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Judicial Depictions of Responsibility and Risk: The Erasure of State Accountability in Canadian Sentencing Judgments Involving Indigenous People

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Abstract

This dissertation is set within the context of Canada's mass imprisonment of Indigenous people and centres on a critical evaluation of reported sentencing judgments. In particular, the dissertation examines some of the ways in which sentencing judges both draw attention to, and obscure, state accountability. The dissertation demonstrates that sentencing judges erase the role of the state in the criminalization of Indigenous people and in the construction of Indigenous people as "risky". The result is that sentencing judgments rationalize and support the re-entrenchment, rather than the redressing, of the state's oppression of Indigenous people.

The dissertation is theoretical and descriptive, critically examining sentencing judges' portrayals of Indigenous people and the state. The case studies are disheartening: the studies illustrate a few different ways in which sentencing law, despite purportedly aiming to repair systemic harm, continues to cement such harm. Yet the theoretical tools used to dissect sentencing judgments' destructive practices can also assist in thinking through possibilities for change. The dissertation draws on theories that engage with the centrality of relationships in people's lives (including people's relationships with the state), the role of the state in generating and sustaining inequality, the interconnections between state efforts to contextualize Indigenous people and the reinforcement of stereotypes, and the resilience, strength, and diversity of Indigenous Peoples, communities, families, and individuals. These theories all support some existing proposals (and some current practices and possible new proposals) for pursuing decarceral approaches.

The decarceral approaches that this dissertation addresses recognize that any sentencing analysis (including an analysis of how to assign responsibility for past criminalized conduct and an analysis of how to protect a community in the future) requires a consideration not only of criminalized individuals' experiences but also of the state's actions and inactions. A sentencing analysis must see and identify the state as having contributed to the criminalization of Indigenous people and to the construction of Indigenous people as "risky". Additionally, the state must take accountability for its actions in historically and contemporarily inflicting violence on Indigenous people and for its potential to instead support Indigenous people's resilience, safety, and sovereignty.

Dedication

For my mom and dad

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Chapter One: Introduction

1.1 The Acknowledgment, and Erasure, of State Accountability in Canadian Sentencing Law

As is well known among criminal law practitioners and scholars, for over 20 years Canadian sentencing law has required judges to situate a criminalized Indigenous person within a context of histories and experiences of systemic discrimination and to consider alternatives to imprisonment. Sentencing law has opened the door for judges to engage with state accountability—to acknowledge that the state bears some responsibility for its criminalization of Indigenous people and for repairing the harmful impacts of the state's criminalization of Indigenous people. Through this practice, judges are to determine the extent to which "unique systemic or background factors" lessen a criminalized Indigenous person's level of responsibility for criminalized conduct.[1] Additionally, judges are to ascertain whether a sanction other than imprisonment would be appropriate and effective in the circumstances—circumstances that include Indigenous people's experiences and needs.[2] The Supreme Court of Canada has indicated that these considerations are meant to redress the judicial practice of imposing sentences of imprisonment on high numbers of Indigenous people.[3] Yet, as is also well known, the mass imprisonment of Indigenous people persists.[4]

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[1] *R v Gladue*, [1999] 1 SCR 688 at para 66, 133 CCC (3d) 385 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at para 73, [2012] 1 SCR 433 [*Ipeelee*].
[2] *Gladue*, *supra* note 1 at para 74; *Ipeelee*, *supra* note 1 at para 74.
[3] *Gladue*, *supra* note 1 at para 64.
[4] See e.g. Statistics Canada, *Adult and Youth Correctional Statistics in Canada, 2018/2019*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 21 December 2020) at 5 [footnotes omitted]: "In 2018/2019, Indigenous adults accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4.5% of the Canadian adult population. These proportions were virtually unchanged from the previous year." Consistent with Supreme Court of Canada jurisprudence, this type of statistical study approaches Canada's imprisonment of Indigenous Peoples as an issue of proportionality.

Sentencing law's stated aims include striving to repair some of the harms that the Canadian state has carried out against Indigenous people. At the same time, sentencing judges continue to imprison high numbers of Indigenous people. This dissertation is set within this context and centres on a critical evaluation of reported sentencing judgments. In particular, I examine some of the ways in which sentencing judges both draw attention to, and obscure, state accountability. I demonstrate that sentencing judges erase the role of the state in the criminalization of Indigenous people and in the construction of Indigenous people as "risky". The result is that sentencing judgments rationalize and support the re-entrenchment, rather than the redressing, of the state's oppression of Indigenous people.

This dissertation is theoretical and descriptive, critically examining sentencing judges' portrayals of Indigenous people and the state. The case studies are disheartening: I illustrate a few different ways in which sentencing law, despite purportedly aiming to repair systemic harm, continues to cement such harm. Yet I ultimately argue that the theoretical tools that I use to dissect sentencing judgments' destructive practices can also assist in thinking through possibilities for change. Throughout the dissertation, I draw on theories that engage with the centrality of relationships in people's lives (including people's relationships with the state), the role of the state in generating and sustaining inequality, the interconnections between state efforts to contextualize Indigenous people and the reinforcement of stereotypes, and the resilience, strength, and diversity of Indigenous Peoples, communities, families, and individuals. These theories all support some

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Throughout the dissertation, I use the term "mass imprisonment", rather than "over-representation", in an attempt to capture the colonial, racist, and structural aspects of the Canadian state's imprisonment of Indigenous Peoples. For further discussion, see pages 45-48 below. For an analysis of the term "mass imprisonment", see Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 440.

existing proposals (and some current practices and possible new proposals) for pursuing decarceral approaches.

At the heart of the decarceral approaches that I address is a recognition that any sentencing analysis (including an analysis of how to assign responsibility for past criminalized conduct and an analysis of how to protect a community in the future) requires a consideration not only of criminalized individuals' experiences but also of the state's actions and inactions. A sentencing analysis must see and identify the state as having contributed to the criminalization of Indigenous people and to the construction of Indigenous people as "risky". Additionally, the state must take accountability for its actions in historically and contemporarily inflicting violence on Indigenous people and for its potential to instead support Indigenous people's resilience, safety, and sovereignty.

1.2 Textual and Theoretical Analysis

In this dissertation, I employ a textual analysis methodology. Specifically, I use a method of textual analysis "that closely examines…the content and meaning of texts".[5] The principal texts that I examine are reported sentencing judgments. Additionally, I supplement this analysis with a textual analysis of a selection of risk assessment instruments, recent empirical research articles relating to risk assessment tools, and—in the conclusion—a painting by Cree artist, Kent Monkman.[6]

[5] Sharon Lockyer, "Textual Analysis" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage, 2012) 865 at 865.
[6] Kent Monkman, *The Scream*, 2017, Acrylic on canvas, 84" x 126", Collection of the Denver Art Museum. See Figure 1 at page 307 below. With respect to the practice of applying textual analysis to both written and visual texts,

With respect to reported sentencing judgments, I examine the texts primarily for the evidence that they provide about "the text of the law"—that is, legal rules—and also "the practice of law"—that is, narratives that provide evidence about how judges, as participants in the criminal justice system, talk about people, relationships, social issues, history, and community responsibilities.[7] Gillian Balfour expands on the method of reading reported sentencing judgments "as social practices" as follows:

> Sociologically, reported sentencing decisions can be read as social practices that are expressions of dominant cultural meanings and relations of power that operate within particular cultural and institutional contexts. In this way, we can read sentencing decisions for the representations of Aboriginal peoples and their communities, violent crimes, and the purposes of punishment that are at work in the practice of law.[8]

The method of reading sentencing judgments "as social practices" thus enables researchers to provide insight into some of the (many) practices at work in the state's mass imprisonment of Indigenous people. For example, I use the method to identify some of the assumptions, stereotypes, and values that are at work in sentencing. These practices contribute to justifying, rather than redressing, the state's mass imprisonment of, and other modes of oppressing, Indigenous people.

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see Catherine Belsey, "Textual Analysis as a Research Method" in Gabriele Griffin, ed, *Research Methods for English Studies*, 2d ed (Edinburgh: Edinburgh University Press, 2013) 160.

[7] Gillian Balfour, "Do Law Reforms Matter? Exploring the Victimization-Criminalization Continuum in the Sentencing of Aboriginal Women in Canada" (2012) 19:1 International Review of Victimology 85 at 88.

[8] *Ibid*. See also Carmela Murdocca, "Ethics of Accountability: *Gladue*, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522 at 525-26 [Murdocca, "Ethics of Accountability"].

The next sections of this introduction will address some of my terminology and provide an overview and outline of the dissertation's chapters. However, I would first like to address two broad aspects of my textual analysis: first, the general number of cases that I examine; and second, my interpretive frameworks.

Regarding the number of cases that I study, my research does not investigate large numbers of judgments. Instead, as I will expand upon throughout the dissertation, I selected small and narrow sets of judgments based on factors such as subject-matter and level of court (sometimes focusing on appellate case law and sometimes including both appellate and first-instance sentencing judgments). I found that, by working with relatively small numbers of judgments, I was able to identify and unpack judicial language and reasoning that relies—even subtly—on discriminatory and individualizing assumptions. Indeed, Sharon Lockyer notes that "a small number of texts" can be appropriate for textual analysis because "textual approaches provide close analyses of texts".[9] My small sets of cases are thus valuable precisely because they enabled me to read the lines of the judgments closely. I could thus see things that I did not expect, and I could explain some of the ways in which depictions that may have become familiar are nonetheless damaging.

In addition to fostering a particular type of inquiry and analysis, my small selection of cases allows for particular types of conclusions. Notably, I do not suggest that my findings are representative of judicial engagement with state accountability in the sentencing of Indigenous people within sentencing judgments and sentencing practices across Canada (including both

[9] Lockyer, *supra* note 5.

reported and unreported judgments, alternative state-led sentencing procedures, and Indigenous sentencing practices). As Carmela Murdocca cautions, particular sentencing judgments do not support sweeping conclusions.[10] Nevertheless, individual judgments provide information about some of the ways in which sentencing judges attempt to repair systemic injustice in the criminal justice system.[11] Along these lines, I conclude that, within narrow sets of judgments, connections have developed between the judicial individualization of risk, placement of responsibility for criminalization onto Indigenous communities and individuals, and erasure of, and de-emphasis on, the state. While not determinative of all sentencing practice within Canada, even a small number of such connections supports calls for movement towards decarceral approaches.

Central to my textual analysis of cases and other documents are my interpretive frameworks. Jennifer Morey Hawkins explains that, within textual analysis, "[a]ll interpretations are influenced by multiple lenses, or frames of understanding, contributing to the cultural context of the individual researcher."[12] My interpretative frameworks include both the theoretical lenses that I apply to my reading and my personal positionality. I will discuss my theoretical lenses in more detail below. Broadly, I draw on a variety of theoretical frameworks to interpret sentencing judgments, risk assessment instruments, empirical risk assessment research articles, and artwork. All the frameworks take seriously the role of relationality in people's lives and the role of the state in producing and maintaining oppression. Additionally, in the final chapter, I bring these literatures into conversation with decarceral and restorative justice scholarship.

[10] Murdocca, "Ethics of Accountability", *supra* note 8 at 526.
[11] *Ibid*.
[12] Jennifer Morey Hawkins, "Textual Analysis" in Mike Allen, ed, *The SAGE Encyclopedia of Communication Research Methods* (Thousand Oaks: Sage, 2017) 1753 at 1754.

My positionality necessarily informs my engagement with sentencing judgments and with theoretical scholarship. I am a white settler Canadian woman who has received university-based education in the social sciences, humanities, and law. I have also participated in criminal justice processes in a professionalized capacity on Treaty 4 Territory and Treaty 6 Territory: I served as a law clerk at the Court of Appeal for Saskatchewan and completed secondments at Legal Aid Saskatchewan and the Public Prosecutions division of the Saskatchewan Ministry of Justice. Additionally, I continue to be a member of the Law Society of Saskatchewan in an inactive/non-practising capacity. My engagement with Canadian law comes thus from a position of immense privilege and from professionalized experiences with institutions and bodies that carry immense power.

I have tried to work hard to think critically about the harms that criminal justice processes and other state practices generate and sustain in Indigenous people's lives. I think that critical studies of sentencing judgments provide valuable insight into these harms. Sentencing judgments inflict power over, and carry out violence against, Indigenous people, and it is important to understand the mechanisms at work as part of a practice of contesting them. At the same time, sentencing judgments can narrow my view simply by virtue of what they include and exclude, and by what they highlight and de-emphasize. I can identify and challenge what I see and do not see in the judgments, but they always have the potential to frame my thinking and limit the scope of my critique. In an effort to see beyond settler-law discourses and frameworks, I have attempted to draw on scholarship and artwork that has been produced by Indigenous people, that identifies and contests practices of stereotyping and essentializing, and that shares some of the standpoints, values, and experiences of some Indigenous people. These practices have formed part of my

attempt to not let settler-legal framings of people and people's experiences, relationships, and needs be determinative of how I see and engage with people. It is a continual work-in-progress.

1.3 A Note on Some Terminology

Throughout this dissertation, I refer to Indigenous Peoples, Indigenous people, Indigenous persons, and Indigenous individuals. As well, some of the sources I discuss use the term "Aboriginal" instead of "Indigenous". In the context of Canada, the term "Indigenous" includes First Nations, Inuit, and Métis peoples.[13] As the Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Human Research Council note, "First Nations, Inuit, and Métis peoples…have their own histories, cultures and languages".[14] Because the term "Indigenous" does not capture this diversity, I also refer to the particular nations with which some individuals identify when that information is available.[15] In particular, when discussing sentencing judgments, I mention the nation with which a criminalized Indigenous person identifies when it is specified.

This dissertation is set within the empirical, legal, and political context of the Canadian state's oppression of Indigenous Peoples. When I use the term "oppression" throughout this dissertation,

[13] Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, Catalogue No RR4-2/2019E-PDF (Ottawa: Secretariat on Responsible Conduct of Research, December 2018) at 110.
[14] *Ibid*.
[15] *Ibid*. See also e.g. Linda Mussell, "Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities" (2020) 33 J L & Soc Pol'y 15 at 18.

I have in mind Iris Marion Young's definition.[16] Young writes: "[o]ppression consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognized settings, or institutionalized social processes which inhibit people's ability to play and communicate with others or to express their feelings and perspective on social life in contexts where others can listen."[17] Furthermore, oppression specifically involves the "immobiliz[ation] or diminish[ment of] a social group."[18] Oppression, then, involves structural policies and practices that impact people who identify as, or whom the state and society identify as, members of a particular social group. The impacts involve preventing group members from learning, exercising skills, engaging with others, sharing, being heard, and otherwise living their lives.

I further recognize that the Canadian state's oppression of Indigenous Peoples involves past and continuing acts of genocide. As stated in *A Legal Analysis of Genocide: A Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, "[i]t is time to call it as it is: Canada's past and current colonial policies, actions and inactions towards Indigenous Peoples is genocide."[19] In particular, the National Inquiry found that the Canadian state has committed

> race-based genocide of Indigenous Peoples, including First Nations, Inuit and Métis, which especially targets women, girls, and 2SLGBTQQIA people. This genocide has

[16] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 38. See also *ibid*, ch 2.
[17] *Ibid* at 38.
[18] *Ibid* at 42.
[19] *A Legal Analysis of Genocide: A Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) at 27 [NIMMIWG, *A Legal Analysis of Genocide*].

> been empowered by colonial structures, evidenced notably by the Indian Act, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.[20]

Canada's genocide of Indigenous Peoples has involved, and continues to involve, long-term governmental policies aimed at the destruction of Indigenous Peoples.[21] The National Inquiry specifically identified a "steady intention…to destroy Indigenous peoples physically, biologically, and as social units".[22] Historically, this intention manifested in policies such as the distribution of smallpox-infested blankets and inhumane medical experimentations such as the intentional exposure of children who were healthy to other children who had tuberculosis.[23] Today, this intention manifests in policies including "child over-apprehension, lack of police protection, forced sterilization, and the ongoing impacts of Indian Act legislation, as well as the maintenance of the status quo."[24] Genocidal policies therefore transform into different policies that carry forward the same goal of destroying Indigenous Peoples.

Canada's policies and acts of genocide provide the necessary background for a critical study of Canadian sentencing law. The obligation on the Canadian state to take accountability for its violation of the international law against genocide and to "end…its perennial pattern of violence against and oppression of Indigenous peoples"[25] is interrelated with an obligation on sentencing law to develop adequate and meaningful relational accounts of responsibility and risk and to end

[20] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 50, quoted in NIMMIWG, *A Legal Analysis of Genocide*, *supra* note 19 at 1.
[21] NIMMIWG, *A Legal Analysis of Genocide*, *supra* note 19 at 9-10.
[22] *Ibid* at 24 [emphasis omitted].
[23] *Ibid* at 24-25.
[24] *Ibid* at 24.
[25] *Ibid* at 26 [emphasis omitted].

the colonial racist stereotypes that continue to loom within the sentencing judgments. An example of overlap is the example of the lack of police protection, which arises not only in connection with genocide but also in connection with individualized accounts of risk. Specifically, sentencing judges participate in obscuring the state's policies aimed at destroying Indigenous Peoples. Sentencing judges do so by associating protection of the public with the need to manage criminalized Indigenous individuals, rather than with the need to assess and improve the actions and inactions of state actors, such as police officers and judges themselves. The overarching backdrop of Canada's genocide helps to highlight the contradictions in sentencing judgments. Sentencing judgments both identify a need to stop imprisoning Indigenous Peoples and find reasons to imprison Indigenous Peoples.

The Canadian state's genocide of Indigenous Peoples brings me to another important term in this dissertation: "state accountability" or "state responsibility"[26]. The National Inquiry stated that, "[u]nder international law, Canada has a duty to redress the harm it caused and to provide restitution, compensation and satisfaction to Indigenous peoples."[27] Moreover, the first responsibility that Canada must meet is "an obligation of cessation", that is, of discontinuing its violent and oppressive treatment of Indigenous Peoples.[28]

In contemporary sentencing law, state accountability appears to include the state's obligation to end its violence against Indigenous Peoples. Section 718.2(e) of the *Criminal Code*,[29] as interpreted by the Supreme Court, envisions state accountability as including judicial recognition

[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid* [emphasis omitted].
[29] *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

of the harms caused by the state against a criminalized Indigenous individual and their family and community.[30] Additionally, sentencing law sees state accountability as encompassing the judicial imposition of non-custodial sentences on criminalized Indigenous individuals.[31] The objective of imposing non-custodial sentences suggests that the Canadian state recognizes the violence inherent in its imprisonment of Indigenous Peoples. However, the state continues to imprison high numbers of Indigenous people. As a way to bring further accountability to the state with respect to the pursuit and application of decarceral approaches, Indigenous people have developed Indigenous justice initiatives and have turned to the *Canadian Charter of Rights and Freedoms*.[32] For instance, in two recent *Charter* cases, Indigenous persons sought to ensure that the state develops and pursues decarceral policies and successfully challenged the limited availability of conditional and intermittent sentences in certain circumstances.[33]

Throughout the dissertation, I also suggest that sentencing law should recognize that the state has an obligation to ensure safety and support for Indigenous people. I argue that this obligation is not met by individualized accounts of responsibility and risk nor by individualized responses to criminalized conduct. The obligation instead requires a relational understanding of people and of criminalization. I have not developed a fully formulated vision of how the state should take accountability for its failures to ensure safety and support for Indigenous people, including people whom the state has criminalized and/or people who have experienced interpersonal violence carried out by non-state actors. Instead, I consider some existing practices and

[30] See generally *Gladue*, *supra* note 1, and *Ipeelee*, *supra* note 1.
[31] See generally *Gladue*, *supra* note 1, and *Ipeelee*, *supra* note 1.
[32] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[33] *R v Sharma*, 2020 ONCA 478, 390 CCC (3d) 1; *R v Turtle*, 2020 ONCJ 429.

proposals. For instance, I discuss the suggestion that sentencing law could be transformed to apportion responsibility between individuals and the state and to significantly limit the scope of criminalization and the imposition of imprisonment.[34] I also address existing Indigenous justice initiatives' aims to foster criminalized people's understanding of both individual and state accountability for crime.[35] Additionally, sentencing judges have recently considered the impact of solitary confinement and a lack of services in prison when assessing a criminalized person's likelihood of changing their behaviour through programming.[36] All of these examples include a relational understanding of people and criminalized conduct.

My analysis of oppression and state accountability in sentencing law draws heavily on the theory of the "in betweenness"[37] of responsibility and risk and on the concept of "responsibilization" and its counterpart, "de-responsibilization".[38] "In betweenness" is the idea that responsibility for past criminalized conduct—and risk of future recriminalization—exists somewhere "in between" individuals and the state. In other words, responsibility and risk cannot be ascribed to individual criminalized people alone. Rather, responsibility and risk are necessarily situated somewhere "in between" individuals and social structures, with the state playing significant roles in criminalizing people, constructing people as "risky", imprisoning people, and failing to support people's safety and wellness. The state, moreover, has the potential to realize different roles. The

[34] Marie-Eve Sylvestre, "'Moving Towards a Minimalist and Transformative Criminal Justice System': Essay on the Reform of the Objectives and Principles of Sentencing" (Department of Justice Canada, 2017).
[35] See e.g. Celeste McKay & David Milward, "Onashowewin and the Promise of Aboriginal Diversionary Programs" (2018) 41:3 Manitoba Law Journal 127; Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313.
[36] *R v Durocher*, 2019 NWTSC 37; *R v Keenatch*, 2019 SKPC 38.
[37] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000) at 208, quoting Kenneth Gergen, "Summary Statements" in Daniel N Robinson, ed, *Social Discourse and Moral Judgment* (San Diego: Academic Press, 1992) 244.
[38] Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty" (2005) 7:1 Punishment & Society 29.

state could choose to not criminalize people, to not construct people as "risky", to not imprison people, and to provide support for people's safety and wellness. "Responsibilization" and "de-responsibilization" involve responsibility attributions. In particular, I explore the people and institutions whom sentencing judgments "responsibilize" for criminalized conduct, for risk of recriminalization, and for experiences oppression. I also examine those whom sentencing judgments "de-responsibilize". Sentencing judgments acknowledge the existence of colonialism and the high numbers of imprisoned Indigenous people. Nevertheless, sentencing judgments place responsibility on criminalized individuals and their family members and communities while allowing the state's contributory actions and inactions to fade into the background.

In addition to using "in betweenness" and "responsibilization" to critique sentencing judgments, I illustrate some of the ways in which these tools can assist in the task of thinking through possibilities for transforming criminal justice processes. Both concepts facilitate the naming of the state and the identification of the state's policies of action and inaction that have generated and sustained its oppression of Indigenous Peoples. Moreover, by examining points of connection between individuals' lives and state policies and practices, the concepts encourage one to take a wider and more nuanced view that includes not only the state but also the multifaceted and diverse experiences of Indigenous people. Hopefully, these devices will assist in the continuing work of exposing, contesting, and eliminating essentialized, pathologized, and racialized depictions of Indigenous Peoples and the erasure of the state.

1.4 Overview and Outline of Chapters

1.4.1 Responsibility and Risk: Tensions and Connections

Risk and responsibility are two dominant frameworks that animate sentencing judges' portrayals of criminalized people, and both are encoded within the *Criminal Code*'s sentencing provisions.[39] Responsibility is backward-looking—sentencing judges are to determine the degree to which the individual they are sentencing is responsible for their criminalized conduct—and risk is forward-looking—sentencing judges are to determine whether the individual poses a risk to society in the future and what sorts of mechanisms should be used to manage and/or reduce such risk.

With respect to the sentencing of Indigenous people, responsibility plays an important role in a *Gladue* analysis. In particular, under the first branch of a *Gladue* analysis, sentencing judges are to consider the extent to which "unique and systemic background factors" have affected a criminalized Indigenous person's level of responsibility. Critical accounts of risk point out that these kinds of contextualized accounts of responsibility are lacking in risk assessment tools—these instruments, and their foundational theories, treat individual people as responsible for systemic factors, which include, for example, experiences of poverty and discrimination.

Given the Supreme Court of Canada's express instructions to sentencing judges to take account of "unique and systemic background factors" when determining a criminalized Indigenous

[39] See *Criminal Code*, *supra* note 29, ss 718.1, 718.2

person's level of responsibility, I thought that I was going to demonstrate that it is the judicial construction and application of risk that omits the state from the sentencing analysis. I thought, moreover, that the individualization of risk would work in opposition to—and in tension with—contextualized accounts of responsibility. Indeed, the sentencing judgments that I examined regularly portrayed responsibility and risk as working against each other, with judges finding lessened responsibility on the part of criminalized Indigenous individuals (after conducting contextualized analyses) but then identifying heightened levels of individualized risk.

Nonetheless, contrary to my assumptions, I found that the relationship between responsibility and risk is more nuanced. In particular, responsibility analyses maintain their focus on individuals and on Indigenous families and communities in a much stronger way than I had anticipated. As a result, while the judgments that I studied regularly use risk (rather than responsibility) to justify imprisonment, it is not only the risk framework that obscures or leaves aside the state but also the responsibility analysis. Responsibility and risk thus appear to detrimentally bolster each other in their tendencies to (re)produce essentialized and stereotyped portrayals of Indigenous people and cultures as innately damaged, to the exclusion of detailed engagement with state responsibilities and its failures to meet those obligations.

The judicial erasure of the state is central to this dissertation. By omitting the state and an analysis of state responsibilities, sentencing law continues to further the mass imprisonment of Indigenous Peoples, rather than redressing it. In what follows, I provide an overview of the dissertation's substantive chapters and of their contributions to the scholarship on responsibility, risk, and the mass imprisonment of Indigenous Peoples.

1.4.2 Chapter Two: Responsibility

The first substantive chapter (Chapter Two) develops the theoretical grounding of the dissertation and illustrates that contextualized judicial depictions of responsibility maintain a focus on essentialized, stereotyped, and pathologized portrayals of criminalized Indigenous persons and their families. The chapter demonstrates that contextualization is not sufficient for a relational analysis—or for redressing the state's mass imprisonment of Indigenous Peoples. In other words, the sentencing judgments in this chapter reveal that judicial constructions of context individualize experiences of oppression and omit the state.

With respect to theoretical foundation, this chapter introduces the reader to relational theory. Specifically, I draw on the relational theories that have been developed by Alan Norrie[40] and Jennifer Nedelsky.[41] Norrie and Nedelsky both see people as both personal and social beings. Additionally, both theorists emphasize that people are constituted not only by interactions and dynamics with other individual people and immediate communities but also by structural relationships of power, including relationships involving the state and state actors. Furthermore, Norrie specifically draws on relational theory to develop a relational account of responsibility for criminal law.

[40] Norrie, *supra* note 37, ch 9.
[41] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

I also bring relational theory into conversation with Murdocca's critical engagement with the enactment of section 718.2(e)[42] and with the application of the provision in sentencing judgments.[43] Murdocca's critiques fit well with relational theory. She identifies some of the ways in which judicial efforts to contextualize criminalized Indigenous people can nevertheless omit the role of the state in harming Indigenous people. When sentencing judgments diminish the relationship between the criminalized person and the state, judicial focus fastens onto Indigenous people's traumas, alone. In the process, judges pathologize and essentialize Indigenous people, thus reducing portrayals of Indigenous people to racialized and colonial stereotypes.

These literatures support my analysis of the judicial erasure of the state in sentencing judgments. I draw on such scholarship to show that judicial responsibility analyses maintain their focus on individuals and on Indigenous families and communities in strong—and harmful—ways. Judicial responsibility analyses are contextualized: judges explain that histories and experiences of oppression reduce a criminalized individual's level of responsibility. The individualization of responsibility thus involves not so much an absence of context as a certain rendering of the context—one in which judges depict a criminalized individual as less responsible for their criminalized conduct but as nevertheless living with pathologies and traumas that are purportedly the result of their own, personal Indigenous heritage, rather than the result of the state's violence against Indigenous people and communities.

[42] Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013).
[43] See generally Murdocca, "Ethics of Accountability", *supra* note 8.

Additionally, Chapter Two demonstrates that the judicial obfuscation of state accountability involves the judicial placement of responsibility onto marginalized individuals other than the people whom the judges are sentencing. In particular, I show that, in first-instance and appellate sentencing judgments involving criminalized Indigenous people living with Foetal Alcohol Syndrome or Foetal Alcohol Spectrum Disorder (FASD), judges have found criminalized individuals to be less responsible for their criminalized conduct but have, at the same time, turned around and blamed their mothers. Chapter Two thus demonstrates that, by not clearly and directly attaching some responsibility to the state, the judicial contextualization of responsibility leads to stereotyped and essentialized portrayals not only of criminalized Indigenous people but also of their family members and communities.

1.4.3 Chapter Three: Risk

With a foundation of relational theory and judicial practices of individualizing responsibility in hand, Chapter Three turns towards risk. I contribute to the development and application of relational theory by connecting relational concepts with critical scholarship on risk. After reviewing the theories and principles relating to the dominant model of risk assessment and management in Canada—the Risk-Need-Responsivity Model[44]—I introduce critical literature in the fields of criminology, law, and education, including scholarship by Kelly Hannah-Moffat[45] and Patricia Monture-Angus.[46] Critiques of risk assessment instruments and practices play an important role in highlighting the state accountability component of risk. This scholarship

[44] Guy Bourgon et al, "Offender Risk Assessment Practices Vary across Canada" (2018) 60:2 Canadian Journal of Criminology and Criminal Justice 167 at 168-169.
[45] Hannah-Moffat, *supra* note 38.
[46] Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" (1999) 19:1&2 Canadian Woman Studies 24.

demonstrates that risk assessment instruments integrate normative value judgments about behaviour, relationships, and ways of living. The normative judgments, moreover, typically align with negative judgments about people's experiences of oppression, including experiences relating to poverty, family status, and unequal access to, or opportunities in, education and employment. Risk assessment instruments incorporate these types of information and try to reduce a person's risk of being recriminalized by targeting such factors. In doing so, risk assessment tools treat experiences of oppression as experiences that are caused by, and fully within the control of, marginalized individuals, rather than as experiences that are generated and sustained by the state. Furthermore, the tools regard experiences of oppression as factors that must be addressed at an individual—rather than structural—level.

Chapter Three goes on to conduct a textual analysis of the Supreme Court of Canada's majority judgment in *Ewert v Canada*.[47] This analysis contributes to critical scholarship on risk assessment by illustrating that the individualized nature of risk assessment tools and dominant risk logic has seeped into sentencing law. Importantly, this individualization occurred despite judicial recognition of colonialism and its harms and despite judicial acknowledgment of the possibility that the tools are biased. The majority judgment stopped short of considering that the reason that the tools might be biased is the historical and continued existence of structural oppression. Specifically, the majority recognized that risk assessment instruments might be biased against Indigenous people on the basis that the empirical development of the tools did not include Indigenous people in the research samples. However, the majority judgment did not consider the need to engage with state accountability in constructing and responding to risk. In particular, the reasoning did not call into question risk assessment instruments on the basis that

[47] *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*].

the instruments essentially assess oppression. The judgment thus left unarticulated and unaddressed the critique that the findings from risk assessments—that is, findings of oppression—require changes in state actions and practices, rather than (only) state-sanctioned attempts to change individuals' behaviour. The dangerous possibility is that these instruments will go on to be "validated" in relation to criminalized Indigenous people—that is, the tools will be found to validly predict that it is likely that criminalized Indigenous people will be recriminalized, even though the reasons for such recriminalization involve systemic injustices in relation to, for example, state surveillance and access to housing, education, and employment.

I supplement my textual analysis of the *Ewert* case with a textual analysis of two other types of texts. First, I analyze the "risk factors" that are included within the tools that Jeffrey Ewert challenged in the case. The types of factors that are included in risk assessment instruments have already been carefully studied by critical criminologists and legal scholars. My contribution thus focuses on positioning the language of the "risk factors" alongside an analysis of *Ewert*. I aim to make explicit that the factors that are embedded in risk assessment instruments involve experiences of oppression. Therefore, I argue that a critique of the tools should call not only for studies of whether the factors predict whether or not Indigenous people are likely to be recriminalized but also for the requirement that those factors be regarded as requiring systemic change.

Second, I conduct a textual analysis of recent empirical research regarding the risk assessment instruments that Jeffrey Ewert challenged. Specifically, I examine research that has been published in the wake of *Ewert* and that seeks to ascertain whether the tools can be validated in

relation to Indigenous people.[48] This scholarship confirms my concerns that the tools will be validated and used to continue supporting the mass imprisonment of Indigenous people. In addition to reading the empirical research texts for their findings, I also read them for their discourses about Indigenous people. Similar to sentencing judgments, I notice a rote recitation of the statistics of mass imprisonment and of the traumas that Indigenous people have experienced, all of which then seems to be dismissed in an analysis of the validity of *individualized* risk factors.

1.4.4 Chapter Four: Risk in Recent Sentencing Judgments

Chapter Four continues the project of using relational theory and critiques of risk assessment as frameworks for identifying and contesting sentencing judgments' erasure of the state. The chapter specifically examines the impact of *Ewert* on sentencing judgments' considerations of risk and state accountability.

Consistent with my concerns about the limited criticism of risk assessment in *Ewert*, most of the sentencing cases I examined obscured the state's role in fostering oppression against Indigenous Peoples. Cases have undertaken this practice both when judges relied heavily on risk assessment tools and when they did not. Some judges incorporated evidence from risk assessment tools by simply acknowledging, but leaving unaddressed, their potential for bias. Additionally, some judges found that the tools are not biased against Indigenous persons, and some found that the

[48] Mark E Olver et al, "Predictive Accuracy of Violence Risk Scale-Sexual Offender Version Risk and Change Scores in Treated Canadian Aboriginal and Non-Aboriginal Sexual Offenders" (2018) 30:3 Sexual Abuse 254; Seung C Lee, R Karl Hanson & Julie Blais, "Predictive Accuracy of the Static-99R and Static-2002R Risk Tools for Identifying Indigenous and White Individuals at High Risk for Sexual Recidivism in Canada" (2020) 61:1 Canadian Psychology 42.

experts administering the tools did not rely on them significantly and instead exercised their own judgment in order to reduce potential bias. The consistent erasure of the state in both sets of circumstances—in reliance on the tools and limited reliance on the tools—suggests that risk assessment frameworks and instruments must be reconceived. Continuing with dominant accounts of risk and relying on the discretion of professionalized individuals will continue the state's oppression of, and violence against, Indigenous Peoples. Both paths have illustrated their tendencies to mask the roles of the state in assembling portrayals of risk that are rooted in stereotypes and experiences of oppression and the state's obligations to redress those practices. Both paths have, moreover, continued to pursue the protection of the community by confining criminalized Indigenous persons in prison.

Two cases suggest that there may be some reason to believe that sentencing judges might change the existing individualization of risk and instead consider the relationship between risk and the state's oppression of, and violence against, criminalized Indigenous persons.[49] These cases illustrate some movement towards a relational engagement with risk. In the cases, judges examined state failures to provide criminalized persons with appropriate prison conditions and/or with the programming that they needed. Moreover, the cases went on to determine whether or not those failures impeded the individuals' abilities to change their behaviour through programming in the future. In other words, the judgments recognized that risk assessment and management intersect with the conditions and opportunities that the state makes available or unavailable to an individual. I would prefer for the judgments to further acknowledge that individualized programming, alone, is likely never sufficient for protecting communities. Protection requires not only attention to the needs of criminalized people but also to the state's

[49] *Durocher*, *supra* note 36; *Keenatch*, *supra* note 36.

actions and inactions that contributed to their criminalization and to the state's own obligations in supporting the needs and wellbeing of survivors and people who might be exposed to violence.

1.4.5 Chapter Five: Change

In the final substantive chapter, I propose that relational understandings of responsibility and risk can assist not only in critiquing existing sentencing law and practice but also in re-imagining and re-creating it. I consider how sentencing law might be reformed and transformed so as to meaningfully acknowledge and redress Indigenous people's historical and contemporary experiences of state violence and oppression. Rather than offering my own suggestions, I demonstrate that my concerns can be addressed by existing and emerging proposals and practices related to criminal justice reform and/or transformation. I think it is important to recognize that my work engages with long-standing issues in the criminal justice system for which there has been considerable advocacy for change. The earlier chapters bring together multiple strands of scholarship to specifically reveal and challenge the erasure of the state in sentencing judgments' portrayals of responsibility and risk. However, the practices of acknowledging and attempting to find ways to redress the state's failures in relation to criminalized Indigenous people, Indigenous survivors, and Indigenous families and communities are not new. I thus seek to integrate my relational analysis with existing and emerging scholarship on decarceral approaches, particularly approaches that try to pay attention to the diverse needs and experiences of multiple Indigenous persons.

1.4.6 A Final Note: Describing Sentencing Judges' Depictions of People, Events, and Circumstances

Throughout the dissertation, I attempt to capture the dynamics in which sentencing judgments both refer to the state and the state's violence and push it into the background and in which sentencing judgments identify an individual's experiences of oppression and attribute those experiences to the individual and/or their family and community. In describing these practices, I incorporate metaphors related to art throughout the dissertation. Sentencing judges play a distinct (and powerful) role in the representation of people and relationships. When a sentencing judge delivers their reasons and imposes a sanction, the judge renders a legally binding interpretation not only of the circumstances that unfolded in relation to the criminalized conduct but also of the people involved. This practice of representing people and events can be likened to the practice of representational drawing or painting. After taking in the evidence and submissions that were put forward by the parties, the judge yields a depiction. Similar to the practice of representational drawing and painting, a judge renders in great detail some parts of the image while erasing, or rendering less vividly, others. Relatedly, the frameworks of responsibility and risk that judges employ to see and describe the subject matter of their judgments might be understood as lenses. Judges are involved in both the development and application of these lenses, and the lenses themselves highlight some people, some experiences, and some relationships, while also excluding other people, experiences, and relationships. The lenses, in other words, produce particular images—for instance, blurred, highly focused, or stereotyped images—of the subject matter that they examine. What I explore throughout the dissertation is my interpretation of the lenses that judges apply and the images that they produce, as informed primarily by relational

theory, critical evaluations of risk assessment instruments, and other textual analyses of sentencing judgments.

