional approaches exist should be less invasive than prescribing each approach within that range, and dictating that legislators should implement one to permanently redress *Charter* violations.³⁴⁹ The foregoing cases all counsel that the Court can remain seized of the matter to adjust the remedial framework for unanticipated contingencies. Such agility can curb the hazards of harm to individual rights and the public interest, without barging into the legislative and executive spheres.

Extrapolating this final element of deliberative remedial procedure to *Bedford* indicates workable alternatives that could have mitigated the continued jeopardy to individuals in the sex trade. Faced with brandishing an already clumsy and now unconstitutional criminal law, *Bedford's* all-or-nothing approach to suspending declarations placed police and prosecutors in a precarious position to do their jobs to protect the public. In addition to the earlier recommendation to rebuild safe houses with restitution, guidelines for staying proceedings could have been a minor mitigation. Prosecutions could have proceeded against pimps and johns, while those who sold sex could qualify for stays. Sorting out prosecutions during *Bedford's* suspension according to exploitative circumstances could have been justified because that distinction among the class of accused is attached to the specific injustice litigated in *Bedford*. Temporarily defusing one element of the dangerous environment would not extinguish the danger, but denying a remedy to persons accused of igniting that danger would uphold *Bedford's* spirit. Furthermore, a nuanced dialogue about the public interest could have occurred if the Court invited provincial Attorneys General to submit their protocol for maintaining uniformity in the administration of justice during the proposed suspended declaration. That conversation might have even obviated judicial stays with prosecutorial stays. Far from curing the unconstitutionality, guidelines would have been a compromise that left the ultimate response to Parliament, respected the Crown's role, and tried to vindicate injustice. At the very least, Monica Forrester would not have had to sacrifice appearing before the Standing Committee's study of Bill C-36 to serve as a surety.

³⁴⁹ For a strong prescription, see the dissent in *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69, [2000] 2 SCR 1120 per Iacobucci, Arbour, and LeBel JJ.

G. Summary

Regardless of whether a declaration is suspended, subjecting remedial decisions to informed, adversarial argument ensures concerns about remedial repercussions are objectively heard, addressed, and recorded. Intended or not, if the government's ultimate solution wrongly dismisses those concerns, or spurns the judgment's spirit without recourse to the exceptional *Charter* override, then publicly chronicling that controversy could be potent for a future *Charter* challenge. By cuing judges to acknowledge and answer arguments and weigh evidence, a hearing devoted to remedial issues could stimulate much-needed written reasons for suspended declarations. Muscular remedial procedure consolidates the cohesive bond between rights and remedies, while avoiding the "tail wagging the dog"³⁵⁰ and – in Leckey's words – the "embolden[ing]" of judges.³⁵¹ The Court's commitment in principle to guard individual and minority interests would be equaled with a commitment in practice. Precedent and predictability would be produced for future litigants and lower courts, and the overall judgment would be imbued with legitimacy through transparently articulated, demonstrable justification. This approach acquiesces to modern reality: governing and enforcing constitutional rights must grow along with the complexities of systemic and polycentric issues. To quote *Bedford*, "considering all of the interests at stake"³⁵² may mean that a final remedy eludes the judiciary's grasp, but all of those interests do not have to be irreconcilable. Even a tourniquet is better than an open wound.

III. CONCLUSION

In their current version, suspended declarations are an unwieldy tool employed for an ambitious mandate: to protect the public, to uphold the rule of law, to maintain equality, and to engage government institutions in democratic dialogue with individuals about fundamental rights and freedoms. Such critical tasks demand careful precision. Yet combing *Bedford's* wake has revealed that the suspended declaration not only missed these remedial functions, it may have impaired them. Along the way, we

³⁵⁰ Bishop, *supra* note 121 at 9–22 (discussing the causation theory of remedial equilibrium).

³⁵¹ Leckey, "Enforcing Laws," *supra* note 17 at 6, 8–9.

³⁵² *Bedford*, *supra* note 1 at para 169.

have also observed that remedial discretion is inextricably woven with unpredictable political factors. It is therefore unfair to hold the judiciary wholly culpable for larger democratic fractures when the legal landscape is transformed in the aftermath of constitutional litigation. Insofar as sex work can be construed as part of broader gender equality and minority rights projects, *Bedford* conveys that a full outlook in systemic advocacy may require adopting political tactics before, alongside, or instead of litigation.³⁵³ Adjudicative reform cannot cure the pains of Parliament. But ignoring the inexorable democratic dimensions of judicial remedies will corrode the legitimacy of Canada's legal institutions, curtail their capacity to provide just and appropriate remedies, and constrict the values of Canada's free and democratic society. While this examination has sought to lay bare the hollows and hazards of utilizing *Charter* litigation alone to achieve systemic social change, constitutional remedies can nevertheless contribute to that change if we are open to learning from the past and adapting to the future. Seen in this light, the more pragmatic question is how those contributions should be made.

Rather than tampering with Canada's theory of constitutional supremacy to reflect problems of remedial practice, revising remedial practice to reflect constitutional supremacy is a viable option.³⁵⁴ To buttress inventive doctrinal directions that do resonate with constitutional supremacy, I have proposed deliberative remedial procedure for suspending declarations of invalidity. This framework is predicated upon a purposive, principled approach to remedial discretion. It aims to avail of adjudication's unique structure for focused, informed, fair deliberation, and tries to tap into the executive's policy expertise, as well as the legislatures' democratic advantages. Accepting that the best cure for constitutional afflictions may lay beyond the judiciary's reach should not absolve judges from their

³⁵³ Rittich, *supra* note 248 (although not discussing sex work specifically, Rittich criticizes using litigation for attaining gender equality); Canadian Alliance for Sex Work Law Reform, *Joint Submission for Canada's Review before the UN Committee on the Elimination of All Forms of Discrimination Against Women, 65th Session, CEDAW, 65th Sess.* (Vancouver: Pivot Legal Society, October 2016), online: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CAN&Lang=EN> (invoking Canada's international obligations to call for the repeal of Bill C-36); Moulard, *supra* note 251.

³⁵⁴ Leckey, "Harms," *supra* note 17 at 603 asserts that if judges do not alter their remedial practice, "the theory of constitutional supremacy requires change."

constitutional duty to secure the channel to that final remedial destination. This requires fulfilling the traditional judicial role to protect and empower individuals, who know and can express their own needs better than anyone else. More than that though, it bears reminding that the judiciary has assumed an implied power to delay a constitutional imperative. The logical corollary to that assumption of power is an assumption of responsibility for what happens during the delay. Concomitant to that responsibility is a need for transparent justification. I hope that a deliberative, evidence-based, inclusive remedial process will encourage frank, thoughtful decisions for mending acute and chronic constitutional violations, and attending to the democratic impacts of those decisions.

