

1-1-2017

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Citation Information

Buhler, Sarah. "“Don’t Want to Get Exposed”: Law’s Violence and Access to Justice." *Journal of Law and Social Policy* 26. (2017): 68-89.
<http://digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/4>

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“Don't Want to Get Exposed”: Law's Violence and Access to Justice

SARAH BUHLER*

Pour plusieurs membres de communautés marginalisées, le droit est trop souvent une source d'oppression. Le système de justice représente une menace et une source de préjudice plutôt qu'un lieu de justice. La plupart des projets d'accès à la justice au Canada se concentrent pourtant sur la tâche de rendre le droit et le système de justice disponible au public, sans véritablement tenir compte des perspectives critiques et troublantes de ces communautés. Dans cet article, je me fonde sur des entrevues qualitatives avec des membres de la communauté de Saskatoon et sur la littérature sur la violence du droit. J'avance que ceux et celles qui se préoccupent de l'accès à la justice doivent confronter les préjudices causés par le droit et les procédures juridiques aux membres de communautés marginalisées. Cela exige que les personnes qui travaillent dans le système de justice s'engagent à prendre au sérieux, et sans se mettre sur la défensive, les perspectives et les expériences des membres de communautés marginalisées affectés par les systèmes juridiques et de justice. J'estime que cet engagement doit mener à de nouvelles façons de penser à l'accès à la justice et à s'engager vers celle-ci. Plus particulièrement, je maintiens que cet engagement peut mener à mettre l'emphase, non pas sur la notion d'« accès » à la justice, mais plutôt sur le fait d'apprendre de ces communautés et en collaboration avec celles-ci, pour mieux comprendre ce que nous devons faire pour aller vers la justice.

For many members of marginalized communities, law is all too often an author of oppression, and the justice system is a site not of justice but of threat and harm. Yet most access to justice projects in Canada devote themselves to the task of rendering law and the justice system more available to the public without a serious consideration of these critical and troubling community-held insights. In this article, I draw on qualitative interviews conducted with community members in Saskatoon and the literature on law's violence to argue that those who are concerned about access to justice must come to terms with harms done through law and legal processes upon members of marginalized communities. This requires a commitment by those working within the justice system to take seriously the perspectives and experiences of members of marginalized communities who are affected by law and justice systems, and to engage non-defensively with these insights. I argue that this engagement may lead to new ways of thinking about, and engaging with, access to justice. Specifically, I propose that it may lead to a de-emphasis on the current focus on “access” and a renewed emphasis on learning with and from communities about what it would take to move towards justice.

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* Sarah Buhler is an Associate Professor at the University of Saskatchewan College of Law. Funding for this research was provided by the University of Saskatchewan's President's SSHRC Fund and is gratefully acknowledged. The author also wishes to thank Janelle Anderson, Amanda Dodge and Stan Tu'Inukuafe, and the anonymous reviewers of this article.

system more available to the public without a serious consideration of these critical and troubling community-held insights. In this article, I draw on qualitative interviews conducted with community members in Saskatoon and the literature on law's violence to argue that legal "system insiders"¹ concerned about access to justice must come to terms with harms done through law and legal processes upon members of marginalized communities. This requires a commitment by those working within the justice system to take seriously the perspectives and experiences of members of marginalized communities who are affected by law and justice systems, and to engage non-defensively with these insights.² I argue that this engagement may lead to new ways of thinking about, and engaging with, access to justice. Specifically, I propose that it may lead to a de-emphasis on the current focus on "access" and a renewed emphasis on learning with and from communities about what it would take to move towards justice.

I draw on interviews from a series of focus groups and individual interviews conducted in Saskatoon in 2013 in order to consider these issues and ground my analysis.³ Participants in the research project included representatives of community organizations and individuals experiencing poverty and social exclusion who shared their understandings about how law and the justice system operate in their communities. The interviews are clear that for some members of marginalized communities in Saskatoon, law and the justice system are associated with ever-present risk, threat, and harm. I argue that these perspectives invite a critique of access to justice discourses and initiatives that are predicated on assumptions including that "justiciable problems" emerge from private or individualized disputes that punctuate otherwise smooth lives; that the legal system is safe and neutral; and that the rule of law operates evenly across society. Further, the insight that law and the justice system are harshly present—even ubiquitous—and are too often a *source* of trouble and pain in the lives of members of marginalized communities destabilizes ideas about access to justice that construct the problem as one of a deficit of access to law and systems of dispute resolution.

I turn first to an overview of the research project and methodology, as well as some general contextual background, situating the project in the field of "legal consciousness" research. I draw on the critical scholarship on law's violence as a framework for understanding the ideas shared by participants and contrast this framework with ideas about law and the justice system that infuse common access to justice discourses. I then turn to an analysis of the themes arising from the interviews and focus groups. Many of the respondents portrayed the justice system as being permeated with risk and threat, and viewed law as a ubiquitous constraining and

¹ I have borrowed the term "system insiders" from Nancy Cook, who wrote about poverty lawyers as being "system insiders" in her article "Looking for Justice on a Two-Way Street" (2006) 20 Wash UJL & Pol'y 169 at 187 [Cook]. In this article I use the term to refer to lawyers, academics, judges, and policy makers who work within the legal system. Of course, members of the legal profession are differently situated and power is unevenly distributed within the profession. Many lawyers have lived experiences of marginalization. However, it is the argument of this article that despite growing diversity within the profession, it remains very important to try to understand the perspective of those who are "outside" the profession and the system, but who experience its impacts.

² As the Action Committee on Access to Justice in Civil and Family Matters stated, "[w]e know that many people have had negative experiences with the justice system. We need to avoid becoming defensive when we hear negative feedback and instead use this feedback as an opportunity to learn and to rebuild trust with those who have been disappointed or excluded." Action Committee on Access to Justice in Civil and Family Matters, *Action Committee Meeting of Provincial and Territorial Access to Justice Groups* (March 2015), online: <cfj-fcjc.org/sites/default/files//docs/ac_meeting_web_ktl03.pdf> at 9-10 [perma.cc/6BHZ-XBU6] [Action Committee on Access to Justice].

³ The research methodology and details about the research are discussed below. Interview transcripts are on file with the author.

surveilling force, something to “survive” and even outwit. They described how interactions with law and the justice system hurt and exhaust community members. Several participants identified the forces of colonialism and racism as being pervasive throughout the justice system. Many conflated the justice system with other state systems and bureaucracies including child protection, welfare, and education; starkly illuminating the ways in which these systems work in concert. However, participants also described the agency and resistance of people in the face of law’s violence, and articulated visions about justice that inform an understanding of access to justice that is attuned to the complex realities of communities grappling with systemic injustice and oppression.

I. METHODOLOGY AND CONTEXT: FOREGROUNDING COMMUNITY KNOWLEDGE

This project proceeds from an assumption that marginalized community members, who are so often the subjects of law but almost never a part of law’s official interpretive community, hold important knowledge about law, justice, and the formal justice system. This perspective and knowledge is often invisible to legal system insiders, who tend to apprehend the problems of the justice system totally differently. As Austin Sarat has pointed out, members of communities who are constantly interacting with law and legal institutions as the subjects of these institutions have access to knowledge “not generally available to those whose contacts with law are more episodic or for whom law is less visible.”⁴ Similarly, Rosemary Coombe has noted that the “meanings of the legal system’s practices to persons who are privileged enough to participate in them are not the same meanings as those which these practices have to persons who merely endure their omnipresence.”⁵ As articulated by one of the respondents in this study, knowledge about law and the system depend on “the person who’s looking.” He stated: “it all depends whose eyes you’re thinking through. Everyone sees... according to their background and their own history and so on. One person might see a police officer and say ‘great protector’ and another guy may think he’s a bag of shit. It’s all through the person who’s looking.”⁶

By foregrounding the knowledge and ideas of community members, this research is situated within the field of legal consciousness research. Legal consciousness research emphasizes the understandings of law and legal processes of ordinary people, seeking to “find the threads of law and legality within the tapestry of ordinary lives and everyday events.”⁷ It further seeks to understand how consciousness about law informs “claims-making and, in turn, the impacts of these processes on existing relations and conditions.”⁸ Although studies of legal consciousness have taken a variety of forms, critical scholars of legal consciousness have attempted to address issues of “legal hegemony” in their research, focusing particularly on “how

⁴Austin Sarat, “‘...The Law is All Over’: Power, Resistance and the Legal Consciousness of the Welfare Poor” (1990) 2 *Yale JL & Human.* 343 at 346 [Sarat, *The Law is All Over*].