Chapter Two: Responsibility and Systemic Oppression in Sentencing Law

2.1 Introduction

A critical investigation into judicial depictions and uses of risk requires, first, a consideration of judicial articulations of responsibility. This foundation is necessary because critical understandings of risk rest upon critical understandings of responsibility. In particular, arguments that current risk assessment practices entrench, rather than redress, oppression are rooted in the idea that such practices "responsibilize" individuals for their experiences of oppression rather than "responsibilizing" the state for contributing to oppression.

Depictions of responsibility in sentencing law are different from depictions of responsibility in substantive criminal law. Criminal law initially presents a sentencing judge with an image of a criminalized person that the law carries over from substantive criminal law. This representation is one that attributes certain capacities to the individual—namely, capacities to exercise autonomy and rationality—and depicts the individual in isolation from their surroundings, relationships, and histories.[1] As the Supreme Court of Canada has indicated, substantive criminal law presumptively bestows people with the capacities for autonomous and rational behaviour: "[t]he criminal law relies on a presumption that every person is an autonomous and rational being whose acts and omissions can attract liability."[2] A person whom the law can hold to be criminally responsible is someone whom the law assumes to be capable of acting on the basis of

[1] See e.g. Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 McGill LJ 771; Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart, 2009) at 69-72.
[2] *R v Bouchard-Lebrun*, 2011 SCC 58 at para 49, [2011] 3 SCR 575 [*Bouchard-Lebrun*].

their "free will",[3] as "expressed through conscious control exerted by the individual over his or her body".[4] A person's control over their body "may be physical, in which case voluntariness relates to the muscle movements of a person exerting physical control over his or her body", and it "may also involve moral control over actions the person wants to take, in which case a voluntary act is a carefully thought out act that is performed freely by an individual with at least a minimum level of intelligence."[5]

In presuming that criminalized people are capable of independently exercising free will and reason, substantive criminal law paints an isolated image of criminalized people. It is possible that defences could, theoretically, provide an opportunity for triers of fact to consider whether criminalized people actually had the capacity and/or opportunity to exercise their choices and actions in accordance with their desires and in accordance with reason.[6] However, criminal law has restricted the scope and application of defences.[7] For example, criminal law construes necessity narrowly, applying it only in "extreme situations".[8] Similarly, criminal law has not extended the defence of not criminally responsible on account of mental disorder to all disabilities that compromise people's abilities to exercise independent autonomy and rationality.[9] Criminal law is, in essence, highly individualizing and highly reluctant to confront the roles of social and political structures within criminalization processes.

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[3] *Ibid* at para 46.
[4] *Ibid* at para 47, citing *R v Perka*, [1984] 2 SCR 232 at 249, 13 DLR (4th) 1.
[5] *Bouchard-Lebrun, supra* note 2 at para 47, citing Hugues Parent, *Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien* (Cowansville.: Yvon Blais, 1999) at 266-71 [as cited in *Bouchard-Lebrun, supra* note 2].
[6] Sylvestre, *supra* note 1 at 778.
[7] *Ibid* at 778-80.
[8] *Ibid* at 779.
[9] Benjamin L Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 117.

Faced with the presumptive image of the independently choosing and rational agent, sentencing law calls upon judges to fill in some of the backdrop and some of the details that are specific to criminalized individuals. In other words, sentencing judges both expand, and add details to, their depictions of people. In doing so, sentencing judges demonstrate their interpretations of the extent to which the capacities that the law presumes to be endowed by an individual are (or are not) present and articulate their perceptions of the ways in which individuals exist within a broader context.

A key sentencing provision of the *Criminal Code* (section 718.1, which enacts the "[f]undamental principle of sentencing"[10]) makes space for such broadened and nuanced depictions of criminalized people. Section 718.1 mandates a sentencing judge to inquire into the seriousness of an offence and an offender's level of responsibility: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[11] The proportionality principle thus requires sentencing judges to draw upon the concept of responsibility when determining a fit sanction for a criminalized person. Furthermore, while substantive criminal law treats responsibility as an on-off concept—an accused person either is or is not criminally responsible—the proportionality principle in sentencing law acknowledges that an individual's responsibility for criminalized behaviour exists along a spectrum.

This chapter engages with the idea that responsibility, as a spectrum, exists not only in varying degrees within an individual, but also in varying degrees *between* people. When the law views

[10] *Criminal Code*, RSC, 1985, c C-46 s 71, s 718.1.
[11] *Ibid*.

responsibility as something that can be attached to an individual in varying degrees, the law is (or should be) left to consider which other individuals and/or entities are also responsible.

I specifically examine the extent to which sentencing law has attempted to distribute responsibility between individual criminalized Indigenous people and the Canadian state. As is well known, Parliament and Canadian courts have acknowledged, and identified an aim to remediate, the "overrepresentation" of Indigenous people in Canada's criminal justice system. Parliament initiated this process by amending the *Criminal Code* in 1996 to include the following sentencing principle: "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 aboriginal offenders."[12] Parliament enacted this principle in combination with a broad set of amendments to the *Criminal Code*'s sentencing provisions.

The Supreme Court of Canada has identified the remedial aim of section 718.2(e) through reference to the provision's legislative history. For instance, in his testimony before the House of Commons Standing Committee on Justice and Legal Affairs, the then-Minister of Justice, Allan Rock, stated: "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada".[13] Justices Cory and Iacobucci quoted this statement in *R v Gladue*[14] and went on to explain the government's remedial and restorative objectives:

[12] *Ibid*, s 718.2(e).
[13] House of Commons Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at 62:15, as quoted in *R v Gladue*, [1999] 1 SCR 688 at para 47, 133 CCC (3d) 385 [*Gladue*].
[14] *Gladue*, *supra* note 13.

> It can be seen…that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.[15]

This passage makes it clear that the purpose of engaging in a section 718.2(e) analysis is not simply to contextualize a criminalized Indigenous person, but to contextualize a criminalized Indigenous person for the specific purpose of reducing the state's imprisonment of Indigenous people.

Yet despite section 718.2(e)'s remedial objective, the Canadian state's mass imprisonment of Indigenous people persists.[16] It is within this context of the state's stated aims of reducing the imprisonment of Indigenous people, and its practices of continuing to imprison Indigenous people at high rates, that this chapter studies judicial depictions of responsibility in sentencing law.

I argue that Canadian courts, including the Supreme Court, have not fully embraced the possibility of "responsibilizing" and blaming the state in the context of ascribing responsibility at

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[15] *Ibid* at para 48.

[16] See e.g. Statistics Canada, *Adult and Youth Correctional Statistics in Canada, 2018/2019*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 21 December 2020) at 5 [footnotes omitted]: "In 2018/2019, Indigenous adults accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4.5% of the Canadian adult population. These proportions were virtually unchanged from the previous year."

sentencing. This chapter demonstrates that, instead of engaging with state accountability, sentencing judges re-entrench responsibility on individual criminalized people and/or re-attach responsibility to other marginalized individuals within criminalized people's communities.

I turn first to a theoretical framework for conceptualizing the sharing of responsibility "between" a criminalized individual, other individuals, and the state. I then explore the Supreme Court's detachment of systemic oppression from the state. Finally, I offer a new study to illustrate the judicial erasure of state accountability. The process of erasure takes place even as judgments claim to identify colonialism as a contributing factor in the criminalization of Indigenous people. The study specifically explores sentencing judgments' portrayals of pregnant women and mothers of criminalized Indigenous people living with foetal alcohol spectrum disorder (FASD). Through these cases, I demonstrate the judicial placement of responsibility and blame on the part of Indigenous pregnant women and mothers. In the process of "responsibilizing" and blaming Indigenous pregnant women and mothers, these judgements obfuscate state accountability for oppression. This context sets the stage for the next chapter, which demonstrates the ways in which dominant risk assessment narratives make criminalized people responsible for their experiences of oppression and for the future reduction of criminalization.

2.2 The "In Betweenness" of Responsibility

Alan Norrie provides a helpful theoretical framework for conceptualizing shared responsibility and blame.[17] According to Norrie, people themselves are relational—people live "'in between'

[17] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000), ch 9. The relational theory of responsibility and blame that Norrie provides is built upon a metaphysical

the individual and the social".[18] This metaphysical portrayal of the self serves as the foundation for Norrie's argument that ascriptions of responsibility and blame ought to also be relational—that is, shared between individuals and communities.

With respect to the self, Norrie draws on Kenneth Gergen's insight that, within a "relational analysis[,]…there is always the concentration on the between."[19] A relational analysis thus does not simply involve an additive consideration of both individuals and communities. Instead, a relational analysis contemplates the ways in which intersections *between* individuals and communities generate selfhood.

Norrie also appeals to Rom Harré's depiction of the ways in which social relationships and interactions create individuals.[20] Through this analysis, Norrie illustrates the frictions that arise in people's experiences of their selves. Specifically, Norrie discusses Harré's claim that people have an "ambiguous sense of selfhood and agency".[21] Individuals experience both a "sense of control" over their lives—knowledge of their self and a feeling of governance over their actions, as well as—"and *at the same time*"—a "lack of control"—things happen that are different from their desires, and people live within personal and institutional social structures that are marked

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theory of the individual. This type of theory can be compared with Antony Duff's relational theory of responsibility, which is an analytical theory focusing on "the logical relationships between the agents who are held responsible, that for which they are held responsible, and those who hold them responsible" (RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) at 29).

[18] Norrie, *supra* note 17 at 221.

[19] Kenneth Gergen, "Summary Statements" in Daniel N Robinson, ed, *Social Discourse and Moral Judgment* (San Diego: Academic Press, 1992) 244 at 245.

[20] Norrie, *supra* note 17 at 205. See also *ibid* at 200, citing Rom Harré, *Personal Being* (Oxford: Blackwell, 1983), Rom Harré, David Clarke & Nicola De Carlo, *Motives and Mechanisms: An Introduction to the Psychology of Action* (London: Methuen, 1985), and Rom Harré, *The Singular Self: An Introduction to the Psychology of Personhood* (London: Sage, 1998).

[21] Norrie, *supra* note 17 at 212.

by histories and practices of power dynamics.[22] In being constituted by their relationships with other individuals and communities, people thus live with tensions in experiencing, on the one hand, personal desires and choices, and on the other hand, constraints or opportunities that are fostered through their communities.

This recognition of the intersections between the individual self and the social self—and the tensions that such connections produce—highlights the complex territory that sentencing judgments ought to enter when ascribing levels of responsibility to criminalized people. Sentencing judgments should engage both with the individual and with the social. More specifically, sentencing judgments should analyze the ways in which other people and broader communities have facilitated and/or constrained the choices and opportunities of criminalized individuals. An analysis of responsibility that favours one dimension of the self to the exclusion of the other would be simplistic, reductive, and unreflective of how people live and of how the state criminalizes people.

Norrie also addresses the implications of a relational theory of the self for the criminal law concepts of responsibility and blame. "Responsibility", Norrie argues, "is something that is shared, so that actors who do bad things must understand that there is a moral reckoning for them, but part of that reckoning involves looking at the social conditions in which they acted and recognizing that the reckoning does not just stop at their door."[23] Responsibility analyses must therefore look "between" individuals and social structures—the analyses must identify the intersections between individual choices and actions and social processes and conditions.

[22] *Ibid* [emphasis in original].
[23] *Ibid* at 220.

The social, moreover, includes the state—the very entity that is "involved in blaming and punishing".[24] As Norrie states, "[t]he reckoning"—or the process of ascribing responsibility—"is shared between the individual and the society of which he is a part, and this includes its institutional forms such as the state."[25] Norrie's relational theory thus accepts that the state can be held responsible for criminalized conduct, even as it strives to hold individuals responsible for such actions. Furthermore, the practice of attributing responsibility "between" individuals and the state is not only permissible, but, according to Norrie, necessary. The ascription of responsibility "between" individuals and the state is vital because it would acknowledge people's experiences of living "in between" the personal and the social. Such an acknowledgment would, moreover, serve to correct the criminal law's usual practices of criminalizing and holding to account "those who have the least opportunities to develop other career paths and life patterns in an unjustly structured social order."[26] Norrie writes that, "[i]n choosing to find such people responsible [that is, individuals whose lives have been unjustly shaped by social, historical, and political patterns of discrimination], we recognize that they are agents, but conveniently we forget that agency exists 'in between' the individual and the social, that it is shared."[27] In the sections below, I will argue that such forgetfulness seems to animate Canadian sentencing law. Specifically, sentencing law has carved out space to acknowledge the ways in which Indigenous people's lives have been negatively impacted by colonialism. However, sentencing law has not followed through in creating meaningful avenues for holding the state at least partly to account for criminalized actions and criminalization processes.

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[24] *Ibid* at 202.
[25] *Ibid* at 220.
[26] *Ibid* at 221.
[27] *Ibid*.

Norrie's relational theory of blame can be complemented by Jennifer Nedelsky's relational theory of the self. Like Norrie, Nedelsky regards individuals as being "constituted by relationships":[28]

> [E]ach individual is in basic ways constituted by networks of relationships of which they are a part—networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming.[29]

Similar to Norrie, Nedelsky thus conceives of all people as relational beings. At the same time, both Norrie and Nedelsky maintain that each individual will experience, and be constituted by, different relationships and different relational dynamics. Additionally, Nedeslky cautions that relational theory does not see people as being "*determined* by their relationships."[30] Relational theory does not, in other words, involve the essentialization of people based on the ways in which dominant social structures and discourses frame and treat people. Rather, relational theory recognizes that relationships of power contribute to constituting people's lives. People's experiences arising out of their relationships will thus vary and shift between individuals and throughout an individual's life. The analysis is thus not one that views relationships—or the

[28] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 19.
[29] *Ibid*.
[30] *Ibid* at 31 [emphasis added].

impacts of relationships—as "determinative" or as "assumed" or "chosen".[31] Rather, a relational analysis strives to identify the various people and institutions that are involved in limiting—or nourishing—individuals' choices, actions, development, and opportunities.

An important point of overlap between the theories that Nedelsky and Norrie advance is that both theories keep the state squarely in view as one of the principal participants in shaping individuals' lives. The state plays a constitutive role in generating experiences of privilege and oppression, and naming the state and its institutions, actors, and actions/inactions is an important part of the practice of identifying and attempting to remedy discrimination and inequality. As I will explore below, judicial analyses of responsibility in the context of sentencing Indigenous people have identified state responsibility for colonialism but have then proceeded to emphasize "Indigenous culture" and "Indigenous ancestry" when discussing the criminalization of an individual and an individual's difficult life experiences. This practice shifts the reader's attention away from the state and from how the state continues to oppress Indigenous people. The practice instead focuses the reader's gaze on Indigenous people and relationships between Indigenous people, making experiences of oppression appear to be a problem intrinsic to, and continued by, Indigenous people and communities, rather than a problem of how the state stereotypes and oppresses Indigenous people.

[31] *Ibid* at 36.

2.3 The Detachment of Systemic Oppression from the State: Critical Readings of *Gladue* and *Ipeelee*

The surface of sentencing law suggests that courts have moved towards portraying criminalized Indigenous individuals' responsibility as being potentially reduced as a result of experiences of oppression. In particular, one set of considerations that sentencing judges are to examine is a grouping of factors related to oppression, referred to as "systemic and background factors".[32] In *R v Ipeelee*,[33] Justice LeBel described "systemic and background factors" as including diminished socio-economic conditions and opportunities. Additionally, Justice LeBel directly stated that such factors might lead to reduced culpability on the part of a criminalized Indigenous person:

> [S]ystemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness…Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely—if ever—attains a level where one could properly say that their actions were not *voluntary*, and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.[34]

[32] *Gladue*, *supra* note 13 at paras 67-69. The second set of considerations includes "sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection" (*ibid* at para 66).
[33] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].
[34] *Ibid* at para 73.

Moreover, Justice LeBel explained that "systemic and background factors" include experiences of oppression generated by the state's own practices:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.[35]

Turning to risk assessment, these passages from *Ipeelee* might imply that Canadian courts are to allocate some responsibility for the criminalization of Indigenous people to the state. If Canadian courts did so, then the argument for de-individualizing risk assessment would be rather smooth—judges should apply similar reasoning from their assessments of responsibility and blameworthiness to their assessments of risk. In other words, judicial acknowledgment of, and engagement with, state responsibility in the context of ascertaining a criminalized person's level of responsibility (and ascertaining the extent to which the state should blame them) would imply that the state ought to similarly assume accountability in the context of risk. Specifically, since systemic oppression contributes to the criminalization of Indigenous people, the "risk" of the criminal justice system recriminalizing Indigenous individuals can only be fully addressed by trying to change the practices of systemic oppression.

[35] *Ibid* at para 60.

Returning to responsibility, despite possible glimmers of state accountability in *Ipeelee*, Canadian courts, including the Supreme Court, have not fully embraced the possibility of "responsibilizing" and blaming the state in the context of responsibility analyses. Indeed, Justice LeBel's judgment in *Ipeelee* demonstrates one of the ways in which judicial discourse avoids assigning and engaging with state accountability. Specifically, sentencing judgments subtly re-entrench responsibility on criminalized Indigenous people. For instance, in one of the passages that I quoted above, Justice LeBel stated that "[m]any Aboriginal offenders *find themselves* in situations of social and economic deprivation".[36] The idea that criminalized Indigenous people simply "find themselves" in diminished socio-economic conditions removes the state from the picture. While these conditions might lead to a lesser level of criminal responsibility, the language implies that criminalized Indigenous people might nonetheless be responsible for having "found themselves" in such circumstances in the first place, or at least that the state has no role in the process.

The removal of state responsibility in relation to Indigenous people's experiences of living "in situations of social and economic deprivation" has important implications for risk. While these conditions might lessen a criminalized Indigenous person's level of responsibility for the offence, such circumstances might simultaneously increase their level of risk. And, because the language suggests that it is not really knowable how a criminalized Indigenous person "found themselves" in such conditions, the reasoning does not clearly indicate that the state itself ought to play a part in expanding a criminalized Indigenous person's opportunities for safety and socio-economic stability.

[36] *Ibid* at para 73 [emphasis added].

Justice LeBel's language also demonstrates slippage between the concepts of criminalization and criminality: he writes that "[i]t would have been naive to suggest that sentencing Aboriginal persons differently, *without addressing the root causes of criminality*, would eliminate their overrepresentation in the criminal justice system entirely."[37] The phrase, "the root causes of criminality", brings to mind images of individuals who *are* criminal, rather than images of oppressive state actions/inactions of *criminalizing* certain people and certain actions. Justice LeBel acknowledged that "the history of colonialism, displacement, and residential schools…continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[38] Given this statement, I assume that Justice LeBel was implying that "colonialism, displacement, and residential schools" are, or at least contribute to, "the root causes of criminality". Nevertheless, the use of the term "criminality" rather than "criminalization" maintains the reader's focus on individuals and on hardships endured by Indigenous people, rather than on the state's practices that cause such hardships and determine who and what is criminalized.

This discussion of "the root causes of criminality" occurred right before Justice LeBel provided an overview of the statistics of "the overrepresentation and alienation of Aboriginal peoples in the criminal justice system".[39] While these forms of statistical information constitute an important part of the context of mass imprisonment, they also pose potential problems. For example, Robert Nichols expresses skepticism about the state's reliance on statistical

[37] *Ibid* at para 61 [emphasis added].
[38] *Ibid* at para 60.
[39] *Ibid* at para 62.

frameworks for understanding and addressing the mass incarceration of Indigenous people. He points out that "the evidentiary record is itself so indebted to a state apparatus of monitoring, tracking, and documenting indigenous bodies".[40] Statistical frameworks represent Indigenous people as "racialized bodies produced by a biopolitics of population management", rather than as "alternative political, economic, ecological and spiritual systems of ordering, governing, and relating."[41] In a context where the continual recitation of these numbers has not curbed mass imprisonment, Nichols' concerns are particularly insightful. Specifically, his concerns about the use of numbers for management purposes runs parallel with concerns about the use of experiences of hardship for management purposes. In addition to repeating the numbers of incarcerated Indigenous people, judgments repeat the difficult experiences in some Indigenous people's lives. But judges use experiences to frame criminalized Indigenous people as "risks". Such a practice purportedly justifies the continued management of criminalized Indigenous people, including through carceral institutions. Both practices—reciting statistics and reiterating circumstances of deprivation—can be connected with an impulse to redress mass imprisonment. However, both practices are also connected with the continuation of mass imprisonment.

Similar to Nichols, Carmela Murdocca argues that "[t]his kind of quantification continues the colonial project."[42] Murdocca demonstrates that the "quantification" of mass imprisonment removes attention from the state and places attention on Indigenous people. Specifically, the practice implies that Indigenous people themselves have a "social problem" of experiencing imprisonment: "A focus on the 'numbers' enables the marking of Aboriginal populations as

[40] Robert Nichols, "The Colonialism of Incarceration" (2014) 17:2 Radical Philosophy Review 435 at 444.
[41] *Ibid* at 445.
[42] Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23 at 29 [Murdocca, "From Incarceration to Restoration"].

having a 'social problem' (that of overrepresentation in prisons) that needs to be solved."[43] The use of "numbers" thus serves as a mechanism for labelling Indigenous people as having the "social problem" of "overrepresentation" in Canada's prisons. In a similar way, Justice LeBel's use of the term "criminality" and his recitation of experiences of oppression encourages readers to see Indigenous people as having the "social problem" of experiencing hardship, including through experiences of "criminality". All the while, the state is placed in the background—present in the past, but not made responsible for its current criminalization and marginalization of Indigenous people.

In addition to critiquing the state's uses of statistical information, Nichols also takes issue with the term "overrepresentation". Nichols argues, in particular, that the term inappropriately presents the problem of mass imprisonment as an issue of proportionality. The phrase incorrectly portrays colonial violence as "a function of the *number* or *proportion* of racialized bodies within institutions", rather than as a "tool of state power".[44] Nichols explains that mass imprisonment is "a political strategy".[45] Policies of prison expansion were developed "first and foremost…to maintain a system of state violence, racialized hierarchy, and…continuous colonial reterritorialization".[46] Outrage at the "disproportionate" imprisonment rates among Indigenous people thus omits critical consideration of the historical and political context of colonialism:

[43] Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013) at 63. See also Murdocca, "From Incarceration to Restoration", *supra* note 42 at 31.
[44] Nichols, *supra* note 40.
[45] *Ibid* at 441.
[46] *Ibid* at 442.

> In the context of ongoing occupation, usurpation, dispossession and ecological devastation, *no* level of representation in one of the central apparatuses of state control and formalized violence would be proportionate. Instead, indigenous sovereignty itself calls forth an alternative normativity that challenges the very *existence* if the carceral system, let alone its internal organization and operation.[47]

Nichols' analysis draws the reader's attention to the overt role of the state in the criminalization and imprisonment of Indigenous people—and to the state's practices of obscuring that role. Nichols thus characterizes the state's actions not as helping Indigenous people to deal with supposed "social problems" but as denying Indigenous sovereignty.

In addition to inaccurately capturing the harms of mass imprisonment, the term, "overrepresentation", often misleadingly appears alongside the term "crisis". This constitutes another linguistic manoeuvre that distances mass imprisonment from the state's ongoing, intentional policies of managing Indigenous people. For instance, in *Gladue,* Justices Cory and Iacobucci wrote: "The figures are stark and reflect what may fairly be termed *a crisis* in the Canadian criminal justice system. *The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem*."[48] In drawing on Nichols' critique, Efrat Arbel argues that the practice of framing Canada's mass imprisonment of Indigenous people as a "crisis" is "a fundamental mischaracterization", because it denies the ongoing, "ordinary" nature of Canada's violence

[47] *Ibid* at 445.
[48] *Gladue*, *supra* note 13 at para 64, quoted in *Ipeelee*, *supra* note 33 at para 58 [emphasis added].

against Indigenous people.[49] Arbel argues that "[t]he language of 'crisis' suggests that Indigenous mass imprisonment is somehow exceptional or temporary, as crises are. Whereas in fact, like colonialism, Indigenous mass imprisonment is embedded in the Canadian legal system, it is an ordinary and predictable by-product of systemic and systematized colonial violence."[50] Arbel's critique asks the reader to directly confront the Supreme Court's limited engagement with state accountability, even as Justice LeBel mentions, in *Ipeelee*, the term "colonialism". In particular, Arbel notes that neither *Gladue* nor *Ipeelee* "assumes responsibility for the production of Indigenous mass imprisonment as colonial violence."[51] In fact, the judgments instead turn towards the state as the entity that can purportedly help 'save' Indigenous people from mass imprisonment. As Arbel argues, "[e]ven at their most progressive and laudable moments, and even as they criticize the Canadian legal system, both turn to that same system to resolve the problem."[52] Arbel thus illustrates the judiciary's simultaneous construction of the state as responsible for oppressing Indigenous people and evasion from such responsibility. In support of this concern, Arbel notes that Jonathan Rudin similarly asks: "How was a system that had, advertently or inadvertently, created a crisis, going to resolve that crisis if nothing about how the system operated was going to change?"[53] Arbel and Rudin thus encourage readers to see the tensions between the state's histories and current practices of oppression and the state's purported efforts to change those practices. Even as the state tries to move past its violence, it ignores its current violence and its potential for continued violence. These tensions do not have easy solutions. Nonetheless, identifying their existence and their proliferation can constitute one

[49] Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 452.
[50] *Ibid*.
[51] *Ibid* at 453.
[52] *Ibid* [footnote omitted].
[53] Jonathan Rudin, "Addressing Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 Crim LQ 447 at 454, quoted in part in Arbel, *supra* note 49 at 453.

part of the process of redressing them. As I will explore in the final chapter, different proposals have been leveraged for ending mass imprisonment. And while the proposals take different positions on the role that the Canadian state can or should play in those efforts, all proposals acknowledge the state and the harms that it generates.

Lower court sentencing judgments have also participated in the process of making criminalized Indigenous individuals—rather than the state—responsible for experiences of diminished health and socio-economic conditions and opportunities. In the process, the judgments have both recognized and obscured state accountability.[54] For instance, Murdocca shows that sentencing (and bail) judgments have erased state accountability by "advancing a particular kind of pathologized racial ontology"[55]—one that reiterates the range of "present-day vulnerabilities that Indigenous people experience in view of the history of colonialism".[56] In framing experiences of oppression as "present-day vulnerabilities", the judgments do not reiterate, contest, or explore avenues for redressing the state's present-day practices of oppression. Instead, the attention turns away from the state and towards Indigenous people's experiences of harm. In the process, judgments essentialize and pathologize Indigenous people, while simultaneously providing a basis for casting the judge as someone who demonstrates "compassion" and a "unique sense of responsibility towards Indigenous people".[57] The focus on criminalized Indigenous people's experiences relating to, for example, poverty, unemployment, and disability to the exclusion of

[54] See Carmela Murdocca, "Ethics of Accountability: Gladue, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522 [Murdocca, "Ethics of Accountability"].
[55] *Ibid* at 537.
[56] *Ibid* at 541.
[57] *Ibid* at 536.

the state's continued generation and exacerbation of such experiences leads to stereotyped portrayals of Indigenous people as intrinsically suffering and as being in need of the state's help.

An example is Murdocca's analysis of Justice Nakatsuru's judgment in *R v Armitage*.[58] Among other parts of the judgment, Murdocca critiques Justice Nakatsuru's tree analogy. She quotes the following passage from the judgment:

> If I could describe Mr. Armitage as a tree, his roots remain hidden beneath the ground. I can see what he is now. I can see the trunk. I can see the leaves. But much of what he is and what has brought him before me, I cannot see. They are still buried. But I am sure that some of those roots involve his Aboriginal heritage and ancestry. They help define who he is. They have been a factor in his offending. They must be taken into account in his sentencing. It is also obvious that this tree is not healthy. The leaves droop and appear sickly. It does not flourish regardless of the attention paid upon it. The tree needs healing.[59]

While this analogy has been praised in the media, Murdocca argues that it "employs a discourse of a culturalized and essentialized Indigenous subject".[60] Murdocca defines "essentialism" as a process that "is expressed through explanations and beliefs that suggest that people (or things) have an underlying or unchanging temporal 'essence.' As it is strategically deployed in racial

[58] *R v Armitage*, 2015 ONCJ 64 [*Armitage*].
[59] *Ibid* at paras 55-56, quoted in Murdocca, "Ethics of Accountability", *supra* note 54 at 535.
[60] Murdocca, "Ethics of Accountability", *supra* note 54 at 535.

settler colonialism, essentialism often reduces Indigenous people and identities to homogenous culturalized identities."[61] Essentialism is, in short, "a form of dehumanization and racism."[62] It involves framing Indigenous people as intrinsically prone to suffering and to experiencing hardship, denying Indigenous demonstrations of resilience and resistance and denying the state's destruction of Indigenous people, communities, and laws.

With respect to the tree analogy, Murdocca observes that "Armitage is not described here for 'who he is' but, rather, for 'what he is'—a state of nature bereft of a link to a productive path towards reason and participating as a subject in a liberal society."[63] In contextualizing and adding detail to Armitage, the judgment therefore ends up dehumanizing Armitage. Part of the dehumanization process involves the judicial portrayal of Armitage as deviant. As Murdocca shows, the metaphor of a "sickly tree" serves to mark Armitage as deviant: "Armitage is a 'sickly tree' experiencing an essentialized pathology where his lived experiences, in life and through the law, evidence a deviation from what can be described or surmised as a normal state of affairs."[64] Judges can thus use deviance as a reason to treat a criminalized Indigenous person as being unable to live a life other than a criminalized life—as being necessarily "sickly". This apparent intrinsic deviance removes from scrutiny the state's own actions in framing a criminalized person in this way. In other words, the concept of being essentially "sickly" removes from examination the choices that a person might have made in specific social and political circumstances, which simultaneously obscures their agency and the state's role in constraining how they exercise their agency.

[61] *Ibid* at 534.
[62] *Ibid* at 535.
[63] *Ibid.*
[64] *Ibid.*

As Sylvestre argues, the practice of separating criminalized people from other people on the basis of deviance enables the criminal justice system to inflict violence on criminalized people. Sylvestre explains that criminal law uses deviance, or "extreme difference or 'monstrosity'", to make sense of and to justify "exclusion and punishment."[65] By marking criminalized Indigenous people, in particular, as "other" or less than human, the criminal justice system can justify its continued framing of Indigenous people as "risky" and as in need of management, even as it acknowledges the harms of colonialism.

Murdocca's analysis of *Armitage* and other judgments illustrates that the erasure of state accountability takes place within the legal practice of "identifying the range of violence, exclusion, marginalization, socio-economic disadvantage, health issues, and other forms of social isolation and dislocation that Indigenous people experience in ongoing settler colonialism".[66] The erasure of state accountability thus involves not the outright denial of state and oppression, but rather the transforming of people's experiences of state violence and oppression into experiences for which the current state bears no responsibility. The listing of "present-day vulnerabilities" is evident in many judgments, including *Ipeelee*, where Justice LeBel directly stated that "such matters as the history of colonialism, displacement, and residential schools…continues to *translate into* lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal

[65] Sylvestre, *supra* note 1 at 773 [footnote omitted].
[66] Murdocca, "Ethics of Accountability", *supra* note 54 at 539.

peoples."[67] As Murdocca acknowledges, this practice is a necessary component of a *Gladue* report.[68] Moreover, it is part of "a progressive liberal politics that seeks to advance the recognition of the issues that Indigenous people have endured in Canada."[69] The practice is thus one that seeks to make visible harms that the state otherwise could have kept out of view.

Yet despite the progressive intentions of the judicial practice of outlining "present-day vulnerabilities", Murdocca demonstrates that the "progressive potential" of the *Gladue* process—as judges currently carry it out—is interdependently connected with "colonial racism".[70] She argues, in particular, that "[t]his focus on culture, vulnerability and pathology" maintains, rather than intercepts, "the racial and gendered relations of domination and subordination that structure historical and ongoing settler colonialism."[71] Moreover, the process does not redress the mass imprisonment of Indigenous people.[72] Systemic and background factors mark Indigenous people as vulnerable (which judgments further portray as a both an exceptional human experience and one common to Indigenous people), in need of healing (which judgments further portray as potentially possible through the sentencing regime), and as experiencing these factors as a result of their Indigenous ancestry. Judges have identified colonialism as the instigator of such experiences. However, judgments allow colonialism to fade into the background, while framing present-day harms resulting from colonialism—such as disabilities, poverty, and unemployment—as pathologies that serve to define a criminalized Indigenous person and to mark a criminalized Indigenous person as deviant—and potentially dangerous.

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[67] *Ipeelee*, *supra* note 33 at para 60.
[68] Murdocca, "Ethics of Accountability", *supra* note 42 at 538.
[69] *Ibid* at 539.
[70] *Ibid*. See also *ibid* at 540.
[71] *Ibid* at 541.
[72] *Ibid*.

The "responsibilization" of Indigenous people in sentencing judgments extends beyond criminalized Indigenous people themselves. In particular, the next section will examine some of the ways in which sentencing judgments also "responsibilize" the Indigenous mothers of criminalized Indigenous people living with Foetal Alcohol Spectrum Disorder. In addition to re-entrenching responsibility onto criminalized Indigenous people for experiences of oppression, sentencing judgments re-attach responsibility for their circumstances (and for the fact that they cannot accept responsibility for their criminalized conduct and for the fact that they engaged in criminalized conduct in the first place) onto Indigenous pregnant women and mothers. In the process of removing responsibility for the criminalized conduct from the people being sentenced, sentencing judgments find another, marginalized group of people to blame. The state continues to remain in the background as the judgments fixate on the "risks" that Indigenous women purportedly take and to which they purportedly expose their children.

2.4 "Responsibilizing" Indigenous Mothers for Experiences of Systemic Oppression: Mother Blaming in the Sentencing of Indigenous People Living with FASD

The interconnection between *Gladue*'s "progressive potential" and "colonial racism" is vividly illustrated in sentencing judgments' portrayals of Indigenous pregnant women and Indigenous mothers of criminalized people living with foetal alcohol spectrum disorder (FASD), or foetal alcohol syndrome (FAS). In this context, judgments demonstrate a transferring of individual responsibility away from criminalized individuals and towards their mothers. In the process, the

judgments either erase, or—more discretely—obscure, state accountability. While the judgments identify lessened responsibility on the part of criminalized individuals, they go on to place individualized responsibility on the part of their mothers. Thus, not only are criminalized Indigenous people living with FASD essentialized and pathologized (in the sense of being defined by their experiences with FASD), but Indigenous pregnant women and mothers are also essentialized and pathologized—and made responsible for the criminalization of their children.

Megan Scribe defines what the "[p]athologizing of Indigenous bodies and cultures" involves in connection with Indigenous women and girls. Importantly, for the context that I am discussing, the practice is intimately connected with portrayals of Indigenous women and girls as reckless, specifically in their use of alcohol and drugs and in their sexual activity:

> Pathologizing of Indigenous bodies and cultures occurs through descriptions of Indigenous women and girls as vulnerable due to their risky behaviours attributed to Indigenous families and communities. Thus, Indigenous girls and women are depicted as more reckless than their white counterparts and, importantly, drinking, using drugs, and selling sex are seen as outcomes of Indigenous cultural systems where these immoral behaviours are supposedly normal and accepted. In other public realms, however, such as among white youth, binge drinking and sexual activity are represented as normal stages of maturing and growing up.[73]

[73] Megan Scribe, "Pedagogy of Indifference: State Responses to Violence Against Indigenous Girls" (2017-2018) 32:1-2 Canadian Woman Studies 47 at 52.

These representations are overwhelmingly present in some sentencing judgments involving Indigenous people living with FASD. Some of the judgments discuss, in detail, a criminalized individual's mother's experiences not only with consuming alcohol while pregnant, but also her previous and continuing experiences with addictions and her experiences with intimate partners.

From a relational theory perspective, the judgments that I discuss are somewhat progressive—they identify some state responsibility, lessen an individual criminalized person's responsibility, and impose, or at least identify the general need for, lesser periods of imprisonment and decarceral sentences. The judgments thus illustrate judicial efforts to move towards shared responsibility and decarceration within the current constraints of the sentencing process and system. Given these judgments' orientations, my critique of them might be unduly harsh. But these judgments are also, I think, places where one can see very clearly the interaction between the "progressive potential" of the *Gladue* process (as currently pursued in reported judgments) and the process's simultaneous reliance on "colonial racist" narratives. The judges writing these judgments appear to be attempting to do what the Supreme Court has called upon them to do. And, through these efforts, we can see some limits in the current construction and application of shared responsibility.

The cases below include one first-instance sentencing judgment and a selection of several appellate judgments. The first-instance judgment is one that has been cited as recognizing that section 718.2(e) involves the attribution of some responsibility to Parliament for criminalized conduct carried out by Indigenous people. For instance, Jillian Rogin cites the case for the

proposition that "[t]he inquiry into the systemic effects that colonization has had on an individual's life circumstances…can also be seen as an attempt by Parliament to take responsibility for the policies and legacy of colonialism that have created the circumstances leading to criminal behaviour."[74] I agree that the judgment has valuably identified national responsibility for the criminalization and imprisonment of Indigenous people. At the same time, I demonstrate that the judgment's language in relation to pregnant women who consume alcohol is violent, "responsibilizing", and blaming. I suggest, therefore, that the judgment vividly illustrates what Murdocca describes as the interdependence between "colonial racism" and the "progressive potential" of a *Gladue* analysis, which leads to particularly harmful portrayals of Indigenous women.