The time is nigh for courts to devote sober thought to how they suspend declarations of invalidity. How this thought is to be provoked is another fruitful question. It should not take irreparable harm to the right to life, liberty and security - nor any *Charter* right - during a suspended declaration to impel the judiciary to remedy the remedy. Given it is a distinct action of the judiciary - not Parliament, and not the executive - that instigates the delay, perhaps a savvy litigator will launch a *Charter* challenge to hold the Court liable for irreparable harm during a suspended declaration. Robert Leckey's account of horizontal inequity to accused inspires one possible basis for doing so. Since the unconstitutional difficulty of unequal treatment starts from the Court's discretionary action of ordering the delay, the unconstitutional impact could be conceived as a distinct deprivation of rights, "beyond the unconstitutional enactment,"³⁵⁵ so as to trigger s. 24(1)'s distinct remedial power.³⁵⁶ This strategy may not be all that far-fetched. Actions of the courts have been previously subject to *Charter* scrutiny.³⁵⁷ Even if such an application fails, it would send a strong message to the judiciary that they should take some accountability for collateral damage when they deploy their discretion.

³⁵⁵ *Ibid* at 587.

³⁵⁶ *Doucet-Boudreau*, *supra* note 21 at paras 42-43.

³⁵⁷ *R v Rahey*, [1987] 1 SCR 588, 39 DLR (4th) 481; *BCGEU v British Columbia*, [1988] 2 SCR 214, 53 DLR (4th) 1.

Challenging Dominant Portrayals of the Trans Sex Worker: On Gender, Violence, and Protection *

LEON LAIDLAW **

ABSTRACT

Amidst the recent amendments to federal legislation, Bill C-16, which seeks to protect transgender Canadians from discrimination, there is a need to contextualize the violence that the trans community experiences within factors other than transphobia. Although trans victims of violence and homicide are most often sex workers, and trans people are disproportionately represented among those who sell sex, trans people remain largely invisibilized in sex work research in Canada. An analysis of transphobia must be complicated by exploring the diversity and fluidity of gender presentations, social location, and labour. Results challenge dominant and polarized representations of trans women – as either stereotypically (hyper)feminine or overtly masculine, ‘barely women’ – by describing the variability of transfeminine expressions and their relationship to transphobia. Further, the dominant ‘victim’ discourse surrounding trans sex workers is countered by outlining resistance strategies and methods of ensuring personal protection.

* This work was supported by the Social Sciences and Humanities Research Council of Canada (SSHRC) [CGS Masters].

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Keywords: Transgender; gender; sex work; prostitution; intersectional; violence; transphobia; police; protection; victimization; resistance; oppression; stigma

I. INTRODUCTION

Transgender¹ resistance and liberation efforts have been documented in North America as early as the 1950s,² yet it is only recently that trans rights have entered mainstream debate. During the same time in which anti-transgender ‘bathroom bills’ spread across the United States,³ an interest in trans rights has been mobilized in Canada through the proposal to amend federal legislation to include anti-discrimination protections for gender diversity. On June 19th, 2017, Bill C-16 received royal assent and came into force and effect, thereby adding “gender identity” and “gender expression” as characteristics protected from discrimination in the *Human Rights Act* and *Criminal Code*. As a result, discrimination based on one’s trans status is now prohibited in the federal jurisdiction and anti-transgender crimes can now officially be conceptualized as hate crimes in the law.

While the lives of trans people have long been invisibilized in social science research,⁴ there has recently been a bolstering interest in

¹ Trans people can be defined as those who “move away from the gender they were assigned at birth, people who cross over (*trans*-) the boundaries constructed by their culture to define and contain that gender” [emphasis in original] (Susan Stryker, *Transgender History* (Berkeley: Seal Press, 2008) at 1). For the purposes of this research, the term ‘transgender woman’ includes anyone who was assigned male at birth but identifies with femininity.

² Leslie Feinberg, *Trans Liberation Beyond Pink or Blue* (Boston: Beacon Press, 2007); Sandy L Laframboise, “Finding My Place: The High Risk Project Society” in Dan Irving & Rupert Raj, eds, *Trans Activism in Canada: A Primer* (Toronto: Canadian Scholars’ Press, 2014) at 51; Jennifer Worley, “‘Street Power’ and the Claiming of Public Space: San Francisco’s ‘Vanguard’ and Pre-Stonewall Queer Radicalism” in Eric A & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland: KA Press, 2011) at 41.

³ National Conferences of State Legislatures, “Bathroom Bill” *Legislative Tracking* (Washington, DC: National Conferences of State Legislatures, 2017).

⁴ Viviane Namaste discusses the way in which trans people have been subject to erasure, both institutionally and socially, by the cultural context of modern Western society (Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (London, UK: The University of Chicago Press, 2000)). Trans invisibility can be

documenting the extensive experiences of victimization among the trans population; in doing so, however, victimization has largely been positioned as a result of transphobia or cisgenderism,⁵ as if trans oppression is separable from other systems of oppression.⁶ Acknowledging that violence against the trans community is overwhelmingly directed at racialized and low-income trans people, many of whom are sex workers,⁷ this article follows the call for the violence against trans people to be contextualized in relation to labour.⁸ Noticing a devastating lack of trans representation in sex work research, this article draws upon the findings of an exploratory research project in which interviews were conducted with seven trans women who sell sex. This article considers the relationship between transphobia and gender expression, social location, and labour, and complicates the issue of victimization by outlining personal safety measures engaged in by trans women who sell sex. First, I counter dominant and polarized conceptualizations of trans sex workers – as either stereotypically (hyper)feminine or overtly masculine, ‘barely women’⁹ – by exploring the diversity and fluidity of gender expressions and their relationship to transphobia. Second, by challenging the dominant ‘victim’ discourse surrounding trans sex workers, I consider

attributed to the hegemonic assumption that the gender assigned to individuals at birth is stable (Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Emeryville, Cal: Seal Press, 2007)).

- 5 Cisgenderism is defined as “the cultural and systemic ideology that denies, denigrates, or pathologizes self-identified gender identities that do not align with assigned gender at birth as well as resulting behavior, expression, and community” (Erica Lennon & Brian J Mistler, “Cisgenderism” (2014) 1:1-2 TSQ: Transgender Studies Quarterly 63 at 63).
- 6 For a discussion of how framing anti-trans violence as exclusively a result of transphobia is problematic, see Sarah Lamb, “Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance” (2008) 5:1 Sexuality Research and Social Policy 24.
- 7 Erin Fitzgerald, Sarah E Patterson & Darby Hickey, *Meaningful Work: Transgender Experiences in the Sex Trade* (Washington, DC: Harper Jean Tobin National Center for Transgender Equality, 2015); National Coalition of Anti-Violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016* (New York: National Coalition of Anti-Violence Programs, 2016) [NCAVP 2016].
- 8 Namaste, *supra* note 4.
- 9 Julia Serano, “Skirt Chasers: Why the Media Depicts the Trans Revolution in Lipstick and Heels” in Susan Stryker & Aren Z Aizura, eds, *Transgender Studies Reader*, 2nd ed (New York and London, UK: Routledge, 2013) at 226.

the ways in which trans women who sell sex ensure their own safety by engaging in resistance strategies while working.