⁵Rosemary J Coombe, “‘Same As It Ever Was’: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill L J* 603 at 641.

⁶Interview transcripts at 79.

⁷Patricia Ewick & Susan S Silbey, “Conformity, Contestation, and Resistance: An Account of Legal Consciousness” (1992) 26 *New England L Rev* 731 at 732 [Ewick & Silbey].

⁸For a recent Canadian study, see Adrian Smith, “The Bunk House Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers’ Housing in Ontario” (2015) 52:3 *Osgoode Hall LJ* 863 at 881. [Smith].

the law sustains its institutional power despite a persistent gap between law on the books and the law in action.”⁹

The University of Saskatchewan Research Ethics Board approved the project on ethical grounds.¹⁰ I worked with a team of community collaborators; namely, Stan Tu’Inukuafe, an Indigenous social worker, educator, and long-time community advocate, Amanda Dodge, a community lawyer at Community Legal Assistance Services for Saskatoon Inner City (CLASSIC), and Janelle Anderson, a student research assistant, to develop a set of questions for the semi-structured individual and group interviews. The questions focused on several themes, including perceptions of law and the legal system held by community members, and ideas about justice priorities in marginalized communities.¹¹ The research project proceeded in two parts: small focus groups made up of members of Saskatoon organizations that work with individuals living on low incomes and experiencing marginalization (notably several representatives of these organizations also had lived experience of poverty, racism and marginalization); and individual interviews with people with lived experience of poverty. In the summer of 2013, we conducted a total of four focus groups with a total of nine participants, and twelve individual interviews.

The purpose of using both individual interviews and focus groups was to bring in a variety of types and depths of perspectives. Fontana and Frey point out that focus group interviews can “provide another level of data gathering or a perspective...not available through individual interviews.”¹² They go on to note that focus group style interviews have the benefit of being flexible, cumulative and elaborative “over and above individual responses.”¹³ Because we brought together individuals who were representatives of community organizations that work closely with marginalized members of the community, our approach with the focus groups was an attempt to bring together “acute observers who are well informed”—an approach that Fontana and Frey point out can be “more valuable many times over than a representative sample.”¹⁴ On the other hand, individual interviews were valuable because they provided insights into people’s individual experiences with law and legal institutions in Saskatoon.

My collaborators and I each conducted a portion of the interviews. The interviews were digitally recorded and then transcribed verbatim. The interviews were all conducted in person: the interviews with individual former clients were conducted at CLASSIC, and the focus group interviews were conducted in a variety of community centre spaces in Saskatoon’s core neighbourhoods. The focus group and individual interviews were semi-structured, meaning that it was uncommon for all questions to be asked of each participant, and each interview therefore followed a slightly different trajectory based on responses from participants. However, all of the interviews covered the core questions and touched on all of the themes of the study. My research assistant and I then manually coded the interviews by identifying emergent themes.

The work of analyzing the interviews is ultimately a subjective interpretive exercise. As Denzin and Lincoln write, “[q]ualitative research is endlessly creative and interpretive. ... The interpretive practice of making sense of one’s findings is both artful and political There is no

⁹ Susan Silbey, “After Legal Consciousness” (2005) 1 Annual Rev Law Soc. Sci. 323 at 323.

¹⁰ REB File #BEH 13-144. On file with author.

¹¹ We also asked respondents about their views of lawyers and legal education. The responses to those questions will be the subject of a separate paper.

¹² Andrea Fontana & James H Frey, “Interviewing: the Art of Science.” In Norman K Denzin and Yvonna S Lincoln, eds., *Collecting and Interpreting Qualitative Materials* (Thousand Oaks, CA: Sage, 1998) 47 at 53-54.

¹³ *Ibid* at 55.

¹⁴ *Ibid* at 54.

single interpretive truth.”¹⁵ And as critical Indigenous scholar Margaret Kovach writes, “we can only interpret the world from the place of our own experience.”¹⁶ I therefore offer here my own critical reading of the interviews and focus groups, noting that other interpretations would certainly be possible. My interpretation is influenced and shaped by my position and location as privileged, white, settler woman who has been engaged in community-based clinical legal education in Saskatoon for almost ten years. Others who read the transcripts of the interviews might well emphasize other aspects of the interviews or find other themes.

As noted above, this research focuses on the views of members of community organizations and individuals in Saskatoon. Saskatoon is a mid-sized and growing prairie city, made up of the descendants of white European settlers, a growing number of recent arrivants¹⁷ from around the world, and an urban Indigenous population that makes up about 10% of the population.¹⁸ As in other Canadian urban centres, poverty and racism are closely linked in Saskatoon.¹⁹ In particular, the spectre of settler-colonialism persists in a wide variety of forms, including pervasive racism, a history of police violence towards Indigenous people, and high rates of incarceration of Indigenous men and women.²⁰ As in many other cities, poverty and inadequate housing and services are concentrated in certain core neighbourhoods in Saskatoon.²¹ Numerous community-based organizations, including food banks, friendship centres, health and housing services, anti-poverty advocacy groups and other agencies operate in these neighbourhoods.

¹⁵ Norman K Denzin & Yvonna S Lincoln, “Introduction: Entering the Field of Qualitative Research,” in Norman K Denzin & Yvonna S Lincoln, eds., *Collecting and Interpreting Qualitative Materials* (Thousand Oaks, Cal: Sage, 1998) 1 at 29-30.

¹⁶ Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 110.

¹⁷ The term “arrivants” was used by poet Edward Kamau Brathwaite in *The Arrivants: A New World Trilogy* (London: Oxford University Press, 1981) and taken up more recently by Jodi A Byrd in *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011) to refer to “those people forced into the Americas through the violence of European and Anglo-American colonialism and imperialism around the globe” (at xix).

¹⁸ See Alan B Anderson, ed., *Home in the City: Urban Aboriginal Housing and Living Conditions* (Toronto: University of Toronto Press, 2013) at 34.

¹⁹ See Cara JA Spence, “Race Relations and Housing” in Alan B Anderson, ed., *Home in the City: Urban Aboriginal Housing and Living Conditions* (Toronto: University of Toronto Press, 2013) 358 at 363.

²⁰ John G Hansen & Rose Antasnen describe the high degree of racism and injustice experienced by many Indigenous people in Saskatoon in their book *Urban Indigenous People: Stories of Healing in the City* (Vernon, BC: JCharlton Publishing Ltd, 2014) at 37, 54. As many critical Indigenous scholars have shown, settler colonialism persists in the present moment. Joyce Green has explained that “colonialism is both an historic and a continuing wrong. A term that encompasses economic and political practices, it refers to the appropriation of the sovereignty and resources of a nation or nations, to the economic and political benefit of the colonizer.” Joyce Green, “Aboriginal Women and Constitutional Rights in Canada” in Joyce Green, ed., *Making Space for Indigenous Feminism* (Black Point, Nova Scotia: Fernwood Publishing/ Zed Books, 2007) 140 at 143. According to Statistics Canada, in 2010/ 2011 almost 80% of adult admissions to Saskatchewan correctional centres were Aboriginal people. Mia Dauvergne, “Adult Correctional Statistics in Canada 2010/2011” *Canadian Centre for Justice Statistics* (October 2012), online <statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.pdf> [https://perma.cc/9EWP-RMTK].

²¹ See Evelyn Peters & Carol Lafond, “‘I Basically Stick with My Own Kind’: First Nations Appropriation of Urban Space in Saskatoon, Saskatchewan” in Evelyn Peters & Chris Anderson, eds., *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) at 87. For more information about inequality and health disparity in Saskatoon’s core neighbourhoods see M Lemstra, C Neudorf & J Opondo, “Health Disparity by Neighbourhood Income” in Mark Lemstra & Cory Neudorf, eds., *Health Disparity in Saskatoon: Analysis to Intervention Saskatoon* (Saskatoon: Saskatoon Health Region, 2008) at 126.