With respect to appellate cases, I chose cases that, again, demonstrate "progressive potential" in terms of acknowledging colonialism and imposing lesser periods of incarceration. At the same time, the cases below are those that use pathologizing and "responsibilizing" language to describe pregnant Indigenous women who consume alcohol. This language again exposes the limits of current judicial attempts to position the state as a responsible entity in the criminalization of Indigenous people—the attempts are set back by the blaming of Indigenous women.

[74] Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95 Can Bar Rev 325 at 331-32, citing: "the analysis of national responsibility and section 718.2(e) articulated in ***R v Quash***, 2009 YKTC 54 at para 55, 84 WCB (2d) 66, followed in ***R v Magill***, 2013 YKTC 8 at para 46, 113 WCB (2d) 791" (Rogin at 332, note 25). See also David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47:3 UBC L Rev 1025 at 1070-71, 1058.

For most of the cases, I include a brief discussion of the circumstances of the offence(s), as relayed in each judgment. The fundamental principle of sentencing—the proportionality principle—requires judges to consider both the level of responsibility of the criminalized person and the circumstances of the offence. Judicial portrayals of the circumstances of criminalized conduct are thus never far from judicial depictions of criminalized people.

Moreover, while judges provide an overview of the offence(s) for the indicated purpose of determining a fit sentence, I think that these depictions can also provide some information about some of the ways in which, as Murdocca writes, "particular people, as subjects in racial settler colonialism, act through domination."[75] For instance, judicial portrayals of the circumstances of the offence(s) at issue, when placed alongside judicial portrayals of the criminalized person's personal and family history, reveal the artificial dichotomy between criminal law's categories of "criminalized" and "victimized" people—for example, criminalized individuals' histories often include experiences of victimization. While judicial engagement with state accountability is typically minimal, even brief comments about colonial violence can begin to helpfully reveal that *this* violence—*colonial* violence—comprises the common thread running through Indigenous people's experiences of criminalization and victimization.

Additionally, a number of the offences in the cases below were offences involving interpersonal violence carried out by Indigenous men against Indigenous women. This is important context when analyzing judicial depictions of Indigenous pregnant women and Indigenous mothers of

[75] Murdocca, "Ethics of Accountability", *supra* note 54 at 541.

criminalized people living with FASD. The context illustrates that, even in cases where violence against women is central to the offence(s) at issue, judgments can stigmatize and blame women. This practice highlights the need for a relational analysis that consistently engages with the state's responsibilities. Currently, the "responsibilizing" of Indigenous people occurs hand-in-hand with the "de-responsibilizing" of the state. Only when judicial analyses fully engage with the state's roles in sustaining violence against women and the mass imprisonment of Indigenous people will judges be able to move beyond the "responsibilizing" and blaming of Indigenous individuals.

Before turning to the judgments, I note that the discourses of mother blaming that I identify and explore can be set within a broader context of mother blaming in public health discourse. For example, in 2009, Kirsten Bell, Darlene McNaughton, and Amy Salmon published an article on mother blaming in "public health discourses".[76] Among the various discourses that they studied, Bell, McNaughton, and Salmon found that "[t]he focus on the 'bad mother' is most explicit in discourses on FAS/FASD."[77]

The cases below describe FASD as having been inflicted solely by a mother's consumption of alcohol and portray FASD as being "uncurable". However, Bell, McNaughton, and Salmon demonstrate that research has "identified compromised nutritional status during pregnancy – a

[76] Kirsten Bell, Darlene McNaughton & Amy Salmon, "Medicine, Morality and Mothering: Public Health Discourses on Foetal Alcohol Exposure, Smoking around Children and Childhood Overnutrition" (2009) 19:2 Critical Public Health 155.
[77] *Ibid* at 161.

primary indicator of poverty – as a key variable accounting for disparate outcomes".[78] Furthermore, research has "found that mothers and infants who received comprehensive clinical, nutritional, social, developmental and educational supports early in life showed outcomes remarkably similar to their non-exposed peers".[79] Comprehensive research into the causes of FASD is beyond the scope of this dissertation. Yet this brief context, at the very least, questions the narrative that is relayed in the judgments below. One judgment, for example, describes the "irreparable harm" of prenatal consumption of alcohol and the absence of a "cure" for FASD.[80] Yet the empirical context suggests that prenatal and postnatal nutrition, along with postnatal social and educational supports, influences FASD outcomes. The practice of blaming women for consuming alcohol while pregnant thus involves a simplified, and harmful, discourse—one that enables state actors to place blame on pregnant women and mothers and to erase the state's marginalization of the women they are blaming. Indeed, Bell, McNaughton, and Salmon explain that the "responsibilization" of individual mothers works in tandem with the obfuscation of broader social and institutional factors that limit women's opportunities and access to health care and support. As Bell, McNaughton, and Salmon state, the emphasis on the individual responsibility of a mother "to protect her foetus from harm…obscures the role of structural and environmental factors which constrain the abilities of individual women and families to 'make good choices' to protect their children's health."[81] The dominant discourse surrounding FASD

[78] *Ibid* at 158, citing Nesrin Bingol et al, "The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome" (1987) 6:4 Advances in Alcohol & Substance Abuse 105, Ernest L Abel & John H Hannigan, "Maternal Risk Factors in Fetal Alcohol Syndrome: Provocative and Permissive Influences" (1995) 17:4 Neurotoxicology and Teratology 445, and Mary Anne George, *The Effects of Prenatal Exposure to Alcohol, Tobacco and Other Risks on Children's Health, Behaviour and Academic Abilities* (PhD Dissertation, University of British Columbia, 2001) [unpublished].
[79] Bell, McNaughton & Salmon, *supra* note 76 at 158, citing M Motz et al, "Breaking the Cycle: Measures of Progress 1995-2005" (2006) 4:22 Journal of Fetal Alcohol Syndrome S1 [as cited in Bell, McNaughton & Salmon, *supra* note 76].
[80] *R v Okimaw*, 2016 ABCA 246 at para 76, 340 CCC (3d) 225 [*Okimaw*].
[81] Bell, McNaughton & Salmon, *supra* note 76 at 163.

thus takes the concept of "choice" for granted, muddling the factors that characterize some experiences as "choices"—and as "good" or "bad" choices—and the factors that make some "choices" inaccessible.

Moreover, even aside from research addressing the causes of, and contributing factors to, FASD, Bell, McNaughton, and Salmon make the important observation that, within mother-blaming discourses, "not all mothers are the focus of equal attack – particular mothers are constructed as dangerous to the interests of their foetuses and children."[82] Bell, McNaughton, and Salmon found, in particular, "that North American FASD policies tend to single out indigenous women and women of colour as particularly prone to alcohol use in pregnancy".[83] By comparison, "white middle- and upper-class women's substance use is rarely constructed and responded to as a 'social problem' requiring State intervention".[84] Furthermore, "whereas white middle- and upper-class women's substance use is less often seen as 'risky', dangerous, or threatening, the effects of their substance use on the health and wellbeing of their children and communities are more often overlooked or underestimated".[85] These discriminatory patterns are similarly evident in the sentencing judgments below, where the judgments pathologize Indigenous pregnant women as being prone to consuming alcohol as a result of their Indigenous "heritage" or "culture". Experiences of oppression are thus transformed into pathologies.

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[82] *Ibid* at 162.
[83] *Ibid* at 163.
[84] *Ibid*, citing Amy Salmon, "'It Takes a Community': Constructing Aboriginal Mothers and Children with FAS/FAE as Objects of Moral Panic in/through a FAS/FAE Prevention Policy" (2004) 6:1 Journal of the Association for Research on Mothering 112.
[85] Bell, McNaughton & Salmon, *supra* note 76 at 163, citing Laura E Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* (Philadelphia: Temple University Press, 1997); Susan Boyd, *Mothers and Illicit Drugs: Transcending the Myths* (Toronto: University of Toronto Press, 1999); Drew Humphries, *Crack Mothers: Pregnancy, Drugs, and the Media* (Columbus: Ohio State University Press, 1999).

In addition to highlighting the harmful and incomplete pictures that sentencing judgments present, the public health context shows that sentencing judgments are not unique in this way. Rather, sentencing judgments are situated within a broader web of state and public health discourses that similarly "responsibilize" Indigenous women for their children's experiences with FASD—and for the apparent "risks" posed to communities in general as a result.[86] The language of "risk" and "responsibility" thus arises in critical literature relating to FASD, existing alongside my study of "risk" and "responsibility" in sentencing judgments.[87] My dissertation briefly identifies some of the ways in which sentencing judgments displace responsibility from criminalized individuals—and the state—and relocate responsibility onto Indigenous pregnant women and mothers. Meanwhile, critical literature on FASD tracks the ways in which the "responsibilization" of women, especially Indigenous women and women of colour, coincides with attempts to manage risk. For instance, as Elizabeth M Armstrong writes, "[c]ontrolling women's bodies is one strategy for managing risk,…threaten[ing] to dehumanize and objectify the pregnant woman."[88] The blaming of Indigenous pregnant women and mothers—for diagnoses and experiences of FASD—in sentencing judgments and public health discourses thus illustrates the intimate connection between the concepts of individualized responsibility and risk. The individual management of risk, in particular, depends upon the individualization of responsibility. If sentencing judges—and other state actors—are to reframe "risk" as something that is socially and politically constructed and sustained (and as something that can only be changed through attention to the dynamics "in between" individual experiences and social,

[86] See also Elizabeth M Armstrong, *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Baltimore: The Johns Hopkins University Press, 2003).
[87] See e.g. *ibid*; Salmon, *supra* note 84.
[88] Armstrong, *supra* note 86 at 10.

political, and institutional actions and inactions), then responsibility must also be de-individualized and situated "in between" individual beings and social structures.

With this context in mind, I turn now to the cases and begin with the first-instance judgment, *R v Quash*.[89] *Quash* is a case that blames Indigenous pregnant women with strong, violent language. This blame is nested within otherwise benevolent language and apparent attempts to identify past harms that the state has inflicted against Indigenous people through colonialism. I find the language in relation to Indigenous pregnant women to be offensive and difficult to read and quote. I am concerned that in reproducing this language, I am re-establishing the stereotypes, assumptions, and essentialized claims that the words embody. However, I decided to include the passages, in context, as I think that I can only offer a fulsome critique of the judicial approach by engaging with the exact language of the judgment.

The criminalized person was named Bobby Ronny Quash, and the judge who delivered the oral sentencing judgment was Judge Michael Cozens of the Territorial Court of Yukon. Bobby Ronny Quash pled guilty to sexual assault, failing to stop a motor vehicle for a peace officer, and breach of recognizance.[90] Judge Cozens described Bobby Quash as a member of the Tahltan First Nation and as having grown up with parents who had drinking problems, which resulted in him being removed from his home for two years when he was a child.[91] His life as a youth also involved his older brother dying from pneumonia.[92] At the time of sentencing, Bobby Quash was

[89] *R v Quash*, 2009 YKTC 54, 84 WCB (2d) 66 [*Quash*].
[90] *Ibid* at para 1.
[91] *Ibid* at para 23.
[92] *Ibid*.

22 years old, with a criminal record containing 18 entries.[93] While he did not have much education or employment history, his employer at the Westmark Hotel provided an encouraging report of his work ethic, dedication, and positive attitude.[94] An FAS Diagnostic Clinic report was also filed with court, diagnosing Bobby Quash with FASD.[95] The report described Bobby Quash as having inabilities to listen and remember well, along with an inability to think quickly.[96]

In sentencing Bobby Quash, Judge Cozens took into account Bobby Quash's FASD diagnosis. Judge Cozens specifically considered the diagnostic report as part of applying section 718.2(e) of the *Criminal Code*, noting that in the Yukon, FASD is "disproportionately an issue within the First Nations peoples."[97] Judge Cozens elaborated by briefly referring to colonialism and its discriminatory impacts on Indigenous peoples: "The problematic consumption of alcohol that has resulted in children being born suffering the permanent effects of FASD often finds its roots in the systemic discrimination of First Nations peoples and the resultant alienation they experience from their ancestry, their culture and their families."[98] This statement seems to place some responsibility on the Canadian state for creating some of the conditions in which criminalized Indigenous people living with FASD experience and encounter the social world.

Judge Cozens proceeded to identify a further concrete social and political responsibility—one belonging to the federal government, provincial and territorial governments, and municipal

[93] *Ibid* at para 7.
[94] *Ibid* at para 24.
[95] *Ibid* at para 29.
[96] *Ibid*.
[97] *Ibid* at para 61.
[98] *Ibid* at para 62.

governments, as well as to individual members of these communities—to provide community-based supports, along with understanding, for criminalized people living with FASD. He expressed the view that Canadian communities have failed to fulfil their responsibilities of ensuring that people living with FASD have access to housing and care and programming within their communities:

> [75] The frank reality is that there are insufficient residential facilities in the Yukon of the type required to meet the needs of these FASD offenders. If there were, fewer of these offenders would be incarcerated in jail; those who are incarcerated would not be incarcerated for as long, and, in the end, there is a very real likelihood that the revolving door of offending, often with increasing severity, would slow or be closed altogether for the individual FASD offender. In the end, society would be better protected and would also benefit from the knowledge that its youngest victims were now being assisted to find a meaningful life, despite the crime visited upon them in the womb.
>
> [76] The problem of providing appropriate supportive residential care facilities for FASD victims is one that will require collaborative effort of all governments, from territorial and/or provincial and municipal, as well as an understanding by us as Yukon and Canadian residents that this is a societal problem and a societal responsibility. If we would choose to put our collective efforts into addressing this immediate need, in the end all parties would benefit.[99]

[99] *Ibid* at paras 75-76.

Taken together, I see the above passages (along with Judge Cozens' earlier discussion of systemic discrimination) as acknowledging that attaching full responsibility to, and then blaming and severely punishing, a young Indigenous person living with FASD in the Yukon, is not appropriate. Such a move would fail to account for the responsibilities belonging to the broader communities and governing orders. And it would be a failure not only to the criminalized individual, but also to all community members.

Judge Cozens' claim that "society would be better protected" through the implementation of non-custodial programming represents an important step in challenging an assumption that the protection of community members simply equates with incarceration, and that, instead, such an assumption can actually be more damaging to people and communities.[100] As Lisa Guenther explains, in the context of solitary confinement, "[t]he social death of prisoners in solitary confinement does not just affect the individual or the family or the local community; it affects all of us who live in a society in which black, brown, and poor people of all races are criminalized and isolated in prisons for the sake of someone else's security and prosperity."[101] The practice of connecting the needs of criminalized people with the needs of broader communities is one that takes on heightened importance in the context of risk. When sentencing judges turn to risk, they are engaged in the task of trying to protect the community or communities in which the criminalized person lives. As I will discuss more thoroughly in the fourth and fifth chapters, questions about how to protect communities—including marginalized groups of people, such as

[100] Compare to the Alberta Court of Appeal's suggestion that the analysis is one of weighing the protection of the public *against* the reintegration of the offender into the public (*R v Ramsay*, 2012 ABCA 257 at para 16, 292 CCC (3d) 400).
[101] Lisa Guenther, *Solitary Confinement: Social Death and Its Afterlives* (Minneapolis: University of Minnesota Press, 2013) at 253.

Indigenous women—call for nuanced and careful assessments of the needs of different community members and of what types of practices might lead towards sustained safety. My argument is thus not one that the needs of criminalized people outweigh or take precedence over the needs of survivors. Rather, my argument is that the frameworks through which safety is envisioned and pursued ought to account for the "in betweenness" of people's actions and lives. More specifically, the state's attempts to respond to harm and to ensure safety ought to consider the ways in which the state itself has contributed to violence and to inadequate support and the ways in which the state could foster safety in the future.

While Judge Cozens demonstrated an attempt to allocate responsibility and blame in a somewhat relational manner, these efforts seem to be undone by his reference to "the crime visited them upon the womb".[102] This statement leaves the disturbing impression of placing criminal responsibility and blame on Indigenous pregnant women. The consumption of alcohol while pregnant is conduct that is not a crime in Canada. Moreover, the statement reveals a concerning ease with which responsibility and blame can be transferred from one individual belonging to marginalized social groups to another one. The statement threatens to undo any work carried out by Judge Cozens' discussion of state responsibilities in relation to creating conditions leading to experiences with FASD and lack of support for people living with FASD. Pregnant women are erroneously labelled as criminally responsible. Furthermore, to borrow Jennifer Nedelsky's relational theory language—that is, what she refers to as people's "webs" of relationships[103]—this labelling is done without even situating women within her own "webs" of relationships and

[102] *Quash*, *supra* note 89 at para 75.
[103] Nedelsky, *supra* note 28 at 28.

experiences, most notably of which would be the ways in which systemic racism and sexism have interlocked in ways that lead to particular forms of oppression against Indigenous women.

The phrase also draws the reader's attention away from the harm that is being addressed in this judgment—a sexual assault against a woman. Bobby Quash's webs of relationships should be taken into account for the purpose of dealing with this criminal offence—for addressing the harm experienced by his aunt—in a world where violence against women is a systemic problem. When mothers of children with FASD are referred to as having committed crimes against their children, readers do not receive the full context or full representation of the women being described, and the reference harmfully equates Indigenous mothers with drinking, neglect of children, and criminality.

Quash concluded with Judge Cozens finding that, despite Bobby Quash's "willingness to change his life", there were no facilities in the community offering the type of supervision and support that he would need.[104] Judge Cozens thus imposed a custodial sentence of 10 months in custody plus three years' probation, after accounting for time served in pre-trial custody and diminished responsibility due to FASD.[105]

The judgment is troubling to read. It seems to demonstrate some movement towards a relational account of responsibility in sentencing law—the judgment begins to address a criminalized

[104] *Quash*, *supra* note 89 at para 82.
[105] *Ibid* at paras 85-86.

person in the context of their web of relationships. But the judgment also shows that this account is not necessarily carefully pursued—the narrative seems instead to demonstrate criminal law's deeply ingrained instinct to blame one person.[106] Bobby Quash's mother and other pregnant women and mothers of children living with FASD were not on trial, were not being sentenced. And yet pregnant women and mothers became, through one line, the criminally responsible figures, the ultimate individuals to blame. Moreover, given Judge Cozens' comments about the "disproportionate" occurrence of FASD within Indigenous communities, his blaming of pregnant women and mothers seems to be targeted towards Indigenous women, in particular.[107]

As *Quash* shows, sentencing judges have begun to acknowledge the state's own accountability for contributing to Indigenous people's current experiences relating to poverty and criminalization. This practice means that the judiciary has at least partly dispelled the illusion of individualized responsibility and blame. A relational analysis should take some of the blame off individuals (whether for criminalized or non-criminalized conduct) and should move towards a consideration of the broader social, political, and institutional circumstances within which individuals live. It should thus not focus on making another individual person individually responsible. In *Quash,* the judicial "responsibilization" of pregnant women occurred alongside an aim to acknowledge that the criminalized person here—Bobby Quash—should be viewed within his broader social context and that he should carry a lighter burden of individual

[106] See Berger, *supra* note 9.
[107] Of course, an Indigenous person could have a biological mother who is not Indigenous. Such possible circumstances do not appear to have been involved or addressed in this case: Judge Cozens noted that Bobby Quash's parents were of "First Nations heritage", although further information was not included in the pre-sentence report (*Quash*, *supra* note 89 at para 58). Mother-blaming in the context of FASD thus seems to presume that the consumption of alcohol while pregnant is an act undertaken predominantly by Indigenous women. Such an assumption illustrates the stereotyping involved in FASD discourses—this judgment, like other dominant narratives, harmfully presents the cause and experience of FASD as something intrinsic to Indigenous people.

responsibility. Judge Cozens seemed to be aiming to show that it is not Bobby Quash's fault that he lives with FASD. And yet in doing so, Judge Cozens seemed to struggle to break with individualized responsibility. He seemed to look back along a tight timeline of Bobby Quash's life, ending up at Bobby Quash's mother and substituting her as the individually responsible person. The practice contradicts Judge Cozens' other comments about the harms of colonialism. It seems as though, rather than drawing out a full backdrop of social context, including state accountability, Judge Cozens has sketched in some social context and some state accountability, and then gone back and erased some of its relevance to pregnant women and mothers.

In addition to pathologizing Bobby Quash's mother (through a generalized reference to pregnant women who consume alcohol), the judgment also pathologizes Bobby Quash. Judge Cozens described Bobby Quash as someone who "will always be FASD", who "cannot be cured", and who needs support in the future in order to behave in ways that are not at high risk of breaking the law.[108] Bobby Quash's FASD diagnosis seems to swallow him up—according to Judge Cozens, Bobby Quash *is* FASD. This is reminiscent of Justice Nakatsuru's judgment in *Armitage*, which I quoted in the section above, in the context of Murdocca's critique: in using a tree analogy, Justice Nakatsuru described Armitage as a tree that is "sickly", "not healthy", and "not flourish[ing] regardless of the attention paid upon it."[109] Additionally, Justice Nakatsuru wrote that "[Armitage's] Aboriginal heritage and ancestry…help define who he is."[110] I am concerned that both judgments use Indigenous people's "present-day pathologies" to wholly define an Indigenous individual and to mark the individual as sick and deviant. Justice Nakatsuru

[108] *Quash*, *supra* note 89 at para 83.
[109] *Armitage*, *supra* note 58 at para 56.
[110] *Ibid* at para 55.

and Judge Cozens both seem to be using Indigenous heritage and ancestry as a way to understand Indigenous people's experiences with pathologies, such as cognitive disabilities like FASD. Judge Cozens is obviously concerned about finding ways to support Bobby Quash, but his analysis of possible supports glosses over the contradiction that arises in relying upon the Canadian state to manage Bobby Quash—through prison, because the state had already failed in providing appropriate community services. Additionally, his analysis reveals an unquestioning preoccupation with FASD as the main issue involved in the state's criminalization of Bobby Quash. In focusing so much on FASD, Judge Cozens obfuscates the state's broad failures towards, and violence against, Indigenous people, especially Indigenous women and girls.

In another case, *R v Quinn*,[111] Justice Myra Bielby's dissenting judgment also illustrates the interwovenness of the "progressive potential" of a Gladue analysis and "colonial racism". Curtis Arthur Quinn appealed his sentence of five years' imprisonment.[112] The sentencing judge had imposed this sentence for Curtis Quinn's convictions for breaking and entering a dwelling-house and committing assault causing bodily harm and for breaking and entering a dwelling-house and committing assault.[113]

In the majority judgment of the Alberta Court of Appeal, Justices Watson and Slatter noted that Curtis Quinn's "principal targets and victims were females; Ms. Maki, having been in an intimate relationship with him, and Ms. Page, being her close friend."[114] Curtis Quinn was 43

[111] *R v Quinn*, 2015 ABCA 250, 606 AR 233 [*Quinn*].
[112] *Ibid* at para 1.
[113] *Ibid*.
[114] *Ibid* at para 2.

years old at the time of the appellate judgment,[115] and the offences had taken place five years earlier.[116] Curtis Quinn had a record of prior but unrelated offences.[117] Dr. N. Bhatia, a psychiatrist, provided a forensic assessment report.[118] The report detailed Curtis Quinn's experiences with addictions and disabilities involving mental and cognitive impairments:

> …[I]t is my opinion that the subject first and foremost suffers from Methamphetamine Dependence, has experienced several episodes of Psychosis secondary to it, Alcohol Abuse, Anabolic Steroid Abuse, Partial Fetal Alcohol Spectrum Disorder and my have untreated Attention Deficit / Hyperactivity Disorder. Underlying this, he impressed to have narcissistic and antisocial personality impairments as evidenced by his grandiosity, entitlement and criminal behaviours. Although he has underlying brain dysfunction and also incurred a head injury which did not result in brain trauma, his psychiatric presentations have primarily resulted from Methamphetamine-induced Psychotic Disorder…[119]

The majority dismissed Curtis Quinn's sentence appeal.[120] By comparison, in her dissenting judgment, Justice Bielby provided reasons for her view that "a global sentence of five years [was] unfit in this case".[121] Justice Bielby "would have allowed the appeal and substituted a

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[115] *Ibid* at para 7.
[116] *Ibid* at para 1.
[117] *Ibid* at para 7.
[118] *Ibid* at para 8.
[119] Forensic assessment report, quoted in *Quinn*, *supra* note 111 at para 8.
[120] *Quinn*, *supra* note 111 at para 27.
[121] *Ibid* at para 28.

global sentence of four years' imprisonment, less 83 days credit for time served."[122] Her conclusion was based on the *Gladue* and *Ipeelee* factors that arose in the case, "particularly the appellant's FASD and the cultural connections to its cause".[123]

From the perspective of reducing imprisonment, Justice Bielby's judgment is somewhat more progressive than the majority judgment. In particular, Justice Bielby would have imposed a lesser sentence, though still a sentence of four years' imprisonment. At the same time, Justice Bielby's judgment relies on pathologizing and essentializing reasoning in order to justify this lesser sentence. Moreover, the pathologizing and essentializing reasoning occurs alongside fleeting references to state accountability. The judgment thus reveals a tension between its identification of the state's past acts of violence against Indigenous people and its suggestions that current struggles and difficulties arise from "Indigenous heritage". Justice Bielby's "progressive" judgment thus involves moving one foot into the territory of shared responsibility while leaving the other foot firmly planted in individualized responsibility—responsibility that attaches to Indigenous individuals and Indigenous families and communities.

An example of the intimate connection between Justice Bielby's acknowledgment of state accountability and her "responsibilization" of Indigenous people is her discussion of FASD. Justice Bielby referred to Curtis Quinn's diagnosis of FASD as being an "inter-generational effect…of colonialism and residential schools."[124] Justice Bielby thus identified colonialism and the state's residential school practices as having contributed to Curtis Quinn's experiences with

[122] *Ibid* at para 57.
[123] *Ibid* at para 54.
[124] *Ibid* at para 49.

FASD. Such a practice illustrates some movement towards recognizing the role of the state in oppressing Curtis Quinn. However, Justice Bielby further described "a link between the commission of these crimes and the appellant's *aboriginal ancestry*".[125] This "link" involved Curtis Quinn's FASD symptoms, including his impaired cognitive and behavioural abilities.[126] Additionally, Justice Bielby also referred to "the cultural connections" that "cause[d]" FASD in Curtis Quinn.[127] The responsibility for FASD is thus muddled—apparently belonging both to the state and to Curtis Quinn's "aboriginal ancestry" and "culture".

In referring both to "the *cultural connections*" related to Curtis Quinn's FASD and to the "link between the commission of these crimes and [Curtis Quinn's]…*aboriginal ancestry*", Justice Bielby's judgment portrays Indigenous ancestry and culture as interchangeable. Moreover, both serve as substitutes for—or as factors that obfuscate—state oppression of Indigenous people. The image painted is one in which Indigenous ancestry and culture are both linked with "present-day pathologies", namely FASD. Instead of keeping the state in full view, the judgment allows the state's roles in constructing pathologies and generating inequality and discrimination to fade into the background.

Justice Bielby's conflation of Indigenous ancestry and culture with experiences of disability, addictions, poverty, and instability is also vividly present in the following passage:

[125] *Ibid* at para 50 [emphasis added].
[126] *Ibid* at para 51.
[127] *Ibid* at para 54.

> This is not a case of an offender who simply happens to be aboriginal, devoid of any connection to residential schools and raised in a successful, stable family…That the appellant's mother's devoted, studious parenting of him later in life was able to provide the appellant with a modicum of success for a few years does not diminish his serious underlying disadvantages arising from FASD. It is difficult to imagine a more direct link between an offender's aboriginal ancestry and the circumstances underlying his commission of crime than that offered as a result of brain damage from a parent's substance abuse during pregnancy.[128]

I will attempt to unpack three ways in which this passage relies on and perpetuates colonial racism. First, the passage implies that the term "aboriginal" most appropriately applies to those whose relatives were forced to attend residential schools and to those who were not raised in "successful, stable family" environments. Such an implication reinforces harmful stereotyping of Indigenous people. In particular, it reinforces the stereotypes that "successful, stable" Indigenous families have not been affected by colonialism and, moreover, that such families "simply happen…to be aboriginal"—that they are not "aboriginal" in a way that is recognized as "aboriginal" by settler Canadian justice systems. The implication simultaneously reinforces the stereotype that "aboriginal" people can be identified as "aboriginal" by their experiences with abuse, illness, and lack of "success" and "stability". The general terms, "success" and "stability", rely, furthermore, on normative assumptions about what constitutes success and stability. By not defining these terms, Justice Bielby leaves the reader with settler Canada's normative assumptions that success and stability can be identified in families that are financially secure and

[128] *Ibid* at para 47.

that involve two heteronormative parents raising children without intrusion from social services for reasons such as parental experiences with addictions and abuse.

Second, the passage suggests that Curtis Quinn's mother can never make up for her actions of using alcohol and sniffing glue while she was pregnant: her "devoted, studious parenting of him later in life…does not diminish his serious underlying disadvantages arising from FASD."[129] This passage appears to have been trying to undo the reasoning of the sentencing judge and the majority of the Court of Appeal, which suggested that there was an insignificant link between Curtis Quinn's experiences as an Indigenous person and his criminalized conduct. For instance, the majority stated:

> [T]here is no indication of a pattern of behaviour which can be attributable to the ongoing effects of physical or emotional deprivation and abuse or the effects of cultural suppression or dislocation or the effects of FASD or brain injury…In many cases where Gladue is cited in mitigation, one sees evidence of such a pattern. Some offenders manifest such underlying problems by violent acting out, poor coping skills and life mismanagement. Against this common phenomenon we have the observations of the author of the Gladue report…that, despite the circumstances of his mother's life, the appellant got into professional snowboarding between ages 22 and 27, followed by University courses and full time employment at Club Fit. The appellant was reported to

[129] *Ibid*.

> have felt guilty about having killed a man in a car crash in 2000 and that it affected his outlook, but he did not follow up on any help.[130]

The majority's reasoning relies on the assumption that experiences of oppression manifest in particular, apparently "common", ways—"violent acting out, poor coping skills and life mismanagement." When an individual such as Curtis Quinn presented a different picture, the majority could not see the connection between Curtis Quinn's experiences of oppression and colonialism and systemic racism. Moreover, his experiences, which I think could be framed as resilience, are marked as insignificant to sentencing. As I will explore in more detail in the next chapters, experiences of oppression also serve to frame criminalized Indigenous people as "risks", a practice that sometimes then purportedly justifies more coercive sentences than their level of responsibility would call for. It seems that there is a tendency to highlight Indigenous people's experiences of hardships and downplay their experiences and expressions of resilience, with the harmful effect of reinforcing systemic racism. Additionally, this passage demonstrates swift blaming of Curtis Quinn's mother—Curtis Quinn went on to pursue professional snowboarding, University courses, and full-time employment "*despite* the circumstances of his mother's life".[131]

Again, from the perspective of reducing imprisonment, it is valuable that Justice Bielby took issue with the sentencing judge's and the majority's views that *Gladue* factors played a limited role in the sentencing of Curtis Quinn. Nonetheless, from the same perspective, it is unfortunate

[130] *Ibid* at para 19.
[131] *Ibid* [emphasis added].

that Justice Bielby did not fully break from the essentializing and pathologizing of Curtis Quinn and his mother. This leads me to the third way in which the passage reproduces colonial racism: in order to show that *Gladue* factors applied in this case, Justice Bielby re-entrenched Curtis Quinn's mother's role in contributing to Curtis Quinn's pathologies. This re-entrenchment of mother blaming is further evident in the final sentence of the quoted passage—a passage I also addressed above when discussing the "link" that Justice Bielby identified between Curtis Quinn's criminalized conduct and his "aboriginal ancestry". Specifically, Justice Bielby wrote: "It is difficult to imagine *a more direct link* between an offender's *aboriginal ancestry* and the circumstances underlying his commission of crime than that offered as a result of *brain damage from a parent's substance abuse during pregnancy*."[132] Here, brain damage resulting from a pregnant woman's use of substances is presented as one of the most imaginable points of connection between an Indigenous person's "aboriginal ancestry" and "his commission of crime". In the same vein, Justice Bielby later wrote:

> The sentencing judge erred in putting little weight on the appellant's aboriginal culture after observing that he had little past or ongoing commitment to aboriginal culture…In so doing, she ignored the direct link between the appellant's mother's substance abuse, arising in the context of her aboriginal culture, as causing his life-long brain injury, and the well-known effects of FASD on impulsivity, the limits it places on ability to plan and the vulnerability it creates to drug and alcohol abuse.[133]

[132] *Ibid* at para 47 [emphasis added].
[133] *Ibid* at para 52.

Again, the emphasis is on "aboriginal culture" rather than state oppression of Indigenous people and communities. While Justice Bielby demonstrated an attempt to contextualize Curtis Quinn's mother's use of substances, she did so, again, without bringing in direct reference to the state, referring instead to "the appellant's mother's substance abuse, *arising in the context of her aboriginal culture*".[134] This passage makes it sound like Indigenous women's use of substances is something intrinsic to "aboriginal culture".

On a generous reading, these passages are relying on references to "aboriginal culture" and "aboriginal ancestry" to stand in for a fuller description of colonialism and its impacts on Indigenous people. Yet, even on this reading, it seems to me to be a dangerous practice, one that reinforces negative stereotypes of Indigenous people, particularly of Indigenous women and mothers. Some of the stereotypes resurface in Justice Bielby's determination that Curtis Quinn's FASD diagnosis "must play a relatively restrained role in sentencing."[135] She wrote:

> Notwithstanding the appellant's history of substance abuse and periodic psychosis, he appears to have done well – including in relation to academic, athletic and workplace achievements – in comparison to many aboriginals who similarly suffer from this brain injury. Many of these successes may have resulted from the ongoing influence and support of his mother, now a trained mental health professional.[136]

[134] *Ibid* [emphasis added].
[135] *Ibid* at para 53.
[136] *Ibid*.

Justice Bielby's recognition of the positive support and influence of Curtis Quinn's mother is welcome. While Justice Bielby appeared to be hesitant to draw a direct link between Curtis Quinn's "successes" and his mother's "influence and support", she at least noted that his mother "*may*" have played a role.[137] At the same time, it is notable that Justice Bielby only framed Curtis Quinn's mother in a positive light in relation to Curtis Quinn's achievements (suggesting, potentially, that if he had not achieved "success", the mother might have been blamed).

Additionally, Justice Bielby unfortunately noted that Curtis Quinn's achievements can be compared with "many aboriginals who similarly suffer from this brain injury"—individuals who have not achieved such "success". The casual reference to "many aboriginals" again reinforces the harmful idea that the typical experience of Indigenous people is one of suffering, and it frames Curtis Quinn's achievements in academics, athletics, and employment as an anomaly. Furthermore, it is disconcerting that potential indicators of resilience work against a criminalized Indigenous person in the context of restorative justice initiatives such as section 718.2(e). Even setting section 718.2(e) aside, evidence of "good character" and "good background", including academic achievements, generally mitigates a sentence.[138] I do not mean to suggest that Indigenous people who have demonstrated resilience in ways different than those presented by Curtis Quinn are not also resilient. Rather, what I aim to suggest is that resilience—which manifests in many ways, including through both dominant and unconventional indicators of "success"—appears to sometimes be an overlooked and undermined experience in the sentencing of Indigenous people.

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[137] *Ibid* [emphasis added].
[138] Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis Canada, 2017) at 321 [discussing "good character"], 269 [discussing "good background"], 275 [discussing academic success].

Justice Bielby's judgment portrayed FASD as a sort of pinnacle of systemic and background factors that purportedly serves to connect an individual's criminalized behaviour with their "Indigenous ancestry". A similar narrative is evident in another judgment of the Alberta Court of Appeal, *R v Okimaw*.[139] This case involved a sentence appeal brought by Frank Okimaw. Following trial, Frank Okimaw was found guilty of aggravated assault and possession of a weapon for a dangerous purpose.[140] The offences took place outside a liquor store in Edmonton.[141] Following trial, the sentencing judge sentenced Frank Okimaw to 30 months' imprisonment, less 7.5 months for time spent on remand, to be followed by a period of 18 months of probation.[142] The sentence also included a mandatory DNA order and a weapons prohibition.[143]

The judgment of the Alberta Court of Appeal was delivered by the Court, which was comprised of Justice Jack Watson, Justice Myra Bielby, and Justice Frederica Schutz. In their analysis, the Court clearly stated that "unique background and systemic factors" played a role in their determination of the level of responsibility to be attributed to Frank Okimaw and in their determination of a fit sentence: "For Okimaw,…unique background and systemic factors are inextricably embedded in Okimaw's own life experiences and clearly bear on his culpability for these offences. His personal development – as an infant, child, teenager and young adult – was

[139] *Okimaw*, *supra* note 80.
[140] *Ibid* at para 3.
[141] *Ibid* at paras 15-16.
[142] *Ibid* at para 4.
[143] *Ibid*.

shaped by these very factors and they provide the necessary context to enable the court to determine an appropriate sentence."[144]

With respect to the various "background and systemic factors" in Frank James Okimaw's life, the Court referred specifically to his mother's use of alcohol while she was pregnant, using violent and blaming language:

> Okimaw was literally conceived into the multiple intergenerational traumas that afflicted, and continue to afflict, his family…His own mother prenatally exposed Okimaw to irreparable harm by continuing to consume alcohol – ethanol squarely implicated in causing Fetal Alcohol Spectrum Disorder for which there is no known cure or ability to reverse the sequelae of malformation and organic brain damage. Okimaw's mother abandoned him.[145]

The language referring to Frank Okimaw's mother's use of alcohol – ethanol mirrors the language used in criminal law, referring to the "irreparable harm" that she caused and to the determination that her use of alcohol – ethanol was "squarely implicated in causing Fetal Alcohol Spectrum Disorder". Relatedly, the reference to Frank Okimaw's conception draws the reader's attention towards his mother's sexual conduct and her use of alcohol while pregnant. Additionally, the emphasis on the lack of a "cure or [an] ability to reverse" the effects of FASD

[144] *Ibid* at para 75 [emphasis added].
[145] *Ibid* at para 76.

detracts and distracts from the research that has "identified compromised nutritional status during pregnancy – a primary indicator of poverty – as a key variable accounting for disparate outcomes".[146] Rather than identifying the multiple forms of inequality that may have been experienced by Frank Okimaw and his mother—and the potential role of those inequalities in Frank Okimaw's experiences with FASD—the Court erased that background and instead attributed individualized responsibility to Frank Okimaw's mother.