II. LITERATURE REVIEW

In 2013, three current and former sex workers, Terri Jean Bedford, Amy Lebovitch, and Valerie Scott, challenged the constitutionality of three provisions of the former sex work legislation before the Supreme Court of Canada in the case of *Canada (Attorney General) v Bedford*. In an unanimous decision, the Court struck down the provisions relating to communication (s. 213(1)(c)), living off the avails of prostitution (s. 212(1)(j)), and keeping a bawdy house as it pertains to prostitution (s. 210) because they were found to be in violation of sex workers' s. 7 Charter right to safety and security of the person.¹⁰ The Court ultimately determined that the harms caused by these provisions, in the way in which they interfered with the safety of sex workers, outweighed their main goal of preventing public nuisance.¹¹ Following this decision, the Court granted the Parliament of Canada one year to respond to these concerns by redrafting the provisions, otherwise they would become of no force and effect.

The following year, the Harper Government introduced Bill C-36, the *Protection of Communities and Exploited Persons Act*.¹² With the implementation of Bill C-36, sex work was made illegal for the first time in Canadian history.¹³ The new laws aim to criminalize the clients of sex workers as well as exploitative third parties. However, sex workers can be criminalized for communicating for the purposes of offering or providing

¹⁰ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

¹¹ For a more thorough analysis of the *Bedford* decision, see Richard Jochelson et al, *Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (New York: Routledge, 2018); Richard Jochelson & Kirsten Kramar, "An Addendum on Bedford: Sex and the Supreme Court – Obscenity and Indecency Law in Canada" in *Sex and the Supreme Court: Obscenity and Indecency law in Canada* (Halifax: Fernwood Publishing, 2011), online: <https://fernwoodpublishing.ca/files/Bedford_Addendum.pdf>; Sonia Lawrence, "2013: Constitutional Cases in Review" (2013) 67:1 *The Supreme Court Law Review: Osgoode's Annual Constitutional Case Conference* 3.

¹² Bill C-36, *Protection of Communities and Exploited Persons Act*, 2nd Sess, 41st Parl, 2014.

¹³ Susana Mas, "Prostitution Bill Would Make It Illegal to Buy Sex in Public," *CBC News* (4 June 2014), online: <www.cbc.ca/news/politics/prostitution-bill-would-make-it-illegal-to-buy-sell-sex-in-public-1.2664683>.

sexual services in the public view. In any case, by criminalizing aspects of the sex industry, the working lives of sex workers are negatively impacted.¹⁴

The new laws have been subject to criticism for the way in which they are predicted to generate similar harms, or potentially exacerbate the same harms to sex workers as the previous provisions that were struck down by the Supreme Court.¹⁵ Indeed, sex work researchers have long contextualized the harms that sex workers experience within the stigmatization and criminalization of sex work.¹⁶ In fact, in the first national study on Canada's sex industry, Benoit and colleagues concluded that the risks associated with sex work were manifestations of the social and legal context in which their work takes place.¹⁷ First, the violence that sex workers experience must be read in the context of their devaluation and marginalization in society. 'Whorephobia' and stigmatic assumptions that sex workers are 'dirty' and 'diseased' work to dehumanize sex workers and promote an environment in which violence against sex workers can flourish.¹⁸

¹⁴ Sally Guy, *Prostitution Policy in Canada: Models, Ideologies, and Moving Forward* (Ottawa: Canadian Association of Social Workers, 2014).

¹⁵ British Columbia Civil Liberties Association, "Re: Public Consultation on Prostitution-Related Offences in Canada" (17 March 2014), online: <<https://bccla.org/wp-content/uploads/2014/03/BCCLA-sex-work-submission-to-Justice-Canada-March-17-2014.pdf>>; The Canadian Bar Association, *Bill C36, Protection of Communities and Exploited Persons Act* (Ottawa: National Criminal Justice Section and Municipal Law Section of the Canadian Bar Association, 2014); Frances Shaver, *Bill C-36: Entrenched in Personal Moral Values and Inaccurate Stereotypes: A Brief to the Standing Committee on Justice and Human Rights House of Commons 41st Parliament, 2nd Session* (Montreal: Concordia University, 2016).

¹⁶ Christine Bruckert & Frédérique Chabot, *Challenges: Ottawa-Area Sex Workers Speak Out* (Ottawa: POWER, 2010); Andrea Krüsi et al, "Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada - A Qualitative Study" (2014) 4:6 *British Medical J Open* 1 [Krüsi et al, "Criminalisation of Clients"]; Andrea Krüsi et al, "'They Won't Change It Back in Their Heads That We're Trash': The Intersection of Sex Work-Related Stigma and Evolving Policing Strategies" (2016) 38:7 *Sociology of Health & Illness* 1137; Maya Seshia, "Naming Systemic Violence in Winnipeg's Street Sex Trade" (2010) 19:1 *Can J Urban Research* 1.

¹⁷ Cecilia Benoit et al, "A Working Paper Prepared as Background to Building on the Evidence: An International Symposium on the Sex Industry in Canada" (2014) Canadian Institutes of Health Research Working Paper No 2014/18.

¹⁸ Bruckert & Chabot, *supra* note 16 at 80–81.

Sex work researchers have also identified the harms arising from criminalization as it interferes with sex workers' labour practices and processes.¹⁹ Of course, it should be noted that criminalization most noticeably affects those who work on the streets by virtue of the public nature of their work.²⁰ Accordingly, scholars and activists are concerned that the new sex work laws will most negatively affect those most marginalized and vulnerable who work in the sex industry.²¹ In attempts to avoid police contact while working, street-level workers are not only dislocated to more isolated and effectively more risky areas, but their negotiation process – a crucial component to screening their clients and ensuring their safety – is also limited by a fear of legal repercussions.²²

Evidence also suggests that access to health and social services is constrained by a fear of criminalization; not only do sex workers fear disclosing their sex worker status to health practitioners and social service workers, but also to police, who have been known to survey social services aimed at supporting sex workers in order to harass those who enter the building.²³ Finally, sex workers' ability to access their legal rights and protections is profoundly limited by the potential criminalization that may ensue as a result of reporting victimization.²⁴ Fundamentally linked with this

¹⁹ Krüsi et al, "Criminalisation of Clients," *supra* note 16; Seshia, *supra* note 16.

²⁰ Bruckert & Chabot, *supra* note 16 at 44.

²¹ Christine Bruckert, "Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action" (2015) 30:1 Can JL & Society 1; Lisa Steacy, *Abolition: Advancing the Frontline: A Submission to the House of Commons Standing Committee on Justice and Human Rights Regarding Bill C-36 on Behalf of the Canadian Association of Sexual Assault Centers* (Canadian Association of Sexual Assault Centres, 2014).

²² Krüsi et al, "Criminalisation of Clients," *supra* note 16 at 6; Seshia, *supra* note 16 at 10-11.

²³ Christine Bruckert & Stacey Hannem, "To Serve and Protect?: Structural Stigma, Social Profiling, and the Abuse of Police Power in Ottawa" in Emily Van der Meulen, Elya M Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) at 297; Frances Shaver, Jacqueline Lewis & Eleanor Maticka-Tyndale, "Rising to the Challenge: Addressing the Concerns of People Working in the Sex Industry" (2011) 48:1 Can Rev Sociology 47 at 57.