Participants in the focus groups included representatives or members of some of these organizations, many who themselves had lived experience of poverty, racism and social exclusion. Participants of the individual interviews were individuals unaffiliated with specific community groups but who lived in the area and had experienced marginalization and interactions with the justice system.²² This paper necessarily considers marginalization in an intersectional frame, aware of the “complex, irreducible, varied, and variable effects which ensue when multiple axes of differentiation—economic, political cultural, psychic, subjective and experiential—intersect in historically specific contexts. The concept emphasizes that different dimensions of social life cannot be separated out into discrete and pure strands.”²³ Although many of the participants highlighted the specific violence of the colonial legal system vis a vis Indigenous communities, several described the experiences of non-Indigenous (settler) community members experiencing poverty and disability, and the experiences of new arrivants to Canada. As Rita Dhamoon has pointed out, the “ongoing, dynamic and continuous” process of settler colonialism functions in part to “make and consolidate hierarchies of Otherness (*e.g.*, among gendered people of colour, among Indigenous people, and between people of colour and Indigenous peoples across borders of the nation-state).”²⁴

II. LAW’S VIOLENCE VERSUS ACCESS TO JUSTICE

Critical scholars have long pointed out that law’s promise of fairness and justice is all too often hollow in practice, noting that law indeed often produces inequality and oppression. One technique through which law achieves this outcome is through the authorization and deployment of state violence upon the bodies and lives of marginalized members of society. Austin Sarat writes that,

[i]t surely comes as no surprise to say that violence of all kinds is done everyday with the explicit authorization of legal institutions and officials or with their tacit acquiescence Moreover, the pain that [law’s violence] produce[s] is everywhere, in the drama of law’s sporadic vengeance as well as in the ordinary lives of those subject to legal regulation.²⁵

Cynthia Chandler and Carol Kingery have observed that “[o]ur system of justice fails to protect the powerless, and actively aggravates an environment of discrimination that increases the

²² Although I use the term “community” as an organizing concept in this paper, I do so with awareness of the complicated dimensions of this term. As Miranda Joseph points out, to “invoke community is to immediately raise questions of belonging and of power.” Miranda Joseph, *Against the Romance of Community* (Minneapolis: University of Minnesota Press, 2002) at xxiii. In the context of this study, participants evoked the idea of “community” in geographical terms to refer to their neighbourhoods, as well as to refer to people with common experiences in terms of poverty, social exclusion, and other related struggles.

²³ Avtar Brah & Ann Phoenix, “Ain’t I a Woman? Revisiting Intersectionality” (2004) 5:3 J of Int Women’s Studies 75 at 76.

²⁴ Rita Dhamoon, “A Feminist Approach to Decolonizing Anti-Racism: Rethinking Transnationalism, Intersectionality, and Settler Colonialism” (2015) 4 *Feral Feminisms* 20 at 32.

²⁵ Austin Sarat, “Situating Law between the Realities of Violence and the Claims of Justice” in Austin Sarat, ed., *Law, Violence, and the Possibility of Justice* (Princeton, Princeton University Press, 2001) 3 at 3 [Sarat, *Situating Law*]. See also Robert Cover, who refers to “organized, social practices of violence” authorized by law: Robert Cover, “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1601. See also Susanna Lindroos-Hovinheimo, *Justice and the Ethics of Legal Interpretation* (New York: Routledge, 2012) at 134-140.

likelihood of victimization ... among the disenfranchised. *It is antithetical to the safety of the underprivileged.*"²⁶ Steve Martinot and Jared Sexton describe how the institutions of society, including courts, prisons and police become "arenas" of violence, "which they then normalize throughout the social field."²⁷ Joseph Pugliese employs the image of the "prosthetics of law" to illustrate the way in which law materializes in the form of violence in the lives of marginalized subjects of law. He writes that "the prosthetics of law" comprises technologies such as police Taser guns and batons, CCTVS and armed riot squads, as well as "spaces and institutions such as courts of law, prisons, and detention centres," all operating to "correct, train and tame the recalcitrant body into a docile subject."²⁸

In addition, law's violence in poor communities in our current neoliberal economic context also takes shape in the way that law helps structure precarious housing, work, evictions, and welfare terminations.²⁹ Thus legal regimes bear down on people on the margins, and criminal law and other forms of law, including housing law, social assistance law, and child protection law work in concert to regulate and impact poor communities.³⁰ As a result, as Austin Sarat has pointed out, members of marginalized communities may experience law as a pervasive and oppressive presence, becoming a "web-like enclosure in which they are 'caught.' ... It is both a metaphorical trap and a material force ... an irresistible and inescapable presence."³¹ Similarly, Nancy Cook has written that too often "the poor receive less than nothing from the legal system. They are constantly at risk of being noticed, and thereby penalized."³²

Critical scholars have worked to reveal how law's violence is closely connected with the maintenance of the "violence of social and economic inequality."³³ Our prevailing neoliberal order idealizes a non-interventionist state, and the "invisible hand" of the free market, and the "guarantee of individual rights shaped around a property regime,"³⁴ but is increasingly accompanied by what Simon Springer calls the "visible fist" of military intervention on the global stage and what Loïc Wacquant has termed the state's "iron fist" through the use of police

²⁶ Cynthia Chandler & Carol Kingery, "Speaking out Against State Violence: Activist HIV-Positive Women Prisoners Redefine Social Justice," in Jael Silliman and Anannya Bhattacharjee, eds. *Policing the National Body: Sex, Race, and Criminalization* (Cambridge, MA: South End Press, 2002) 81 at 91 (emphasis added). See also the work of Sherene Razack, who writes about the violence of Canadian legal processes on Indigenous people. See, for example: Sherene H Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015).

²⁷ Steve Martinot & Jared Sexton, "The Avant-Garde of White Supremacy" (2003) 9:2 *Social Identities* 169 at 179-180 [Martinot & Sexton].

²⁸ Joseph Pugliese, *State Violence and the Execution of Law: Biopolitical Caesurae of Torture, Black Sites, Drones* (New York: Routledge, 2013) at 215.

²⁹ See Janet Mosher & Joe Hermer, "Welfare Fraud: the Constitution of Social Assistance as Crime" in Janet Mosher & Joan Brockman, eds., *Constructing Crime: Contemporary Processes of Criminalization* (Vancouver: UBC Press, 2010) 17; Smith, *supra* note 8 at 24; Lucie White, "Paradox, Piece-work, and Patience" (1991-1992) 43 *Hastings LJ* 853 at 856-7; and, generally, Loïc Wacquant, *Punishing the Poor: the Neoliberal Government of Social Insecurity* (Durham: Duke University Press, 2009).

³⁰ I have borrowed the concept of legal regimes "bearing down" from Sameer Ashar. See Sameer Ashar, "Deep Critique and Democratic Lawyering" (2016) 104 *Calif L Rev* 201 at 218.

³¹ Sarat, *The Law is All Over*, *supra* note 4 at 345.

³² Cook, *supra* note 1 at 184.

³³ Douglas Hay, "Time, Inequality, and Law's Violence" in Austin Sarat & Thomas R Kearns, eds., *Law's Violence* (Ann Arbor: The University of Michigan Press, 1992) 141 at 159 [Hay]. See also See Ewick & Silbey, *supra* note 7 at 741.

³⁴ Simon Springer, "The Violence of Neoliberalism" in Simon Springer, Kean Birch & Julie MacLeavy, eds., *The Handbook of Neoliberalism* (New York: Routledge, 2016) 153 at 153 [Springer].

and carceral force in local contexts.³⁵ Similarly, Loïc Wacquant shows how legal systems support the shedding of economic responsibility and the tolerance of “a high level of poverty as well as a wide opening of the compass of inequalities.”³⁶ Critical scholars in Canada have documented how law maintains the current economic structure and operates to regulate the lives and bodies of people who are marginalized in this country. For example, Janet Mosher has observed that “[a]reas such as immigration, public welfare policy, and education are now increasingly viewed and acted upon, not as problems of public policy, but as problems of safety, security, and crime.”³⁷ Douglas Hay has argued that law’s violence is all too often deployed as a solution to the problems of social inequality, while law all too often remains deafeningly silent on issues of inequality.³⁸ In this way, law and the legal system operate to assist and maintain the wider “structural violence” that characterizes our current reality.³⁹

Of utmost importance when considering the role of law and justice systems in communities such as Saskatoon is the work of Indigenous scholars who have traced the complicity of Canadian law in the ongoing settler colonial project in Canada. The late Patricia Monture was clear that “Canadian law is a central source of the marginalization of Aboriginal Peoples.”⁴⁰ Sakej Henderson writes that “Canadian law was and remains the performance of an institutionalized form of colonization. It is the place in which detailed institutional arrangements of colonial society ... are made explicit and justified.”⁴¹ Lisa Monchalin concludes in her comprehensive study of the “colonial problem” in the Canadian justice system that there “is little doubt that Euro-Canadian assimilationist policies, legal manipulation strategies, resource development priorities, disrespect of cultures, and retributive justice approaches contribute to the ongoing injustice impacting Indigenous peoples.”⁴² Sylvia McAdam (Saysewahum) shows how settler colonialism expresses itself through “multiple disruptions, causing nations of Indigenous people to lose their connection to the laws that the Creator has given them to live by.”⁴³ Stacy Douglas and Suzanne Lenon have noted that Canadian law has “functioned to systematically erase Indigenous bodies and communities from the land in order to protect and make room for

³⁵ *Ibid.* Loïc Wacquant, “The Penalization of Poverty and the Rise of Neo-liberalism” (2001) 9 Eur J Crim Pol’y & Research 401 at 402.