In this case, it appears that the Court did attempt to link Frank Okimaw's mother's use of alcohol with the state's oppression of Indigenous people. Specifically, the Court noted that her actions comprised a component of "the multiple intergenerational traumas that afflicted, and continue to afflict, his family."[147] Nevertheless, the Court did not meaningfully engage with the role of the state in generating and sustaining these traumas. In addition to the above comments about Frank Okimaw's conception, the Court projected "intergenerational traumas" onto Frank Okimaw's Indigenous family without connecting the traumas to the state's practices and policies: "Other than his kokum, family members simply could not triumph over, or ultimately surmount, the collective traumas that befell them."[148] The judgment thus presents "the collective traumas" as detached from the state or any other entity—as simply 'falling' upon Frank Okimaw's family. A disturbing undercurrent of suggestions of weakness is also present in the statement that his "family members *simply could not triumph over, or ultimately surmount,* the collective traumas*"*.[149] The Court leaves unmentioned the state's continued practices of surveillance,

[146] Bell, McNaughton & Salmon, *supra* note 76 at 158, citing Bingol et al, *supra* note 78, Abel & Hannigan, *supra* note 78, and George, *supra* note 78.
[147] *Okimaw*, *supra* note 80 at para 76.
[148] *Ibid*.
[149] *Ibid* [emphasis added].

criminalization, and racialization. Rather than addressing the state's continued oppression of Frank Okimaw's family, the passage implied that the state's harmful actions existed only in the past and that somehow Frank Okimaw's family has been unable to overcome that history.

When describing Frank Okimaw's mother's role in causing his FASD, the Court also referred to his mother as having "abandoned him."[150] Earlier in the judgment, the Court elaborated:

> Okimaw's mother never provided meaningful or sustained care for him as a child (or any of her other children, his six maternal half-siblings); she remains entirely absent from his life...Okimaw recalled living with his mother for two months when he was six years old, and then not seeing her again until he was 13; she has never met any of his own children, the eldest of whom is now 10 years of age.[151]

The Court also noted that "[a]t least two of his mother's other children spent time in foster care and group homes."[152] With respect to Frank Okimaw's mother's background, the Court stated that "Okimaw believes his mother is a First Nations member but is unsure of her home community or her family background".[153] The brief statement that Frank Okimaw's mother "abandoned him" is problematic, because it erases her own experiences, particularly her relationship with the state, including the state's removal of at least two of her other children from her care. The idea that she simply "abandoned" her child fails to acknowledge the lack of support

[150] *Ibid*.
[151] *Ibid* at para 33.
[152] *Ibid* at para 34.
[153] *Ibid* at para 33.

that she might have faced, especially in a context where Frank Okimaw "recalls his father hitting his mother, other domestic partners and his half-siblings".[154]

In this judgment, the Court did not only blame Frank Okimaw's mother—the Court also blamed his father: "Okimaw's father could not parent him, abused alcohol and was physically violent to Okimaw and others whom Okimaw loved. Okimaw's attempts to intervene to protect loved ones had no apparent impact on his father, who continued abusing alcohol and perpetrating violence against those around him."[155] This does not, however, excuse the act of blaming in relation to either parent. It would be preferable, in my view, for sentencing judgments to move away from individualized blame and towards an engagement with the state's accountabilities, including an identification of the state's failures to meet its responsibilities and a consideration of how the state might better meet its obligations in the future. In the absence of engaging with state accountability, sentencing judgments depict Indigenous individuals as vulnerable and responsible for both the experiences arising from colonialism and systemic racism and for future attempts to untangle themselves from discrimination, surveillance, and violent management.

In the result, the Court allowed Frank Okimaw's appeal: "Given his lessened moral blameworthiness, a demonstrably fit sentence requires this Aboriginal offender to serve 21 months in custody, reduced by the 7.5 months credit he originally received for time served pre-sentence. He is also entitled to any statutory remission available for time served post-

[154] *Ibid* at para 36.
[155] *Ibid* at para 76.

sentence."[156] The Court kept the mandatory orders in place, along with the probation order.[157] With respect to the probation order, the Court specifically stated: "To encourage Mr. Okimaw to continue embracing a pro-social lifestyle, his probation order will not be disturbed."[158] The view that an individualized probation order can help reduce criminalization, by assisting Frank Okimaw "to continue embracing a pro-social lifestyle" is reflective of the sentencing analysis's practice of re-individualization. Despite the "systemic discrimination" that contributed to Frank Okimaw's "reduced moral culpability",[159] it is now up to Frank Okimaw himself to cultivate "a pro-social lifestyle". The Court may have been trying to both recognize reduced individual responsibility while showing respect for personal choice and self-direction. Such an attempt is further revealed in the following passage, where the Court explains that systemic and background factors played a direct role in limiting the choices and opportunities of Frank Okimaw and his family members:

> The systemic and historic factors experienced by Okimaw's grandparents and parents created insuperable obstacles to social normalcy that robbed them of the incentive and means to achieve, and caused dire social and economic deprivation. This is Okimaw's seriously troubled life experience. These factors have not only had a direct impact on Okimaw's culpability, they also speak to the sustained nature of what has been, and continues to be, a disproportionately very common indigenous experience in Canada,

[156] *Ibid* at para 93.
[157] *Ibid* at paras 93-94.
[158] *Ibid* at para 94.
[159] *Ibid* at para 93.

> cycling through generations of indigenous families, communities, and chosen ways of life.[160]

Unfortunately, I do not think that the Court has demonstrated respect for Frank Okimaw and his family. The passage directly links "systemic and historic factors" with "Okimaw's culpability" and with his grandparents' and parents' choices, opportunities, and socio-economic experiences. This identified link is indicative of a valuable effort to lessen Frank Okimaw's level of responsibility and blameworthiness. However, the Court did not clearly reposition responsibility and blameworthiness on the state. For instance, the Court noted that the factors "speak to the sustained nature" of "troubled life experience[s]". The passage implies that the state's oppression of Indigenous people helps readers to understand Indigenous people's current "chosen ways of life".[161] This language may be indicative of an effort to balance respect for choice with acknowledgment of oppression. However, I think it would have been preference for the Court to more expressly consider the ways in which the state's continued practices of oppression continue to harm, and *constrain the choices* of, Indigenous people. A more thorough engagement with the state would, I think, help to ensure respect for agency, while setting choices within the context of social, institutional, and political constraints.

The passage also presented Frank Okimaw's family's experiences as simultaneously different from "social normalcy" and as "disproportionately very common indigenous experiences in Canada". This juxtaposition harmfully implies that Indigenous people's experiences are both not

[160] *Ibid* at para 82.
[161] *Ibid*.

"normal" and almost uniformly "troubled". The image of "troubled life experience[s]…cycling through generations of indigenous families, communities, and chosen ways of life" suggests that recognizing colonialism helps judges and readers to see how Indigenous people got caught in this "cycle" in the first place. Harmfully, the image does not engage with the state's actions in sustaining the "cycle".

A similar practice of judicial attribution of dysfunction to Indigenous communities and families can be found in *R v Kalmakoff*.[162] In this case, the Alberta Court of Appeal was comprised of Justice Jack Watson, Justice JD Bruce McDonald, and Justice Myra Bielby. The Court referred to John Dwayne Kalmakoff's mother's "self-ruin":

> [T]he Court is not oblivious to the sad and deprived background of the respondent. Although he appears to have spent little time involved with the aboriginal community, *his aboriginal mother appears herself to have had a life pattern that is reflective of the dislocations and self-ruin that have been discussed in many cases*. The Court is prepared to infer that her unstable and alcohol afflicted life has damaged the respondent, perhaps in ways that he himself has not come to grips with.[163]

The Court appeared to be demonstrating the importance of paying attention to an Indigenous person's background. Yet in doing so, the Court attributed responsibility for "ruin" to John

[162] *R v Kalmakoff*, 2013 ABCA 405.
[163] *Ibid* at para 24 [emphasis added].

Kalmakoff's own Indigenous mother. Additionally, the Court seemed to be suggesting that it benevolently decided to contextualize John Kalmakoff's abilities and experiences, despite the fact that the finding had to be made on the basis of an inference. Specifically, the Court indicated that it decided "to infer that [his mother's unstable and alcohol afflicted life has damaged…[him]". While the Court appeared to be illustrating its adherence to *Gladue*, it did so not by inferring that the Canadian state damaged John Kalmakoff, but by inferring that his mother damaged him. Again, the language reveals strong adherence to individualized responsibility.

Two cases in which appellate courts have provided more contextualization of a criminalized person's mother are *R v JP*[164] and *R v Charlie*.[165] In *JP*, Justice Robert Leurer of the Saskatchewan Court of Appeal summarized the convictions and sentence as follows: "After trial…, J.P. was convicted of being a party to two armed robberies…J.P. also pleaded guilty to several other offences. For all of these crimes, J.P. was sentenced to 17 years' imprisonment, which was reduced by the sentencing judge to a global sentence of ten years less credit for time spent on remand".[166] In the result, Justice Leurer allowed JP's sentence appeal—he varied the sentence for the robberies to concurrent sentences of five years' imprisonment, and he varied the global sentence to eight years' imprisonment, less credit for JP's time spent on remand.[167]

[164] *R v JP*, 2020 SKCA 52, 62 CR (7th) 328 [*JP SKCA*].
[165] *R v Charlie*, 2015 YKCA 3, 320 CCC (3d) 479 [*Charlie YKCA*].
[166] *JP SKCA*, *supra* note 164 at para 2.
[167] *Ibid* at para 3.

With respect to the circumstances of the offences, JP's nephew carried out the armed robberies at two convenience stores.[168] JP's nephew was 14 years old, and the trial judge found that JP "not only assisted his nephew in the commission of the two robberies in question, he also encouraged and directed him to do so."[169] The other offences involved convictions for theft of property of a value not exceeding $5,000, possession of unlawfully obtained property, breach of recognizance, break and enter and commit an indictable offence, and possession of marijuana.[170]

JP was 37 years old when he carried out the above offences, and he had a criminal record with more than 70 convictions.[171] Soon into Justice Leurer's discussion of JP's "personal circumstances", Justice Leurer described JP's "aboriginal ancestry":

> His family included residential school survivors on both his maternal and paternal sides. His mother was raised by her grandparents (J.P.'s great-grandparents), whose relationship was characterized by alcohol abuse and domestic violence. His father was an alcoholic and a drug addict who was also raised by abusive parents. The extreme poverty, minimal educational opportunities, and overcrowded and deficient housing experienced by J.P.'s parents cannot be captured in a few words, but *the outcome was a life of family dysfunction, substance and alcohol abuse, and violence*.[172]

[168] *Ibid* at para 4.
[169] *R v JP*, 2016 SKQB 392 at para 62, quoted in *JP SKCA*, *supra* note 164 at para 7.
[170] *JP SKCA*, *supra* note 164 at para 8.
[171] *Ibid* at para 9.
[172] *Ibid* at para 10 [emphasis added].

Justice Leurer thus referred to JP's ancestors as "residential school survivors". This language aptly captures the resilience of JP's ancestors, framing them as "survivors" of residential schools, rather than as people who (more neutrally) attended residential schools. Justice Leurer then proceeded to outline the vulnerabilities and pathologies that afflicted JP's family. While it is implied that these experiences are "the outcome" of residential schools, the term, "outcome", seems to imply an endpoint—that JP's family has reached a final destination of "dysfunction". Moreover, the emphasis on "the outcome" being "a life" characterized by "family dysfunction, substance and alcohol abuse, and violence" centres trauma and situates trauma on the family. Rather than referring to the state's dysfunction in not providing support for JP's family, Justice Leurer instead refers to JP's family as dysfunctional.

These subtle erasures of the state are important. The acknowledgment and removal of the state gives the combined impression of state accountability for criminalized conduct, of reduced individual blameworthiness for criminalized conduct, and of a sort of hopelessness. The sense of despair arises from the resituating of blameworthiness on Indigenous people, or at least from a lack of clarity regarding the ways in which past residential school traumas continue to negatively impact Indigenous people's lives. Justice Leurer presents an image of Indigenous families and communities being afflicted by vulnerabilities and pathologies. While Justice Leurer acknowledged that such hardships arose as a result of residential schools, he left unacknowledged the ways in which the everyday actions of police officers, social workers, health care workers, lawyers, judges, and teachers have sustained the traumas in contemporary people's lives.

In this case, erasures of state actors also take place in relation to JP's mother. Justice Leurer situated JP's mother, Ms. P, within some of her social context. In addition to briefly describing the violent relationship between her grandparents who raised Ms. P, Justice Leurer also mentioned that "J.P.'s mother was 15 years old when he was born"[173] and that "J.P.'s parents never lived together".[174] Normative standards in Canadian society still include the standard of married, heterosexual parents raising children together. These norms can lead to discrimination against young single mothers. I am concerned that in not describing the connection between these features of Ms. P's life and JP's "personal circumstances", Justice Leurer leaves the impression that it is simply presumed that JP's personal circumstances were negatively affected, without explaining how or why. It would perhaps have been helpful to frame such experiences in a way that acknowledges that single parenthood and teen pregnancy, for instance, are not examples of vulnerabilities and pathologies, but instead examples of experiences and identities that are sometimes discriminated against by the state and by mainstream society.

Justice Leurer also noted that the *Gladue* report indicated that Ms. P "reported childhood poverty, hunger, and experiences of racism at school", that she "quit school in grade 7, when she was pregnant with J.P.", and that her boyfriend, who was JP's father, was 22 years old when she became pregnant.[175] Justice Leurer explained that "[a]ll of this…puts the medical report quoted in the *Sentencing Decision* in a broader *Gladue* context".[176] The medical report itself referred to Ms. P's experiences with pregnancy. The descriptions of Ms. P's use of alcohol and solvents are

[173] *Ibid* at para 11.
[174] *Ibid*.
[175] *Ibid* at para 44.
[176] *Ibid*.

detailed. I reproduce a passage from the report in an attempt to illustrate the report's obfuscation of the state:

> [Ms. P] reported that she was unaware she was pregnant until the third trimester (around 7 months pregnant)…She reported binge-drinking alcohol on weekends throughout the pregnancy (wine and vodka) to the point of getting drunk and sometimes blacking out. She sniffed solvents (lighter fluid, spray paint; and a plastic wood product) during the time she was unaware she was pregnant. There were no other problems during the pregnancy, although *she did not have standard prenatal care*.[177]

In contrast to the detail of Ms. P's use of alcohol and drugs, the report appears to be silent on the final note that "she did not have standard prenatal care." This simple statement that Ms. P did not receive "standard prenatal care" presents the fact as innocuous, but the lack of standard health care likely embeds a web of discriminatory practices and gaps in services. Perhaps research into the quality and standards of medical care provided to Indigenous people would provide further insight into the state's failures in fulfilling its responsibilities towards JP and his family—and further insight into JP and his family's experiences with systemic and background factors.

In his analysis, Justice Leurer drew a direct connection between JP's FASD diagnosis and the state's actions of placing his ancestors in residential schools:

[177] Dr. Lejbak's medical report, as quoted in *JP SKCA*, *supra* note 164 at para 44.

> In this overall context, J.P.'s FASD presents as a Gladue factor not simply because of disproportionate FASD rates among Aboriginal communities, but because it is, in his life, *an intergenerational consequence of residential schools*. The Gladue report invited *a connection between J.P.'s FASD, his mother's childhood experiences and pregnancy, and the life of his great-grandmother with whom his mother lived*.[178]

Similarly, Justice Leurer further explained: "the evidence disclosed that *J.P.'s actions were an outcome of his upbringing which, in turn, was the product of the systemic background facts* reviewed in the Sentencing Decision".[179] The direct connection is helpful for maintaining focus on state accountability. Nonetheless, the judgment still obfuscates state accountability in the sense that the judgment refers to the "outcome of [JP's] *upbringing*" and to "*the life of his great-grandmother* with whom his mother lived". It still sounds as though the state takes responsibility for placing Indigenous people in residential schools—and for the outcomes arising today as a consequence—but that those outcomes are familial, community outcomes, internal to Indigenous families and communities, not generated and sustained by the state. A similar example can be found in Justice Leurer's statement that "*J.P.'s parents were incapable of caring for him*, so he was raised in his early years by his maternal grandmother in the Lestock and Muskowekan First Nation area. *This household 'was marked with alcoholism, violence and abuse, including sexual abuse'*".[180] The passage framed JP's parents as incompetent, rather than as unsupported, and his maternal grandmother's "household" is treated as a site of violence and abuse, rather than a site that has been oppressed by the state.

[178] *JP SKCA*, *supra* note 164 at para 45 [emphasis added].
[179] *Ibid* at para 47 [emphasis added].
[180] *Ibid* at para 12 [emphasis added].

In *Charlie*, the Yukon Court of Appeal similarly identified a direct connection between a criminalized individual's mother's use of alcohol and her experiences in residential schools. In particular, Justice Pamela Kirkpatrick stated: "the FAS effects are directly linked to his parents' forced placement in a residential school. Specifically, the FAS is the product of Mr. Charlie's mother consuming high levels of alcohol during her pregnancy, which consumption of alcohol is linked to her experience in the residential schools."[181] In addition to expressly connecting Franklin Charlie's mother's experiences with alcohol with her experiences in residential schools, Justice Kirkpatrick also referred to Franklin Charlie's mother's "forced placement in a residential school." The emphasis on these links and on the forced nature of her placement in residential schools keeps the state more closely in the reader's view (although, notably, Justice Kirkpatrick still keeps the state unnamed—the reader can infer that state actors forced Franklin Charlie's parents to be placed in residential schools, but Justice Kirkpatrick participated in the practice of erasing the state's agency by leaving it unnamed).

Despite the direct connections that Justice Kirkpatrick drew between residential schools and Franklin Charlie's mother's use of alcohol, I find there to be something unsettling in the continued emphasis on her use of alcohol. As Scribe writes, "Indigenous girls and women are depicted as *more reckless* than their white counterparts and, importantly, *drinking, using drugs, and selling sex are seen as outcomes of Indigenous cultural systems*".[182] In keeping with such "pathologizing" of Indigenous women and girls, Justice Kirkpatrick later explained that Franklin

[181] *Charlie YKCA*, *supra* note 165 at para 32 [emphasis added].
[182] Scribe, *supra* note 73 at 52.

Charlie's "inability to control himself when he consumes alcohol or drugs…derives from his FAS, which, in turn, *originated from problems flowing from his Aboriginal background*."[183] Again, even if the phrase, "problems flowing from his Aboriginal background", can be read as a shorthand for experiences flowing from the state's oppression of Indigenous people, the phrase is in itself an oppressive shorthand. The phrase dangerously substitutes state violence with "Aboriginal background".

The judgment also involves the re-attachment of accountability to Franklin Charlie. Justice Kirkpatrick stated that, "[w]ithout rehabilitation, his pattern of offending clearly will continue. With rehabilitation, he has a chance to lead an effective life. Society is best served if that were to occur...In a sense, this may be Mr. Charlie's last chance. He is given the opportunity to turn his life around. If he does not, society cannot continue to be compromised by his conduct."[184] Justice Kirkpatrick previously acknowledged that Franklin Charlie's "moral culpability" for his criminalized actions was lessened as a result of his and his family's experiences arising from residential schools.[185] Yet despite that acknowledgment, it seems that Justice Kirkpatrick did not fully engage with the idea of shared responsibility between Franklin Charlie and other people and entities, most notably state actors. Any diminished responsibility due to Franklin Charlie's experiences arising from colonialism is replaced with full responsibility for changing his circumstances—it is up to Franklin Charlie himself "to turn his life around"—an "opportunity" that Justice Franklin presented as having been generously and compassionately granted by the sentencing judge. The state has, again, faded into the background.

[183] *Charlie YKCA*, *supra* note 165 at para 42 [emphasis added].
[184] *Ibid* at paras 42-43.
[185] *Ibid* at para 33.

Moreover, Justice Kirkpatrick paints those state actors who *are* present in the judgment in a benevolent way. The sentencing judge "was confronted with a dilemma: incarceration would only provide a respite from the risk that Mr. Charlie poses to society because his condition does not allow him to fully benefit from any rehabilitative potential of incarceration."[186] In addition to the "dilemma", the sentencing judge was also "faced with exceptional circumstances": "Mr. Charlie presents a serious challenge to the sentencing process. He is seriously compromised, but has the potential to do well in a controlled community environment."[187] By framing Franklin Charlie as presenting the courts with "exceptional circumstances" and a "dilemma", Justice Kirkpatrick implied that, despite the state's violent actions in placing his parents in residential schools, sentencing judges now face a burdensome and complicated challenge in figuring out how to now provide care and support for Franklin Charlie. While the sentencing process does present challenges to sentencing judges, the challenges in this case are not necessarily "exceptional" (given the mass imprisonment of Indigenous people that continues in Canada). Furthermore, in suggesting that it is Franklin Charlie himself who presents the "exceptional circumstances" and the "dilemma", Justice Kirkpatrick obfuscates both the state's failures to provide Franklin Charlie and his family with support in the first place and the state's ongoing responsibilities to repair relationships with Indigenous people and communities.

In the result, Justice Kirkpatrick dismissed the Crown's appeal from the sentencing judge's imposition of a sentence of 9 weeks' imprisonment, in addition to the 14 months that Franklin

[186] *Ibid* at para 34.
[187] *Ibid* at para 42.

Charlie had already served on remand, to be followed by a period of 3 years of probation.[188] The sentence had been imposed after Franklin Charlie pled guilty to the robbery of an individual's home in Ross River.[189] In concluding that the sentencing judge did not err, Justice Kirkpatrick referred to the police presence in Franklin Charlie's community, Ross River:

> His probation order had attached to it 17 strict conditions. We were advised that since his release, which would appear to be about six months ago, he has not breached any conditions. *He resides in the small community of Ross River which has a RCMP detachment. One need no evidence to infer that, in such a small community, the RCMP will be aware of breaches and can keep track of Mr. Charlie's whereabouts*.[190]

Justice Kirkpatrick went on to note that, "[i]n my view, this suggests that…Mr. Charlie has a promising chance to rehabilitate."[191] These passages involve open praising of the increased surveillance and management that the RCMP will likely impose on an Indigenous person. Justice Kirkpatrick might have stated that Franklin Charlie "has a promising chance to rehabilitate" because he had not breached his conditions since his release. However, the passages might also suggest that it is the police presence and surveillance that will provide Franklin Charlie with "a promising chance to rehabilitate." In either case, Justice Kirpatrick appears to portray agents of the state—police officers—as helpers to criminalized Indigenous people and their communities. Justice Kirkpatrick does so without even an acknowledgment of the tensions involved in relying

[188] *Ibid* at paras 48, 2.
[189] *Ibid* at para 1; *ibid* at para 4, quoting *R v Charlie*, 2014 YKTC 17 at para 3.
[190] *Charlie YKCA*, *supra* note 165 at para 45 [emphasis added].
[191] *Ibid* at para 46.

on the same entity that was involved in forcing Indigenous people, such as Franklin Charlie's parents, to attend residential schools to now help him rehabilitate and/or help keep him and his community safe.

To the extent that this judgment involved the review of not only a short term of incarceration but also an extended period of probation, the judgment presents an opportunity to reflect on the themes that might continue to arise even when decarceral avenues are pursued in sentencing. In particular, from a relational perspective, decarceral options should involve thinking about how an individual criminalized person can and should be supported in the community. Additionally, a relational analysis should involve thinking about who is and who should be involved in providing such support and care for the criminalized person *and for* other community members, such as survivors of criminalized conduct. Furthermore, a relational analysis should prompt consideration of how the state can take accountability for its actions and inactions that have contributed to criminalized behaviour, such as through the state's systemic racism, its lack of providing access to safe housing and healthcare, and its lack of support for caregivers.

In a later appellate judgment involving Franklin Charlie,[192] Justice DeWitt-Van Oosten of the Yukon Court of Appeal provided a helpful comment on Franklin Charlie's mother's resilience. In particular, Justice DeWitt-Van Oosten noted: "*In a show of tremendous strength,* Mr. Charlie's mother later attended treatment programs and regained her sobriety. At a 2012 sentencing hearing involving her son, mention was made of the fact that Mr. Charlie's mother

[192] *R v Charlie*, 2020 YKCA 6.

had by then abstained from alcohol for 25 years."[193] This contextualization of Franklin Charlie's mother is important, because it shows that she has multiple—and resilient—dimensions and that an appellate judgment described Franklin Charlie's mother beyond her use of alcohol during pregnancy.

2.5 Conclusion

This chapter illustrates that sentencing judgments have contextualized the responsibility analysis without adequately "relationizing" it. Specifically, sentencing judgments have inserted context into the responsibility analysis, identifying "systemic and background factors" such as a criminalized individual's experiences with FASD, unemployment, and childhood exposure to interpersonal violence. However, the responsibility analysis continues to be highly individualized, remains detached from the state, and embeds traces of "colonial racism". The language in sentencing judgments places responsibility for suffering onto "Indigenous heritage" and "Indigenous culture". Additionally, sentencing judgments force Indigenous women to bear increased "responsibilization" and blame for consuming alcohol while pregnant. This chapter thus shows that contextualizing a sentencing judgment is not enough, in terms of redressing the state's violence against Indigenous people. Instead, contextualization can simply and harmfully involve the reframing and reattribution of individualized responsibility.

[193] *Ibid* at para 28 [emphasis added].

These hazards are not new. For instance, in 2006, Sonia Lawrence and Toni Williams relatedly cautioned that contextualized sentencing judgments can "other" marginalized groups of people.[194] Judgments have, for example, essentialized Black women who live in poverty as criminalized people. Moreover, such a practice is fueled by, and sustains, the judiciary's erasure of the state's own harmful practices, such as "targeted enforcement".[195]

The practical reality is that contextualization has the potential to re-entrench stereotypes, rather than disrupt harmful narratives and violent state practices. This practice is important to keep in mind when considering sentencing judgments' portrayals of risk. As I will explore in the next chapter, the Supreme Court of Canada has scrutinized risk assessment tools in the context of imprisonment. While the jurisprudence has recognized that the tools may discriminate against Indigenous people, it has not drawn attention to the argument that the tools' discriminatory results are rooted in the state's own violence against Indigenous people. Critical criminological scholarship shows that a recognition of bias—like a recognition of context—is not sufficient for developing and pursuing decarceral responses to criminalization. I thus argue that, without sustained consideration of the "in betweenness" of both responsibility and risk, sentencing judgments will likely continue to harmfully (and unhelpfully) place blame on, and attempt to manage, Indigenous people—despite stated efforts to reduce the imprisonment of Indigenous people.

[194] Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285 at 329-30.
[195] *Ibid* at 330.

Chapter Three: Individualized Risk

3.1 Introduction

The responsibility lens assists one to look back in time, aiming to place a criminalized person within their past life experiences and context. By comparison, the risk lens brings one's view forward in time, trying to illuminate a criminalized individual's future life. Criminal justice practitioners utilize the risk lens when working towards the goal of protecting society from possible harm—when ascertaining what steps are purportedly necessary to protect society from the possible harms that might be posed by a criminalized person in the future.[1]

The risk lens is comprised of risk assessment and risk management. Risk assessment aims to determine the likelihood that a criminalized individual will be charged with, or convicted of, another criminal offence in the future. Risk assessment thus demonstrates that the risk lens is probabilistic in nature: risk assessment generates predictions of future behaviour and potential consequences resulting from that behaviour. The lens tells us not about a particular individual, but about what has happened to a group of people in circumstances similar to a given individual.

Risk management involves the state's attempts to manage, or control, people who are labelled as dangerous or risky. In other words, risk management involves the state's responses to findings of

[1] A risk framework purports to serve the state's objective of managing groups of people who are identified, and classified together, as posing a risk of harm to others: see Malcolm M Feeley & Jonathan Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications" (1992) 30:4 Criminology 449.

risk. The state may manage people who are labelled as dangerous, or risky, through preventive measures including control, separation, the restriction of an individual's liberty, and the offering of treatment. Risk management is sometimes presented in benevolent language, along the lines of rehabilitating or healing criminalized individuals. Yet, within sentencing law, rehabilitation and healing efforts continue to be intimately connected with risk assessment theory and tools.

As I will demonstrate below, risk assessment is currently highly individualized in nature, conceptually removing criminalized people from their communities and experiences and from the state's oppressive actions and inactions. Risk management is similarly individualized, framing an individual who fulfills pre-established risk factors as being in need of change, without considering the ways in which the actions of communities and the state might also need to change. As a result, rehabilitation and healing do not emerge as part of a pursuit of reconciliation or social justice. Instead, rehabilitation and healing constitute part of a practice of characterizing Indigenous individuals and communities as risky and as responsible for generating the conditions for risk.

This chapter illustrates the individualized nature of risk within Canadian criminal justice discourses and practices. I demonstrate that this dominant approach obscures the "in betweenness"[2] of risk by framing risk as something that attaches to an individual rather than as something that the state contributes to constructing and sustaining. I first provide an overview of the theoretical framework that supports the use of risk assessment instruments and risk

[2] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000) at 208, quoting Kenneth Gergen, "Summary Statements" in Daniel N Robinson, ed, *Social Discourse and Moral Judgment* (San Diego: Academic Press, 1992) 244.

management practices within the Canadian criminal justice system. This framework involves the assumption that it is appropriate and necessary for the law to make individuals bear the weight of consequences resulting from predictions about which experiences and behaviours lead to criminal charges and convictions. I will identify several critiques of risk assessment and management, including the criticism that individualized accounts of risk obscure and discount the roles of colonial, racist, sexist, ableist, and classist norms and practices.

I turn next to the Supreme Court of Canada's recent case, *Ewert v Canada*,[3] which involved a challenge against the Correctional Service of Canada's use of risk assessment instruments in making correctional plans and recommendations to the Parole Board of Canada. While the judgment did not involve sentencing law, it addressed the types of instruments that are also incorporated into, and relied upon in, sentencing judgments. I argue that the majority's judgment offered a limited critique of risk assessment and risk factors—one that preserves assumptions of individual and "cultural" responsibilities for experiences of oppression and one that continues to blur the state's role in producing these difficulties. As part of my analysis of *Ewert*, I provide an overview the risk assessment tools that were at issue in the case. While a variety of tools are used within Canada's correctional settings,[4] this review aims to provide the reader with a sense of some of the precise factors are involved in some of the instruments at play.

Following my analysis of *Ewert*, I consider some of the ways in which the *Ewert* proceedings have influenced risk assessment research. Recent publications confirm my concern that the

[3] *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*].
[4] See e.g. Guy Bourgon et al, "Offender Risk Assessment Practices Vary across Canada" (2018) 60:2 Canadian Journal of Criminology and Criminal Justice 167.

majority judgment will simply enable researchers to validate risk assessment tools in relation to Indigenous people without clarifying the social and institutional practices that contribute to Indigenous people receiving high scores on these tools. In other words, some of the tools have been shown to accurately predict which groups of people are likely to be implicated in further criminal justice charges and convictions without investigating the normative and oppressive foundations of the factors involved.

3.2 The Risk-Need-Responsivity Model

The dominant model of risk assessment and management in Canadian criminal justice practices is called the "Risk-Need-Responsivity Model of Offender Assessment and Treatment".[5] It was formally introduced in 1990 by DA Andrews, James Bonta, and RD Hoge,[6] and it is rooted in a psychology theory of criminal conduct, specifically the "General Personality Cognitive Social Learning (GPCSL) perspective of criminal behavior".[7] Bonta and Andrews explain that a psychology theory of criminal conduct seeks "to assist in predicting who will or will not commit crimes in the future and suggest deliberate interventions that will reduce future crime."[8] The theory thus purports to have implications for both risk assessment and risk management, in that it aims to both predict future criminal charges or convictions and reduce their occurrence. Given these sought-after effects, the GPCSL theory claims to have a "practical goal"—"the

[5] See e.g. *ibid.*
[6] DA Andrews, James Bonta & RD Hoge, "Classification for Effective Rehabilitation: Rediscovering Psychology" (1990) 17:1 Criminal Justice and Behavior 19. See also James Bonta & DA Andrews, "Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation" (Ottawa: Public Safety Canada, 2007) at 1 [Bonta & Andrews, "Risk-Need-Responsivity Model"].
[7] James Bonta & DA Andrews, *The Psychology of Criminal Conduct*, 6th ed (New York: Routledge, 2017) at 176 [Bonta & Andrews, *Psychology of Criminal Conduct*].
[8] *Ibid* at 3.

rehabilitation of offenders".[9] Bonta and Andrews assert that, "[b]y focusing on the causal variables suggested by the theory, we have the potential to *influence criminal activity through deliberate interventions*."[10]

Andrews, Bonta, and Hoge introduced the Risk-Need-Responsivity Model in a context where risk assessment practices were previously dominated by professional discretion and by attention to unchangeable risk factors, such as a person's criminal record. In particular, the first generation of risk assessment, which governed in the early to mid-1900s, involved "professional judgment".[11] Under this model, clinicians and correctional staff assess the level of risk posed by criminalized individuals and determine which individuals need "enhanced security or supervision."[12] Between 1970 and 1980, researchers developed second generation risk assessment instruments, which involve the use of "evidence-based" instruments—specifically, actuarial risk assessment instruments.[13] These instruments purport to predict behaviour by linking particular factors, such as past convictions and past substance use, with future criminal charges and convictions.[14] The more risk factors an individual has, the riskier the assessment finds them to be. While studies showed that these tools were better at predicting risk than professional judgment, concerns arose due to their lack of being grounded in a theory and due to their historical or static nature—the factors can never change.[15] For example, if someone was criminalized once before, their fulfillment of that risk factor will always make them riskier than if they had never been convicted.

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[9] *Ibid* at 35.
[10] *Ibid* [emphasis added].
[11] Bonta & Andrews, "Risk-Need-Responsivity Model", *supra* note 6 at 3.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid* at 3-4.

The third generation of risk assessment draws on the Risk-Need-Responsivity Model. In particular, third generation actuarial risk assessment instruments incorporate dynamic risk factors.[16] Dynamic risk factors are regarded as changeable factors, including, for example, "present employment", "criminal friends", and "family relationships".[17] Dynamic risk factors are also called criminogenic needs—they are "risk factors that, when changed, are associated with changes in the probability of recidivism."[18]

The General Personality Cognitive Social Learning perspective, which is the theory upon which the Risk-Need-Responsivity Model is based, identifies eight "central" risk/need factors.[19] One of these factors is static: "Criminal History".[20] The others are dynamic: "Procriminal Attitudes"; "Procriminal Associates"; "Antisocial Personality Pattern"; "Family/Marital"; "School/Work"; "Substance Abuse"; and "Leisure/Recreation".[21] For each factor, the theory includes a "strength" and a "[d]ynamic need and promising intermediate targets of change".[22] For example, with respect to antisocial personality pattern, the theory indicates that this factor is a strength in an individual who demonstrates "[h]igh self-control and good problem-solving skills" and that the factor's dynamic needs/promising targets of change include "increas[ing] self-management skills, build[ing] empathy, anger management and improv[ing] problem-solving skills."[23] The Risk-Need-Responsivity Model thus guides third-generation instruments—these instruments identify and assess risk factors and criminogenic needs.

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[16] *Ibid* at 4.
[17] *Ibid*.
[18] Bonta & Andrews, *Psychology of Criminal Conduct, supra* note 7 at 180.
[19] *Ibid* at 44.
[20] *Ibid* at 45, Table 3.1.
[21] *Ibid* at 45-46, Table 3.1. See also *ibid* at 44.
[22] *Ibid* at 45-46, Table 3.1.
[23] *Ibid* at 45, Table 3.1.

As part of its practice of identifying central risk/need factors, the Risk-Need-Responsivity Model involves a number of guiding principles. For example, the model separates itself from criminal law principles of "deterrence, restoration, just desert, and due process", instead resting upon the claim that "[i]t is through human, clinical, and social serves that the major causes of crime may be addressed."[24] Through this principle, the Risk-Need-Responsivity Model moves from the territory of aiming to *predict* criminalized behaviour towards the domain of trying to *treat the causes* of criminalized behaviour.