²⁴ Christine Bruckert & Collette Parent, "The Incall Sex Industry: Gender, Class, and Racialized Labour in the Margins" in Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)justice in Neo-liberal Times*, 2nd ed (Black Point, NS: Fernwood Publishing, 2014); Tamara O'Doherty, "Criminalization and Off-Street Sex Work in Canada" (2011) 53:2 Can J Criminology & Criminal Justice 217; Seshia, *supra* note 16.

inability to access legal protections is the stigma associated with sex work. Evidence suggests that law enforcement sometimes draw upon stigmatic assumptions of sex workers – that they are just ‘whores’ who are ‘assuming the risks’ associated with the industry – in order to justify their inaction.²⁵ Accordingly, sex workers tend not to report violence to law enforcement because they believe police will not respond effectively.²⁶ When they do, in some cases, sex workers experience additional violence at the hands of police.²⁷

Through research and activism, the voices and needs of sex workers are increasingly being heard. Sex work activists ultimately aim to decriminalize and destigmatize the sex industry, thereby affording sex workers the same benefits, legal rights, and protections as they would receive in mainstream jobs.²⁸ At the same time, dominant discourse on sex work has largely overlooked marginalized groups who sell sex, such as trans people. In Canada, little research has focused exclusively on the experiences of trans people in sex work.²⁹ Rather, trans women are most often invisibilized in broader sex work studies.³⁰ However, in light of the pervasiveness of

²⁵ Bruckert & Hannem, *supra* note 23; Jacqueline Lewis & Frances Shaver, *Safety, Security and the Well-Being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws* (Windsor: Sex Trade Advocacy and Research, 2006) at 26; Seshia, *supra* note 16.

²⁶ Bruckert & Chabot, *supra* note 16 at 23; Krüsi et al, “Criminalisation of Clients,” *supra* note 16 at 7; Shaver, Lewis & Maticka-Tyndale, *supra* note 23 at 54.

²⁷ Bruckert & Chabot, *supra* note 16 at 54.

²⁸ Maggie’s Toronto Sex Workers Action Project, Press Release, “Condemnation Grows as More Sex Workers’ Groups Speak Out Against Police Harassment, Urge Parliament to Go a Different Route” (29 January 2014); Jenn Clamen, Tara Santini & Marie-Claude Charlebois, *The Basics: Decriminalization of Sex Work 101* (Montreal: Stella, 2013) at 2.

²⁹ Namaste, *supra* note 4; Tara Lyons et al, “Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada” (2017) 27:2 *Qualitative Health Research* 182; Tor Fletcher, “Trans Sex Workers: Negotiating Sex, Gender, and Non-Normative Desire” in Van der Meulen, Durisin & Love, *supra* note 23 at 65.

³⁰ Here, I am speaking to the way in which sex work research assumes a cisgender experience. When trans people are present in sex work research, their experiences are not fully accounted for – perhaps the few number of trans participants compared to cisgender participants render researchers unable to conduct an analysis on trans experiences.

employment discrimination,³¹ familial and social rejection,³² and mental health concerns³³ among the trans population, which interferes with their ability to obtain and maintain mainstream employment, some trans people find employment in the sex industry. As a result, trans women, and particularly trans women of colour, are overrepresented among those who sell sex.³⁴ As such, they are also at elevated risk of arrest and incarceration.³⁵

Due to the marginalization that they experience, trans sex workers most often work at street level and have fewer options in where to work compared to their cisgender counterparts.³⁶ While sex work research has long theorized the effects that stigma plays on the violence that sex workers experience, research on trans sex workers has spoken to the issue of transphobia and described how ‘coming out’ as trans when negotiating with clients is a means of preventing transphobic victimization.³⁷ At the same time, research has also identified the benefits of sex work for trans women, who may experience gender affirmation through their work³⁸ and who can flourish financially in the competitive, niche market.³⁹

While such research helps set the groundwork for trans inclusion into sex work research, the broad nature of these findings also risks generalizing trans experiences and expressions. To account for the diversity of gender

³¹ Greta Bauer & Ayden I Scheim, *Transgender People in Ontario, Canada: Statistics to Inform Human Rights Policy* (Toronto: Trans PULSE, 2015) at 3; Dan Irving, “Performance Anxieties: Trans Women’s Un(der)-Employment Experiences in Post-Fordist Society” (2016) 30:83 *Australian Feminist Studies* 50.

³² Sandy E James et al, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016).

³³ Nooshin Khobzi Rotondi et al, “Depression in Male-to-Female Transgender Ontarians: Results from the Trans Pulse Project” (2011) 30:2 *Can J of Community Mental Health* 113; Sue Scruton, *Trans Needs Assessment Report* (Ottawa: Canadian AIDS Society, 2014) at 29.

³⁴ James et al, *supra* note 32; Fitzgerald, Patterson & Hickey, *supra* note 7.

³⁵ Rebecca L Stotzer, “Law Enforcement and Criminal Justice Personnel Interactions with Transgender People in the United States: A Literature Review” (2014) 19:3 *Aggression and Violent Behavior* 263 at 273.

³⁶ James et al, *supra* note 32; Jacqueline Lewis et al, “Managing Risk and Safety on the Job: The Experiences of Canadian Sex Workers” (2005) 17:1-2 *Journal of Psychology & Human Sexuality* 147.

³⁷ Lyons et al, *supra* note 29 at 185.

³⁸ *Ibid.*

³⁹ Fletcher, *supra* note 29.

expressions among trans women, the issue of ‘passing’⁴⁰ must be examined in relation to transphobia. Transphobia does not affect all trans people in the same manners or intensities. First, everyone has different access to the resources that would allow for medical transition.⁴¹ Indeed, ‘passing’ is inextricably linked with economic privilege – that is, who can or cannot afford to transition and purchase new clothing, makeup, and wigs.⁴² Moreover, transitioning is a process. While gender transition can be described as a shift away from the gender category that one was assigned at birth,⁴³ this crossover is not necessarily neat or linear. That is, ‘passing’, if one desires to achieve it, can take time. Second, trans expressions are diverse and trans people will inevitably want different outcomes from their transition; some may wish to achieve a normative gender presentation and effectively ‘pass’ as cisgender, while others prefer to resist hegemonic gender norms and not identify within the gender binary.⁴⁴ It is only with this understanding of the multiplicity and fluidity of gender expression that the complexity of transphobic experiences amongst trans sex workers can be understood.

As a result of this devastating lack of consideration for trans women’s experiences in the sex industry, this article explores the experiences unique to trans women who sell sex. Following Rev and Maeve Geist’s warning to not frame trans sex workers as agentless victims,⁴⁵ this article contextualizes the violence experienced by these women while working as a result of social and legal factors. Moreover, this article explores the resistance strategies engaged in by trans sex workers and how they are practiced within the

⁴⁰ ‘Passing’ can be defined as being ‘read’ as a normative gender, or cisgender. To some, passing means hiding one’s trans status to achieve invisibility (Leslie Feinberg, “Transgender Liberation: A Movement Whose Time Has Come” in Susan Stryker & Stephen Whittle, eds, *The Transgender Studies Reader* (New York: Routledge, 2006) at 205.