³⁶ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, NC: Duke University Press, 2009) at 19. See also James A Tyner, *Violence in Capitalism* (Lincoln: University of Nebraska Press, 2016) at 56-57.

³⁷ Janet E Mosher, “Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools” (2008) 46:4 Osgoode Hall LJ 807 at 828 [Mosher].

³⁸ Douglas Hay, “Time, Inequality, and Law’s Violence” in Austin Sarat & Thomas R Kearns, *Law’s Violence* (Ann Arbor: University of Michigan Press, 1995) 141 at 164.

³⁹ See Paul Farmer’s discussion of “structural violence” in *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley: University of California Press, 2005) at 40. For an example of the operation of law’s violence through land use planning law processes, see Adrian Smith, *supra* note 8.

⁴⁰ Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 205-206.

⁴¹ James (Sa’ke’j) Youngblood Henderson, “The Split Head Resistance: Using Imperial Law to Contradict Colonial Law for Aboriginal Justice,” in Elaine Coburn, ed., *More will Sing Their Way to Freedom: Indigenous Resistance and Resurgence* (Halifax: Fernwood, 2015) 50 at 53-54.

⁴² Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) at 287.

⁴³ Sylvia McAdam (Saysewahum) *Nationhood Interrupted: Revitalizing Nehiyaw Legal Systems* (Saskatoon: Purich, 2015) at 27.

colonial wealth,"⁴⁴ and Joyce Green has described the Canadian justice system as "hostile terrain" for Indigenous people.⁴⁵ Sarah Hunt concludes that,

law is itself dependent on violence for its power. Indigenous people are all too familiar with being racially profiled and randomly stopped on the street by police, and have also disproportionately felt the violation of having generations of children forcibly removed from their homes by state representatives Violence is not outside of law, but is both an outcome and the means through which law comes into being.⁴⁶

For some observers, a characteristic of law's violence is its banality. As Austin Sarat explains, "[t]he bloodletting done, authorized, or condoned by law occurs with all the normal abnormality of bureaucratic abstraction."⁴⁷ Further, as Simon Springer points out, this kind of violence "always runs the risk of becoming ... so routinized, quotidian, ordinary, and banal that we no longer feel an emotional response to its appearance precisely because it is the norm."⁴⁸ Perhaps this observation explains the difficulty with which legal system insiders apprehend the spectre of law's violence and the relative absence of a discussion of law's violence in most discussions about access to justice.⁴⁹ Yet this violence is painfully present and visible to those who experience it, and as Douglas Hay has noted, "the ways in which the violence of law is experienced generates judgments about the significance of law for all those who experience it intimately."⁵⁰ That is, the legitimacy of law and the legal system are compromised "when the experience of law's violence, mainly directed at the poor, occurs at such high rates and times of greatly increased inequality."⁵¹

While law's violence may not be easily visible to legal system insiders, the access to justice crisis is highly visible and of great and growing concern. Indeed, recent years have seen a proliferation of reports, studies, and academic articles about the access to justice "crisis" in Canada.⁵² Most discussions about access to justice focus on the justice system's failure to

⁴⁴ Stacy Douglas & Suzanne Lenon, "Introduction" (2014) *Can J L & Soc'y* 141 at 142.

⁴⁵ Joyce Green, "Honoured in their Absence: Indigenous Human Rights" in Joyce Green, ed., *Indivisible: Indigenous Human Rights* (Halifax: Fernwood, 2014) 1 at 7. See also Jaskiran K Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing" (2015) 4:2 *Decolonization: Indigeneity, Education & Society*.

⁴⁶ Sarah Hunt, "Representing Colonial Violence: Trafficking, Sex Work, and the Violence of Law" (2015/2016) 37:2 *Atlantis* 25 at 27.

⁴⁷ Sarat, *Situating Law*, *supra* note 25 at 3.

⁴⁸ Springer, *supra* note 34 at 158.

⁴⁹ Perhaps this is because, as Douglas Hay points out, most "overt manifestations of violence are confined to low law: summary proceedings, including the formidable latitude to the use of violence in policing, the discipline of prisoners and control of them on release; routine debt collection" Hay, *supra* note 33 at 168.

⁵⁰ *Ibid* at 159.

⁵¹ *Ibid* at 172.

⁵² See, for a selection: Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013); Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 *UBC L Rev* 255; The Canadian Bar Association Access to Justice Committee, *Equal Justice: Balancing the Scales* (Ottawa: Canadian Bar Association, 2013) [Canadian Bar Association]; Brent Cotter, "Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada" (2012) 63 *UNBLJ* 54; Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63 *UNBLJ* 38 [Cromwell]; Mary Eberts, "'Lawyers Feed the Hungry': Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76 *Sask L Rev* 115; Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 *Osgoode Hall LJ* 957 [Farrow]; Andrew

provide adequate or sufficient service to members of the public. Chief Justice Beverley McLachlin has decried the lack of “adequate access to justice in Canada,”⁵³ and Justice Thomas Cromwell has written that “our current situation falls far short of providing access to the knowledge, resources, and services that allow people to deal effectively with civil and family legal matters.”⁵⁴ Studies routinely emphasize the lack of availability of legal services and the multitude of barriers including cost, complexity, and delay that hinder people’s access to the official justice system and institutionalized dispute resolution processes. In response, barriers to the justice system have been the targets of various reform efforts including simplified court procedure initiatives, legal aid plans, the introduction of paralegals, and the proliferation of dispute resolution processes within the system.⁵⁵ Such discussions tend to conflate access to justice with access to the justice system and also to assume that “justice” is located squarely within law and the justice system.⁵⁶

Roderick MacDonald described the focus on system reforms as a focus on the “supply side” of the access to justice equation, noting that an understanding of access to justice must also attend to the “demand” side—that is, the perspectives and experiences of “justice-seekers” and members of the public.⁵⁷ A growing body of research addresses this question.⁵⁸ Many of these studies explore the “justiciable” problems of ordinary people—that is, problems that “exist at the intersection of civil law and everyday adversity” and that would be soluble through legal means.⁵⁹ Researchers have shown that justiciable problems are complex and intersect with non-legal problems, and have explored how people respond (or fail to respond) to these problems.⁶⁰ Although various studies and reports have identified that people who are poor and marginalized

Pilliar, “Law and the Business of Justice: Access to Justice and the Profession/Business Divide” (2014) 11 JL & Equality; Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?” (2013) 20:3 Int J of the Legal Prof; Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

⁵³ Rt. Hon. Beverley McLachlin, “Forward”, in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) ix at ix.

⁵⁴ Cromwell, *supra* note 52 at 39.

⁵⁵ Janet Mosher describes this response to the access to justice crisis in her article about racialized youths and access to justice; Mosher, *supra* note 37 at 816. See also, generally, Catrina Denvir, Nigel J Balmer & Pascoe Pleasance, “When Legal Rights are Not a Reality: Do Individuals Know their Rights and How Can We Tell?” (2013) 35 J of Soc Welfare and Family L 139.

⁵⁶ Mosher, *supra* note 37 at 816.

⁵⁷ Roderick A MacDonald, “Access to Civil Justice” in Peter Cane and Herbert M Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 492 at 516 [MacDonald].

⁵⁸ See, for example: Farrow, *supra* note 52; Ab Currie, *The Legal Problems of Everyday Life: the Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Dept. of Justice Canada, 2007); Rebecca L Sandefur, “The Importance of Doing Nothing: Everyday Problems and Responses of Inaction” in Pascoe Pleasance, Alexy Buck & Nigel J Balmer, eds., *Transforming Lives: Law and Social Process* (Legal Services Commission, 2007) at 112.