The model's guiding principles also include risk, need, and responsivity principles. The risk principle includes two features: (1) the claim "that criminal behavior can be predicted"; and (2) "the idea of *matching levels of treatment services to the risk level of the offender*."[25] With respect to matching treatment to risk level, the model provides that "higher-risk offenders need more intensive and extensive services".[26]

Through the need principle, the model distinguishes between criminogenic and noncriminogenic needs. As mentioned above, criminogenic needs are dynamic risk factors—they are "risk factors that, when changed, are associated with changes in the probability of recidivism."[27]

With respect to the model's responsivity principles, these principles include both general and specific responsivity. According to the general responsivity principle, "social learning

[24] *Ibid* at 178.
[25] *Ibid*.
[26] *Ibid* at 179.
[27] *Ibid* at 180.

interventions are the most effective way to teach people new behaviours regardless of the type of behaviour",[28] and according to the specific responsivity principle, treatment practices should "consider [and be tailored to] personal strengths and socio-biological-personality factors."[29]

Fourth generation risk assessment "emphasize[s] the link between assessment and case management."[30] Fourth generation risk assessment thus capitalizes on the Risk-Need-Responsivity Model's claim that treatment should be matched to an individual's risk level. In particular, the model provides that programs should treat high-risk individuals. Fourth generation tools pursue this goal by including an assessment of the "central eight risk/need factors" along with specific responsivity issues and specific risk and need factors.[31] Specific responsivity issues include considerations such as an individual's motivation and intelligence level.[32] Specific risk and need factors relate to particular types of offences. For example, "a male batterer would be queried about intimidating and stalking behavior."[33] Additionally, fourth generation tools might integrate assessment and case management by indicating that practitioners "must prioritize the criminogenic needs of the offender, engage the offender in setting concrete targets for change, and choose a means to reach these goals" and by including a progress record for the individual being assessed and treated.[34]

[28] Bonta & Andrews, "Risk-Need-Responsivity Model", *supra* note 6 at 5.
[29] *Ibid* at 7.
[30] Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 7 at 198.
[31] *Ibid*.
[32] *Ibid* at 200, Table 10.4, "A Brief Sampling of the Level of Service/Case Management Inventory™ (LS/CMI™)".
[33] *Ibid* at 198.
[34] *Ibid* at 201, discussing the LS/CMI.

Risk assessment instruments can also vary in terms of the amount of professional discretion that is applied in conjunction with a tool. Some tools are "purely actuarial".[35] Based on the data upon which the tool is built, purely actuarial instruments produce a risk score for the person being assessed. By comparison, some instruments involve "structured professional judgement".[36] These tools "consist of items drawn from the general literature rather than a specific data sample."[37] Additionally, "the overall assessment of risk is left to the professional's judgment and not a mechanistic formula".[38]

3.3 Criticisms of Dynamic Risk Factors: Dynamic Risk Factors Target *Possible* Causes and Involve Normative and Oppressive Dimensions

One of the key features of the Risk-Need-Responsivity Model, which guides both third and fourth generation instruments, is its reliance on dynamic risk factors or criminogenic needs. These factors purport to embrace and respond to individuals' potential to change. In a review of the psychology of criminal conduct, Clare-Ann Fortune and Roxanne Heffernan note that, "[a]rguably DRF [dynamic risk factors] or criminogenic needs are the most widely used concept in forensic and correctional practices."[39] Fortune and Heffernan observe that these factors

[35] James Bonta, Julie Blais & Holly A Wilson, "The Prediction of Risk for Mentally Disordered Offenders: A Quantitative Synthesis" (Ottawa: Public Safety Canada, 2013) at 4.
[36] *Ibid*.
[37] *Ibid*.
[38] *Ibid*, citing Kirk Heilbrun, Kento Yasahura & Sanjay Shah, "Violence Risk Assessment Tools: Overview and Critical Analysis" in Randy K Douglas & Kevin S Otto, eds, *Handbook of Violence Risk Assessment* (New York: Routledge, 2010) 1.
[39] Clare-Ann Fortune & Roxanne Heffernan, "The Psychology of Criminal Conduct: A Consideration of Strengths, Weaknesses and Future Directions" (2019) 25:6 Psychology, Crime & Law 659 at 662.

"determine sentencing and parole outcomes, as well as access to and the goals of interventions".[40]

Yet, although widely used, dynamic risk factors/criminogenic needs have faced critical scrutiny. One concern, canvassed by Fortune and Heffernan, is the possibility that risk assessment tools might conflate *predictive* factors with *causal* factors (that is, with factors that are regarded as being in need of targeting and treatment). For example, in the context of violent behaviour, contemporary conceptions and uses of dynamic risk factors claim not only to identify which characteristics and circumstances *precede* an individual's violence (that is, they claim to identify which factors are predictive of future violence), but also to identify those that *also*, when treated, *reduce* an individual's violence (that is, they claim to identify those factors that also ought to be treated for the purpose of reducing an individual's violence).[41] In other words, as Fortune and Heffernan explain, dynamic risk factors "occupy dual roles in the tasks of risk prediction and risk reduction".[42]

Fortune and Heffernan observe that, at this time, "[c]riminogenic needs are…viewed as *potential causes* (i.e. they influence the decision to engage in crime), and further research into their relationship with recidivism should help to determine this status."[43] Fortune and Heffernan argue that researchers must show both that treatment can result in a reduction in rearrest or reconviction *and* that the reduction occurred because the treatment targeted causal factors.[44]

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[40] *Ibid*.
[41] See e.g. Gabrielle Klepfisz, Michael Daffern & Andrew Day, "Understanding Dynamic Risk Factors for Violence" (2016) 22:1-2 Psychology, Crime & Law 124.
[42] Fortune & Heffernan, *supra* note 39 at 666.
[43] *Ibid* [emphasis in original].
[44] *Ibid*.

They further explain that, "[w]hile [dynamic risk factors] likely contain causal strands, in their standard form they are more like general categories that also incorporate contextual (e.g. gang membership), behavioral (e.g. watching child pornography), and psychological state aspects (e.g. feeling lonely)."[45] Because of these multiple categories, tools that utilize dynamic risk factors cannot pinpoint which possible cause explains which type of behaviour.[46]

Gabrielle Klepfisz, Michael Daffern, and Andrew Day further illuminate the lack of evidence regarding the causal links between dynamic risk factors and violence.[47] In revealing this limited evidentiary foundation, Klepfisz, Daffern, and Day adopt Kevin S Douglas and Jennifer L Skeem's[48] account of the three elements that are needed for classifying risk factors as dynamic.[49] As summarized by Klepfisz, Daffern, and Day, in order to be dynamic, a risk factor: (1) "must be an antecedent to, and increase the propensity for, violence"; (2) "must be able to change spontaneously or as a result of treatment efforts"; and (3) "must predict changes in violent recidivism as a result of intervention."[50] Klepfisz, Daffern, and Day demonstrate that gaps exist in relation to the research supporting the first and third elements.

The first element is concerned with the "predictive accuracy" of risk factors.[51] With respect to this element, Klepfisz, Daffern, and Day explain that it is difficult to prove that a dynamic factor precedes violence without "robust longitudinal studies".[52] In particular, a number of studies have

[45] *Ibid* at 667-68.
[46] *Ibid* at 668.
[47] *Supra* note 41.
[48] Kevin S Douglas & Jennifer L Skeem, "Violence Risk Assessment: Getting Specific About Being Dynamic" (2005) 11:3 Psychology, Public Policy, and Law 347.
[49] Klepfisz, Daffern & Day, *supra* note 41 at 125.
[50] *Ibid*.
[51] *Ibid* at 129.
[52] *Ibid* at 128.

identified "*associations* between dynamic risk factors and subsequent violence".[53] Nonetheless, these studies cannot demonstrate that the dynamic risk factors *preceded* the violence. Because the studies are measuring "s*ubsequent* violence", it is possible that the prior violence triggered the occurrence of the dynamic risk factor.[54]

Despite this difficulty, researchers have identified numerous "individual risk factors for violence".[55] Two factors that have received the strongest evidentiary backing are: (1) procriminal attitudes, which include "attitudes supportive of crime, seeing little need to maintain law, and having little respect for law/authority"; and (2) psychosis.[56] Procriminal attitudes "have been identified as one of the strongest predictors of criminal offending",[57] and "a body of research has established that psychosis is significantly associated with an increase in the odds of future violent behaviour".[58]

By comparison, the evidentiary foundation for other risk factors is "inconsistent".[59] For example, Klepfisz, Daffern, and Day discuss a study by Grant T Harris and Marnie E Rice.[60] Harris and Rice found that some of the dynamic risk factors that practitioners frequently assess did not predict violence at all.[61] The factors showing no predictive connection included "insight" and

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[53] *Ibid* [emphasis added].
[54] *Ibid* [emphasis added].
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*, citing Paul Gendreau, Tracy Little & Claire Goggin, "A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!" (1996) 34:4 Criminology 575, and Leslie Helmus et al, "Attitudes Supportive of Sexual Offending Predict Recidivism: A Meta-Analysis" (2013) 14:1 Trauma, Violence, & Abuse 34.
[58] Klepfisz, Daffern & Day, *supra* note 41 at 128, citing Kevin S Douglas, Laura S Guy & Stephen D Hart, "Psychosis as a Risk Factor for Violence to Others: A Meta-Analysis" (2009) 135:5 Psychological Bulletin 679.
[59] Klepfisz, Daffern & Day, *supra* note 41 at 129.
[60] Grant T Harris & Marnie E Rice, "Progress in Violence Risk Assessment and Communication: Hypothesis Versus Evidence" (2015) 33:1 Behav Sci & L 128.
[61] *Ibid* at 135.

"denial".[62] Additionally, Klepfisz, Daffern, and Day refer the reader to research demonstrating that some risk factors connected with violence appeared to be "proxy variables"—that is, the assessed risk factors were present but could more accurately be regarded as proxies for factors that served as the actual causes of the violent behaviour.[63]

Similarly, Seth J Prins recently investigated whether it is "possible that exposure to the criminal justice system increases criminogenic risk levels",[64] and he found that it is indeed possible. Like Klepfisz, Daffern, and Day, Prins observed that "virtually all research on criminogenic risk factors has been conducted with samples that are already involved in the criminal justice system", meaning that "the causal contrast is unavailable for questions regarding criminogenic risk factors as causes of criminal behavior more broadly."[65] By comparison, Prins's own research drew on data from the Pittsburgh Youth Study.[66] He specifically examined the data relating to "a community-based sample of 504 boys" who participated in the Pittsburgh Youth Study.[67] These boys were "followed from childhood into early adulthood," and Prins's analysis of the data revealed that "*exposure to the criminal justice system increased subsequent criminogenic risk factors*. Each arrest, and to a lesser extent conviction, an individual experienced increased their subsequent antisocial characteristics."[68] The sample was "predominantly Black (56%) and White (41%) with 3% Asian, Hispanic, and mixed-race/ethnicity", and "[a]s of 2012, the cohort

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[62] *Ibid*.
[63] Klepfisz, Daffern & Day, *supra* note 41 at 129, citing Jessica L Mooney & Michael Daffern, "Institutional Aggression as a Predictor of Violent Recidivism: Implications for Parole Decision Making" (2011) 10:1 International Journal of Forensic Mental Health 52.
[64] Seth J Prins, "Criminogenic or Criminalized? Testing an Assumption for Expanding Criminogenic Risk Assessment" (2019) Law and Human Behavior 1 at 2.
[65] *Ibid* at 3.
[66] *Ibid* at 4.
[67] *Ibid* at 8.
[68] *Ibid* [emphasis added].

[was]…assessed a total of 19 times".[69] The racialized and ethnic make-up of the sample "reflect[ed] the racial/ethnic composition of Pittsburgh public schools at the time."[70] Given his finding, Prins's research provides support for the concern that individualized risk reduction strategies "ignore…structural causes of exposure to the criminal justice system that are not fully mediated by individual-level factors."[71] In other words, risk appears to be something that is created through the structural practices of the criminal justice system. I will expand on the importance of the social and normative construction of crime and on the significance of state and societal oppression and marginalization below.

The second element of a dynamic risk factor involves the changeability of the risk factor—the ability of the factor to change, either spontaneously or due to intervention.[72] Klepfisz, Daffern, and Day did not identify concerns with the research supporting this element. Instead, they described several factors that meet this requirement, such as substance use: "intoxication and the use of substances wax and wane, even among heavy users, and evidence suggests that substance use can change following treatment".[73]

The third element concerns the ability of treatment and programming interventions to reduce violent recidivism. In other words, the theory is that, as a result of treatment and programming interventions that target the risk factor, violent recidivism will be reduced.[74] Unfortunately, "[t]here is…only limited evidence to suggest that completion of violent offender treatment will

[69] *Ibid* at 4.
[70] *Ibid*.
[71] *Ibid* at 8-9.
[72] Klepfisz, Daffern & Day, *supra* note 41 at 129.
[73] *Ibid*, citing Nena Messina et al, "A Randomized Experimental Study of Gender-Responsive Substance Abuse Treatment for Women in Prison" (2010) 38:2 Journal of Substance Abuse Treatment 97.
[74] Klepfisz, Daffern & Day, *supra* note 41 at 130.

lead to a reduction in violent recidivism".[75] Moreover, there is "even less evidence that reduced re-offending results from change in identified areas of dynamic risk."[76] For example, Klepfisz, Daffern, and Day describe a study carried out by Daryl G Kroner and Annie K Yessine.[77] This study looked at the relationships between cognitive-behavioural interventions, criminal and antisocial attitudes, and recidivism. Kroner and Yessine found differences in the results at a group level versus at an individual level. In particular, the group that participated in the treatment program was 53% less likely to be reconvicted than the control group. However, the only factor that showed a connection with reduced recidivism at an individual level was a factor that was different from those on which the treatment program focused. The treatment program primarily focused on targeting the factors of criminal and antisocial attitudes, but the individual-level results showed that the factor that was connected with reduced recidivism was antisocial *associates*. Kroner and Yessine conclude:

> Based on the present results, reducing crime-causing areas within a person has limited correspondence with preventing that person's likelihood of future crime. Whereas the between-groups results provide strong support for the Risk-Need-Responsivity (RNR) model…the within-person results do not. From an applied perspective, one cannot assume a reduction in individual risk because of program participation.[78]

[75] *Ibid*, citing Devon LL Polaschek & Rachael M Collie, "Rehabilitating Serious Violent Adult Offenders: An Empirical and Theoretical Stocktake" (2004) 10:3 Psychology, Crime & Law 321.
[76] Klepfisz, Daffern & Day, *supra* note 41 at 130.
[77] Daryl G Kroner & Annie K Yessine, "Changing Risk Factors That Impact Recidivism: In Search of Mechanisms of Change" (2013) 37:5 Law and Human Behavior 321.
[78] *Ibid* at 331.

Essentially, Kroner and Yessine's research showed that it is not clear that targeted programming reduces an individual's risk of being recriminalized.

Through their review of existing scholarship, Klepfisz, Daffern, and Day illuminate two significant evidentiary gaps in risk assessment and management research: (1) the lack of evidence to establish that risk factors actually precede violent behaviour; and (2) the limited evidence establishing that programming and treatment interventions that target specific dynamic risk factors reduce recidivism, and the even more limited evidence that the interventions reduce recidivism *because* they targeted those factors. These gaps are particularly relevant to sentencing law. As I will explore in more detail in the next chapter, judges rely on risk assessment evidence and risk factors in determining what type of sanction and what sort of treatment-related conditions to impose on a criminalized person. To the extent that sentencing judges are engaged in the project of trying to protect communities through the sentences that they impose on criminalized individuals, it is important to highlight the shortcomings of the tools that judges consider in that process.

Another concern in relation to dynamic risk factors involves the concept of capacity for change. In particular, scholars have recognized that the capacity for change is itself a double-edged sword. On the one hand, the Risk-Need-Responsivity Model's emphasis on change recognizes that people have the capacity to author their own lives. Bonta and Andrews developed the model in response to the "nothing works" perspective—the claim, prominent in the 1970s, that "nothing works" to rehabilitate criminalized people.[79] The Risk-Need-Responsivity Model asks clinicians and criminal justice practitioners to instead see individuals who have been criminalized in the

[79] See Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 7 at 223-26.

past not as inevitable offenders but as individuals who may be able to change their behaviours in the future. The model thus recognizes that no individual is reducible to a single behaviour, experience, or identity.

On the other hand, the notion of the changing individual, as employed in risk-assessment literature and instruments, relies upon problematic assumptions. First, it rests upon the state's claims about which forms of conduct render people as being in need of change. The theory calls upon criminalized people, criminal justice practitioners, and communities more broadly to accept the grounds on which the state criminalizes and coercively manages people. Tony Ward explains that dynamic risk factors incorporate norms from criminal law and ethics:

> It is apparent that the definition of dynamic risk factors and their inclusion in risk management principles is normative in at least two senses. First, the link with recidivism reveals that they are partly defined with respect to legal norms; that is, individuals acting contrary to the law. Second, there are also ethical norms at stake as well. The assumption is that when criminal laws are broken individuals and members of the community are significantly harmed.[80]

We should exercise significant caution in equating legal wrong with ethical wrong or ethical harm and in using legal wrong as a basis for 'rehabilitating' people. Canadian criminal law has a history of criminalizing people for actions that simply fall outside the boundaries of what the state and mainstream society considered to be the 'norm', such as same-sex sexual activity,

[80] Tony Ward, "Dynamic Risk Factors: Scientific Kinds or Predictive Constructs" (2016) 22:1-2 Psychology, Crime & Law 2 at 3.

which was not decriminalized until 1969. Canadian criminal law also has a history of criminalizing practices of Indigenous laws and politics, such as the Potlatch, which the federal government criminalized until 1951. And Canadian criminal law has a history of leaving some conduct outside the scope of criminal law on the basis that the state did not deem the group of people being harmed as worthy of protection. For example, the British Empire did not officially abolish slavery until 1834. Additionally, corporal punishment has a long history of legality in Canadian law: English common law historically allowed people to use corporal punishment on women and servants, with the practice being recognized as illegal by the time of criminal law's codification in Canada in 1892; masters were allowed to use corporal punishment on apprentices until 1955; and whipping criminalized people was allowed until 1972.[81]

More recently, academics have expressed concerns around numerous other examples, including the continued legality of the defence of corporal punishment of children,[82] the underreporting of sexual assault and the low rate of sexual assault convictions,[83] the criminalization of HIV non-disclosure,[84] the omission of "sex offenders" from abolitionist scholarship,[85] and the criminalization of Indigenous land defenders and environmental activists.[86]

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[81] Sharon D Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to Be Protected from Physical Assault, Part I" (1998) 41:3 Crim LQ 288 at 292-93 [Greene, "The Unconstitutionality of Section 43 Part I"].
[82] See *Criminal Code*, *supra* note 10, s 43. For critiques, see generally Greene, "The Unconstitutionality of Section 43 Part I", *supra* note 81; Sharon D Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault, Part II" (1999) 41:4 Crim LQ 462; Mark Carter, "Corporal Punishment and Prosecutorial Discretion in Canada" (2004) 12:1 Intl J Child Rts 41.
[83] See e.g. Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018).
[84] See *R v Mabior*, 2012 SCC 47, [2012] 2 SCR 584. For critique, see e.g. Aziza Ahmed, "Adjudicating Risk: AIDS, Crime, and Culpability" (2016) 2016:3 Wisconsin Law Review 627.
[85] Adina Ilea, "What About 'the Sex Offenders'? Addressing Sexual Harm from an Abolitionist Perspective" (2018) 26:3 Critical Criminology 357.
[86] See e.g. Irina Ceric, "Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance" (2020) 119:2 The South Atlantic Quarterly 353.

These examples illustrate the simple point that crime is a social construct. As Prins writes:

> Crime is in fact a complex, multilevel construct that denotes social deviance and norm violations, activities prohibited by the state and codified in law, and various dynamic subsets and intersections therein. Crime can thus be both a specific action/behavior *and a social process, the latter in terms of dynamic interactions among people, institutions, norms, and laws, all of which can differ over time and place*.[87]

As social practices, criminalization, imprisonment, and oppression have, moreover, historically been linked. For instance, Chris Chapman, Allison C Carey, and Liat Ben-Moshe describe the intimate connections between confinement, "treatment", and marginalized people.[88] Confinement was first regarded as being "useful" for confined people in the 1800s: as secularization spread across Christian Europe, people were viewed as being able to change their lives—"[o]ne could not only accrue wealth and status—as was evident in the new bourgeois class—but could also become educated, cultivated, sane, or 'civilized'".[89] As Chapman, Carey, and Ben-Moshe further explain, "[t]he idea of the individual transformation intersected with the 'treatment' of denigrated populations."[90] Relatedly, shortly after the British abolished slavery in Canada and in other colonies, the Province of Canada introduced the residential school system

[87] Prins, *supra* note 64 at 10 [emphasis added].
[88] Chris Chapman, Allison C Carey & Liat Ben-Moshe, "Reconsidering Confinement: Interlocking Locations and Logics of Incarceration" in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave Macmillan, 2014) [Ben-Moshe, Chapman & Carey, *Disability Incarcerated*] 3 [Chapman, Carey & Ben-Moshe, "Reconsidering Confinement"].
[89] *Ibid* at 5, citing Chris Chapman, "Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination" in Ben-Moshe, Chapman & Carey, *Disability Incarcerated*, *supra* note 88, 25.
[90] Chapman, Carey & Ben-Moshe, "Reconsidering Confinement", *supra* note 88 at 5.

and built a "Lunatic Asylum".[91] Additionally, prison staff began to inflict "strict routines" on prisoners "as a means of developing self-discipline."[92] Thus, despite the abolition of slavery, efforts to "transform" people who were viewed as "degenerate, disabled, criminalistic, or uncivilized" flourished. The prevailing vision of personhood "offered a very narrow conception of normalcy", against which all people were measured.[93] "Anything outside this narrow conception still required elimination"—elimination through transformation.[94] Furthermore, alongside practices of confinement arose practices of purportedly "integrat[ing]" people categorized as "slaves, First Nations, paupers, criminals, or intellectually, physically or psychiatrically disabled…into society as menial laborers."[95] In other words, "[t]he secular dream that people are masters of their own destiny only extended so far, and it intersected with the capitalist requirement for cheap labor."[96] Carey, Ben-Moshe, and Chapman thus demonstrate that, while the stated purposes and sites of confinement might change over time, confinement nevertheless continues to entrench power relations and norms.

Close attention to who and what is criminalized and close attention to which harms are left un-criminalized can reveal which groups of people the state views as needing to change and as needing protection, and which are not. Additionally, close attention to the ways in which state actors characterize criminalized people, position criminalized people within their communities, and position criminalized people in relation to the state can reveal the state's conception of how

[91] *Ibid* at 5-6, citing Suzanne Fournier & Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Toronto: Harper Collins, 1999) at 53 [as cited in Chapman, Carey & Ben-Moshe, "Reconsidering Confinement", *supra* note 88], and Jijian Voronka, "Re/moving Forward? Spacing Mad Degeneracy at the Queen Street Site" (2008) 33:1-2 Resources for Feminist Research 45.
[92] Chapman, Carey & Ben-Moshe, "Reconsidering Confinement", *supra* note 88 at 5-6.
[93] *Ibid* at 6, citing Lennard J Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (London: Verso, 1995).
[94] Chapman, Carey & Ben-Moshe, *supra* note 88 at 6.
[95] *Ibid*.
[96] *Ibid*.

to regard and respond to people who are involved in some forms of state-identified violence and/or harm. In drawing the reader's attention to just a few examples that show the normative nature of criminalization and the normative nature of depictions of criminalized and otherwise confined people, I aimed to briefly identify concerns both around who is criminalized and confined and around who is *not* criminalized or confined. In the fifth chapter of this dissertation, I will explore more deeply the idea that aspirations and efforts to de-criminalize and/or to de-incarcerate do not need to be separated from goals to end (and respond to) violence, including violence against women and children. For instance, Emily L Thuma traces activist movements inside and outside of US prisons in the 1970s, exploring a strand of grassroots activism that sought to eradicate *both* gender-based violence and incarceration.[97] By looking at the experiences of both people who carry out harm and people who are harmed (which often overlap), I think that we can see the criminal law's contradictions more clearly:[98] the criminal law and the criminal justice system maintain an allure of providing an opportunity for redressing violence and harm, but the criminal law's continued use of violent and oppressive practices suggest that it can, instead, simply perpetuate violence and oppression.

In addition to calling upon criminal justice practitioners, criminalized people, and communities to accept the state's decisions about who counts as someone in need of rehabilitation through criminal justice responses, dynamic risk factors assume that it is only an *individual* who needs to

[97] Emily L Thuma, *All Our Trials: Prisons, Policing, and the Feminist Fight to End Violence* (Urbana: University of Illinois, 2019).
[98] For a related argument, see e.g. Diana Majury, "What Were We Thinking? Reflections on Two Decades of Law Reform on Issues of Violence Against Women" in Margrit Eichler, Sheila Neysmith & June Larkin, eds, *Feminist Utopias: Re-Visioning Our Futures* (Toronto: University of Toronto Press, 2002) 125 at 137 (arguing that, "in the short term…we have to focus exclusively on the woman in this process", and, in order to avoid arguing for punishments that go against feminist values, "we should resist our understandable outrage and desist from publicly denouncing what continue to be glaringly short sentences for violence against women offences, relative to sentences for other serious crimes").

change, not also, or alternatively, society and/or the state.[99] Dynamic risk factors are defined as "changeable or potentially changeable factors that can be influenced or changed by psychological, social, or physiological means, such as treatment interventions."[100] Such factors are thus limited to those that can be targeted on an individualized level.[101] At the same time, they suppress the actions and inactions of state actors in policing, confining, and othering certain populations and in failing to provide needed resources and supports. As Kelly Hannah-Moffat explains, individuals are thus "responsibilized"[102] and blamed for their criminalization. By focusing on the individual, the model erases the state's discriminatory and violent practices, including historical oppressive practices (and their continued effects) and contemporary practices. Moreover, the model not only erases the state's oppression but also re-attributes responsibility for oppression to oppressed people themselves.

Similar to Hannah-Moffat, Patricia Monture-Angus critically explains that "[w]hat is being measured is not 'risk' but one's experiences as part of an oppressed group."[103] Monture-Angus is unequivocal in her criticism of the individualized nature of risk assessment instruments. She argues that individualized conceptions of risk fail to account for the effects that colonial oppression has had both on the lived experiences of individual Indigenous people and on Indigenous communities:

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[99] See also Jessica M Eaglin, "Technologically Distorted Conceptions of Punishment" (2019) 97:2 Wash U L Rev 483 at 507, citing Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016) at 31 ("risk tools…grew from a larger initiative to address the sociohistorical conditions that produce crime through a one-sided approach focused on controlling the individual's behavior rather than simultaneously addressing social conditions in society").
[100] Stephen CP Wong & Audrey Gordon, "The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool" (2006) 12:3 Psychology, Public Policy, and Law 279 at 283.
[101] Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty" (2005) 7:1 Punishment & Society 29 at 39, 43 [Hannah-Moffat, "Transformative Risk Subject"].
[102] *Ibid* at 42 [endnote omitted].
[103] Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" (1999) 19:1&2 Canadian Woman Studies 24 at 27 [Monture-Angus, "Women and Risk"].

> These risk scales are all individualized instruments. Applying these instruments to Aboriginal people (male or female) is a significant and central problem. The individualizing of risk absolutely fails to take into account the impact of colonial oppression on the lives of Aboriginal men and women. Equally, colonial oppression has not only had a devastating impact on individuals but concurrently on our communities and nations.[104]

Monture-Angus thus identifies the erasure of the state's oppression of Indigenous people as a central problem with risk assessment instruments. Furthermore, she recognizes that the issue of the erasure of the state obscures not only the portrayal of individuals but also the portrayal of Indigenous communities and nations. As I discussed in the previous chapter, individualized responsibility involves placing blame on both Indigenous individuals and Indigenous communities for experiences of state oppression. Such practices essentialize Indigenous people, making hardship and suffering appear to be intrinsic to Indigenous communities and Indigenous heritage, rather than as experiences that are fostered and sustained through the state's actions and inactions.

Monture-Angus's criticisms of risk assessment instruments are echoed by Rachel Fayter in her 2016 publication in the Journal of Prisoners on Prisons.[105] In her piece, which draws on

[104] *Ibid* at 27, citing Patricia A Monture-Angus, "Lessons in Decolonization: Aboriginal Over-Representation in Canadian Criminal Justice" in David Long & Ovide Dickason, *Visions of the Heart* (Toronto: Harcourt Brace, 1996) 335.
[105] Rachel Fayter, "Social Justice Praxis within the Walls to Bridges Program: Pedagogy of Oppressed Federally Sentenced Women" (2016) 25:2 Journal of Prisoners on Prison 56.

scholarship and on her own lived experiences,[106] Fayter criticizes the Correctional Service of Canada's programming for its individualization of crime and risk:

> CSC defines a risk factor as an *individual* characteristic that leads one to engage in problematic or criminal behaviour. With the intent of encouraging "accountability", *social, economic, familial and environmental factors are disregarded* in correctional conceptualizations of risk. Thus, *the underlying structural oppressions – which form the basis of our needs – are ignored*…CSC program facilitators inform us that *we always have a choice, even if that choice means starving, being homeless or dying*. We are told these choices are always preferable to committing a crime. As I reflect on the social justice readings and my experience within CSC programs, *I continue to feel angry, frustrated, and powerless. These programs do not explore issues of marginalization, diversity, oppression or inequality* – and they were not developed or evaluated with input from their intended beneficiaries."[107]

Fayter's critique reiterates the concepts that individualized risk assessments omit. These concepts include "social, economic, familial and environmental factors", and they underpin an individual's needs. Additionally, Fayter illuminates some of the emotional experiences that can accompany the experience of being told that crime is a "choice" when one's lived experiences

[106] In the author note, Fayter identified as "a 35-year-old single woman currently incarcerated at Grand Valley Institution in Kitchener, Ontario" (*ibid* at 71). She holds a BA in Psychology and an MA in Community Psychology and was working towards a PhD before her incarceration, and she "has done extensive work in both community and research settings with troubled children and youth, and homeless adults grappling with mental health issues" (*ibid* at 71).
[107] *Ibid* at 60-61.

suggest that marginalization, oppression, and inequality have significantly constrained one's "choices".[108]

The limited view offered by the risk lens (as constructed by the Risk-Need-Responsivity Model) can be illustrated by examining the dynamic risk factor of procriminal associates, and by looking beyond the boundaries of the factor to see what it leaves out. With respect to the issue of simply scoring high within this category, Monture-Angus writes that Aboriginal prisoners will not score well in this category because "the incidence of individuals with criminal records is greater in Aboriginal communities."[109] As Monture-Angus also establishes, while "Aboriginal people do not belong to communities that are functional and healthy", it is "colonialism" that "is significantly responsible for this fact."[110] Monture-Angus thus places responsibility for harm and struggle onto the state, rather than onto Indigenous individuals and communities.

With respect to the concept of changing one's score over time (through intervention), the very idea of *changing* one's procriminal associates suggests that a practitioner might assess an individual's "rehabilitation" on the basis of whether or not the individual has stopped associating with their "procriminal" family members and close friends. Rather than looking at the practices that bring certain groups into regular contact with the police and state agencies such as child protective services, the model simply asks individuals to potentially leave members of their communities.

[108] On constrained choices, see also e.g. Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 45-53.
[109] Monture-Angus, "Women and Risk", *supra* note 103.
[110] *Ibid* at 24.

Research suggests that Indigenous women likely face distinctive challenges, or more precisely, distinctive conflicting demands, in this area. In particular, as Emma Cunliffe and Angela Cameron's research into judicially convened sentencing circles demonstrates, sentencing judges and appellate judges have placed responsibility on women survivors to both protect themselves from violence and to help their male partners stop committing violence against them.[111] Sentencing judges and risk assessment logic thus place criminalized Indigenous women survivors in a bind. As Cunliffe and Cameron's research shows, sentencing judges expect Indigenous women survivors of domestic violence to support their abusive male partners.[112] At the same time, the state criminalizes Indigenous women for violence occurring within a domestic violence context, in relation to an abusive partner. The contradictory demands that the state will thus place on some Indigenous women—to both support their abusive partners and to leave their partners (that is, to protect themselves by leaving and to reduce look after their criminogenic needs by not associating with "procriminal associates")—takes away their agency. These demands, on their own and together, fail to account for the complexities of both of these possibilities and the multiple ways in which Indigenous women might navigate and respond to these experiences and circumstances. In the name of fostering change in abusive male partners, sentencing judges dismiss the needs of women survivors and construct women survivors in an essentialized way. As Cunliffe and Cameron write, when sentencing and appellate judges engage in the rare task of depicting a survivor's experiences within a judgment, judges appeal to "enduring tropes of women's selflessness, feminine dependence, and the disorder presented by

[111] Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 CJWL 1. Recently, Parliament amended the *Criminal Code* to require sentencing judges to consider Indigenous women victims' vulnerability when imposing sentences for offences involving intimate partner violence (*Criminal Code*, *supra* note 10, 718.201) and to emphasize denunciation and deterrence when imposing sentences for offences involving violence against Indigenous women (*ibid*, s 718.04).
[112] Cunliffe & Cameron, *supra* note 111 at 28.

racialized women's bodies".[113] Moreover, the individualized lens of risk leaves out an analysis of colonialism and the ways in which it has generated, and continues to generate, violence within Indigenous communities. Rather than examining the impacts of colonialism, the risk lens leaves out the role of the state in generating harm and violence and leaves out the possible role of the state in supporting—and not thwarting—the facilitation of healing. Individual women survivors are instead asked to take on the role of healing their abusive male partners. And yet, if a woman survivor is also convicted of a violent offence, her rehabilitative prospects might be evaluated based on whether or not she associates with family members and friends who have also been criminalized.

Similarly, the dynamic risk factor of antisocial personality pattern masks racialized responses to antisocial behaviour among youths. For example, Ryann A Morrison, Jonathan I Martinez, Emily C Hilton, and James J Li review a collection of research establishing that "African American youths experience more negative consequences for their ASB [antisocial behaviours] relative to their Caucasian peers",[114] including more experiences in juvenile detention[115] and "harsher and more frequent school-based consequences…, including more expulsions and suspensions in comparison to their Caucasian peers".[116] Research in Canada suggests similar trends. While the

[113] *Ibid* at 26, citing Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 2001) [as cited in Cunliffe & Cameron, *supra* note 111], and Lisa Sarmas, "Storytelling and the Law: A Case Study of *Louth v. Diprose*" (1994) 19:3 Melb U L Rev 701.
[114] Ryann A Morrison et al, "The Influence of Parents and Schools on Developmental Trajectories of Antisocial Behaviors in Caucasian and African American Youths" (2019) 31:4 Development and Psychopathology 1575 at 1575.
[115] *Ibid*, citing Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Glossary* (2015), online: <https://www.ojjdp.gov/ojstatbb/snapshots/index.html> and US Census Bureau, Quick Facts: United States (2016), online: <https://www.census.gov/quickfacts/fact/table/US/RHI225216#viewtop>.
[116] Morrison et al, *supra* note 114, citing Lauren Brinkley-Rubinstein, Krista L Craven & Mark M McCormack, "Shifting Perceptions of Race and Incarceration as Adolescents Age: Addressing Disproportionate Minority Contact by Understanding How Social Environment Informs Racial Attitudes" (2014) 31:1 Child and Adolescent Social Work Journal 25, and KM McIntosh et al, "Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline" (2014) 5:2 Journal of Applied Research on Children 1.

reasons for suspension in the Toronto context were unnoted, a 2019 report of the Toronto District School Board indicated that, in the 2016-2017 school year, "Black students…were disproportionately high in the suspensions/ expulsions" and "Indigenous, Middle Eastern and Mixed students were over-represented in the suspensions/expulsions."[117] Relatedly, research involving a New South Wales population sample showed that, "[a]t the most punitive end of [criminal justice] decision-making, Indigenous young people are most likely to be dealt with by way of arrest and charge, while at the least punitive end of decision-making non-Indigenous young people are more likely to be dealt with by way of a warning."[118] These examples illustrate the "in betweennes" of risk—risk is something that is constructed at the social level, with structures of colonialism and racism influencing which people the state construes as "risky".

In a critical analysis of the social construction of "African Canadian male youth who are often categorized as 'at risk students'", Carl E James draws on critiques of the "at risk" language.[119] These critiques are reminiscent of critiques of dynamic risk factors, demonstrating that individualized "risk" conceals structural patterns of oppression and structural resistance to difference. For instance, James refers to Terry Wotherspoon and Bernard Schissel's argument that "'[t]he language of risk can serve as a *euphemism* for racism, sexism, and biases' based on factors such as class, immigrant status, family makeup, neighborhood of residence, cultural assumptions, and other 'risk-inducing' constructs".[120] Similarly, James draws on M Fine's argument that "[t]he cultural construction of a group defined through a discourse of risk

[117] S Zheng, *Caring and Safe Schools Report 2017 – 2018* (Toronto: Toronto District School Board, 2019) at 7.
[118] Chris Cunneen, "Changing the Neo-Colonial Impacts of Juvenile Justice" (2008) 20:1 Current Issues in Criminal Justice 43 at 50.
[119] Carl E James, "Students 'at Risk': Stereotypes and the Schooling of Black Boys" (2012) 47:2 Urban Education 464 at 467.
[120] *Ibid* at 465, quoting Terry Wotherspoon & Bernard Schissel, "The Business of Placing Canadian Children and Youth 'At-Risk'" (2001) 26:3 Canadian Journal of Education 321 at 331 [emphasis added].

represents a quite partial image, typically strengthening those institutions and groups that have carved out, severed, denied connection to, and then promised to '*save*' those who will undoubtedly remain 'at risk'".[121] Fine's argument mirrors concerns about the criminal justice system's purported attempts to "save" criminalized Indigenous people. The Risk-Need-Responsivity Model itself claims to be rooted in an altruistic aim—the aim to rehabilitate criminalized people. Yet this objective strikes me as being intimately connected with a goal of reinforcing the role of violent criminal justice (and related) institutions in "saving" people whom the state has cast as inferior to white, able-bodied, heterosexual, financially secure males. Furthermore, the state continues to blame criminalized people for the circumstances and experiences generated by the state's oppression and violence. To carry over Fine's language into this context: risk logic "strengthen[s]" the criminal justice system—a collection of "institutions…that have carved out, severed, denied connection to" criminalized Indigenous people—and promises to then "'save'" criminalized Indigenous people.