⁴¹ Medical transition means transitioning one’s gender through the assistance of hormones and/or gender-affirming surgeries. For a discussion on the complexity of defining transition, see Julian Carter, “Transition” 1:1-2 TSQ: Transgender Studies Quarterly 235.

⁴² Talia-Mae Bettcher, “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion” (2007) 22:3 *Hypatia* 43 at 52.

⁴³ Stryker, *supra* note 1.

⁴⁴ Carter, *supra* note 41.

⁴⁵ Nihils Rev & Fiona Maeve Geist, “Staging the Trans Sex Worker” (2017) 4:1 TSQ: Transgender Studies Quarterly 112.

broader context in which access to formal legal protections is limited. Considering the recent changes to the law that now officially protects trans Canadians via Bill C-16, and the increasing need to include the experiences of trans people in sex work research, I undertake an intersectional approach to consider how the harms of criminalization and stigma have particular implications for trans women who sell sex.

III. METHODS

This exploratory research project sought to investigate transgender women's experiences working in the sex industry relating to their: 1) labour practices and processes; 2) engagement with the criminal justice system; and 3) physical, sexual and emotional wellbeing, including access to health resources. This research was affiliated with the community-based research project, *After Bedford: The Impact to the Protection of Communities and Exploited Persons Act on Ottawa Area Sex Workers*, conducted by sex worker rights group, POWER (Prostitutes of Ottawa/Gatineau Work, Educate, and Resist). Whereas POWER sought to investigate the effects of the recent changes to the federal sex work laws on Ottawa-area sex workers, this study investigated the unique experiences of trans women who sell sex. Both studies relied on the use of one-on-one, in-depth, qualitative interviews. Because our research projects were conducted during the same time frame, the studies engaged in joint-recruitment methods. Participants were invited to participate in the study through the use of a recruitment poster distributed in person in social service agencies and health clinics, through online platforms frequently used by sex workers, and through social media. For this article, I draw upon my own research interviews as well as POWER's interviews with trans women. Recruitment occurred in Ottawa, Ontario over the months of late July to December of 2016.

Prior to obtaining oral consent, participants were explained the purpose, methods, and ethical procedures of the study. Participants also chose a pseudonym by which they would be referred to in the research and were given a monetary honorarium to compensate for any costs associated with their participation (such as child care or travel expenses). Interviews were audio-recorded, then transcribed and anonymized. In total, there were seven participants.

In-depth, qualitative interviews are a useful method in exploratory research as they aim to uncover broad themes and topics significant in the

lives of participants.⁴⁶ Indeed, the purpose of these findings is to “indicate rather than conclude.”⁴⁷ As such, the fact that this study relies on a relatively small sample of participants does not detract from the significance of the findings. In fact, qualitative studies with smaller sample sizes are increasingly common in social science research, and evidence suggests that this does not affect the value and rich quality of the data itself.⁴⁸ Accordingly, the results shared here from the interviews with seven trans women who sell sex are broad in nature, and are intended to help construct the foundation of research on the experiences of trans sex workers in Canada.

In terms of demographic information, participants ranged from 23 to 54 years old. Four out of the seven participants identified as transgender, two as women/female, and one participant identified as two-spirit. In terms of racial identity, one participant identified as white, two as racialized minorities, two as mixed-race, and two identified as Indigenous. Five out of the seven participants were currently working part-time in the sex industry. The two former workers had worked full-time. All participants worked independently, and the length of work experience varied between two and a half months to 31 years. On average, participants had worked 19 years. In terms of sector, Belle de Jour and Cleopatra worked exclusively as escorts and Roadie worked exclusively on the streets. Others floated between sectors of the industry: Tammy worked as both an escort and on the streets; three participants worked out of bars and clubs, of which two worked at street level and one as an escort. Finally, it is worth noting that participants were at different stages of their transition and wanted different outcomes from their transition; while four participants had socially transitioned and were living full-time as women, three participants had not transitioned and were living their lives outside of sex work as men, but presented as women while working.

⁴⁶ Timothy J Rapley, “The Art(fulness) of Open-Ended Interviewing: Some Considerations on Analysing Interviews” in Paul Atkinson & Sara Delamont, eds, *SAGE Qualitative Research Methods* (Thousand Oaks, CA: SAGE Publications, 2010) at 304.

⁴⁷ Mira Crouch & Heather McKenzie, “The Logic of Small Samples in Interview-Based Qualitative Research” (2006) 45:4 *Social Science Information* 483 at 492.

⁴⁸ *Ibid* at 484.

IV. RESULTS AND DISCUSSION

All participants spoke to the fear of violence associated with their work. In line with other sex work research,⁴⁹ participants described experiencing violence from clients, the public, and police. Here, however, rather than being attributed solely to stigma, violence was largely discussed in relation to transphobia. Because of the way in which trans identities are denigrated in society, when one's trans identity is discovered, violence can be imminent. "Sometimes you get the odd person that's drunk that doesn't realize that I'm a male and I'm actually dressed as a woman [sic]. It can get violent. It can get very violent fast" (Wanda, not-transitioned, escort/bars). Here, violence manifests from the cisgenderist perception of trans women as not 'real' or 'authentic' women.⁵⁰ At the same time, because trans women are commonly miscategorised as men, transphobic violence is often mobilized through homophobia.

Alongside client-perpetrated violence, sex work research outlines the risk of harassment and violence from the public among those who work on the streets.⁵¹ Participants described being subject to verbal harassment and name-calling, cat-calling, and having objects thrown at them. At the same time, while out of the public's eye, escorts are not immune to verbal harassment. Belle de Jour, a transitioned trans woman who does out-calls, shares her experiences:

Over the phone you get a lot of disrespect. I get crank calls from kids trying to think they're funny. What child goes [online] to the trans section, crank calls this girl, calling her 'tranny'? Like, you know, okay! Okay child! Hopefully your refrigerator is running and you can go catch it!

Whereas sex workers are devalued and denigrated by virtue of the stigma associated with their work, in this instance, the verbal assault that Belle de Jour experienced was not just because she was a sex worker, but because she was a trans woman who sells sex. Similarly, transphobic harassment from the public was not uncommon to Margaret (not-

⁴⁹ Bruckert & Chabot, *supra* note 16; Elizabeth Comack & Maya Seshia, "Bad Dates and Street Hassles: Violence in the Winnipeg Street Sex Trade" (2010) 52:2 Can J Criminology and Criminal Justice 203; Lewis et al, *supra* note 36.

⁵⁰ Alexandre Baril & Kathryn Trevenen, "Exploring Ableism and Cisnormativity in the Conceptualization of Identity and Sexuality 'Disorders'" (2014) 11 Annual Review of Critical Psychology 389.