⁵⁹ *Ibid* at 113.

⁶⁰ See for example: Ab Currie, “The Legal Problems of Everyday Life” in Rebecca L Sandefur, ed., *Access to Justice* (Bingley, UK: Emerald Group Publishing, 2009) 1 at 28 [Currie]; Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns” (2006) 13:3 International J of the Legal Profession; Geoff Mulherin & Christine Coumervalos, “Access to Justice and Disadvantaged communities” in Pascoe Pleasance, Alexy Buck & Nigel Balmer, eds., *Transforming Lives: Law and Social Process* (Legal Services Commission, 2007) 9 at 37.

experience more legal problems than other members of society,⁶¹ the work on justiciable problems and the access to justice concerns of ordinary people generally does not track the source of these troubles back to law or the justice system.⁶² It mostly does not tend to discuss a backdrop of constant legally sanctioned surveillance and disruption, or what one of the respondents in this study called the “perpetual state of crisis” experienced by oppressed communities.⁶³ Rather, legal or justiciable problems tend to be seen as emerging through individual disputes that interrupt ordinary lives that are otherwise unencumbered by the heavy weight of law.

Furthermore, most of the work on access to justice assumes the existence of a robust rule of law that meaningfully functions to check the power of state actors in the interests of vulnerable citizens.⁶⁴ Dominant access to justice imaginaries do not contemplate a more messy world where law and law’s agents are implicated in oppression, and where law is tangled up in the production of conditions that lead to the materialization of legal problems in individual lives. Law is therefore imagined as being capable of meaningfully checking power and promoting equality evenly across all parts of the community, and there is an assumption that the justice system, once rendered accessible, can and will mete out justice to all those who need it. Overall, the problem is therefore framed as one of scarcity: the law and the system with its promises of justice are simply insufficiently available to those who need it.

Thus, most conceptions of access to justice are predicated on an assumption that people would desire *more access* to the system, which is imagined as a balm for justiciable problems. As a result, ideas for access to justice innovations often focus on making more legal information available, on making dispute resolutions systems more hospitable or on building more bridges into the justice system through procedural and other reforms.⁶⁵ As Nancy Cook has noted, most dominant approaches to access to justice assume that the solution to access to justice woes is to shepherd more people into the system, where lawyers serve as their clients’ “escorts from their home communities to the elite institutions where law rules and justice is dispensed.”⁶⁶

It should also be noted that most discussions and reports dealing with access to justice distinguish between criminal justice and civil and family justice. Recent Canadian initiatives, such as the Canadian Bar Association Reaching Equal Justice Report and the Action Committee on Access to Justice in Civil and Family Matters, have emphasized access to justice in civil and

⁶¹See Farrow, *supra* note 52 at 7; Action Committee on Access to Justice, *supra* note 2 at 2; Canadian Bar Association, *supra* note 52 at 52-53.

⁶²There are some exceptions. For example, the Canadian Bar Association noted in its *Reaching Equal Justice Summary Report* (Ottawa: Canadian Bar Association, 2013) [CBA Reaching Equal Justice Report] at 6 that the justice system often exacerbates problems for members of marginalized communities. Ab Currie has also noted that “experiencing justiciable problems is one aspect of a larger process by which social disadvantage is created, as justiciable problems trigger both other justiciable problems and a range of health and social problems,” Currie (2009) *supra* note 60 at 37.

⁶³Interview transcripts at 66.

⁶⁴North American access to justice literature and reform initiatives do not generally question the existence of the rule of law and its smooth application across society. As Janet Mosher points out, “[t]he central components of the rule of law (*i.e.* that the law is binding equally upon all, that is superior and non-discriminating) are presumed to be features of social life in North America.” Mosher, *supra* note 37 at 844.

⁶⁵See, for example, The Action Group on Access to Justice, “Summary of Innovative Access to Justice Ideas Survey – 2014” (2014), online: <luc.on.ca/uploadedFiles/TAGSurveySummary.pdf > [perma.cc/ZK44-QEWD]; Canadian Bar Association, “Innovations that Could Improve Access to Justice” online: <cba.org/CBA-Equal-Justice/About/Innovations-that-could-improve-access-to-justice> [perma.cc/H7BH-PPDQ].

⁶⁶Cook, *supra* note 1 at 169.

family law contexts. The CBA Report notes that, “[t]he focal point is on non-criminal matters because substantive change in the civil justice system has a particular urgency and timeliness, and current initiatives in this area are especially fragmented and under-resourced.”⁶⁷ As will become apparent, this dividing line between civil and criminal justice systems, although intuitive for justice system insiders, does not always bear out for individuals who experience law and the justice system first hand. Rather, participants tended to understand civil, administrative justice, and criminal law systems as working together, and therefore I have not attempted to separate discussions of civil and criminal access to justice issues in this article.

Although ideas for justice system innovation and reform are proliferating at a rapid pace, very few interrogate these foundational assumptions or consider the perspectives and knowledge held within marginalized communities. As Roderick Macdonald noted in 2010, “just a few ... studies investigate how marginalized publics themselves both define their lack of access and what they imagine as optimal for overcoming it.”⁶⁸ This is the case even though research has shown that members of marginalized communities face disproportionately more legal problems than members of the general public.⁶⁹ In Canada in recent years, several research projects have indeed explored these questions specifically from the perspective of members of marginalized communities, and the findings of these studies resonate with the interviews that my collaborators and I undertook in Saskatoon. I will mention three recent studies below.⁷⁰

First, Janet Mosher’s qualitative study of the access to justice experiences of black youths living in a poor and highly policed neighbourhood in Toronto paints a picture of a legal system that functions as a “club for the privileged.”⁷¹ The youths described persistent police harassment and unfair treatment in their school experiences and daily encounters. They identified a reality where “in taking on conventional power, they are likely to lose (or even more disturbingly) be further harmed.”⁷² Furthermore, the youths described the ways in which the rule of law failed to function in their neighbourhoods, noting that, “law fails to impose any effective inhabitations upon the exercise of power.”⁷³

Second, the Canadian Bar Association conducted an important study about access to justice from the perspective of marginalized community members in 2013. Similarly to Mosher’s

⁶⁷ CBA Equal Justice Report, *supra* note 62 at 11.

⁶⁸ MacDonald, *supra* note 57 at 503. I will discuss three more recent studies that do focus specifically on the perspectives of members of disadvantaged groups (as distinguished from the public more generally). Other studies exist too: see Tania Sarkar, “Access to Justice in Saskatchewan” (Access to Justice Committee, Law Society of Saskatchewan, 2001); Ian Morrison & Janet Mosher “Barriers to Access to Civil Justice for Disadvantaged Groups” in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review, Volume 2* (Toronto, 1996) at 637; Yedida Zalik, “Where There is No Lawyer: Developing Legal Services for Street Youth” (2000), 18 Windsor YB Access Justice 153. I should note here that several empirical Canadian studies have examined the access to justice perceptions and experiences of a more general sample of the public; see Farrow, *supra* note 52; David Coletto, “Public Perceptions of Access to Justice” *The Action Group on Access to Justice* (August 2016), online:

theactiongroup.ca/wp-content/uploads/2015/08/Abacus_TAG_Release_Oct14.pdf [perma.cc/UHY4-PTGH]. This was an online study of 1,500 Ontarians that found that the justice system has a negative image generally in the population. The report noted that “strikingly, over half of Ontarians (52%) believe the justice system is unfair” (at 1). The report noted, however, that people who are marginalized are particularly likely to see the justice system as inhospitable and inaccessible (at 7).

⁶⁹ See CBA Reaching Equal Justice Report, *supra* note 62 at 34.

⁷⁰ As noted above, a few other such studies exist.

⁷¹ Mosher, *supra* note 37 at 848.

⁷² *Ibid* at 841.

⁷³ *Ibid* at 844.

study, the respondents in the CBA report (written by Amanda Dodge) identified that legal rights existed “on paper” but not in reality, and justice system processes were not to be trusted.⁷⁴ The report states: “When community members were asked whether the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules, the most common response was to laugh out loud.”⁷⁵ Further, respondents identified persistent racism in the system, and a system that was “simply overwhelming,” causing stress and discouragement and “endless obstacles.”⁷⁶ Among other recommendations, the CBA Report noted the need for “accessible and safe” avenues to justice system processes that would effectively hold those in power to account.⁷⁷

Finally, in 2010 the Alberta Legal Services Mapping Project included data collected from individuals experiencing homelessness. In an article describing this aspect of the study, Mary Stratton noted that people who were experiencing homelessness experienced interactions “between criminal, civil, and administrative areas of law that are coupled with health, and economic issues”⁷⁸ and noted that “our laws and legal systems do little to prevent or reduce homelessness but often have a role in precipitating it or deepening it.”⁷⁹ As I will discuss below, the responses in this research project resonate with, and build upon, the themes highlighted in these studies.