James's research further clarifies the types of oppressive practices that go unnoted in risk logic—namely "stereotyping and cultural attribution".[122] James acknowledges that, "[u]nderstandably, there is a need to identify students who are at risk because of their failure to attend school, earn passing grades, comply with school discipline, and/or productively engage with educational expectations."[123] In an effort to help, schools have implemented interventions, such as programs involving mentorship. Nevertheless, such interventions do not appear to have had "an impact on the 'risky' practices and circumstances of students, particularly African Canadian (used

[121] Michelle Fine, "Making Controversy: Who's 'At Risk'?" in Roberta Lyn Wollons, ed, *Children at Risk in America* (New York: State University of New York, 1993) 91 at 91, quoted in James, *supra* note 119 at 465 [emphasis added].
[122] James, *supra* note 119.
[123] *Ibid* at 466.

interchangeably with Black) males."[124] Rather, James notes that "Black youth are counted among the most 'at risk' students".[125] The reasons why schools continue to classify Black students as being "at risk" include "their continued disengagement from school, poor academic performance, and high rates of absenteeism, suspension, expulsion, and dropout, due in part to the school's 'progressive discipline' policies and practices".[126] In the face of persistent "at risk" designations despite schools' efforts to intervene, James theorizes that schools have continued to label African Canadian male students as being "at risk" because of the "often *unstated components of the 'at risk' designation*, that is, stereotyping and cultural attribution in the social construction of these 'at risk' males."[127] James explores, in particular, "the stereotypes of African Canadian males as immigrants, fatherless, athletes, troublemakers, and underachievers, noting how these stereotypes tend to reflexively serve to frame individuals' perceptions and discourses of these youth and, in the process, contribute to the very educational and social problems that the 'at risk' identification is expected to address."[128] Risk logic thus not only relies on stereotypes but also perpetuates stereotypes. Moreover, in enabling practices rooted in stereotyping, risk management efforts develop precisely the kinds of "problems" that they were meant to deal with. At the same time, the myths continue, and institutions blame marginalized individuals and their backgrounds, rather than their own practices and assumptions, for "risk".

Similarly, the Risk-Need-Responsivity Model demonstrates an unwillingness to deal directly with institutional and social harms such as racism. The model instead focuses on the

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[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*, citing A Bhattacharjee, "Paying the Price: The Human Cost of Racial Profiling" (Toronto: Ontario Human Rights Commission, 2003) [as cited in James, *supra* note 119] and Frances Henry & Carol Tator, *The Colour of Democracy: Racism in Canadian Society*, 4th ed (Toronto: Nelson Education, 2010) [footnote omitted].
[127] James, *supra* note 119 [emphasis added].
[128] *Ibid* [footnote omitted].

consequences of such harms, such as the circumstances in which some racialized people live and the ways in which Canadian society marginalizes some racialized people. The model leaves the harms themselves fuzzy, or out of focus, and in the background. Furthermore, similar to what James suggests, the model itself contributes to "problems" that it is meant to redress. As I mentioned above, for example, research has begun to show that criminalization itself can increase an individual's level of "risk". In the next chapter, I will turn to look at what sorts of stereotypes and cultural attributions appear in sentencing judgments. Specifically, I examine the typecasts that sentencing judges apply to criminalized people and to criminalized people's families and communities as part of the practice of implementing section 718.2(e) of the *Criminal Code* and risk assessment evidence. These practices can similarly be described as having been designed to "save" the very people whom the state has marginalized and oppressed.

Another dynamic risk factor is "present employment". This factor is understood as changeable, in the sense that a person can move from employment to unemployment and vice versa. However, the factor seems to be imbued with the assumption that finding employment depends only on individual efforts involving, for example, self-motivation, self-control, and discipline. It leaves out the reality that, in Canada, Indigenous people live with high rates of unemployment.[129] As in the context of mass imprisonment, a statistical study of unemployment "rates" of Indigenous people exists within a settler colonial framework. The normative assumption is that paid employment is good and valuable and that unpaid employment is not good and invaluable. In addition to relying on—and reinforcing—the settler colonial logic that underpins the perceived value and importance of paid employment, the Risk-Need-Responsivity Model also

[129] Statistics Canada, *Labour Force Characteristics by Region and Detailed Indigenous Group*, Table: 14-10-0365-01 (Ottawa: Statistics Canada, 6 November 2015).

has the potential to strengthen negative stereotypes against Indigenous people who are unemployed. In particular, in addition to portraying employment as something that a rational individual would necessarily strive towards, the model also treats employment as something that is solely within the control of an individual. The model might, therefore, perpetuate the idea that an Indigenous person is unemployed because of their own work habits and abilities, rather than because of, for instance, the discrimination that an Indigenous person might face in finding employment and within employment. While the Risk-Need-Responsivity Model thus possibly buttresses such stereotypes, it nonetheless claims to be taking steps to *support* all criminalized people.

Risk assessment instruments enter the territory of systemic racism, colonialism, sexism, ableism, and heteronormativity. And yet the instruments place all the responsibility to change these forms of oppression onto the individuals whom the state oppresses. As pointed out in the critical scholarship I discussed above, this incoherence is, unfortunately, not necessarily accidental. Nor is the incoherence necessarily a sign of a system that is not functioning in the way it was designed to operate. The state has confined and limited the opportunities of disabled, racialized, and Indigenous people. At the same time, the state has claimed to "save" disabled, racialized, and Indigenous people through further confinements, further control, and further denial of its own harmful actions (and inactions).

3.4 Risk Assessment, Criminalized Indigenous People, and the Supreme Court: *Ewert*

Ewert v Canada is the leading Supreme Court of Canada case on the use of risk assessment instruments in the criminal justice context. At the time that the Supreme Court handed down its judgment in 2018, Jeffrey G Ewert was 56 years old and was serving two concurrent life sentences for murder and attempted murder. Through two, separate attacks, which took place in 1984, he strangled and sexually assaulted two women. As of 2018, Jeffrey Ewert had served over 30 years in federal custody.

Jeffrey Ewert identifies as Métis, and through these proceedings, he challenged the Correctional Service of Canada (CSC)'s use of actuarial risk assessment and psychological instruments on the basis that the instruments' validity had not been established with respect to Indigenous people. In particular, Jeffrey Ewert challenged the CSC's use of the following tools: the Hare Psychopathy Checklist-Revised ("PCL-R");[130] the Violence Risk Appraisal Guide ("VRAG");[131] the Sex Offender Risk Appraisal Guide ("SORAG");[132] the Static-99;[133] and the Violence Risk Scale – Sex Offender ("VRS-SO").[134] Jeffrey Ewert claimed that the CSC used these five tools to assess

[130] RD Hare, *The Hare Psychopathy Checklist-Revised* (Toronto: Multi-Health Systems, 1991), as cited in Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 5; RD Hare, *The Hare Psychopathy Checklist-Revised*, 2d ed (Toronto: Multi-Health Systems, 2003), as cited in Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 5.
[131] Vernon L Quinsey et al, *Violent Offenders: Appraising and Managing Risk* (Washington: American Psychological Association, 1998), Appendix A.
[132] *Ibid*, Appendix B.
[133] R Karl Hanson & David Thornton, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales" (2000) 24:1 Law and Human Behavior 119 [Hanson & Thornton, "Improving Risk Assessments for Sex Offenders"].
[134] S Wong et al, *The Violence Risk Scale: Sexual Offender version (VRS-SO)* (Saskatoon: Regional Psychiatric Centre and University of Saskatchewan, 2003), as cited in Mark E Olver et al, "Predictive Accuracy of Violence Risk Scale-Sexual Offender Version Risk and Change Scores in Treated Canadian Aboriginal and Non-Aboriginal Sexual Offenders" (2018) 30:3 Sexual Abuse 254.

his criminogenic needs and his level of risk.[135] Additionally, he claimed that the tools had not been validated with respect to Indigenous people. In other words, the tools had been created and validated mainly on samples of people that excluded Indigenous people.[136] He submitted that, in using these tools in relation to Indigenous people, the CSC breached its obligations under the *Corrections and Conditional Release Act*[137] and infringed his section 7 and section 15 *Charter* rights.[138]

3.4.1 A Closer Look at the Challenged Instruments

Before turning to the Supreme Court's analysis in *Ewert*, I will discuss the tools that were at issue in the case. In *Ewert*, neither of the judgments—delivered by Justice Wagner (as he then was) for the majority and by Justice Rowe, dissenting—provided much information about the challenged instruments. For example, with respect to the Hare Psychopathy Checklist Revised, Justice Wagner wrote that it is "a tool that was designed to assess the presence of psychopathy but is also used to assess the risk of recidivism."[139] For each of the remaining tools, Justice Wagner similarly provided succinct summaries:

> [T]he Violence Risk Appraisal Guide…and the Sex Offender Risk Appraisal Guide…[are] two actuarial tools designed to assess the risk of violent recidivism; the Static-99…[is] an actuarial tool designed to estimate the probability of sexual and violent

[135] *Ewert*, *supra* note 3 at para 12.
[136] *Ibid*.
[137] *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].
[138] *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*]. See *Ewert*, *supra* note 3 at para 12.
[139] *Ewert*, *supra* note 3 at para 11.

> recidivism; and the Violence Risk Scale – Sex Offender…[is] a rating scale designed to assess the risk of sexual recidivism that is used in connection with the delivery of sex offender treatment.[140]

In what follows, I offer a more detailed summary of these instruments. I indicate the types of factors that the instruments incorporate, and, for the instruments that were specifically designed as risk assessment tools, I note their proxies for "recidivism".

All of the challenged tools other than the Hare Psychopathy Checklist were specifically developed as risk assessment instruments. Three of the tools—the VRAG, the SORAG, and the Static-99—are second-generation actuarial risk assessment tools. In other words, they were not developed in connection with the general psychology theory of criminal conduct,[141] and they only incorporate static risk factors. The developers of the Static-99, R Karl Hanson and David Thornton, note the limits of the instrument as a result of its focus on static factors: "Static-99 is intended to be a measure of long-term risk potential. Given its lack of dynamic factors, it cannot be used to select treatment targets, measure change, evaluated [*sic*] whether offenders have benefited from treatment, or predict when (or under what circumstances) sex offenders are likely to recidivate."[142] As second-generation instruments, therefore, the VRAG, SORAG, and Static-99 rely solely on historical information, rather than also on the types of factors that are regarded as "changeable". Additionally, they are all purely actuarial instruments.[143]

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[140] *Ibid* at para 11.
[141] See Bonta & Andrews, "Risk-Need-Responsivity Model", *supra* note 6 at 15 (discussing the VRAG and STATIC-99 in particular).
[142] Hanson & Thornton, "Improving Risk Assessments for Sex Offenders", *supra* note 133 at 132.
[143] Grant T Harris et al, *Violent Offenders: Appraising and Managing Risk*, 3d ed (Washington: American Psychological Association, 2015) at 121 (on the VRAG and the SORAG) [Harris et al, *Violent Offenders*, 3d ed]; Andrew Harris et al, *Static-99 Coding Rules: Revised – 2003* (Ottawa: Department of the Solicitor General of

With respect to the instruments' proxies for recidivism, the VRAG was designed to predict "any new criminal charge for a violent offense."[144] The SORAG is a modified version of the VRAG, and it was specifically "conceptualized for sexual offenders to assess violent recidivism risk that includes sexual offenses involving physical contact with the victim (sexual hands-on recidivism)."[145] Like the VRAG, the SORAG aims to predict recidivism by predicting "criminal charges".[146] Finally, the recidivism criteria in the Static-99's samples included both convictions and charges/readmissions.[147]

Among the instruments, the static factors include romantic relationships (whether the individual has never been married[148] or whether the individual is single[149]), difficulties adjusting in elementary school,[150] past criminalization (including the types of offences),[151] the individual's relationship with the victim(s) of their prior offence(s),[152] the gender of the victim(s),[153] the individual's age,[154] the individual's living circumstances when they were a child (whether the

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Canada, 2003) at 4 (on Static-99, noting that additional assessments "should be stated in any report as 'additional factors that were taken into consideration' and not 'added' to the STATIC-99 Score").

[144] Harris et al, *Violent Offenders*, 3d ed, *supra* note 141 at 122.

[145] Martin Rettenberger et al, "Actuarial Risk Assessment of Sexual Offenders: The Psychological Properties of the Sex Offender Risk Appraisal Guide (SORAG)" (2017) 29:6 Psychological Assessment 624 at 625.

[146] *Ibid*.

[147] Hanson & Thornton, "Improving Risk Assessments for Sex Offenders", *supra* note 133 at 123, Table 2.

[148] VRAG (see Grant T Harris et al, "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument" (1993) 20:4 Criminal Justice and Behavior 315 at 324, Table 2); SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).

[149] Static-99 (see Ulrika Haggård-Grann, "Assessing Violence Risk: A Review and Clinical Recommendations" (2007) 85:3 Journal of Counseling & Development 294 at 297).

[150] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).

[151] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1), Static-99 (see Haggård-Grann, *supra* note 149).

[152] Static-99 (see Haggård-Grann, *supra* note 149).

[153] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1), Static-99 (see Haggård-Grann, *supra* note 149).

[154] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1), Static-99 (see Haggård-Grann, *supra* note 149).

individual, as a child, lived with both of their parents[155] or whether the individual, as a child, was separated from their parents[156]), psychiatric diagnosis of a personality disorder,[157] psychiatric diagnosis of schizophrenia,[158] problems with, or abuse of, alcohol,[159] the individual's past behaviour on release (whether they broke conditional release conditions in the past),[160] their results on a phallometric test,[161] and their score on the Psychopathy Checklist-Revised assessment.[162]

The fourth tool at issue was the VRS-SO. The VRS-SO is a third-generation risk assessment instrument that aims to identify risk and plan treatments for sexual offenders.[163] It is "designed to assess sexual violence risk, identify targets for sexual violence risk management, and to assess changes in risk from treatment or other change agents."[164] In studies validating the VRS-SO, recidivism is "defined as any conviction for a new sexual or nonsexual violent offense following first release to the community after program participation."[165] A sexual offense is defined as "any conviction for an offense that was clearly sexual in nature (e.g., sexual assault, sexual interference) or was sexually motivated as determined by reviewing police reports."[166] A

[155] SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[156] VRAG (see Harris, Rice & Quinsey, *supra* note 148).
[157] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[158] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[159] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[160] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[161] SORAG (see Rettenberger et al, *supra* note 145 at 626, Table 1).
[162] VRAG (see Harris, Rice & Quinsey, *supra* note 148), SORAG (see Rettenberger at al, *supra* note 145 at 626, Table 1).
[163] Mark E Olver et al, *supra* note 134 at 257.
[164] *Ibid*.
[165] Mark E Olver & Stephen CP Wong, "The Validity and Reliability of the Violence Risk Scale-Sexual Offender Version: Assessing Sex Offender Risk and Evaluating Therapeutic Change" (2007) 19:3 Psychological Assessment 318 at 321.
[166] *Ibid* [footnote omitted].

nonsexual violent offense is defined as "an offense against a person that was not sexually motivated (e.g., nonsexual assault, robbery, uttering threats, murder)."[167]

The VRS-SO includes both static and dynamic factors. The static factors relate to the individual's age, the type of sexual offences for which the individual has been convicted, the individual's relationship to the victim(s), the gender of the victim(s), and the dates on which sentences were previously imposed.[168] The dynamic factors concern "[s]exual deviant lifestyle", "[s]exual compulsivity", "[o]ffense planning", "[c]riminal personality", "[c]ognitive distortions" relating to sexual offences, "[i]nterpersonal aggression", "[e]motional control", a lack of "insight" into the individual's actions of carrying out sexual offences), "[s]ubstance abuse" that is connected with their sexual offences, insufficient "[c]ommunity support" or a disinclination to utilize this support, "[r]eleased to high-risk situations", "[s]exual offending cycle", "[i]mpulsivity", unwillingness to "[c]ompl[y] with community supervision" or with "[t]reatment", "[d]eviant sexual preference", and "[i]ntimacy deficits".[169]

The final instrument that Jeffrey Ewert challenged was the Hare Psychopathy Checklist. Robert Hare first published the Psychopathy Checklist (PCL) in 1991 and then a revised version (PCL-R) in 2003. The PCL-R functions by scoring a number of items on a scale from 0 to 2: "'0' (zero) for not applicable, '1' for uncertain, and '2' for definitely present."[170] As explained by Bonta and Andrews, "[t]he higher the score, the more likely the individual is a psychopath."[171] While the PCL-R is a diagnostic tool, Bonta and Andrews identify both static and dynamic risk

[167] *Ibid*. See also Olver et al, *supra* note 134 at 260.
[168] Olver & Wong, *supra* note 165 at Appendix.
[169] *Ibid*.
[170] Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 7 at 101.
[171] *Ibid*.

factors within the instrument. The static factors relate to the individual's romantic relationships (short duration), behavioural issues as a child, involvement with the criminal justice system at a young age and previous "failure on parole", and a history of criminalization for a variety of offences.[172] Bonta and Andrews classify the following factors as dynamic factors, or criminogenic needs: "[l]ying and manipulative, indiscriminative sexual relationships", "[s]hows little guilt, denies responsibility", and "[p]oor self-control, unrealistic goals".[173] Additionally, Bonta and Andrews note that the instrument includes the following responsivity factors: "[o]verly charming, shallow"; "[n]arcissistic"; and "[s]ensation seeker".[174]

This review demonstrates that, despite the attempts of risk logic to individualize risk, risk factors themselves reveal the "in betweenness" risk. For example, an assessment of people's marital status tells us about the state's normative differentiations between, and judgments of, family structures. Additionally, prior offences reveal that the state has criminalized an individual in the past, diagnoses of psychiatric conditions show that professionalized psychiatrists have marked an individual's mental and/or cognitive abilities as being different from the 'norm', and difficulties adjusting in elementary school might suggest that schools may not have had sufficient supports in place to help students adjust. All of these factors involve both individuals and the state and other institutions and professionalized bodies. It is impossible to disaggregate the individual from the social, and it would be preferable for criminal justice practitioners to instead identify and analyze points of intersection.

[172] *Ibid* at 111, Table 5.3.
[173] *Ibid*.
[174] *Ibid*.

The review of the risk assessment instruments also demonstrates that the tools measure non-neutral proxies for recidivism. In *Ewert*, Justice Wagner explained that the risk assessment instruments were designed to predict recidivism. However, Justice Wagner did not include the definitions of recidivism that are utilized by the studies developing, or testing the validity of, the instruments. Importantly, the studies use a new charge and/or conviction as a proxy for recidivism (or for reoffence). Justice Wagner is not alone in this labelling—proponents and developers of risk assessment instruments also refer to the instruments' predictions of recidivism and reoffending.[175] Yet this is a significant clarification: whereas the terms recidivism and reoffending obscure the role of the state in charging and convicting people, the language of an individual being charged and convicted by the state brings the state and its practices back into view. As Kelly Hannah-Moffat argues, "*simple statistical correlations between gender, race, and crime tell us more about criminal justice practices than offender behavior*. Actual rates of recidivism are not observable. Instead, recidivism as defined in risk assessment instruments is an indicator of arrest or convictions."[176] Cathy O'Neil makes a similar observation. She considers the question, "why are nonwhite prisoners from poor neighborhoods more likely to commit crimes?"[177] In answering this question, she deals first with the answer that is implied by the data inputs: based on the data going into the algorithms, these groups of individuals are regarded as being "more likely to be jobless, lack a high school diploma, and have had previous run-ins with the law. And their friends have, too."[178] But O'Neil also goes further and counters this answer

[175] See Sandra G Mayson, "Bias In, Bias Out" (2019) 128:8 Yale LJ 2219 at 2251-54.
[176] Kelly Hannah-Moffat, "The Uncertainties of Risk Assessment: Partiality, Transparency, and Just Decisions" (2015) 27 Federal Sentencing Reporter 244 at 246 [emphasis added].
[177] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Broadway Books, 2017) at 97.
[178] *Ibid*. O'Neil seems to be referring here to the types of questions included in the LSI-R (the Level of Supervision Inventory – Revised) questionnaire, which include questions relating to the first time the individual was "involved with the police" and about the individual's friends' and family's criminal records (see *ibid* at 25-26).

with a perspective that focuses on the state's role—on the likelihood of arrest rather than the likelihood of carrying out an offence. As O'Neil explains:

> Another way of looking at the same data…is that these prisoners *live in poor neighborhoods with terrible schools and scant opportunities. And they're highly policed.* So the chance that an ex-convict returning to that neighborhood will have another brush with the law is no doubt larger than that of a tax fraudster who is released in a leafy suburb. In this system, the poor and non-white are punished more for being who they are and living where they live.[179]

O'Neil's analysis is similar to James's critique of the construction of Black male youth as "at risk". Individualized risk logic views marginalized people as simply being more likely to meet the factors that would put them at risk for committing criminal offences in the future. However, marginalized groups are more likely to be subjected to negative stereotypes, to a lack of resources, and to higher levels of policing or other forms of surveillance and management. In other words, when we shift the lens from a narrow, individualized focus to a broad, contextualized one, we can see that the state has contributed to creating the conditions that position marginalized people as meeting the criteria for being portrayed as "risky".

3.4.2 Ascribing Risk to Individuals and to Culture

In this section, I turn to the majority's analysis of risk assessment tools in *Ewert*. Justice Wagner held that the CSC breached its obligations under the *CCRA*. In particular, the CSC breached its

[179] *Ibid* at 97 [emphasis added].

obligation under section 24(1) of the *CCRA*, which provides: "The Service shall 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."[180]

Justice Wagner held that, contrary to section 24(1) of the *CCRA*, the CSC did not take "all reasonable steps" to make sure that the information from the psychological and risk assessment instruments was accurate, as applied in relation to Jeffrey Ewert and other imprisoned Indigenous people. Justice Wagner determined that there was "ampl[e] support" for the trial judge's finding that the CSC did not take reasonable steps to verify this information.[181] The support included the trial judge's findings "that the CSC had long been aware of concerns regarding the possibility of psychological and actuarial tools exhibiting cultural bias" and that the CSC had researched the validity of other actuarial tools as applied in relation to Indigenous people and discontinued its use of those tools.[182] Additionally, other jurisdictions had researched the cross-cultural validity of some of the instruments that were at issue in this case.[183] The trial judge also found that the CSC did "not take…any action to confirm the validity of the impugned tools and that it…continued to use them in respect of Indigenous offenders without qualification. This was true despite the fact that research by the CSC into the impugned tools, though challenging, would have been feasible."[184]

With respect to the meaning of validity, Justice Wagner referred to Dr. Hart's testimony at trial. According to Dr. Hart—a psychology professor—validity "refers to 'the accuracy or

[180] *CCRA*, *supra* note 137, s 24(1).
[181] *Ewert*, *supra* note 3 at para 48.
[182] *Ibid* at para 49.
[183] *Ibid*.
[184] *Ibid* at para 50.

meaningfulness of test scores' and…'with respect to a violence risk assessment tool, the accuracy would be the ability of the test scores to forecast future violence'".[185] Cross-cultural bias or cross-cultural variance constitutes a particular type of invalidity: "Dr. Hart testified that cross-cultural variance occurs when the reliability or validity of an assessment tool varies depending on the cultural background of the individual to whom the tool is applied."[186]

Justice Wagner also found support for the CSC's failure to take reasonable steps by interpreting section 24(1) of the *CCRA* in conjunction with section 4(g). Section 4 provides guiding principles for the CSC, including the following: "(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups".[187] Justice Wagner interpreted this provision "as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders."[188] In interpreting this principle, Justice Wagner illuminated part of the political and social context within which criminalized Indigenous people live:

> Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system…Parliament has recognized an evolving societal consensus that these problems must be remedied by accounting for the

[185] *Ibid* at para 44.
[186] *Ibid* at para 13.
[187] *CCRA*, *supra* note 137, s 4(g).
[188] *Ewert*, *supra* note 3 at para 53.

> unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.[189]

In the result, Justice Wagner clearly confirmed that the CSC has an obligation to take reasonable steps to ascertain whether the information it utilizes is discriminatory:

> Although this Court is not now in a position to define with precision what the CSC must do to meet the standard set out in s. 24(1) in these circumstances, what is required, at a minimum, is that *if the CSC wishes to continue to use the impugned tools, it must conduct research into whether and to what extent they are subject to cross-cultural variance when applied to Indigenous offenders*.[190]

Justice Wagner's judgment simultaneously "responsibilized" and "de-responsibilized" the Canadian state.[191] On the one hand, Justice Wagner "responsibilized" the state by recognizing that it needs to take some action in relation to these risk assessment instruments. Justice Wagner confirmed that the CSC has a responsibility to take reasonable steps to ensure that its risk assessments do not involve racist (specifically interpreted by Justice Wagner as culturally inappropriate) responses in relation to Indigenous people. In doing so, Justice Wagner expressed an aim to broaden the risk lens, purportedly aiming to encompass within its view historical and contemporary oppression, experiences, and knowledges of Indigenous people. Moreover, the judgment calls upon the CSC to also broaden its risk lens—before continuing to use the risk

[189] *Ibid* at paras 57-58.
[190] *Ibid* at para 67 [emphasis added].
[191] For the terms "responsibilize" and "de-responsibilize", see Hannah-Moffat, "Transformative Risk Subject", *supra* note 101.

assessment instruments that were challenged in this case, the CSC *must* determine whether the tools involve cross-cultural variance when applied to imprisoned Indigenous people. Justice Wagner also briefly acknowledged that the criminal justice system has carried out racist and systemically unjust practices against Indigenous people and that the criminal justice system has a role to play in redressing the harms produced through these practices.[192]

Yet despite such efforts to broaden the risk lens and "responsibilize" the state, Justice Wagner also "de-responsibilized" the state. In particular, Justice Wagner did not inquire into the ways in which the state's practices of oppression relate to the factors involved in risk assessment instruments. In other words, he did not engage with the limited view of social life that is embraced both by risk assessment instruments and by the broader logic of risk in contemporary criminal law and criminal justice practice. So long as the tools accurately predict what they are trying to predict (such as risk of being charged with, or convicted of, a violent offence), researchers will regard the tools as valid. Yet this approach to assessing risk does not acknowledge that, while a risk assessment instrument might accurately predict which individuals are likely to be rearrested or reconvicted for (violent) offences, the instrument excludes the broader social and institutional mechanisms that might contribute to practices such as the state's labelling of certain conduct as criminal behaviour, a marginalized individual's participation in criminalized behaviour, and the criminal justice system's contact with marginalized people. In other words, even if researchers validate a risk assessment instrument in relation to a particular marginalized group of people, practitioners still apply the instrument in relation to *individuals*: risk assessment instruments focus on assessing and changing an individual, rather than (also) assessing and changing the discriminatory practices and policies carried out by the state.

[192] See *Ewert*, *supra* note 3 at paras 57-58.

As I explained above, some scholars have criticized risk assessment's individualized approach, arguing that dynamic risk factors can be understood as attributing state and societal oppression to individuals and to marginalized groups. To elaborate here, Hannah-Moffat, for instance, critiques the CSC's use of this approach in the context of cognitive behavioural programs. Such programs comprise the bedrock of custodial programming designed to reduce an individual's risk,[193] and they are premised on the idea of "teaching" people, rather than "treating" people.[194] In particular, Hannah-Moffat explains that these programs "suggest that an offender can become a 'rational decision maker' who makes prudent choices that avoid recidivism. This construction of the offender leaves intact *the presumption that crime is the outcome of poor choices or decisions*, and not the outcome of structural inequalities or pathology."[195] While the programs recognize state responsibilities, those responsibilities are limited to constructing "responsible" individuals:

> [N]ew technologies of need management rely on the *creation* of independent autonomous subjects. Broader structural relations are either ignored or constructed as individual inadequacies. The state is de-responsibilized for ongoing social problems and gaps in service. Offenders are encouraged to take responsibility for their offending; in other words, for their histories and current problems. Offenders are seen not as victims of circumstance but as individuals incapable of adequately managing needs in a way that

[193] Hannah-Moffat, "Transformative Risk Subject", *supra* note 101 at 34, 41-42.
[194] *Ibid* at 34, citing Stephen Duguid, *Can Prisons Work? The Prisoner as Object and Subject in Modern Corrections* (Toronto: University of Toronto Press, 2000) at 197. See also Duguid, *supra* note 194 at 195-196.
[195] Hannah-Moffat, "Transformative Risk Subject", *supra* note 101 at 41-42 [emphasis added].

> averts the seemingly foreseeable risks of victimization, poverty, racism and unemployment.[196]

This notion of transforming an individual aligns with the theory of confinement described by Chapman, Carey, and Ben-Moshe above—the idea that confinement can help transform marginalized people into "normal" and "productive" members of society.

Hannah-Moffat further argues that risk strategies that aim to respond to the needs of an oppressed group can instead end up disadvantaging that group. In particular, she shows that risk logic transforms the needs of criminalized women (for example, "those related to children, past abuse, and trauma"[197]) into *criminogenic* needs. Such needs only qualify as "meaningful therapeutic targets…when they are statistically linked to recidivism *and* can be addressed through available correctional programming".[198] As Hannah-Moffat further explains, correctional programs only aim to target "manageable" problems:

> Manageable criminogenic problems are those that can be resolved through behavioural or lifestyle changes that are seen as achievable with a positive attitude and being amenable to normalizing interventions, programs, or therapists who provide tools for change and teach offenders to think rationally and logically. Structural barriers conveniently

[196] *Ibid* at 43 [emphasis in original].
[197] *Ibid*.
[198] *Ibid* [emphasis added], citing Kelly Hannah-Moffat, "Losing Ground: Gender, Responsibility and Parole Risk" (2003), unpublished conference paper, meeting of American Society of Criminology [as cited in Hannah-Moffat, "Transformative Risk Subject", *supra* note 101].

> disappear. Systemic problems become individual problems or, more aptly, individuals' inadequacies.[199]

Individualized risk logic thus not only highlights the individual but erases the state and broader society. The settings and standards in which people lived before they were criminalized, and in which they will exist following criminalization, are wiped away. Moreover, as explained in the scholarship that I reviewed in the section on critiques of risk assessment above, it is not always clear that an individual whose recidivism is reduced following programming experienced the change as a result of the programming. Therefore, while correctional programs aim to deal with "manageable" problems, it is not always certain that those programs are playing the role they claim to be playing when people are not recriminalized.

In addition to not addressing the individualized nature of risk assessment instruments, Justice Wagner framed the problem of the state's application of risk assessment instruments in relation to Indigenous people as a failure to consider the "cultural differences" of Indigenous people,[200] rather than as a failure to consider the oppression of Indigenous people by the Canadian state and Canadian society. Justice Wagner specifically held that the CSC failed to "take seriously the credible concerns…according to which information derived from the impugned tools is of questionable validity with respect to Indigenous inmates *because the tools fail to account for cultural differences*."[201] Relatedly, in drawing upon expert evidence, Justice Wagner concentrated on the tools' possible failures to account for an individual's "cultural background": Justice Wagner referred to Dr. Hart's testimony that "the reliability or validity of an assessment

[199] Hannah-Moffat, "Transformative Risk Subject", *supra* note 101 at 43.
[200] *Ewert*, *supra* note 3 at para 66.
[201] *Ibid*.

tool varies depending on the *cultural background* of the individual to whom the tool is applied."[202] Justice Wagner also noted that "[n]umerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, *whether as a result of overtly racist attitudes or culturally inappropriate practices*, extends to all parts of the criminal justice system, including the prison system".[203] It is not clear to me from this sentence whether Justice Wagner viewed "culturally inappropriate practices" as different from racism, or as a less overt form of racism. In any event, while he referred to the existence of racist attitudes in this passage, his judgment only addressed the possibility that risk assessment tools fail to account for Indigenous people's cultural differences. Moreover, he did not unpack what the phrase "culturally inappropriate practices" means.

Justice Wagner's references to "cultural difference" and "culturally inappropriate practices" are concerning, because they potentially contribute to discrimination against Indigenous people instead of alleviating it. As Carmela Murdocca argues, the framing of racialized difference as cultural difference is a significant and constitutive practice of white settler societies. She writes: "[a] white settler society often relies for its coherence upon the production of a particular type of racial difference, that of *cultural difference*".[204] Murdocca further explains that these frameworks

[202] *Ibid* at para 13.
[203] *Ibid* at para 57, citing *R v Gladue*, [1999] 1 SCR 688, at paras 61-65 and 68 [*Gladue*], 133 CCC (3d) 385, *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Manitoba: Aboriginal Justice Inquiry, 1991) at 431-473, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996), and *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, by Louise Arbour (Ottawa: Privy Council Office, Solicitor General Canada, 1996) at 219-23.
[204] Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23 at 24 [emphasis in original] [Murdocca, "From Incarceration to Restoration"].

succeed because "they obscure the *ongoing material violence* of colonization and exploitation faced by Aboriginal communities and people of colour."[205]

Ewert exemplifies Murdocca's description of the "success[es]" of "cultural difference discursive frameworks".[206] Additionally, *Ewert* demonstrates the accuracy of Murdocca's warning of the harms that such frameworks leave unaddressed. While Justice Wagner acknowledged the existence of systemic discrimination, he did not illuminate the ways in which systemic discrimination fuels the very ideas of, and responses to, what counts as "risky" and the very processes that contribute to some people being implicated in these so-called "risks" and in the criminal justice system.

I see Justice Wagner's judgment as specifically illustrating three inter-related harmful features of the "cultural differences discursive framework". First, Justice Wagner's critique loses sight of the Canadian state's attempts to destroy Indigenous people, communities, laws, and politics. Justice Wagner's critique does so by framing Indigenous traditions as 'cultural' and settler Canadian traditions as 'legal'. Such an approach implies a hierarchy of legitimacy and authority. I do not mean to suggest that cultural practices and traditions are not important or significant to communities and to governance. Moreover, I am drawn to the claim that laws and legal systems themselves are forms of culture.[207] Instead, what I mean to highlight here is the delegitimization that occurs when a judgment aligns the term "culture" with Indigenous traditions and the term "law" with settler Canadian traditions. In this context, I think that "culture" carries a stigmatized

[205] *Ibid* at 25.
[206] *Ibid*.
[207] See Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 35-40.

connotation, presented as something inferior to law. Such a depiction not only erases the legitimacy of Indigenous laws and governance but also erases the state's own acts in damaging Indigenous laws and governments. As Monture-Angus explains, colonialism has played a major role in interfering with community relations and governance within Indigenous communities:

> The imposition of foreign forms and relations of governance must be seen to have significantly interfered with Aboriginal justice traditions. This does not mean that traditions have been destroyed or that they no longer exist. It simply means that colonialism has had, and continues to have, a negative impact on the ability of Aboriginal people to maintain peaceful and orderly communities.[208]

By framing Indigenous traditions and difference as simply "cultural" in nature, Justice Wagner's judgment moves the Canadian state's destruction of Indigenous laws and political communities—and the continued and evolving existence of Indigenous laws and governance—to the background.

Second, Justice Wagner's critique seems to rely—at least somewhat—on the harmful logic that a person's (racialized) heritage is indicative of a person's beliefs, perspectives, and practices. Such an attribution is part of the very process of racialization, which James defines as "the categorization of individuals into groups with reference to their physiological characteristics…and attributing abilities, cultural values, morals, and behavior patterns that reflect these characteristics".[209] Justice Wagner moves between the concepts of racism and

[208] Monture-Angus, "Women and Risk", *supra* note 103 at 25.
[209] James, *supra* note 119 at 469, citing Henry & Tator, *supra* note 126.

cultural difference seamlessly, implying that racialized and cultural differences are the same and that racism can be dealt with through attention and sensitivity to cultural differences. This practice of blurring such concepts risks reproducing stereotypes and myths. As James further explains, "[r]acialization serves to essentialize, homogenize, and generalize about minority group members, thereby ignoring group diversity and intragroup differences, and, in the process, de-contextualize and de-historicize their experiences".[210] Justice Wagner's vague references to culture thus downplay differences and diversity among Indigenous people.

Third, the judgment's critique of risk assessment instruments suggests that such tools might be harmful for the purportedly straightforward reason that the instruments do not respect an individual's "fundamentally different cultural values and worldviews".[211] This framing detracts and distracts from the violence that the Canadian state has carried out, and continues to carry out, against Indigenous people. Murdocca points out that Indigenous scholars, such as Joyce Green, have objected to the practice of portraying the Canadian state's racism against Indigenous people as being rooted in "cultural misunderstanding".[212] Joyce Green argues that racism is, instead, "a matter of…systemic power relations with historical origins and contemporary practices."[213] In the context of risk assessment instruments, in particular, Justice Wagner's focus on cultural difference regards Indigenous people who score high on risk assessments as potentially scoring high because of cultural differences (which might, in turn, be regarded as cultural 'deficiencies', given that risk assessment is concerned with assessing 'dysfunction' within individuals and their

[210] James, *supra* note 119 at 469, citing Aaron Celious & Daphna Oyserman, "Race from the Inside: An Emerging Heterogeneous Race Model" (2001) 57:1 Journal of Social Issues 149.
[211] *Ewert*, *supra* note 3 at para 58.
[212] Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" (paper presented to the Canadian Political Science Association, London, ON, 2-4 June 2005) at 15, online: < https://www.cpsa-acsp.ca/papers-2005/Greene.pdf>, cited in Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013) at 45.
[213] Green, *supra* note 212 at 14.

immediate communities and teaching individuals how to live in a more 'functional'/'non-criminal' way). This approach conceals the state's role in generating and sustaining inequality. In my view, high scores are more aptly indicative of the state's systemic oppression of Indigenous people. To again borrow Monture-Angus's fitting statement, "[w]hat is being measured is not 'risk' but one's experiences as part of an oppressed group."[214] Unfortunately, such a framing is omitted by Justice Wagner's presentation of the harm of risk assessment instruments as a failure to account for cultural difference.