⁵¹ Comack & Seshia, *supra* note 49 at 210.

transitioned, street-level/bars): “Getting called names or, ‘Look at the fag over there! Hey, where’s your fucking skirt!’ Just people trying to show their ignorance.” While abusers again preyed on the individual’s trans identity, they were reinforcing stereotypes of transfemininity – that all trans women should don a form of ‘lipstick and heels’.⁵² Trans scholar Julia Serano discussed the dominant portrayals of trans women; either trans women are depicted as highly sexualized, stereotypically feminine subjects (who are thus perceived as inherently ‘deceptive’ for not being identifiable as trans) or they are portrayed as ‘pathetic’, masculine subjects who are ‘barely’ women.⁵³ In either characterization, trans women are not conceptualized as ‘real’ women. However, their gender expressions are policed in accordance with stereotypical and conventional notions of cis femininity. Accordingly, trans women are subject to a heightened risk of transphobic victimization when they fail to live up to this norm. Yet, recall that three of the seven participants in this study had not socially transitioned, but were living as men outside of their work, and two out of the three were unsure if they would ever transition. Because of the diversity of trans expressions, the polarized depiction of trans women as either hyperfeminine or barely feminine must also be challenged.

While research has addressed the issue of transphobic violence, transphobia must be complicated by exploring how differential gender expressions shape experience. While Lewis et al. claimed that trans women had sometimes previously worked as men in the sex industry,⁵⁴ what remains unaccounted for are the differences in social treatment that result from transitioning. Roadie, a two-spirit person who worked on the streets, had particular insights into the industry considering that she had previously sold sex as a man:

Now when I did it as a male, it’s a lot more hostile because of the stigma with, you know, gay people and all that stuff. So that was a lot rougher doing it as a male compared to when I did it as a female. You might get your odd person yelling at you, but when you’re on the dude-side going out and doing it you got gay-bashers, you got people throwing shit at you, you got people from religious groups coming saying you’re an abomination of God.

⁵² Serano, *supra* note 9.

⁵³ *Ibid.*

⁵⁴ Lewis et al, *supra* note 36 at 155.

Although Roadie's words initially suggest that trans women may be afforded better treatment than men who sell sex, she also thought she 'passed' as a cisgender woman and "kind of blended in" by working in areas that were known for cis women to be working. In other words, Roadie's experience illustrates the material implications of 'passing privilege'.⁵⁵ Considering that those who 'pass' as cisgender are afforded better treatment in society,⁵⁶ Roadie may have had more positive experiences while working as a woman only because she could successfully 'pass' as cis woman and did not disclose her trans identity to clients. However, if she was an 'out' trans woman, or did not 'pass' as cis, her experiences may have been different.

'Passing' implies appearing to be cisgender. In the case of trans women, they are expected to enact stereotypical forms of femininity – to further oneself from masculinity.⁵⁷ Participants in this study knew that their gendered appearance correlated with their social treatment. "If I had short hair and still walked down the street, I'm pretty sure I'd get teased" (Tammy, transitioned, escort/street-level). Indeed, Tammy felt as though she had to enact femininity in order to hide any signs that may ultimately reveal her trans status. Many participants spoke to how they performed femininity while getting ready for work. "I get cleaned up and make myself look as pretty as I can and I head out" (Margaret, not-transitioned, street-level/bars). While gender expression is tied to an inner sense of self, it can also be interpreted not only in the context of safety, but also employability and desirability. Because of the way in which trans women are often denied their status as 'real' women, and how "lookism" is so prevalent within the sex industry,⁵⁸ trans women may feel compelled to enact stereotypical forms of femininity in order to feel desirable or marketable. "When I dress up as a woman its more easier because look-wise and stuff like that – it's a lot more easier to get picked up" (Roadie, not-transitioned, street-level).

At the same time that 'passing' may afford some better treatment, all participants aside from Roadie and Tammy consistently 'outed' themselves to clients during the negotiation process. "I'm never putting myself in a

⁵⁵ Bettcher, *supra* note 42.

⁵⁶ Namaste, *supra* note 4.

⁵⁷ Serano, *supra* note 9.

⁵⁸ Bruckert & Parent, *supra* note 24 at 103. Bruckert and Parent explain that lookism disadvantages sex workers who do not conform to narrow and conventional notions of attractiveness, such that they may find it harder to find work.

situation where they don't know I'm trans" (Belle de Jour, transitioned, escort). Others have noted that 'coming out' as trans while working in the sex industry is a means of preventing transphobic violence.⁵⁹ Belle de Jour explains her reasoning for disclosing her trans identity:

So hiding my identity in one way could be beneficial because I could be along the lines of any cis girl, but then I put myself at a much greater risk of 'what if they see the Adam's apple'? What if they figure it out somehow? That puts me at a really big risk.

Just like Belle de Jour disclosed her trans identity as a means of ensuring her safety, Margaret (not-transitioned, street-level/bars) remarked: "If they get a surprise, you might too." While those working in public places identified themselves as trans during the negotiation process, those who advertised online to attract clients, like Belle de Jour and Cleopatra, listed their trans status in their ads. Belle de Jour (transitioned, escort) also noted that showing her face in her online advertisements was a means of preventing refusal and violence from clients: "When you're a trans woman, I feel like posting your face might actually do more for your safety than not posting your face. Cause you go in, you have these insecure men, you could be turned away, you could be subject to verbal harassment."

Scholars have spoken to the way in which violence most intensely occurs against trans women who 'pass' as cisgender; trans women who are not easily recognizable as trans are often framed as 'sexual deceivers' who attempt to 'prey' on innocent men.⁶⁰ In other words, when a cis man is attracted to a trans woman, or if they engage in sexual relations, and he later finds out that she is transgender, he may claim that he has been 'tricked' and this accusation of deception is used to justify the violence directed towards her. Indeed, Margaret (not-transitioned, street-level/bars) speaks to the violent implications associated with being 'found out' as trans: "Some of them were fooled by the look and kind of really get upset and want to hurt you." Thus, by 'outing' themselves as trans prior to the interaction, participants were, in fact, screening their clients in attempts to avoid transphobic responses and thereby maintain their personal safety.

Finally, at the same time that violence was attributed to transphobia, or sometimes homophobia, violence against trans people cannot be separated

⁵⁹ Lyons et al, *supra* note 29 at 185.

⁶⁰ Bettcher, *supra* note 42.

from the issue of violence against sex workers.⁶¹ That is, trans people do not experience violence in the same manners or to the same extent. Rather, violence is contextual – and labour matters. Indeed, it is almost always racialized trans women, many of whom are sex workers, who are the victims of violence and homicide.⁶² In this way, transphobia alone cannot account for the experiences of victimization. Rather, transphobia and stigma interact to position trans women at a particular risk of violence.