III. LAW'S UNSAFE AND EXHAUSTING PRESENCE IN THE COMMUNITY

I turn now to a closer analysis of the themes that arose in the interviews and focus groups. What emerges is a picture of law's violence operating in marginalized communities in Saskatoon, through an unsafe justice system working in concert with other oppressive systems and too often reflecting systemic racism and colonialism. Law and the justice system were seen as usually working against the interests of marginalized communities and in favour of privileged communities, and exhausting people through a constant and oppressive *presence*. In these accounts, law and the system are pervasive, and yet justice is often absent. However, respondents also shared their stories of navigation of and even resistance to law's violence and their visions of a just community—a subject that I will turn to in the following section. These visions may inform future access to justice initiatives that are responsive to the realities of marginalized communities, and suggest that it is time for those concerned with access to justice to focus on learning from and with marginalized communities about what moving towards justice might look like.

Most respondents described law and the justice system as fundamentally unfair, unsafe, and filled with risk for marginalized community members. One focus group respondent stated:

⁷⁴ Amanda Dodge, “Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations” *Canadian Bar Association* (March 2013) online: <cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf> at 2 [perma.cc/8VAT-9PCT].

⁷⁵ *Ibid* at 3.

⁷⁶ *Ibid* at 16.

⁷⁷ *Ibid* at 4.

⁷⁸ Mary Stratton, “Access to Justice? The View from the Street” (2010) 35:2 at 7 <lawnow.org/wp-content/uploads/2012/08/LawNow35-2.pdf> [perma.cc/B8MQ-AKZL].

⁷⁹ *Ibid* at 8.

“There’s no fairness in our justice system. That’s a big, big, big problem.”⁸⁰ Another noted that the system “seems to have a way of keeping people down rather than boosting them up.”⁸¹ Respondents reported negative experiences with the justice system, and also identified the system as a source of disruption, threat, and violence, calling forth the framework of law’s violence. The comment of one of the focus group respondents summarizes this well:

Most of the people I’ve met view [law and the justice system] very negatively because they’ve had negative experiences. So, negative experiences include being evicted, incarcerated, family, police—being bothered by police. So, there’s that end to it I haven’t seen a lot of people find the positive ends to law And it has a very negative impact on the community people because it’s looked at as it’s not helping them.⁸²

Another spoke specifically of the violence of the prison system when asked about the way law operates in the community:

Well, they are creating a whole new gambit of terror. I mean, terror is living in threat. If you go into the jail system and see how they have to live in there, and I’m not condoning what they’ve done, I’m just talking about the living conditions, right? And you wonder, what rights do they really have as human beings?⁸³

Another respondent spoke of how “holes in the justice processes” transpire to provide immediate results for powerful individuals but cause less powerful people to experience “hurt, humiliation, and pain” regardless of whether “they are right or wrong.”⁸⁴ This respondent gave the example of the ability of landlords to get immediate eviction orders under the law and compared this with the slow process of social services appeals: “Like if you do a social services appeal it, it stays until the appeal is kind of heard and everything else, but at the Rentalsman if you’re kicked out you’re kicked out.”⁸⁵

Significantly, several participants discussed the justice system as a site of explicit threat and intimidation, noting that people who have experienced a violation of rights often avoid the system for fear of exposure to further harm to them or their families.⁸⁶ One person noted that there is a “feeling of intimidation” that makes people “afraid to speak up about what’s right and what’s wrong.”⁸⁷ The spectre of child apprehension, loss of benefits or arrest is a constant one in the community, according to these respondents. A respondent stated that people “don’t want to get exposed with the legal system in case it gets worse. And they don’t want other people they know to get involved, too, and get exposed, too.”⁸⁸ Another respondent explained “there would

⁸⁰ Interview transcripts at 6.

⁸¹ Interview transcripts at 61.

⁸² Interview transcripts at 55-56.

⁸³ Interview transcripts at 157.

⁸⁴ Interview transcripts at 162.

⁸⁵ *Ibid.* The reference to the “rentalsman” is a reference to Saskatchewan’s housing law tribunal, currently called the “Office of Residential Tenancies” but previously known as the “Rentalsman.”

⁸⁶ This fear of exposure to potential harm was noted by Austin Sarat in his research about the legal consciousness of individuals seeking legal services to assist with welfare claims: Sarat, *supra* note 4 at 362.

⁸⁷ Interview transcripts at 54.

⁸⁸ Interview transcripts at 208.

be a high degree of risk” in attempting to try to resolve legal issues relating to homelessness or social assistance, for example, noting that,

that risk is pretty justified because you'll get your kids apprehended, right? ... So we see people kind of, you know, not wanting to turn to services for fear that it will be used against them. Or if they have outstanding warrants or something like that. Or, you know, a family member does. I think that there is systemic discrimination that is still present in the justice system.⁸⁹

Similarly, another respondent stated that people in the community have “fear of the legal system! Fear to be caught about something. Or having to go for something, maybe a fine of some kind.”⁹⁰ Participants also spoke about the “stigma” associated with being involved with justice system processes. One noted that people avoided going to the justice system to enforce rights “because of the time and because of the stigma. It's sort of ‘oh what did you do?,’ ‘why are you in trouble?’ Like it's like ‘you must've done something ... done something wrong.’”⁹¹ Another noted that he had never really considered that “going to court is a way of enforcing your rights,” explaining that “it's almost seen now as, ‘Oh, I have to go to court.’ It's a punishment before the punishment even exists.”⁹²

Another participant noted that knowledge of legal rights was insufficient, as the system has a way of “re-focusing” the issue in a way that can be harmful to a potential claimant. She stated that even if people have knowledge about rights and how to make a claim,

they are afraid ... especially if they have had problems in the past, it is hard for them to be authoritative in that issue because of their past experiences or maybe even their record. Because as soon as the police come up, it's like, ‘Oh, well we know who you are and such and such.’ Or, if they put them through the scanner they find out who they are and then all of a sudden the focus of the issue changes, you know.⁹³

In this way, respondents describe the ways in which community members feel constantly under surveillance by the system, which they may actively avoid even when they have experienced discrimination or harm, in order to protect themselves and their loved ones from further exposure.

Participants also indicated that the justice system failed fundamentally to comprehend their realities, and that this was another reason to avoid it.⁹⁴ One respondent noted that decision makers in the system were unable to “hear properly” the realities of people:

The thing that I think in general with the justice system, a lot of times I think for people, a lot of people instead of being involved and advocating, it seems to be a lot

⁸⁹ Interview transcripts at 69.

⁹⁰ Interview transcripts at 210.

⁹¹ Interview transcripts at 112-113.

⁹² Interview transcripts at 34.

⁹³ Interview transcripts at 15.

⁹⁴ This was also noted in the CBA Community Consultation report, as discussed in the CBA Reaching Equal Justice report, *supra* note 62 at 18.

of the reverse. Because why would I get involved? Because this is going to happen and that is going to happen. And they'll never hear you properly.⁹⁵

Another participant explained that many people find themselves caught up in the legal system as a result of trying to survive poverty, but the justice system worked to “punch people for surviving.”⁹⁶ This respondent noted that people would be unable to convey to decision makers within the system how poverty constrains and shapes their choices and actions, noting that the system ends up “punishing people for being truthful” or “giving [people] a swift kick in the head” instead.⁹⁷

Several respondents emphasized the colonialism and systemic racism of the legal system. A focus group participant explained:

You know, [the justice system] is a product of colonization. It is inherently racist ... let's just say it as it is and then we can move on and start facing it instead of always decrying how it's not a racist system. There is no denying it. There is a racial bias here in the justice system and it needs to be called out and confronted.⁹⁸

This respondent noted that the racism in the justice system is “quiet” but “dangerous,” stating “I have a tough time with someone in authority who has underlying racist intent and does things through legal means to undermine my rights.”⁹⁹ Another noted that judges base their interpretation of the law “on their personal thoughts [and] their own biases.” This person noted, “I have seen, I feel, a lot of them rule on their own personal biases Because no matter what, always, always Aboriginal people get the short end of the stick.”¹⁰⁰ Another noted that “incredible fear of the justice system” was rooted in the racism embedded in the system.¹⁰¹

Respondents thus located the power of law and the justice system not in an abstract system of rules but rather squarely in human beings wielding power and making decisions based on their own experiences and worldviews. One respondent stated, “I think anything that's controlled by people, [they're] the ones who make the decisions and decide which way something goes.”¹⁰² And another respondent noted that the problem lies with people who are running the justice system, explaining, “it's the way that ... certain people apply [the rules] that make the problem.”¹⁰³ Another said that, “the people I talk with about the legal system, they are kind of negative about it. They say, ‘Ah! The thing is corrupted!’”¹⁰⁴ Another noted the way that “tunnel vision” of those working within the justice system created a barrier to justice.¹⁰⁵ In this way, the interviews reflected an understanding of law and the justice system consistent with the

⁹⁵ Interview transcripts at 152.