Justice Wagner's simultaneous "responsibilization" and "de-responsibilization" of the state is consistent with contemporary dynamic risk/criminogenic needs logic. The "success"[215]—for the state—of these combined maneuvers is that they erase the state's role in framing certain people and actions as "risky", while clearly marking and highlighting the state's apparent potential to rehabilitate and teach those whom the state presents as "risky". The state thus frames itself as helpful, responsive, and protective. This framing leaves out the reality that the state has played a destructive role in shaping the lives of criminalized Indigenous people. In particular, even if researchers validate risk assessment instruments for cross-cultural variance, the validated factors might nevertheless still be located in colonial harms. In other words, the assessments might frame Indigenous people as risks based on factors that are embedded in colonial oppression. The result could be a collision between the state's purported efforts to hold itself accountable for its systemic discrimination and the state's efforts to label people as risks—people in relation to whom the state claims to justifiably manage and rehabilitate. This collision is particularly apparent in sentencing law, where courts are obligated to consider the ways in which systemic

[214] Monture-Angus, "Women and Risk", *supra* note 103.
[215] Murdocca, "From Incarceration to Restoration", *supra* note 204 at 25.

oppression has contributed to a criminalized Indigenous person's experiences for the purposes of assessing their blameworthiness and considering alternatives to imprisonment. As Toni Williams argues, "[m]ore challenging for the courts than procedural dimensions of *Gladue* is the extent to which the 'unique background and systemic factors' also represent aspects of identity and circumstances that penal practitioners classify as sources of criminogenic risk or needs".[216] Williams continues: "[a]s '*Gladue* factors', these considerations function as a reason not to incarcerate Aboriginal women, but as risk/needs they operate as justifications for prison terms to contain the threat the defendant poses and custodial correctional programming to reduce it."[217] If researchers validate risk assessment instruments in relation to Indigenous people, they will likely simply translate state oppression into individualized risks/needs. Those risks/needs will then purportedly claim to justify correctional programming.

Importantly, this collision between the state's apparent efforts to acknowledge its own accountability and the state's efforts to identify and manage risks does not necessarily produce a tension between the responsibility and risk lenses. Instead, the collision seems to result in a strengthening of the individualized focus within both the responsibility and risk lenses. Moreover, the erasure of state accountability is not necessarily accidental. Williams observes that the Supreme Court has adopted an approach "of scrutinizing the defendant's experience of disadvantage and trauma *at home, in the family and the community* to explain her offence as well

[216] Toni Williams, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does It Make?" in Emily Grabham et al, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: Routledge-Cavendish, 2009) 79 at 92, citing Kelly Hannah-Moffat & Margaret Shaw, *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada* (Ottawa: Status of Women Canada, 2001), and Kelly Hannah-Moffat, "Empowering Risk: The Nature of Gender-Responsive Strategies" in Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (in)Justice in Neo-Liberal Times* (Halifax: Fernwood, 2006) 250.
[217] Williams, *supra* note 216 at 92.

as to justify non-carceral sanctions".[218] Such an approach creates "a link between her contextualized intersectional identity and lawbreaking. This move not only *masks the unequal relations* inside and outside the criminal justice system that structure the defendant's experience but it also *revives and reinforces stereotypes about Aboriginal criminality*."[219] Through such an approach, sentencing courts can paint Indigenous individuals, families, and communities as responsible for generating conflict and harm, rather than bringing to life the state and its oppressive actions and inactions.

A *Gladue* analysis involves two branches—one relating to an examination of systemic oppression and another relating to culturally appropriate sentences. Additionally, Justice Wagner referred explicitly to systemic discrimination in *Ewert*. Nonetheless, Justice Wagner's evaluation of risk assessment instruments appears to be fixated on one of the branches of the *Gladue* analysis—the need for culturally appropriate responses—rather than (also) on the branch dealing with systemic problems. Without diminishing the importance of applying sentencing and correctional practices that are attuned to an Indigenous person's needs, I think that the focus on only this aspect of Canada's unjust treatment of Indigenous people in criminal justice processes—when filtered through the generic label of "culture"—can both inappropriately simplify the meaning of appropriate sentencing practices for Indigenous people and suppress the state's discriminatory laws, policies, actions, and inactions in relation to Indigenous people. Relatedly, it can also lead to the essentializing of Indigenous people. For instance, as I will explore in more detail in the next chapter, courts have considered the appropriateness of alternatives to custody for criminalized Indigenous people based on their judicially determined

[218] *Ibid* at 87 [emphasis added].
[219] *Ibid* [emphasis added].

connection to their Indigenous heritage. The message can suggest that the issue is simply one of difference—that Indigenous people might need different criminal justice responses only because (and only if) Indigenous people's own cultural practices and beliefs differ from those of Canadian settler society. Such an approach can reify Indigenous traditions and erase the ways in which the Canadian state is responsible for making it difficult for Indigenous communities to carry out laws, practices, and values. We can thus see an important way in which responsibility and risk are connected: they both emphasize cultural difference, and they do so in a way that undermines the supposed recognition of state accountability. Together, the interaction between responsibility and risk generate further oppression—together, the lenses purport to bring the accountability of the state into view, while nonetheless leaving the state out of the ultimate image that they produce.

3.4.3 Impact of *Ewert* on Risk Assessment Research

Jeffrey Ewert's case has impacted empirical research surrounding risk assessment instruments. In particular, two recent studies cite *Ewert* as the impetus for conducting research that aims to validate some of the risk assessment tools that were at issue in the case. In this section, I explore these studies for a two-fold purpose: first, I aim to see what sort of findings these studies have made (in other words, I investigate whether or not the studies validated the tools in relation to Indigenous people); and second, in an effort to identify the ways in which the scholars portray Indigenous people and the state, I examine the language that the studies employ.

In 2018, Olver et al published a study examining the predictive accuracy of VRS-SO risk scores and change scores in Aboriginal and non-Aboriginal men who were imprisoned in Canadian federal penitentiaries and who participated in the CSC's sexual offender treatment programming.[220] Change scores measure the change in an individual's ratings on dynamic risk factors prior to and following treatment.[221] Olver et al set their study within the context of the trial judgment in *Ewert*.[222] They examined both the VRS-SO as well as the Static-99R,[223] and they found that the Static-99R and VRS-SO risk scores "significantly predicted all recidivism outcomes in both Aboriginal and non-Aboriginal offenders."[224] Additionally, Olver et al found that the Static-99R and VRS-SO instruments produced higher risk scores in relation to imprisoned Aboriginal men in comparison to imprisoned non-Aboriginal men. Olver et al noted that "the largest differences were found on static tools heavily weighted toward criminal history, whereas smaller differences were found on changeable dynamic factors."[225] Furthermore, they established that both Aboriginal and non-Aboriginal men *changed* their risk scores in the same amounts after receiving sexual offender treatment.[226] With respect to score changes, Olver et al found that "positive treatment changes on the VRS-SO were associated with decreased recidivism among both racial/cultural groups in this sample."[227]

Olver et al's final finding was that, "[a]fter controlling for risk and treatment change, Aboriginal men still had significantly higher rates of general violent recidivism postrelease than non-

[220] Olver et al, *supra* note 134.
[221] *Ibid* at 257, 259.
[222] *Ibid* at 269.
[223] Leslie Helmus et al, "Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights" (2012) 24:1 Sexual Abuse: A Journal of Research and Treatment 64.
[224] Olver et al, *supra* note 134 at 269.
[225] *Ibid* at 271.
[226] *Ibid*.
[227] *Ibid*.

Aboriginal men".[228] Olver et al suggest that this finding shows "that there are likely variables and contextual circumstances unique to Aboriginal group membership, and not necessarily tied to risk or treatment performance per se, that partly account for the higher rates of general violent recidivism observed in this group".[229] They conclude that "risk and change information on its own does not explain all individual differences in recidivism rates at least for general violence."[230] Olver et al go on to contemplate the role that section 718.2(e) of the *Criminal Code* might play in guiding judges in how to sentence Indigenous criminalized people. They explain that "Canada's Gladue provision…is an important sentencing tool to take into account historical, social, and cultural considerations unique to Aboriginal persons that may have contributed to the individual's conflict with the law to inform sentencing and sanctions."[231]

In recognizing that systemic factors can contribute to the criminalization of Indigenous people, Olver et al took a positive step. Nonetheless, Olver et al specifically describe systemic factors as being *different* from those incorporated into risk assessment, arguing that "the Gladue provision permits *consideration of other factors*, at least at the time of sentencing that may have bearing on involvement in antisocial behavior."[232] Olver et al do not address the ways in which those very factors have also influenced the construction of risk factors. Neither do they contemplate whether increased recidivism is connected with potential challenges posed by the state with respect to Indigenous people's opportunities to realize the 'changes' that dynamic risk factors ask of them,

[228] *Ibid*.
[229] *Ibid* at 272, citing, "for a detailed analysis of possible considerations", Holly A Wilson & Leticia Gutierrez, "Does One Size Fit All? A Meta-Analysis Examining the Predictive Ability of the Level of Service Inventory (LSI) with Aboriginal Offenders" (2014) 41:2 Crim Justice & Behavior 196.
[230] Olver et al, *supra* note 134 at 272.
[231] *Ibid*.
[232] *Ibid* [emphasis added].

such as utilizing "[c]ommunity support".[233] These 'changes'—which rest upon contestable value judgments to begin with—do not solely depend on the actions and choices of criminalized individuals but also on the actions and choices of the state and private actors. Olver et al's analysis would likely be strengthened if, rather than describing systemic factors as "other" factors that are specific to Indigenous people, they described systemic factors as factors that are specific to *the state's treatment* of Indigenous people and as factors that are also incorporated into risk factors. The analysis might then shift away from trying to find the ultimate (and likely illusory) individualized understanding of crime and towards a consideration of the factors that play important roles in criminalizing and imprisoning Indigenous people.

Olver et al make a couple of other claims with respect to the supposed fairness of risk assessment instruments—claims that I think are also open to critique. For instance, Olver et al claim that "[t]he use of a structured approach…helps to apply risk information in a systematic manner, to reduce bias, and to increase the fairness and accuracy of decision making."[234] Yet one established criticism of actuarial tools would take issue with this claim—a criticism known as the "bias in, bias out" critique. This is the argument that biased data goes into risk assessment instruments. In other words, as explained by the Law Commission of Ontario in a recent report, the argument is that "the…'inputs' used by risk assessment algorithms – arrests, convictions, incarceration sentences, education, employment – are themselves the result of racially disparate practices".[235] Therefore, risk scores will unavoidably be biased.[236]

[233] Olver & Wong, *supra* note 165 at Appendix.
[234] Olver et al, *supra* note 134 at 271.
[235] Law Commission of Ontario, *The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada* (Toronto: October 2020) at 21.
[236] *Ibid*.

Another related claim of fairness that Olver et al make is that "higher scores for a subgroup may not necessarily indicate problems with the scale so long as it reflects *actual differences*; to the extent that test scores are being artificially inflated or used for unfair purposes would higher scores become problematic."[237] Olver et al offer this comment after noting that the Static-99R and the VRS-SO generated higher risk scores among Aboriginal men in comparison to non-Aboriginal men. This context implies that Olver et al are aiming to assuage concerns about higher risk scores among Aboriginal men. Yet the notion of "actual differences" suggests that the differences are attributable to the individuals being tested. As I argued above, this understanding of risk leaves out the accountability of the Canadian state and white settler society in oppressing, marginalizing, and harming Indigenous people and communities. It would be more accurate to say that the scores "reflect…actual differences" in how colonialism and racism have negatively affected Indigenous people and communities.

Olver et al's study demonstrates that Jeffrey Ewert's case has had an important effect on empirical risk assessment research, in the sense that researchers cite the case as having contributed to their decision to validate risk assessment tools in relation to Indigenous people. At the same time, I think that Olver et al have harnessed *Ewert*, and the broad context of the state's mass imprisonment of Indigenous people, in some problematic ways. In particular, in the same way that Justice Wagner "de-responsibilized" the state in *Ewert*, Olver et al also allow the state to fade into the background. An illustrative example is the following passage:

> *Ethnic and racial minorities* in North American countries and the Western English speaking world, including Aboriginal persons, *often have a history of colonization, and*

[237] Olver et al, *supra* note 134 at 271 [emphasis added].

> for decades or even centuries in some instances, *have faced an erosion of traditional culture, beliefs, and language, family upheaval, poverty, social plight, intergenerational trauma, and human rights violations*[.][238]

This passage describes the impacts of colonialism without mentioning the state. Instead, "[e]thnic and racial minorities…, including Aboriginal persons" serve as the active agents—"[e]thnic and racial minorities…, including Aboriginal persons, often have a history of colonization, and…have faced an erosion of traditional culture…". While Olver et al mention a number of harms, they do not name a couple of key harms, such as the state's attempted destruction of Indigenous laws (instead, the focus is, again, on culture, beliefs, and language, which, while important, de-centre Indigenous communities' authority and sovereignty). Additionally, Olver et al do not discuss state violence against Indigenous people. For instance, British officials' distribution of smallpox blankets and the continued failure of Canadian state actors to investigate deaths and disappearances of Indigenous women and children are examples of more direct ways of describing some of the state-imposed harms.

In addition, Olver et al do not mention the state as the agent carrying out and instigating harm. While it might be implied that the state is responsible for the harms that Olver et al describe, it is a rather dangerous role to leave to implication. One of the myths that colonialism has relied upon and proliferated is the idea that Indigenous people are inferior to white settlers and not strong

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[238] *Ibid* at 256 [emphasis added], citing Statistics Canada, *Victimization and Offending Among the Aboriginal Population in Canada*, by Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, in 26:3 *Juristat: Canadian Centre for Justice Statistics* 1, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, June 2006), Statistics Canada, *Violent Victimization of Aboriginal People in the Canadian Provinces, 2009*, by Samuel Perreault, in *Juristat: Canadian Centre for Justice Statistics* 1A, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 March 2011), and Katie Scrim, "Aboriginal Victimization: A Summary of the Literature" in *Victims of Crime Research Digest* Issue 03/2010 (Ottawa: Department of Justice Canada, 2010).

enough to survive.[239] As well, part of the harm of colonialism is the state's failure to take responsibility for its oppression of, and violence against, Indigenous people. To describe the "erosion" of Indigenous communities without mentioning the role of the state in oppressing and harming Indigenous people and in making it difficult for Indigenous people to maintain their laws and communities is to also possibly imply that Indigenous communities were gradually weakened for some intangible, not clearly identifiable reason. I do not mean to single out Olver et al. Indeed, as I will show in the next chapter, these linguistic omissions of the state are common in sentencing judgments as well. And, as Alice Ristroph observes with respect to philosophy of punishment literature, such scholarship also has a tradition of erasing any mention of the state and state actors: "philosophies of punishment tend to assume that the state will be the agent of punishment, but beyond that they usually say little about the state."[240] Particularly within retributivism theory, scholars "tend to work in the passive voice—their question is why the criminal deserves *to be punished* rather than why the state has the power or authority *to punish* him."[241] Rather than singling out Olver et al (or the authors of the next article that I consider), I aim to use their work to demonstrate the importance of critically investigating the language used in state documents and in the research that state actors might rely upon. We live in a reality where the state's purported efforts—including courts' efforts—to not imprison Indigenous people at high rates are not working. We thus see contradictory aims and results. Given this context, I think that it is necessary to undertake a close reading of "the everyday

[239] See e.g. Chapman, Carey & Ben-Moshe, "Reconsidering Confinement", *supra* note 88 at 6, 7.
[240] Alice Ristroph, "Just Violence" (2014) 56:4 Ariz L Rev 1017 at 1020.
[241] *Ibid* at 1021 [emphasis in original].

violence of state documents"[242] and of the research documents that the state might rely upon in making and carrying out laws and policies.

In another recent study, Seung C Lee, R Karl Hanson, and Julie Blais similarly cite the *Ewert* proceedings as signaling a need to assess the predictive accuracy of risk assessment instruments in relation to Indigenous people.[243] Like Olver et al, Lee, Hanson, and Blais begin with an overview of "Indigenous Overrepresentation in Canadian Corrections".[244] However, Lee, Hanson, and Blais are more specific about the roles played by state actors and settler Canadian society. In particular, they specifically mention "social policies" and "the dominant social class" when they describe the importance of contextualizing "indicators of adversity and social disadvantage" within "the context of Canada's history of colonization".[245] Specifically, Lee, Hanson, and Blais describe "the devastating effects of racist social policies toward Indigenous peoples", "the dominant social class' efforts to eliminate Indigenous culture (i.e., residential schools, the *Indian Act*, and enfranchisement", and "the reserve system".[246] They explain that, "[w]hether it is poverty, substance abuse, low levels of formal education, or alienation and isolation, the criminogenic factors that contribute to higher rates of crime among Indigenous peoples in Canada are rooted in some 500 years of Indigenous-settler relations."[247] Additionally, Lee, Hanson, and Blais note that "[a]nother factor that may lead to Indigenous overrepresentation is the effect of systemic discrimination and bias in how Indigenous

[242] Megan Scribe, "Pedagogy of Indifference: State Responses to Violence Against Indigenous Girls" (2017 32:1-2 Canadian Woman Studies 47 at 54.
[243] Seung C Lee, R Karl Hanson & Julie Blais, "Predictive Accuracy of the Static-99R and Static-2002R Risk Tools for Identifying Indigenous and White Individuals at High Risk for Sexual Recidivism in Canada" (2020) 61:1 Canadian Psychology 42 at 44.
[244] *Ibid* at 43.
[245] *Ibid*.
[246] *Ibid*.
[247] *Ibid*.

individuals are treated at all levels of the justice system".[248] Furthermore, they explain that these discriminatory practices are rooted in "the false assumption that Indigenous peoples, just because of their race, are more likely to commit a crime (i.e., higher risk) than non-Indigenous individuals."[249]

I appreciate the efforts of Lee, Hanson, and Blais to carefully delineate the power relationship between settler-colonial Canada and Indigenous people and the existence of harmful myths and stereotypes. Nonetheless, I am still concerned that they might be (inadvertently) contributing to the oppression of Indigenous people. Lee, Hanson, and Blais outline the myriad hardships that the state and settler Canadian society have inflicted upon Indigenous people, but these descriptions leave Indigenous people sounding as though they are fully trapped within the Risk-Need-Responsivity Model's conceptions of risk. For instance, their statement, "[w]hether it is poverty, substance abuse, low levels of formal education, or alienation and isolation", makes it sound as though Indigenous people are necessarily afflicted by any possible disadvantage and form of suffering imaginable. Notably, these forms of disadvantage and suffering are in line with dynamic risk factors/criminogenic needs. Lee, Hanson, and Blais make sure to attribute these harms to the settler state, and they note that it is false to assume that Indigenous people "are more likely to commit a crime" simply "because of their race".[250] Nonetheless, Lee, Hanson, and Blais seem to miss drawing the link between the Risk-Need-Responsivity Model's own reliance on factors (such as employment, relationships, financial stability, substance use) that, if higher

[248] *Ibid* at 43-44, citing generally *Gladue*, *supra* note 203, Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System", research paper commissioned by the Ipperwash Inquiry, online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf>, and *Honouring the Truth, Reconciling for the Future: Summary Report of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).
[249] Lee, Hanson & Blais, *supra* note 243.
[250] *Ibid*.

among Indigenous people, are higher primarily because of the state's decisions to marginalize and harm Indigenous people.[251] Lee, Hanson, and Blais might not make this link because the instruments that they assess in this study—the Static-99R and the Static-2002R[252]—only involve static risk factors. However, the assessment of only static factors does not, to me, remove the need to draw links between what counts as a "risk" and the ways in which the state has contributed to generating those "risks".

Rather than investigating (or in some way addressing) the normative nature of risk assessment factors, Lee, Hanson, and Blais proceed to assess whether the Static-99R and the Static-2002R are accurate in their risk predictions. Predictive accuracy measures "discrimination, or the extent to which recidivists are different from nonrecidivists, and…calibration, how closely the predicted recidivism rates match the observed recidivism rates in replication studies".[253] According to this framework, "[a] prediction tool is biased when either the discrimination or the calibration varies across groups".[254] This definition of discrimination does not account for the likelihood that some groups of people will both score higher and be recriminalized due to a combination of oppressive policies and practices that both raise people's risk scores and put people in increased contact with the criminal justice system.

[251] See Monture-Angus, *Women and Risk*, *supra* note 103.
[252] R Karl Hanson & David Thornton, *Notes on the Development of Static-2002* (Ottawa: Department of the Solicitor General of Canada, January 2003).
[253] Lee, Hanson & Blais, *supra* note 243, citing L Maaike Helmus & Kelly M Babchishin, "Primer on Risk Assessment and the Statistics Used to Evaluate Its Accuracy" (2017) 44:1 Criminal Justice and Behavior 8.
[254] Lee, Hanson & Blais, *supra* note 243, citing Cecil R Reynolds & Lisa A Suzuki, "Bias in Psychological Assessment: An Empirical Review and Recommendations" in John R Graham, Jack A Naglieri & Weiner, eds, *Handbook of Psychology: Vol 10 Assessment Psychology* (Hoboken: Wiley, 2013) 82.

In the result, Lee, Hanson, and Blais found that the Static-99R, which was at issue in *Ewert*,[255] "showed similar predictive accuracy for both White and Indigenous study groups".[256] Therefore, they conclude that "the current study supports the use of Static-99R for Indigenous peoples in the criminal justice system."[257] By comparison, the Static-2002R tool did not show similar predictive accuracy.[258] Lee, Hanson, and Blais thus stated that the current research "does not support the use of the Static-2002R" in relation to Indigenous people.[259] However, they further noted that the Static-2002R study involved a small sample size and that future studies with larger samples might be able to support its use.

In discussing "Implications for Policy and Practice", Lee, Hanson, and Blais further suggest that "treatment programming will likely be most effective when it takes into consideration the cultural values or norms of Indigenous peoples (e.g., spirituality) as well as *sociodemographic characteristics that influence their response to treatment* (e.g., low education and socioeconomic status, systemic oppression, distrust of criminal justice system".[260] Rather than lumping sociodemographic factors into culture, Lee, Hanson, and Blais helpfully distinguish between "cultural values or norms of Indigenous people" and "sociodemographic characteristics". However, their statement implies that sociodemographic factors impact how an individual responds to such "treatment". Here, the language has the potential to make individual criminalized Indigenous people (and Indigenous communities as a whole, which are cast as being

[255] See Lee, Hanson & Blais, *supra* note 243 at 43. The Static-99R involves a slight modification to the Static-99. Specifically, the Static-99R involves an updated "age item" (Static-99R Clearinghouse, online: <http://www.static99.org/>).
[256] Lee, Hanson & Blais, *supra* note 243 at 51.
[257] *Ibid* at 53.
[258] *Ibid* at 51.
[259] *Ibid* at 53.
[260] *Ibid*, citing Leticia Gutierrez, Nick Chadwick & Kayla A Wanamaker, "Culturally Relevant Programming Versus the Status Quo: A Meta-Analytic Review of the Effectiveness of Treatment of Indigenous Offenders" (2018) 60 Canadian Journal of Criminology and Criminal Justice 321 [emphasis added].

synonymous with low education and socioeconomic status) responsible for experiences of oppression. At the very least, the passage omits (or does not emphasize) the important points that social and political practices generate those factors and that such factors influence how *other* people and state actors interact with a criminalized Indigenous person.

Moreover, appeals to Indigenous cultural values and norms are more complex than presented here. For example, Murdocca discusses Indigenous women's groups' arguments against Bill C-41, which was the bill that Parliament ultimately passed and that introduced section 718.2(e) into the *Criminal Code*. Murdocca drew on these arguments in order to illustrate that the government's claims to respect Aboriginal culture can have harmful effects. In particular, such claims can silence the experiences and needs of Indigenous women, reify and generalize Indigenous culture, and conceal the responsibilities of the state. For instance, Murdocca explains that Pauktuutit, the Inuit Women's Association of Canada, "not[ed] that the practices deemed culturally appropriate for Inuit communities by the Canadian government and justice officials have no relevance to Inuit culture or history."[261] In carrying out such practices, state actors thus continue to manage Indigenous people, though under the guise of respecting Indigenous culture.[262] Moreover, the government's implementation of such programs force groups such as Pauktuutit to contest the government's appeals to tradition and culture through *further appeals* to tradition and culture.[263] This has the harmful effect, Murdocca maintains, of "coher[ing] Aboriginal identity and practices to a paradigm of culture."[264] Additionally, the government's

[261] Murdocca, "From Incarceration to Restoration", *supra* note 204 at 32.
[262] *Ibid* at 33. See also *ibid* at 31, citing Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 75.
[263] Murdocca, *supra* note 204 at 33.
[264] *Ibid*.

continued management of Indigenous communities through culturally "appropriate" practices relies upon the idea that the state can displace its responsibilities with respect to criminalization onto Indigenous communities.[265] Murdocca argues that, through this process, the state "continues to rely upon the notion that 'social problems' are somehow both the ontological property of Indigenous people and the collective responsibility of these communities."[266] Indigenous cultural values and norms are thus diverse, and the state should not use culture as a mechanism to conceal its own responsibilities to redress the harms that it has carried out against Indigenous people.

Olver et al seem to similarly rely upon, and simplify, the concept of culture. In reviewing studies that have validated risk assessment instruments in relation to Canadian Aboriginal "offenders", Olver et al note that, in such studies, "Aboriginal offenders…do score higher on conventional risk tools and they do have higher rates of all recidivism outcomes."[267] Nonetheless, Olver et al further note that, despite these findings, "the predictive accuracy of these tools is often somewhat lower among Aboriginal offenders, depending on the tool and sample."[268] This leads Olver et al to suggest that the tools are missing out on "other unmeasured variables"[269] and to propose that there is a "need to exercise appropriate cautions, *sensitivity to cultural context, and professional discretion* in applications of forensic clinical measures with diverse populations."[270] Olver et al thus swiftly make a cultural difference claim. Furthermore, they imply that the people who can respond sensitively and with appropriate discretion are those who have also been integral components of the settler state—professionals working in the correctional context or whose work

[265] *Ibid* at 32.
[266] *Ibid*.
[267] Olver et al, *supra* note 134 at 256.
[268] *Ibid*.
[269] *Ibid*.
[270] *Ibid* at 256-57 [emphasis added].

is relied on by corrections officials. Just above this discussion, Olver et al went through the motions of talking about the harmful effects of colonialism on Indigenous people. It is concerning that the authors did not address the question of whether and how those same effects might continue to be perpetuated in the correctional context. Rather than considering whether and how the "unmeasured variables" consist of structural oppression, and rather than questioning the legitimacy of the settler state's professionalized bodies' exercising appropriate sensitivity and discretion, Olver et al appeal to the notion of "saving" criminalized Indigenous people. The idea is that, while the state subjected Indigenous people to violence and harm, state actors, including decision-makers, corrections officials, and the experts they rely on, can now "save" Indigenous people. Olver et al specifically contemplate the value of risk assessment "to help" criminalized people, posing the following question: "what about the potential for risk assessment *to help*, not only decision making authorities such as judges and parole boards, but also *for the offenders themselves*?"[271] The reader is left with the image of criminalized Indigenous people requiring the benevolence of other people in order to be "helped".

3.5 Conclusion

Similar to judicial engagement with responsibility, Justice Wagner has signaled that risk ought to be understood in context. Yet, as also happens with responsibility, the contemplated context of risk obscures the state. In particular, Justice Wagner's judgment in *Ewert* predominantly confined context to Indigenous culture. The judgment—and recent empirical research relating to risk assessment tools—thus makes sense of high risk scores through reference to an Indigenous person's different cultural background and traditions. In the process, the analysis obfuscates the

[271] *Ibid* at 257-58 [emphasis added].

state's historical and contemporary acts of oppression against Indigenous people, communities, and laws. Such an approach has the potential to sustain harmful stereotypes and harmful—individualized, carceral—responses to determinations that an Indigenous individual is likely to be recriminalized. As a result, similar to responsibility, the leading jurisprudence on risk in the criminal justice context does not engage with the "in betweenness" of risk. Instead, the jurisprudence entrenches risk's individualization, while nonetheless claiming to take seriously the possible bias in risk assessment instruments. Until bias is understood as intimately connected with the state's own actions and inactions and with structural patterns, researchers will likely continue to find that risk assessment instruments accurately predict risk among Indigenous people, even if those predictions involve high levels of risk. What ought to be recognized is that those predictions, while perhaps accurate, are reflections—and predictions—of the state's oppression of Indigenous people. The next chapter turns to the sentencing context, exploring the judicial use of risk assessment instruments in sentencing judgments.

Chapter Four: Risk Assessment in Canadian Sentencing Law: "Responsibilizing" Criminalized Indigenous Individuals for Experiences of Oppression

4.1 Introduction

Results from risk assessment tools come into play in two areas of sentencing law. First, a key area where risk assessment instruments are used is dangerous offender designation proceedings. In these proceedings, psychiatrists and psychologists incorporate risk assessment results into their assessments of the criminalized person's risk of being charged with, or convicted of, future violent offences and/or violent sexual offences. As I will elaborate on below, dangerous offender designations prioritize the separation of criminalized people from other members of society. The second area where risk assessment evidence enters sentencing law is within judicial determinations of fit sentences. With respect to the judicial determination of fit sentences, section 718 of the *Criminal Code* defines "[t]he fundamental purpose of sentencing" by appealing to the overarching aim of protecting society: "[t]he fundamental purpose of sentencing is *to protect society* and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society".[1] The *Criminal Code* then directs sentencing judges to pursue these goals "by imposing just sanctions that have one or more of the following objectives", including "separat[ing] offenders from society, where necessary",[2] and "assist[ing] in rehabilitating offenders".[3]

[1] *Criminal Code*, RSC, 1985, c C-46 s 718 [emphasis added].
[2] *Ibid*, s 718(c).
[3] *Ibid*, s 718(d).

This chapter explores the judicial treatment of risk assessment tools in dangerous offender judgments and in other sentencing judgments. My primary interest lies in investigating the ways in which *both* significant use and limited use of the results from these instruments have re-entrenched notions of individualized responsibility and risk. In other words, I show that judgments that rely upon risk assessment instruments—and judgments that explicitly do *not* significantly rely upon risk assessment tools—subtly erase the state as an entity that creates oppressive conditions. By oppressive conditions, I mean structural conditions that have contributed to the Canadian state's criminalization of Indigenous people, and other structural conditions such as poverty and inadequate access to health services and programming, which, left unchecked, will likely continue to contribute to the criminalization and mass imprisonment of Indigenous people.

I turn first to an overview of the dangerous offender regime and then to a recent judgment of the British Columbia Court of Appeal that articulated the relationship between dangerous offender designation proceedings and "unique systemic or background factors".[4] I then consider a Saskatchewan Court of Appeal judgment that urged caution in relying on risk assessment instruments that involve structured clinical judgment.

In the final section of the chapter, I examine cases that engage with *Ewert*. I consider cases involving dangerous offender designations and cases that are outside of the dangerous offender context. I identify three categories of cases, grouped according to the judicial treatment of *Ewert* and/or the judicial treatment of risk factors in relation to criminalized Indigenous people. In one category, judges simply cite *Ewert*, acknowledge some criticisms of the tools, and proceed to

[4] *R v Gladue*, [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385 [*Gladue*].

incorporate the tools' risk assessment results in sentencing. The second category of cases involves judicial determinations that the concerns raised in *Ewert* have been overcome and/or that minimal weight will be placed on the tools' results. In particular, judges refer to expert evidence indicating that some of the tools have been validated in relation to Indigenous people, that the expert evidence in the case at hand did not call for significant caution in relation to judicial reliance upon the results, that the experts adjusted their application of the tools to account for the tools' potential for "cultural bias", and/or that the experts placed minimal weight on risk assessment instruments. The final category of cases involves two cases that take closer consideration of state accountability. One of those judgments[5] was previously addressed in the second category, in terms of the case's specific treatment of *Ewert*. The case also considered the relationship between administrative segregation and a criminalized person's later performance in programming that had been designed to address his risk factors. In the other case,[6] the judge cited *Ewert*, incorporated expert risk assessment evidence into the judgment, and described the state's failures to provide appropriate programming to the criminalized individual during his time in custody. These two cases demonstrate that sentencing law has the potential to hold space for an analysis of the relationship between the state's acts of violence against criminalized Indigenous people and institutionalized assessments of criminalized Indigenous people's supposed levels of "risk".

[5] *R v Durocher*, 2019 NWTSC 37 [*Durocher*].
[6] *R v Keenatch*, 2019 SKPC 38 [*Keenatch*].

4.2 Dangerous Offender Law: Preventive Sentencing

The *Criminal Code*'s dangerous offender regime provides the authority for courts to sentence a criminalized person to indeterminate detention. The purpose of enabling this type of sentence is to "protect the public from a small group of persistent criminals with a propensity for committing violent crimes against the person."[7] Additionally, the regime has been defined as being "neither punitive nor reformative but primarily [consisting of] segregation from society"[8] and as constituting "a preventive sanction [that] can be imposed only upon offenders for whom segregation from society is a rational means to achieve the overriding purpose of public safety."[9]

A dangerous offender designation application involves a two-step process.[10] First, the Crown must establish that a criminalized person was convicted of "a serious personal injury offence".[11] Offences that count as serious personal injury offences for this purpose are listed in the *Criminal Code*.[12]

Second, the Crown must demonstrate dangerousness resulting either from violent behaviour or from sexual behaviour.[13] With respect to violent behaviour, the Crown must show that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons".[14] The threat must be established on the basis of the criminalized person showing a

[7] *R v Boutilier*, 2017 SCC 64 at para 3, [2017] 2 SCR 936 [*Boutilier*].
[8] *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) at 223, quoted in *Boutilier*, *supra* note 7 at para 33.
[9] *Boutilier*, *supra* note 7 at para 33.
[10] *Ibid* at paras 13-18.
[11] *Criminal Code*, *supra* note 1, ss 753(1)(a), 753(1)(b).
[12] *Ibid*, s 752(a).
[13] *Boutilier*, *supra* note 7 at para 16.
[14] *Criminal Code*, *supra* note 1, ss 753(1)(a), 753(1)(b).

"violent pattern…of conduct",[15] and the language describing such types of conduct is language that "responsibilizes"[16] an individual for their "failure" to behave in ways that align with the law's standards (described in the legislation as "normal" standards): the *Criminal Code* refers to a criminalized person "showing a failure to restrain his or her behaviour",[17] a criminalized person "showing a substantial degree of indifference…respecting the reasonably foreseeable consequences to the persons of his or her behaviour",[18] and a criminalized person whose "behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint".[19] With respect to dangerousness on the basis of sexual behaviour, the *Criminal Code* refers to a criminalized person who "has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses".[20]

The lack of control that must be attributed to an individual in this context has recently been emphasized by the Supreme Court of Canada, with Justice Suzanne Côté stating that "a sentencing judge must…be satisfied on the evidence that the offender poses a high likelihood of recidivism and that his or her conduct is intractable. I understand 'intractable' conduct as meaning *behaviour that the offender is unable to surmount*. Through these two criteria, Parliament requires sentencing judges to conduct a prospective assessment of dangerousness."[21] This passage suggests that, with respect to individuals who carry out criminalized conduct, but whom the law does not regard as fully autonomous beings, the criminal law becomes concerned

[15] *Boutilier*, *supra* note 7 at para 18.
[16] Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty" (2005) 7:1 Punishment & Society 29 at 42 [endnote omitted].
[17] *Criminal Code*, *supra* note 1, s 753(1)(a)(i).
[18] *Ibid*, s 753(1)(a)(ii).
[19] *Ibid*, s 753(1)(a)(iii).
[20] *Ibid*, s 753(1)(b).
[21] *Boutilier*, *supra* note 7 at para 27 [emphasis added].

with assessing their potential threat and with managing them. This constructed group of people are "responsibilized" in the sense that their limitations in exercising control in legally acceptable ways are regarded as being internal to them—as something that they (not also the state and/or other individuals) are responsible for, even if they are not necessarily fully responsible for their actions (in the sense that they might be limited in their abilities to exercise control over their behaviour).

Dangerous offender law thus purports to deal with a tension between an identification of an individual's lessened control over their behaviour and an identification of an increased risk of the criminal justice system charging or convicting the individual for the same type of behaviour in the future. Specifically, dangerous offender law attempts to address the tension by favouring the risk lens and placing a cap over the responsibility lens. In other words, the framework allows for the prioritization of preventive measures over responses to criminalized conduct that are tailored to the blameworthiness of the criminalized person. I will consider the relationship between findings of lessened responsibility and heightened risk in more detail in the next section, which explores the judicial treatment of "unique systemic and background factors" in the dangerous offender context.

With respect to the centrality of risk in dangerous offender designation proceedings, Justice Barbara Fisher of the British Columbia Court of Appeal recently reiterated that predictions of risk of future violent conduct are central to dangerous offender designations: "Integral to the designation stage is an assessment of future risk. As the Supreme Court of Canada confirmed in *Boutilier*, an offender cannot be designated as dangerous unless he is shown to present a high

likelihood of harmful recidivism and that his violent conduct is intractable."[22] Additionally, Justice Fisher emphasized that dangerousness assessments—in particular, determinations of whether "violent conduct is intractable"—must include an evaluation of the likelihood of successful treatment: "a judge must conduct a prospective assessment of dangerousness—which necessarily involves the consideration of future treatment prospects—before designating an offender as dangerous".[23]

In *Boutilier*, Justice Côté elaborated that "treatability" plays different roles at the "designation stage" (that is, determining whether someone should be designated as a dangerous offender) and the "penalty stage" (that is, the stage of determining a fit sentence): "The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. *At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat*."[24] This passage connects risk assessment both with an identification of threats to public safety that the criminalized person purportedly poses (as a result of the extent to which the individual purportedly can or cannot be treated) and with an identification of the perceived options for managing the threats posed by the individual (also as a result of the perceived extent to which, and ways in which, the individual can or cannot be treated). The approach mirrors the Risk-Need-Responsivity Model's attempts to both predict risk and manage risk (including through treatment).