While victimization has been an integral point of investigation among sex work researchers and has been contextualized within stigma, the law, and structural oppressions, we must also refrain from positioning sex workers as agentless victims of these forces.⁶³ Despite the risks that selling sex as a trans woman may involve, Rev and Maeve Geist have noted that being a victim is a “temporary condition” and reifying this as an identity works to remove the agency of trans sex workers.⁶⁴ Tammy’s (transitioned, escort/street-level) story of a close encounter with a client illustrates the way in which trans sex workers combat victimization:

[The bad date] wanted to laugh at someone...Just to go in the river halfway and just laugh at you like a fuckin’ idiot [...] I didn’t want to do it. I put one foot in the water and my boot started to fill up and I said, ‘Fuck this’. So I just got out – tried to get out. The guy pushed me in the water, tried to drag me. I was trying to grab like twigs and just to pull myself up and I did and I pepper sprayed him.

Sex workers gain insight into their work through experience. One of the valuable insights is knowing how to protect yourself. Like Tammy, as a result of the pervasive risk of violence, Wanda (not-transitioned, escort/bars) “learned how to fight real fast.” Roadie (not-transitioned, street-level) explained: “Guys who are bigger than me think they can take advantage and I’ve had that happen a few times where hairspray always comes out.”

Learning to fight was a means of protecting themselves against violence. At the same time, it must also be read in the context of a lack of formal legal protections for sex workers as well as within the lengthy history of criminalization of their community. Research has determined that most trans sex workers are uncomfortable seeking police assistance.⁶⁵ Of course,

⁶¹ Namaste, *supra* note 4.

⁶² Fitzgerald, Patterson & Hickey, *supra* note 7 at 4; NCAVP 2016, *supra* note 7 at 9.

⁶³ Rev & Maeve Geist, *supra* note 45.

⁶⁴ *Ibid* at 120.

⁶⁵ Fitzgerald, Patterson & Hickey, *supra* note 7 at 5.

this is a common stance among sex workers generally, especially those who work in public places.⁶⁶ The results from this study were no different. Here, five out of seven participants stated that they could not rely on police for assistance. In fact, it was only the two indoor workers who stated that they would access police services if necessary – one of which said that she would have a friend call police on her behalf, if needed. This finding should not be surprising considering that escorts often times have more positive relations with police than those who work on the streets.⁶⁷

Participants' reluctance to report victimization or seek assistance during times of need must be contextualized within other findings that describe police's failure to assist street-level sex workers, as well as the ways in which police sometimes re-victimize sex workers.⁶⁸ Past negative experiences with police also have the potential to deter sex workers from seeking redress. Trans sex workers must not only fight against sex work stigma, but also transphobia by police. Indeed, transphobic violence at the hands of police is not uncommon.⁶⁹ In fact, the largest US national survey of transgender people conducted by James et al., surveying 27,715 trans people across 50 states, found that 65% of trans sex workers who have engaged with police reported being subject to verbal harassment.⁷⁰ Here, four out of the five participants who worked in public places spoke of police harassment. "When you're working on the street they [police] harass you constantly. Constantly. Or take your money. That happened to me so many times" (Wanda, not-transitioned, escort/bars). Wanda also described experiencing physical abuse at the hands of police. Pointing to the police-perpetrated

⁶⁶ Bruckert & Chabot, *supra* note 16; O'Doherty, *supra* note 24; Seshia, *supra* note 16.

⁶⁷ Andrea Krüsi et al, "Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study" (2012) 102:6 *American J Public Health* 1154 at 1158.

⁶⁸ Bruckert & Chabot, *supra* note 16; Bruckert and Hannem, *supra* note 23; Lewis et al, *supra* note 36; Seshia, *supra* note 16.

⁶⁹ Jamie M Grant et al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011); National Coalition of Anti-Violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* (New York: National Coalition of Anti-Violence Programs, 2015) [NCAVP 2015]; Stotzer, *supra* note 35.

⁷⁰ James et al, *supra* note 32 at 163.

sexual coercion and violence directed towards sex workers,⁷¹ Kara (transitioned, bars/street-level) explains that officers “look down on me. And they tease you a lot. But some of them flirt, you know. Maybe just to laugh at you, they do it.”

The fear of criminalization is yet another impediment to accessing formal legal protections. Trans sex workers, however, are in a particularly precarious position as a result of the cisgenderism embedded in the criminal justice system. Belle de Jour (transitioned, escort) felt like she had to self-regulate her behaviour to ensure that she would not be swept into the system:

I'm definitely afraid of the criminal justice system right now and the way I conduct myself is indicative of that. I try my best not to break any fucking laws while I'm doing this because, well, I still have my penis. I could very well go to a male correctional facility, which scares the shit out of me.

Indeed, trans people are in a particularly vulnerable position when incarcerated – risking violence from both prisoners and staff.⁷² While Correctional Service Canada has recently changed their housing policy to allow for trans people to be housed in federal institutions on the basis of gender identity, not genitalia, decisions are ultimately made on an individual basis.⁷³ That is, federal transgender prisoners are not guaranteed gender-appropriate housing placements. Further, provincial and territorial policies are not consistent across Canada; for instance, in 2015, Ontario and British Columbia were the first provinces to change their housing policies to accommodate provincial trans prisoners, pending individual assessments,⁷⁴ yet at this point, other provincial/territorial policies are not publicly known. In this way, the fear of being incarcerated in the wrong

⁷¹ Bruckert & Hannem, *supra* note 23; Lewis et al, *supra* note 36 at 158.

⁷² Gabriel Arkles, “Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention” (2009) 18:2 Temple Political & Civil Rights L Rev 515; Allen J Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmate* (Washington, DC: US Department of Justice, 2014); George Brown, “Qualitative Analysis of Transgender Inmates’ Correspondence: Implications for Departments of Correction” (2014) 20:4 Journal of Correctional Health Care 334.

⁷³ Correctional Service Canada, *Gender Dysphoria* (Canada: CSC, 2017), online: <<http://www.csc-scc.gc.ca/politiques-et-lois/800-5-gl-eng.shtml>>.

⁷⁴ Kyle Kirukp, “How Ontario’s Prisons Pioneered Sensitivity to Transgender Inmates” TVO (26 January 2016).

institution can act as a unique barrier for trans sex workers to report violence.

While street-level sex workers are particularly burdened by the effects of criminalization, stereotypes about trans sex workers as inherently suspicious may impact levels of police surveillance. The depiction of trans women, especially racialized trans women, as ‘deceptive’ fuels police profiling of them as criminals and sex workers.⁷⁵ In this way, systemic racism which allows for the over-policing and profiling of racialized individuals⁷⁶ and transphobia, interact to justify the surveillance of trans sex workers. While trans people have been invisibilized in sex work research, research on trans people’s engagement with the Canadian criminal justice system is virtually nonexistent in research. Looking to the US, the National Transgender Discrimination Survey found overwhelming police contact among trans sex workers, in that four-fifths (79.1%) have interacted with police.⁷⁷ In this study, participants spoke to the high police presence in areas that they worked. “Well they’re targeting me. They’re letting you know they’re in the area” (Margaret, not-transitioned, street-level/bars). Roadie (not-transitioned, street-level) describes a conversation she had with a cop: “You pulled over, told me to come to the window. I’m out here just sitting here smoking my cigarette. You got no proof.” Others have referred to the profiling of trans woman on the streets, regardless of their involvement in the sex industry, as the charge of ‘walking while trans’.⁷⁸ The trans community has a lengthy history of fighting against criminalization and police oppression⁷⁹ which has resulted in a deep distrust of law enforcement to this day.⁸⁰ As we have seen in the ways in which participants enacted

⁷⁵ Elias W Vitulli, “The Prison-Industrial Complex in the United States” (2014) 1:1-2 TSQ: Transgender Studies Quarterly 162 at 209.