⁹⁶ Interview transcripts at 32.

⁹⁷ *Ibid.*

⁹⁸ Interview transcripts at 29.

⁹⁹ Interview transcripts at 30.

¹⁰⁰ Interview transcripts at 6.

¹⁰¹ Interview transcripts at 70.

¹⁰² Interview transcripts at 81.

¹⁰³ Interview transcripts at 189.

¹⁰⁴ Interview transcripts at 203.

¹⁰⁵ Interview transcripts at 126.

observation of Sarat that, "the majesty of law is demystified; its power is located in human relations and transactions."¹⁰⁶

Police were constantly identified as one of the dominant faces of the law in the community, consistent with Martinot and Sexton's observation that in marginalized and racialized communities "law is made by the uniform"¹⁰⁷ such that "the actual policing that we face is *to be a law unto itself*, not the socially responsible institution it claims to be in its disavowals."¹⁰⁸ A respondent stated that the "police now think they have the right to take from people whatever they feel they want to take from them, you know, like, without justification. You know, I really think, that they [police] think they're more powerful and they got more power than they really should have, you know."¹⁰⁹ Several respondents recalled the "bad history"¹¹⁰ of the freezing deaths of Indigenous men on the outskirts of the city, where they had been dropped off by city police as part of the notorious starlight tours in the 1990s.¹¹¹ One respondent noted that Indigenous-police relations had improved somewhat in the wake of the subsequent inquiry into the freezing death of Neil Stonechild and change in police leadership.¹¹² However, she noted that "there's still officers out there that are not very nice. But the street people know who they are. So, if they get turned around to something that's going on, they know that cop, and if that cop is the same one that's arresting them, sometimes it can get bad."¹¹³ Another respondent simply noted that ongoing mistrust of police continues to exist in the community, "mistrust with cops will always, always be there with the Aboriginal people because of all the ... past issues."¹¹⁴

Meanwhile, several participants were clear that while the justice system was often damaging for marginalized community members, it was designed to work well on behalf of those with power and money. One interviewee noted that, "There is one law for the rich and another for everybody else. And that's not democracy."¹¹⁵ He noted that law is "a matter of politics."¹¹⁶ Another respondent explained that many people in the community did not have trust in the legal system because, "They think that the law always goes against them because they don't have the money, they don't have the power."¹¹⁷ Others noted that people in the community often feel that they do not have any rights.¹¹⁸

Throughout the interviews, respondents spoke about the justice system as working in concert with, and often being conflated with, other systems operating in the community,

¹⁰⁶ Sarat, *supra* note 4 at 357.

¹⁰⁷ Martinot & Sexton, *supra* note 27 at 179.

¹⁰⁸ *Ibid* at 171. Emphasis in original.

¹⁰⁹ Interview transcripts at 176.

¹¹⁰ Interview transcripts at 3.

¹¹¹ See Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" in Carol Schick & James McNinch, eds., "*I Thought Pocahontas was a Movie*": *Perspectives on Race/ Culture Binaries in Education and Service Professions* (Regina: Canadian Plains Research Centre Press, 2009) at 129 and Sherene Razack "It Happened More than Once": Freezing Deaths in Saskatchewan" (2014) 26 *Can J Wom & L* 51.

¹¹² Interview transcripts at 4.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*. These responses resonate closely with the research of Elizabeth Comack on racialized policing. See Elizabeth Comack, "Colonialism Past and Present: Indigenous Human Rights and Canadian Policing" in Joyce Green, *Indivisible: Indigenous Human Rights* (Winnipeg: Fernwood Press, 2014) at 60.

¹¹⁵ Interview transcripts at 127.

¹¹⁶ Interview transcripts at 125.

¹¹⁷ Interview transcripts at 16.

¹¹⁸ Interview transcripts at 67.

including the social assistance system, the child protection system, and the police. In other words, the justice system was often, for respondents, indistinguishable from other oppressive systems, and was not imagined as holding a special autonomous power. Respondents described how different systems worked together, noting how an interaction with one system could lead to an entanglement with another. One respondent discussed the way that people become “pegged between systems.”¹¹⁹ Another explained how a complaint to a police officer, or taking legal action relating to homelessness, could quickly lead to the apprehension of children.¹²⁰ These observations are consistent with Sarat’s conclusion that many people struggling with welfare and other bureaucracies gain a deep understanding of the ways that various systems are interrelated, and the way that the legal system’s “various elements are tightly interconnected rather than autonomous and...political influence is pervasive.”¹²¹ It calls to mind also Loïc Wacquant’s characterization of the ways that welfare and penal systems operate as a “single organizational mesh flung at the same clientele” under late neoliberalism, functioning to “invisibilize problem populations.”¹²²

For community members, the effect of this constant presence of the justice system, the effort of dealing with it or avoiding it, is an experience of exhaustion, to the point, in some cases, of becoming physically sick. One respondent remarked that many people in her neighbourhood have “never had any justice. So to stand up now, you know, what’s the point? [People would say that] ‘I’m so broke and I’ve had so many things happen to me.’”¹²³ Another respondent noted that for most people dealing with a problem with legal implications, the most common approach would be to “just to deal with that and get on with life. I mean, if you don’t have the money and you don’t have the time, you’re not going to ... I mean, it’s easier just to say, ‘Okay, that really sucked, but I’ve got to move on with my life.’”¹²⁴ Similarly, another respondent stated: “I think people would rather close an eye to it or just pretend it’s not there or just that it’s never happened to me type thing.”¹²⁵ One participant noted that she would not consider seeking a remedy from the landlord and tenant tribunal for substandard housing conditions, explaining, “if you are not happy with the way it is, just leave.”¹²⁶ Another noted that she had “severely suffered” as a result of the legal problem she had faced but was not willing to “lose my soul” by going through a redress process.¹²⁷ Another stated that she “could have gone to the Human Rights Commission, but I didn’t use it. I just decide to plead deaf. But to the point of making me sick, and stuff like that.”¹²⁸ Another noted that people in the community do not pursue or attempt to enforce rights because “they are surviving. They’re doing everything in their power to live.”¹²⁹

Thus, the people we interviewed did not emphasize barriers to accessing law or the justice system when asked about access to justice in their community. Rather, for them, the justice system is pervasive and inextricably linked with other systems that are experienced as harmful—including policing, social services, child protection and others. They were keenly

¹¹⁹ Interview transcripts at 116.

¹²⁰ Interview transcripts at 12.

¹²¹ Sarat, *supra* note 4 at 356.

¹²² Wacquant, *supra* note 36 at 288.

¹²³ Interview transcripts at 19.

¹²⁴ Interview transcripts at 60.

¹²⁵ Interview transcripts at 95.

¹²⁶ Interview transcripts at 204.

¹²⁷ Interview transcripts at 96.

¹²⁸ Interview transcripts at 203.

¹²⁹ Interview transcripts at 12.

aware of the ways in which law and the justice system too often operate to sustain ongoing structural violence and individual traumatic experiences, thwarting instead of facilitating access to a better and fairer and more just life. But it is important to note that participants also shared stories of navigating and at times even resisting the justice system, and also shared their visions of how the justice system might be transformed. It is to these aspects of the interviews that I turn now.