⁷⁶ Wendy Chan & Dorothy E Chunn, *Racialization, Crime and Criminal Justice in Canada* (Toronto: University of Toronto Press, 2014); Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Black Point, NS: Fernwood Publishing, 2012).

⁷⁷ Fitzgerald, Patterson & Hickey, *supra* note 7 at 17.

⁷⁸ Chris Daley, Elly Kugler & Jo Hirschman, “Walking While Transgender”: *Law Enforcement Harassment of San Francisco’s Transgender/Transsexual Community* (Oakland: Ella Baker Center for Human Rights and TransAction, 2000); Vitulli, *supra* note 76 at 163.

⁷⁹ Namaste, *supra* note 4; Eric A Stanley, “Gender Self-Determination, Queer Abolition, and Trans Resistance” in Eric A Stanley & Nat Smith, *supra* note 2 at 1.

⁸⁰ James et al, *supra* note 32 at 185.

individual resistance strategies rather than relying on formal protections, we can conclude that if the law will not protect them, they will protect themselves.

V. CONCLUSION

While transgender Canadians have now received formal protections by the state following the recent passing of Bill C-16, we have seen the ways in which transgender sex workers ensure their own protection rather than relying on state assistance. Not only does the criminalization of aspects of the sex industry limit sex workers' ability to access legal protections, but it also limits trans sex worker's access to their rights guaranteed under Bill C-16. Thus, trans sex workers experience the same burdens as sex workers – who adamantly avoid police contact while working and fear relying on police assistance due to the constant threat of legal repercussions – but are further limited in their access to hate-crime and anti-discrimination protections afforded to trans people generally.

Although trans people continue to be largely erased in social science research and official criminal justice statistics in Canada, empirical evidence deriving from the United States speaks to the prevalence of transphobia-motivated hate crimes; the National Coalition of Anti-Violence Programs (NCAVP) analyzed 1,036 incidents of hate violence reported to them from 12 anti-violence programs across the United States.⁸¹ Although reports estimate that transgender people represent 0.6% of the general US population,⁸² they composed 32% of those subject to hate-motivated violence.⁸³ Further, of the 28 homicides reported to the NCAVP in 2016, two-thirds (19) of the victims were transgender individuals – 17 out of the 19 identified as a trans woman, and all but one was a member of a racialized minority.⁸⁴ Acknowledging that violence against trans people varies significantly in prevalence, forms, and intensities, this article sought to contextualize the violence that participants experienced in relation to labour, social location, and gender expression.

⁸¹ NCAVP 2016, *supra* note 7 at 9.

⁸² Andrew R Flores et al, *How Many Adults Identify as Transgender in the United States?* (Los Angeles: The Williams Institute, 2016) at 2.

⁸³ NCAVP 2016, *supra* note 7 at 42.

⁸⁴ *Ibid* at 9.

Despite the violence that participants experienced, the criminalization of sex work and the systemic cisgenderism within the criminal justice system fostered an atmosphere in which reporting violence or seeking redress was limited. Criminalization, police violence, and a lengthy history of police oppression render trans sex workers more likely to protect themselves than rely on state assistance. Today, trans women are nearly 6 times more likely to experience police violence than any other LGBTQ* group.⁸⁵

While there has been a lengthy history of oppression and criminalization of transgender people, there has been an equally “rich history of trans sex work as a site of agency and resistance integral to the formation of trans cultures and social networks.”⁸⁶ Indeed, trans women have been integral to the history of the sex worker rights movement – from helping to develop the first national sex workers rights march in Canada to founding sex worker-specific programs that are inclusive of trans people.⁸⁷ Here, we have seen the means of self-defence, resistance, and control that trans women who sell sex adopt in order to ensure their own safety in a criminalized and devalued industry. There is a continued need for the voices and experiences of trans sex workers to be central in discussions of sex work.

While there has been a recent shift to consider the unique experiences of trans people who sell sex,⁸⁸ trans expressions and experiences are vast. This article sought to challenge the dominant portrayals of trans women, as either stereotypically (hyper)feminine or overtly masculine, ‘barely women’, by considering the variability of gender expression, how it is inextricably tied to social location, and its relationship to transphobia. Not only is gender expression dependent on an individual’s sense of self, but the stressors of economic marginalization limit access to the means of transition and transphobia fosters an environment in which trans people may feel compelled to hide their identities in order to ensure their safety.

Alongside advocating for the decriminalization of sex work to help ensure sex workers’ access to legal rights and protections, we must also be conscious of the needs of those most marginalized in sex worker

⁸⁵ NCAVP 2015, *supra* note 69 at 9.

⁸⁶ Rev & Maeve Geist, *supra* note 45 at 118.

⁸⁷ Joyce Arthur, Susan Davis & Esther Shannon, “Vancouver’s Sex Worker Movement” in Van der Meulen, Durisin & Love, *supra* note 23 at 13; Anna-Louise Crago & Jenn Clamen, “Ne Dans le Redlight: The Sex Workers’ Movement in Montreal” in Van der Meulen, Durisin & Love, *supra* note 23 at 147.

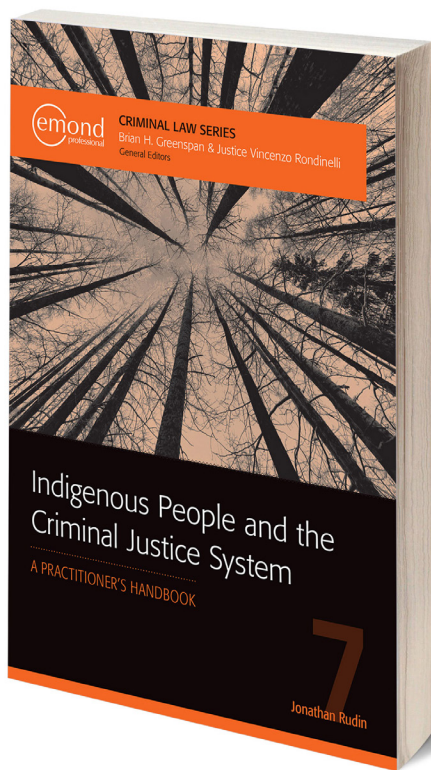
⁸⁸ Fletcher, *supra* note 29; Lyons et al, *supra* note 29.

communities, such as trans people. Doing so, we become aware that the fight for decriminalization and destigmatization of sex work is incomplete without a commitment to destigmatize and depathologize trans identity. Future sex work researchers are urged to be cognizant of the disproportionate numbers of trans people working in the sex industry, make greater efforts at community outreach to ensure trans representation in their research, and engage in an intersectional analysis that accounts for the diverse experiences of trans sex workers.

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