IV. TOWARDS “THE RIGHT KIND OF JUSTICE”

In addition to their critique of the justice system and their account of law's violence in their community, respondents also shared stories that illustrate moments of confrontation with the current system and visions of what one participant described as the “right kind of justice.”¹³⁰ In other words, participants held their critique of the justice system in tension with a view that it could be transformed to respond more fully to the injustices existing in the community. They seemed to understand, with Lise Gottel, that law can be “simultaneously a site of change and an obstacle to change.”¹³¹ As the participant mentioned above stated, “what is most important is we need to have the right kind of justice, right? So, if you're going to have the right kind of justice, you have to think it is very important to invest into this area because it affects everything and anything, right?”¹³²

When respondents were asked to describe the most pressing justice issues in their community, the majority identified issues of what could best be described as substantive social justice issues: pervasive poverty, inadequate housing, oppressive policing, racism, health disparities, and addictions. A participant noted that,

one of the biggest [justice issues] that comes to my mind is poverty. The other legal issues in the poverty situation is how do we get people legally into places to live, what can we possibly figure out how to address these situations. And also, all of the crime that is going on right now, it's all connected to the poverty.¹³³

Another respondent noted that adequate housing and shelter was the most pressing justice issue, stating “[a]nd the housing is an issue. And the inner city, what goes on in the inner city and people not being able to get out of the inner city. Those are big justice issues. They are justice issues, really, because they all end up back in the court system.”¹³⁴ These responses call to mind the responses shared by the respondents in Trevor Farrow's study in Toronto, where participants understood access to justice “as access to the kind of life—and the kinds of communities in which people would like to live. It is about accessing equality, understanding, education, food, housing, security, happiness, etc.”¹³⁵ Similarly, the responses resonate with the observation of the Action Committee on Access to Justice in Civil and Family Matters, which noted that “at the

¹³⁰ Interview transcripts at 153.

¹³¹ Lise Gottel “Reassessing the Place of Criminal Law Reform and the Struggle Against Sexual Violence: a Critique of the Critique of Carceral Feminism,” in Anastasia Powell, Nicola Henry & Asher Flynn, eds., *Rape Justice: Beyond the Criminal Law* (New York: Palgrave MacMillan, 2015) 53 at 61.

¹³² Interview transcripts at 153.

¹³³ Interview transcripts at 156.

¹³⁴ Interview transcripts, at 67.

¹³⁵ Farrow, *supra* note 52 at 33.

end of the day, what people want most is a safe, healthy and productive life for themselves, their children and their loved ones.”¹³⁶

Several respondents spoke about how people navigated and even resisted the reach of the justice system in their lives through self-reliance, community solidarity and even outwitting the system—and in so doing, created and sustained a community sense of justice. One respondent noted that community members often “arrange their stuff by themselves, eh? ... Like, say if a car, like, if somebody hit a car, instead of going through the system, they will say, ‘Okay, I will pay you so much’ or ‘My buddy is going to fix your car’ and, you know.”¹³⁷ Another respondent explained that people in the community had to become proficient at understanding “what they can get away with and what they can’t get away with. It helps in all their dealings and all their maneuverings through life now. They almost become lawyers for themselves all the time, navigating through what can be proven and not proven.”¹³⁸ Another spoke of how community members share information about the system via “word of mouth,” so that the knowledge about how to navigate the system becomes shared between community members “who could probably, you know, use this as an information package for themselves.”¹³⁹ Another respondent explained that learning about how to advocate and speak up from fellow community members is empowering for people, helping them to “see a little bit of, you know, the light between the clouds.”¹⁴⁰ While these observations and narratives may not appear to be coordinated or particularly conscious acts of resistance by community members, they do in many ways underscore the critique of the system held by community members, and may prefigure other forms of resistance and engagement. As Sibley and Ewick have pointed out,

[r]esistance, to the extent that it constitutes forms of consciousness, ways of operating and making do, may prefigure more formidable and strategic challenges to power. Through everyday practical engagements with power, individuals identify the cracks and vulnerabilities of institutions such as the law. A consciousness of these openings may be a necessary, if not sufficient, precursor of political resistance.¹⁴¹

In addition to speaking about the ways that people avoided, navigated or even resisted the justice system, many respondents expressed the view that the justice system could be transformed to better respond to the justice needs of the community. Respondents suggested that those within the justice system should come to terms with its harmful impact on so many members of marginalized communities, and focus instead on how law and the justice system can assist with “healing.” One respondent stated, “and you see, the law is supposed to be a two-edged sword. It is for justice, but it is also for healing. It is also for good!”¹⁴² Another simply stated that “[t]he legal system has to be more human.”¹⁴³ One person noted that “justice isn’t always about blood, you know, you slap me I need to slap you back kind of thing. It’s about solving those ... solving the issue that is in front [of you].”¹⁴⁴ And another emphasized that the focus should be on

¹³⁶ Action Committee, *supra* note 2 at 9.

¹³⁷ Interview transcripts at 204.

¹³⁸ Interview transcripts at 33.

¹³⁹ Interview transcripts at 205.

¹⁴⁰ Interview transcripts at 19.

¹⁴¹ Ewick & Silbey, *supra* note 7 at 749.

¹⁴² Interview transcripts at 131.

¹⁴³ Interview transcripts at 12.

¹⁴⁴ Interview transcripts at 32.

healing: "how does that person win? How do they come out of this so that they are not an unhealthy person in the justice system?"¹⁴⁵

The people we spoke with had ideas for how justice systems might respond. Several respondents noted that justice system insiders—including judges and lawyers, needed much more intensive education on issues pertaining to poverty, addictions, mental health issues, and the systemic roots of these issues. One noted that focusing on the justice system without considering the ways in which other systems (housing, welfare, policing, etc.) systems operate would undermine the possibility of justice. This person explained: "They go hand in hand, I think. It's just not, like, this is justice, this is social, you know?"¹⁴⁶ Similarly, another respondent stated that addressing social justice problems, even if "outside of the explicit limits of the legal system, [is still] within the realm of the needs of both the community and an individual within the community."¹⁴⁷ Another stated that lawyers and other agents of the justice system should get involved in addressing the way the legal system "works against the community."¹⁴⁸ This person noted that to actually be effective in the community, justice system insiders would need to "go beyond the capacity of the legal system to be beneficial and get involved with the community ... They have to address the contradictions within the legal system in their practice in order to be of benefit to the community."¹⁴⁹

Thus, community members challenged justice system insiders to put the goal of building a just society at the centre of their access-to-justice work. This will involve, as Jerry McHale has argued, imagining access to justice as requiring the elimination of injustice,¹⁵⁰ but also considering substantive social justice goals as central to the work of the justice system. There is significant expertise and experience within marginalized communities from which justice system insiders can learn. As Sameer Ashar has written, we need to develop the "capacity of deep critique, of thinking beneath and beyond liberal legalist approaches to social problems. We can develop this capacity only through collaborative work with people, communities, and thinkers at the margins of our social structure."¹⁵¹

V. CONCLUSION

For the people who we spoke to as part of this project, access to legal information, law, and legal institutions are not the primary barriers to justice. To the contrary, respondents described a reality where the justice system, in concert with other systems, operates relentlessly within and upon their communities, sustaining rather than combating injustice, and where exposure can be risky. This study suggests that a foundational challenge for those working on the issue of access to justice is therefore to recognize the structural violence of social injustice, and consider how law and the justice system are implicated in this wider injustice. Making changes to the system to make it more user-friendly and accessible will do little, if anything, when these more

¹⁴⁵ Interview transcripts at 29.

¹⁴⁶ Interview transcripts at 205.

¹⁴⁷ Interview transcripts at 142.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Jerry McHale, "What Does "Access to Justice" Mean?" *University of Victoria Access to Justice Centre of Excellence* (2 Feb 2016), online: <uvice.com/blog/2016/2/2/what-does-access-to-justice-mean> [perma.cc/V8LF-ETQN].

¹⁵¹ Sameer Ashar, "Deep Critique and Democratic Lawyering in Clinical Practice" (2016) 104 *Cal L Rev* 201 at 218.

fundamental problems remain unacknowledged. As Roderick MacDonald wrote, “[g]reater access to institutions that are the source of one’s oppression is hardly a desirable outcome.”¹⁵²

Respondents in this study were clear that for access to justice to have real meaning, it must place justice at its centre, and furthermore that justice demands equality, health, housing, and an end to racialized and oppressive policing and carceral practices,. They were willing to imagine a justice system that embodies these goals. Acknowledging the harm inflicted by law and legal processes on many members of marginalized communities, and working to support communities seeking justice is therefore a key challenge for those seeking to improve access to justice.

¹⁵² MacDonald, *supra* note 57 at 518.