[22] *R v Awasis*, 2020 BCCA 23 at para 70 [*Awasis*].
[23] *Ibid*, citing *Boutilier*, *supra* note 7 at paras 45–46.
[24] *Boutilier*, *supra* note 7 at para 45.

As part of its emphasis on risk and prevention, the dangerous offender regime also involves explicit traces of dehumanization. The regime appears to justify its existence by degrading the individual "dangerous offender". Specifically, the regime labels dangerous offenders as "evil".[25] As the British Columbia Court of Appeal wrote in *R v George*: "In my view the attitude of the offender must be examined more broadly in order to fulfil what I take to be Parliament's intention; namely, to identify the *truly evil personality type* who has no compassion for others at any time. … It must always be remembered that dangerous offender proceedings may lead to the most severe penal sanction in our law, a lifetime of custody."[26] This passage appears to be grounded in an attempt to emphasize the limited and restricted application of the dangerous offender regime. Yet in doing so, it serves to dehumanize—to mark as so different and deviant from humanity—the group of individuals whom it classifies as dangerous. The characterization of dangerous offenders as "truly evil"[27] enables judges to construct a group of offenders that can be subjected to sanctions that Canadian criminal law principles would ordinarily regard as inappropriate and intolerable.[28] As Marie-Eve Sylvestre explains, the practice of dehumanizing criminalized people enables the state to "distance" itself from criminalized people.[29] The practice enables state actors to avoid confronting their own "responsibility" for crime.[30] Additionally, the practice of dehumanizing criminalized people reinforces "ingrained fears of the unknown, the strange or paranormal, and ultimately fear of ourselves and of our own fatal human condition."[31]

[25] *R v George* (1998), 126 CCC (3d) 384 at para 23, 109 BCAC 32 (BCCA).
[26] *Ibid* [emphasis added]. This passage was recently quoted in *R v Montgrand*, 2017 SKCA 49 at para 23, 352 CCC (3d) 485 [*Montgrand*].
[27] *Ibid*.
[28] Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) at 773 (discussing "monstrosity"))
[29] *Ibid* at 797.
[30] *Ibid* at 798.
[31] *Ibid*.

These creating and applying the category of the "the truly evil personality type", judges have likely demonstrated an attempt to both label and contain fears of difference, harm, and fatality.

The dehumanization process seems to involve an attempt to make sense of a regime that is difficult to justify. As Antony Duff writes, the practice of imposing "presumptively permanent imprisonment" on even a very small group of people "would keep some people locked up until they died. It would mark a kind of giving up on them, even if there is some scope and help for them to redeem themselves. I am not sure that a liberal polity should be ready thus to give up on any of its members."[32] The idea of "giving up on" people whom the courts label as "dangerous offenders" disrespects people's dignity and also eschews relational conceptions of risk. By marking some people as "truly evil" and "giving up on them", the dangerous offender regime leaves no meaningful room for engaging with the shared nature of risk.

4.3 Dangerous Offender Law and "Unique Systemic and Background Factors": *Awasis*

In the recent case, *R v Awasis*,[33] the British Columbia Court of Appeal addressed the relationship between "unique systemic and background factors" and dangerous offender designations. In particular, the Court affirmed that judges must consider "systemic and background factors" in dangerous offender proceedings. Justice Fisher wrote: "It is beyond dispute that judges have a

[32] RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 173-74.
[33] *Supra* note 22.

duty to consider *Gladue* factors in determining a just and appropriate sentence in *any* case involving an Aboriginal offender, including dangerous and long-term offender proceedings".[34]

Justice Fisher went on to note that systemic and background factors may play a "limited" role in the dangerous offender context.[35] The rationale was the difficulty in reconciling section 718.2(e)'s mandate to consider sanctions other than imprisonment with the priority placed on public protection in the dangerous offender regime and the fact that, in this context, "the available sanctions are limited to sentences of imprisonment as set out in s. 753(4)".[36]

Yet Justice Fisher also explained that, despite the emphasis on public protection in the dangerous offender context, the Supreme Court of Canada has indicated that the regime does not necessarily omit other sentencing objectives from judicial consideration. In establishing this point, Justice Fisher quoted the following passage from the majority judgment in *Boutilier*: "It is permissible for Parliament to guide the courts to emphasize certain sentencing principles in certain circumstances without curtailing their ability to look at the whole picture."[37] Justice Fisher explained that "[t]he 'ability to look at the whole picture…of course includes *Gladue* considerations".[38] Therefore, despite the dangerous offender regime's "emphasis on public safety

[34] *Ibid* at para 122, citing *R v Ipeelee*, 2012 SCC 13 at para 87, [2012] 1 SCR 433 [*Ipeelee*], *Boutilier*, *supra* note 7 at paras 53–54 and 63, *R v Shanoss*, 2019 BCCA 249 at para 24, and *R v Fontaine*, 2014 BCCA 1 at para 33, 348 BCAC 305.
[35] *Awasis*, *supra* note 22 at para 123.
[36] *Ibid*, citing *R v Garnot*, 2019 BCCA 404 at para 66 and *R v Jennings*, 2016 BCCA 127 at para 37, 384 BCAC 152. Justice Fisher also referred to the following cases: *R v Smarch*, 2015 YKCA 13 at para 47, 374 BCAC 291 (citing *R v Ominayak*, 2012 ABCA 337 at para 41, 539 AR 88), and *R v Standingwater*, 2013 SKCA 78 at para 49, 417 Sask R 158 [*Standingwater*]. Additionally, Justice Fisher noted that the statement was opposite to *R v Shanoss*, 2013 BCSC 2335.
[37] *Boutilier*, *supra* note 7 at para 56, quoted in *Awasis*, *supra* note 22 at para 124.
[38] *Awasis*, *supra* note 22 at para 125.

and the narrower options available to a sentencing judge",[39] Justice Fisher confirmed that "the choice for the sentencing judge is not simply custody or not custody, but rather the possibility of reducing a sentence to accommodate subsequent probation, or in this case, long-term supervision."[40] Justice Fisher went on to identify the importance of rehabilitation in the dangerous offender context: in determining whether to impose a period of indeterminate imprisonment or a period of imprisonment that is less than determinate, a sentencing judge will consider the "the offender's prospects for addressing the issues that contribute to his or her risk."[41] This passage suggests that Justice Fisher views risk factors as being fully within the control of a criminalized individual.

Justice Fisher concluded her overview of the relationship between "systemic and background factors" and dangerous offender proceedings with the following observation:

> While it may seem counterintuitive to suggest that *Gladue* factors could overcome findings of dangerousness, a high risk of recidivism and intractability—they could, for example, provide a basis for assessing the viability of traditional Aboriginal-focused treatment options aimed at addressing the issues that contribute to or aggravate an offender's risk. If such resources are available and considered appropriate, they could provide a basis for finding that a lesser sentence will adequately protect the public.[42]

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[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid* at para 127. For support, Justice Fisher referred to *Standingwater*, *supra* note 36 at para 51. In *Standingwater*, Justice Caldwell held that, in dangerous offender proceedings, "the *Gladue* factors remain relevant and the sentencing principle advanced under s. 718.2(e) of the *Criminal Code* must be addressed; but, the sentencing court must do so within the context of the paramount sentencing objective under Part XXIV, that being, again, the protection of society" (*ibid* at para 49). Justice Caldwell further provided an example of how systemic and background factors could play a role in a dangerous offender proceeding:

Justice Fisher therefore held that it is possible for "Aboriginal-focused treatment options" to be used as a reason for imposing a lesser sentence, while still pursuing the goal of protecting the public. I think it would have been preferable for Justice Fisher to engage with the reasons why such a supposedly "counterintuitive" possibility might be established. In particular, it would have been preferable for Justice Fisher to consider the links arising between systemic factors and the factors that risk assessment tools and clinical professionals use in ascertaining the likelihood that a criminalized person will be charged or convicted again in the future. Without directly confronting that overlap, Justice Fisher paints a picture of individualized risk and individualized public protection, both of which purportedly require the management and (possibly) rehabilitation of an individual, regardless of the state's and society's roles in constructing portrayals of risk and "risky" individuals.

In applying this analysis in *Awasis*, Justice Fisher affirmed the sentencing judge's "determination that *public protection was paramount despite the appellant's reduced moral blameworthiness*".[43] As I will show next, Justice Fisher acknowledged that Johnny Wilfred Troy Awasis's reduced moral blameworthiness was connected with his experiences as an Indigenous person.

> "For example, under s. 753.1(1)(c), the sentencing court must have reference to Gladue factors where they serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of reoffending posed by the Aboriginal offender in question. If such means exist, are available and are suitable in the circumstances, then they go to enhance the cogency of the possibility of eventual control of the risk that the Aboriginal offender will reoffend in the community." (*Ibid* at para 51)

Justice Caldwell's language involved an individualized portrayal of risk, referring to "the risk of reoffending posed by the Aboriginal offender" and "the possibility of eventual control of the risk that the Aboriginal offender will reoffend". Yet his language might also open the door for a more relational portrayal of risk and of options for lessening risk. In particular, he referred to "the environmental, psychological or other circumstances which aggravate the risk". This case did not demonstrate the existence of sufficient community supports, but that fact can also serve as an indication that the state has not fulfilled its responsibilities in relation to the community and criminalized individual. I will give further consideration to the issue of insufficient supports in the next chapter.

[43] *Awasis*, supra note 22 at para 134 [emphasis added].

Nonetheless, she held that the sentencing judge did not err in determining that "public protection" was more important than responding to Johnny Awasis's reduced blameworthiness.

Johnny Awasis's case involved two sexual assaults against women. In reviewing his "[f]amily and social history", Justice Fisher noted that he "is an Indigenous man with a very unfortunate background."[44] At the time of the judgment, he was 38 years old.[45] Justice Fisher explained that "[h]is parents and grandparents were survivors of the residential school system"[46] and that Johnny Awasis also spent about seven months at a residential school, where "he was emotionally, physically and sexually abused."[47]

While Justice Fisher included further details in relation to Johnny Awasis's parents' lives, I will not reiterate many of them here. What I would like to emphasize is that, despite outlining the state's violence against Johnny Awasis and Johnny Awasis's parents, such as Johnny Awasis's experiences of abuse at a residential school,[48] his mother's experience of being "sexually assaulted by a priest at a residential school",[49] and his father's imprisonment,[50] Justice Fisher nonetheless placed blame on Johnny Awasis's parents for the "terrible instability" that he experienced as a child.[51] In particular, Justice Fisher stated that Johnny Awasis's "childhood was marked by terrible instability *as a result of his parents' substance abuse, neglect and violence*."[52] Justice Fisher elaborated, noting, for example: "*[d]ue to his parents' alcoholism*, he and his

[44] *Ibid* at para 8.
[45] *Ibid* at para 2.
[46] *Ibid* at para 8.
[47] *Ibid* at para 10.
[48] *Ibid*.
[49] *Ibid* at para 9.
[50] *Ibid* at para 10.
[51] *Ibid*.
[52] *Ibid* [emphasis added].

siblings were often left alone for days or weeks at a time";[53] and "[h]e had difficulties in school *due to this instability as well as some learning disabilities*".[54] Justice Fisher makes no mention, for example, of whether the schools provided adequate support for accommodating Johnny Awasis's learning disabilities. Additionally, Justice Fisher connects "instability" with his parents' actions, rather than with the state's violence against, and neglect of, him and his parents. Justice Fisher commented that Johnny Awasis "did manage to advance in alternative programs until approximately grade eight."[55] It is not clear what these alternative programs entailed or whether they continued to be available to Johnny Awasis beyond grade eight. Moreover, later in the judgment, Justice Fisher notes that, "[a]t the onset of his sentence, the appellant was noted to have a possible learning disability…but was nonetheless able to successfully complete without much difficulty a GED with one course short of a Dogwood high school diploma."[56] This is an important illustration of Johnny Awasis's resilience, and while Justice Fisher mentions it in the judgment, I think it would have been helpful to include this note about Johnny Awasis's academic skills within the earlier review of his personal history, where it might have come across as more central to his personal circumstaces.

With respect to the possibility of "addressing the issues that contribute to or aggravate [Johnny Awasis's]…risk" through "traditional Aboriginal-focused treatment options", Justice Fisher stated that "the judge was not satisfied that the appellant had the motivation or capability to meaningfully participate in treatment or address his addiction problems such that he could be

[53] *Ibid*.
[54] *Ibid* at para 11.
[55] *Ibid*.
[56] *Ibid* at para 33.

managed in the community to an acceptable level."[57] Troublingly, Justice Fisher further suggested that, "[w]hile the appellant's lack of motivation and capacity undoubtedly stem largely from his tragic background, the judge was unable to remedy this complex problem through the sentencing process."[58] This is a discouraging statement. It pathologizes Johnny Awasis by portraying him as lacking motivation and capacity. Additionally, the statement attributes this pathology to "his tragic background". The word "background" implies that the tragedies result from his Indigenous background, rather than from the state's oppression of Indigenous people. Additionally, the use of the word "tragic" seems to lose its meaning when the result is simply that the sentencing judge could not provide a remedy to "this complex problem through the sentencing process." Furthermore, the introduction of the term "complex" seems to, paradoxically, simplify the "problem" of the state's oppression of Indigenous people. The term occludes consideration of the elements of oppression, erasing such elements because they are too complex for a sentencing judge to untangle or delineate. Thus, while sentencing judges are supposed to take into account systemic injustice against Indigenous people, sentencing judges are permitted from not doing so on the basis that sentencing law does not actually (or apparently) provide the tools to do so.

In my view, Justice Fisher's analysis of risk in *Awasis* exposes the need to depict both responsibility and risk relationally, that is, in a manner that identifies state accountability and that regards public protection as a goal requiring actions beyond those that can be undertaken by an individual criminalized person. Relational understandings of responsibility and risk show that the dual goals of imposing a sentence that pursues public protection and that reflects a criminalized

[57] *Ibid* at para 131.
[58] *Ibid* at para 132.

person's reduced moral blameworthiness are not necessarily in tension. Rather, the two goals can be better understood as supporting one another: if an individual's blameworthiness is reduced because of the state's oppression of this person, their family, and their community, then it is likely that the state's aim to protect the community can only be pursued if the state also changes its oppressive practices. It is problematic to posit that, despite a context of experiences of oppression, an individual holds all the power and potential to protect their community in the future. Such a perspective erases the context of oppression.

In dangerous offender designation judgments, the judicially constructed picture of community safety is narrow. The image focuses the viewer's attention on the possible harms that an *individual* might carry out in the future. Of course, it is of deep concern that an individual might continue to harm other people in the community, and I do not dispute that concern. What I take issue with is the re-individualizing of the image. If systemic factors played a role in the commission of the offence at issue, surely those factors will continue to play a role in the future if the state (through the judiciary and other criminal justice practitioners) continues to try to pursue public protection through individualized approaches. Rather than making determinations of dangerousness by looking back at a criminalized person's record, recounting their perceived "failures" to be open to treatment and to try to change, and assessing their likelihood of future failures and resistance, perhaps the judgments could also look at how the state has continued to oppress this individual, including, for example, through imprisoning the individual, the (mis)treatment of the individual in prison, criminal justice practitioners' interactions with the individual, and systemic barriers to employment.

Upon close examination, *Awasis* also brings into view the need for a clearer distinction between an individual's reduced blameworthiness because of their reduced capacity for controlling their behaviour and an individual's reduced blameworthiness because of shared responsibility between the individual and the state. In dangerous offender law, these two determinations will not necessarily be discrete. Dangerous offender designations involve a finding of an "intractable" inability to control one's violent behaviour. In this type of context, the state will likely share some responsibility for crime on the basis that it failed to provide an individual with the support that the individual needed in order to exercise their (limited) capacity to control their behaviour in legal ways. But the state may also share responsibility for crime not (only) because of a failure to provide support to the individual's limitations in controlling their behaviour, but also because of other modes of oppression, such as sustaining inequality in access to housing, education, and healthcare.[59]

I think that judges could better engage with both an identified need for public protection and a recognition of lessened individual responsibility (arising both from limited capacities to control one's behaviour and from the state's systemic oppression against the individual) if the dangerous offender regime brought state accountability more fully into view. State accountability helps to illuminate the possible compatibility in finding that a criminalized person is both less responsible for their conduct (due to their limited capacity to control their conduct and due to the state's actions oppression) and more at-risk of recriminalization. Specifically, systemic injustices that

[59] Given the ableist norms that pervade Canadian law and policy, I doubt that there will be many circumstances in which an individual will demonstrate lessened responsibility only because of a lessened capacity to control their behaviour and not also because of shared state responsibility. Additionally, the dangerous offender regime affects criminalized Indigenous people at a high rate (David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 Alberta Law Review 619 at 620). This suggests that systemic discrimination has likely contributed to dangerous offender designations.

contributed to a person's interactions with the criminal justice system will continue, if unaddressed, to make the individual more at-risk of future interactions. The public can therefore only be protected if crime and portrayals of dangerousness are viewed in a relational manner. Moreover, the careful delineation of the ways in which a criminalized individual's responsibility is lessened and shared with the state could help to determine which state actions and policies need to be changed.

4.4 Limited Use of Structured Clinical Judgment: *Montgrand*

In 2017, Justice Neal W Caldwell of the Saskatchewan Court of Appeal addressed the weight to be given to evidence arising from risk assessment and psychological instruments in dangerous offender designation hearings.[60] The tools involved in the case were the Hare Psychopathy Checklist-Revised ("PCL-R"), the History, Clinical, and Risk—20 ("HCR-20"),[61] the Risk for Sexual Violence Protocol ("RSVP"),[62] and the Spousal Assault Risk Assessment Guide ("SARA").[63] In relation to these tools, Justice Caldwell stated:

> I am not aware of any standard against which the predictive value of these or any other assessment model is gauged. Indeed, in his testimony, Dr. Lohrasbe remarked there is a

[60] See generally *Montgrand*, *supra* note 26.
[61] CD Webster et al, *The HCR-20: Assessing Risk for Violence (Version 2)* (Burnaby: Simon Fraser University, 1997), as cited in James Bonta & DA Andrews, *The Psychology of Criminal Conduct*, 6th ed (New York: Routledge, 2017) [Bonta & Andrews, *Psychology of Criminal Conduct*].
[62] SD Hart et al, *The Risk for Sexual Violence Protocol (RSVP): Structured Professional Guidelines for Assessing Risk of Sexual Violence* (Burnaby: Mental Health, Law, and Policy Institute, Simon Fraser University, 2003), as cited in Stephen D Hart & Douglas Boer, "Structured Professional Judgment Guidelines for Sexual Violence Risk Assessment: The Sexual Violence Risk-20 (SVR-20) and Risk for Sexual Violence Protocol (RSVP)" in Randy K Douglas & Kevin S Otto, eds, *Handbook of Violence Risk Assessment* (New York: Routledge, 2010) 269.
[63] PR Kropp et al, *Manual for the Spousal Assault Risk Assessment Guide*, 2d ed (Vancouver: British Columbia Institute on Family Violence, 1995), as cited in Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 61.

> great deal of flexibility and individual expertise in administering non-statistical models. As this indicates, there are good reasons why a sentencing judge must critically assess the weight to be given to an expert opinion as to an offender's risk of reoffending.[64]

Justice Caldwell went on to hold that, "in this case, it appears from the record that the judge [incorrectly] accepted the result of Mr. Montgrand's risk assessment itself as sufficient proof that the established pattern of behaviour showed a likelihood of Mr. Montgrand causing death, injury or severe psychological damage in the future."[65]

As I discussed in the previous chapter, the PCL-R is a diagnostic tool that scores the likelihood that an individual can be labelled as a psychopath. The remaining instruments in this case—the HCR-20, the RSVP, and the SARA—all involve structured clinical judgment. As James Bonta and DA Andrews explain, "structured clinical judgment…instruments structure what the professional should consider in the assessment but do [not] [*sic*] link actuarially to a 'score' that categorizes the offender in terms of risk, leaving this decision to the professional."[66] For example, Bonta and Andrews describe the HCR-20 as follows:

> The HCR-20 is a 20-item instrument consisting of 10 Historical items (e.g. previous violence), five Clinical items (e.g. lack of insight), and five Risk management items (e.g. plans lack feasibility). Although each item is scored (0, 1, or 2) and the scores are added

[64] *Montgrand*, *supra* note 26 at para 14.
[65] *Ibid* at para 15.
[66] Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 61 at 217.

> up for a total score, there is no instruction as to what score corresponds to low, moderate, or high risk. The professional makes the final judgment.[67]

The RSVP and the SARA function similarly.[68]

Justice Caldwell's statements suggest that risk assessment evidence arising from structured clinical judgment is not sufficient, on its own, to establish a criminalized person's likelihood of causing death, injury, or severe psychological harm in the future. This determination demonstrates that judges ought not to make a dangerous offender designation simply on the basis that, given the recidivism patterns of others in the past (as reflected in the data incorporated into risk assessment and psychological tools), it appears likely (in a professional's judgment) that a given criminalized person might follow, or be put onto, the same path.

While Justice Caldwell determined that judges should place limited weight on instruments involving structured clinical judgment, he seemed to leave the door open for judges to give more weight to actuarial evidence that is unmediated by professional judgment—that is, to purely actuarial risk assessment evidence. I have explored some of the potential drawbacks of actuarial risk assessment in the previous chapter, focusing primarily on their individualization of risk, their exclusion of state and other social responsibilities and actions, and their reliance on normative assessments of one's lifestyle, such as relationship and financial status. Rather than

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[67] *Ibid* at 218.

[68] See e.g. Kurt F Geisinger et al, eds, *APA Handbook of Testing and Assessment in Psychology*, vol 2: Testing and Assessment in Clinical and Counseling Psychology (Washington: American Psychological Association, 2013) at 277 (on the RSVP); Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 61 at 310 (on the SARA); Henrick Belfrage et al, "Assessment and Management of Risk for Intimate Partner Violence by Police Officers Using the Spousal Assault Risk Assessment Guide" (2012) 36:1 Law and Human Behavior 60 (on the SARA).

reiterating those concerns here, I will instead consider some of the ways in which judicial discretion in *Montgrand* similarly omitted an engagement with state accountability.

Justice Caldwell demonstrated an aim to not treat structured clinical judgment as determinative of Leonard Montgrand's level of risk. Nonetheless, Justice Caldwell's judgment proceeded to assess Leonard Montgrand's level of risk by incorporating professionalized normative assessments of what counts as dangerous and what counts as harm. For instance, in describing the prior offences of which Leonard Montgrand was convicted, Justice Caldwell quoted from the trial judge's summary and from the report of the psychiatrist, Dr. Lohrasbe. These descriptions involve graphic and pernicious images. I reproduce them here in an effort to illustrate the tension that dangerous offender law has created between assessing an individual's dangerousness and acknowledging the harm that has been inflicted on others. The details of the offences are relevant, because in my view, they might be perceived as involving more harm and seriousness than accepted by Justice Caldwell.

Leonard Montgrand's previous violent offences included the following: "knifing" a man; "kick[ing]…[a man] in the legs…and punching his fist into the palm of his hand", "push[ing him] and spit[ting] snuff in his face and wrestl[ing] him to the ground"; sexually assaulting a 16-year-old young woman, which involved entering her bedroom while she was asleep in her bed, getting onto her bed and "touching her vagina"; breaking and entering a home at night and sexually assaulting a woman, which involved getting "on top of her, pull[ing] her shorts down to her knees, and perform[ing] oral sex on her"; and assaulting his common-law spouse, which involved, for example, "us[ing] a kitchen table and chair, which gashed her forehead, and then

pummell[ing] her so that she was scratched and bruised around the…face and neck" and "kicking and punching her, leaving bruises on her body."[69]

Leonard Montgrand thus carried out a number of violent offences, including sexual offences, against women, including young women. Justice Caldwell referred to the following, quoting from Dr. Lohrasbe's report: "Mr. Montgrand's violent offences were at the 'relatively non-serious end' and that '[t]he anticipated impact on the victim would not be of a major kind.'"[70] In my view, the labelling of these offences as "relatively non-serious" and as likely to inflict only minor damage on the survivors has the potential to diminish and dismiss the harms that the survivors might have experienced. Such labelling might also perpetuate the potentially harmful message that violence against women can be ranked according to the physical actions involved and the physical injuries it causes.[71]

It is of concern that the dangerous offender regime allows for the possibility of a response to criminalized behaviour that is so severe and harmful—indefinite imprisonment—that psychiatrists and judges resort to what can come across as a diminishment, and a dismissal, of the harms that have been imposed on other groups of marginalized people, including women. Perhaps judges could more helpfully respond to violence against women if the options for sentencing were not so harsh. For example, rather than trying to justify, or not justify, a period of indefinite imprisonment on the basis of a professional's perception of the level of harm that survivors have experienced, judges could instead apply sentences that aim to be more tailored to

[69] Sentencing hearing, quoted in *Montgrand*, *supra* note 26 at para 4.
[70] *Montgrand*, *supra* note 26 at para 18, quoting Dr. Lohrasbe's report.
[71] For a discussion of alternative, "[e]motion-focused" definitions of rape, see e.g. Rebecca Campbell, *Emotionally Involved: The Impact of Researching Rape* (New York: Routledge, 2002) at 110-117.

the expressed needs of the survivors in the case. Additionally, perhaps judges could demonstrate more cognizance of the need for systemic change, rather than narrowly focusing on a professional's assessment of a criminalized individual's effort (or lack of effort) at rehabilitating. I will explore these possibilities more fully in the next chapter.

What I have attempted to show is that, even if judges utilize risk assessment evidence sparingly, the concerns related to their use do not disappear. Rather, similar concerns are still present, arising in a different form—here, in the form of clinical and judicial discretion about what counts as dangerousness and what counts as harm. Therefore, simply opting to make limited (or even no) use of risk assessment evidence will not necessarily remove the presence of systemic bias in sentencing law and practice. Until judgments engage more thoroughly with the state's actions and policies that sustain inequality and that maintain images of certain groups of people as more "risky" than others—judgments will continually try to deal with systemic harms in ways that only deal with—at best—half of the equation. Such harms include, for example, criminalized people's experiences of racism and addictions and survivors' experiences of violence against women. In the next section, I will explore further examples of the potential for discretion to individualize risk. Some of the cases since *Ewert* have referred to clinical discretion as removing the potential for "cultural bias", but the analyses appear to still be significantly individualized.

4.5 Recent Judicial Uses of Risk Assessment Instruments: Case Law Since *Ewert*

In the sentencing context, *Ewert* does not appear to have limited the judicial use of evidence arising from risk assessment instruments. Sentencing judgments incorporate such evidence, with

judges either simply acknowledging some criticisms of the tools or deciding that such concerns have been overcome in some way. With respect to the latter approach, cases have referred to expert evidence indicating that some of the tools have been validated in relation to Indigenous people, to expert evidence expressing less concern about the potential for "cultural bias", to the experts' practices of adjusting the tools' results to account for the potential for "cultural bias", and to the experts' practices of placing no or minimal weight on unvalidated instruments. The final cases that I discuss engage with the possibility of identifying failures in state responsibilities with respect to imprisoned Indigenous people, alongside the application of risk assessment evidence. Given the insertion of analyses of state accountability into these judgments, the cases illustrate that there could be space in sentencing judgments for judges to engage more explicitly and thoroughly with relational responsibility and relational risk.

4.5.1 Acknowledging the Supreme Court of Canada's Concerns

R v Dennis[72] is a case in which the sentencing judge dealt with the Supreme Court's decision in *Ewert* by merely acknowledging the criticisms of risk assessment instruments that were raised in the case. I will engage with *Dennis* in detail, and then I will briefly mention a few other cases that take a similar approach.

In addition to illustrating one judicial approach to *Ewert* in the sentencing context, *Dennis* provides further insight into an important point of overlap between judicial analyses of responsibility and risk. In particular, the case demonstrates that a judge might omit references to the state not only when depicting the creation and maintenance of systemic discrimination and

[72] *R v Dennis*, 2018 BCPC 270 [*Dennis*].

violence against Indigenous people but also when describing constructions of risk. In other words, judicial analyses of both risk and "unique systemic and background factors" can remove the agency and accountability of the state and state actors. Thus, in the same way that risk assessment theory and tools convert criminogenic needs into an individual's supposed personal failings and shortcomings—and leave the state unnamed and absent—judges convert systemic injustices into experiences that are only *experienced by* Indigenous individuals and communities, not experiences that were or are imposed by state institutions and actors. I argue that the judicial suppression of the state, state actors, and state actions in relation to both risk analyses and *Gladue* analyses demonstrates that both risk and responsibility lenses continue to revert to a narrow, individualized gaze.

In Shane Dalton Dennis's sentencing case, Judge Armstrong explained that Shane Dennis pled guilty to a charge of arson, which took place at the Sandman Inn and Suites Hotel in downtown Kamloops.[73] Shane Dennis's home was in Williams Lake.[74] He spent most of his life in the area of Williams Lake and on a T'exelemc Band reserve.[75] In July 2017, Shane Dennis and his family were evacuated because of forest fires and were housed in the Sandman Inn and Suites Hotel.[76] At the time of the offence, Shane Dennis had recently finished serving his parole that had followed his custodial sentence for a sexual assault offence.[77] Shane Dennis "declared that he was not meant for the outside world and wanted to return to the penitentiary."[78] He used alcohol and drugs and took money from the pension belonging to his grandmother.[79]

[73] *Ibid* at para 1, 6.
[74] *Ibid* at para 6.
[75] *Ibid* at paras 6, 8.
[76] *Ibid* at para 6.
[77] *Ibid* at para 8.
[78] *Ibid* at para 6.
[79] *Ibid*.

With respect to the arson offence, one of Shane Dennis's family members called 911 to report that Shane Dennis had broken a hotel window and had "trashed" a hotel room.[80] Afterwards, Shane Dennis "exited his hotel room, dropped to his knees and exclaimed 'arrest me'."[81] People then saw smoke coming from the room he had been in—he had set his grandmother's suitcase on fire—and the fire activated the hotel's sprinkler system.[82] According to the evidence, "at least $5,002 was spent on clean-up and a further estimate of $18,000 in repair costs was provided."[83] The sentencing court did not receive any victim impact statements.[84]

Shane Dennis is a member of the Iskut First Nation.[85] In his sentencing judgment, Judge Armstrong reviewed detailed information about Shane Dennis's upbringing, his grandmother's experiences in residential schools, his use of drugs and alcohol, and his mental health. This case illustrates that even when a judge incorporates and reflects on the background information provided in a *Gladue* report, the judge may not draw links between such detailed experiences and the state's actions and inactions. For instance, Judge Armstrong wrote that "[t]he multitude of systemic and background factors which flow from Mr. Dennis' indigenous heritage are evident in the reports filed".[86] This passage erroneously implies that "systemic and background factors" result not from the Canadian state's systemic destruction of Indigenous people, laws, and communities, but from a person's "indigenous heritage". The passage pathologizes Indigenous

[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid* at paras 6, 7.
[83] *Ibid* at para 7.
[84] *Ibid*.
[85] *Ibid* at para 8.
[86] *Ibid* at para 29.

people as being endemically imbued with a "multitude" of apparent shortcomings, such as addictions, a purported inability to care for children, and clinically diagnosed mental disabilities.

Judge Armstrong further wrote that "Mr. Dennis was victimized at a young age by family and community members in unthinkable ways. He was apprehended and placed in foster care. He experienced racism at school."[87] The term "unthinkable" is distancing—Judge Armstrong marked Shane Dennis's experiences as unknowable. Yet abuse is not "unthinkable" to settler colonial Canada, as demonstrated by Judge Armstrong's earlier depictions of residential school abuse. As Judge Armstrong indicated earlier on, Shane Dennis's grandmother, Veronica Dennis, attended Residential Schools.[88] These schools included St. Mary's Residential School in Mission, British Columbia, which Veronica Dennis attended for 11 years.[89] Judge Armstrong noted that "[r]esidents of that school experienced mental, physical and sexual abuse with frequent use of the strap."[90] Judge Armstrong thus canvassed the Canadian state's violence towards Indigenous people but later erased the state and state actors, suggesting instead that the effects of such violence, including present-day actions of violence carried out by Indigenous people against Indigenous people, are "unthinkable".

Furthermore, the term "unthinkable" implies a limited level of understanding of settler colonial violence and of the lived experiences that it contributes to today. Even after reviewing and depicting circumstances of residential school abuse, Judge Armstrong suggested that further abuse committed by and against Indigenous people is "unthinkable". In my view, the task of

[87] *Ibid*.
[88] *Ibid* at para 11.
[89] *Ibid*.
[90] *Ibid*.

finding ways to respond to such abuse requires not being unable to imagine it, but being able to respond to it with understanding and respect. For instance, in a markedly different tone, Hadley Louise Friedland writes:

> A contemporary issue within Indigenous communities is the frightening rates of internal violence and child victimization. How do we speak of unspeakable things? How do we protect those we love – *from* those we love? Can we reject monstrous actions without rejecting the actor as a monster? And what resources do we need to think through such terrible things in principled and effective ways?[91]

Friedland expresses compassion, including for the difficulty of speaking about violence. By using the term "unspeakable" rather than "unthinkable", she expresses understanding, not distancing. The term "unspeakable" acknowledges the difficult endeavour of talking about violence without distancing oneself from the lived experiences of people involved in violence (as can happen when such experiences are described as "unthinkable"). Moreover, Friedland demonstrates respect for the dignity of individuals whose acts are labelled as "monstrous". She recognizes the importance of both identifying the harms that "monstrous actions" cause and attempting to find "principled and effective ways" to understand and respond to such actions.[92]

In the above summary, Judge Armstrong also left out references to the abuse that appears to have been imposed on Shane Dennis during his time in foster care. Earlier, Judge Armstrong

[91] Hadley Louise Friedland, "The *Wetiko* Legal Principles: Cree and Anishinabek Responses to Violence and Victimization" (Toronto: University of Toronto Press, 2018) at xv.
[92] On the inter-related concepts of "monstrosity", distancing, compassion, and dignity, see Sylvestre, *supra* note 28 at 773, 797-99.

explained that Shane Dennis "experienced sexual abuse at the hands of siblings, household members, and other community members between the ages of 2 and 7. He was placed in foster care from ages 7 to 12. At age 11, he was violently raped by an adult male which caused him significant trauma."[93] It is unclear from this sentence what Shane Dennis's relationship was to the adult male who sexually assaulted him. However, what does appear to be clear is that this assault took place while Shane Dennis was in foster care, that is, while he was in the supposed "care" of the state. To leave out this abuse in the later summary and analysis of the systemic and background factors that shaped Shane Dennis's level of responsibility is to further erase the state's role in generating, or allowing, harm under the guise of "care". While it is possible that Judge Armstrong intended this abuse to be included in his reference to abuse by "community members", the more detailed description of the abuse suggests otherwise. In the detailed description, Judge Armstrong separated the abuse carried out by family and other community members from the "violent…rape…by an adult male" that Shane Dennis experienced when he was 11. Additionally, the order in which Judge Armstrong presented Shane Dennis's experiences in the later summary suggests that the state apprehended him and took him under its "care" in order to protect him from abuse. Moreover, Judge Armstrong did not re-state the fact that foster care did not result in such protection: "Mr. Dennis was victimized at a young age by family and community members in unthinkable ways. He was apprehended and placed in foster care." To erase the abuse imposed on Shane Dennis during his time in foster care within the summary is to replicate the Canadian state's historic and ongoing practices of erasing its agency in harming Indigenous people. The analysis presents Indigenous people as unable to cope and as unable to raise and not harm children. At the same time, the analysis presents the Canadian state and state

[93] *Dennis*, *supra* note 72 at para 8.

actors as helpful and responsive, even while continuing to inflict, or withstand the infliction of, harm.

Similar to Judge Cozens' judgment in *Quash*, which I discussed in the second chapter, Judge Armstrong treads a fine line between acknowledging the ways in which Shane Dennis's individual responsibility is diminished and simply transferring that responsibility onto another individual—again, an Indigenous mother. Judge Armstrong wrote, "Mr. Dennis has experienced many of the unique background and systemic factors outlined in his *Gladue* report which have resulted in his current offending including:…*the impacts of severe substance abuse within his family and in particular, on his mother who was unable to care for him or his siblings*, and substance misuse by his siblings".[94] I find this representation of Shane Dennis's mother's substance abuse to be troubling. A judge has, again, at least partly blamed an Indigenous mother as part of the process of contextualizing a criminalized person and assessing his level of responsibility. Shane Dennis's "father was not a part of [Shane Dennis's] life".[95] Yet Judge Armstrong made no mention of this within the apparent review of Shane Dennis's family relationships and the supposed dysfunctionality inherent in those relationships. I do not mean to suggest that Shane Dennis's father should have been similarly blamed. Rather, I aim to show that, in the name of *contextualizing* an individual criminalized person (for the purpose of remedying the mass imprisonment of Indigenous people), judges may insert essentialized depictions of other individuals into the judgment. This leads, in the end, to the continued use of unidimensional and stereotyped portrayals of people. Indeed, *not* reiterating a father's absence

[94] *Ibid* at para 33 [emphasis added].
[95] *Ibid* at para 12.

also stereotypes the father, potentially implying that a disconnect between a father and a child is an expected, normal relationship—not one to be considered, contested, or explored.

Also concerning is the possible implication that substance abuse is presented as a problem for Indigenous women not in and of its own right but because it prevents Indigenous women from carrying out their socially defined roles. The quick alignment between, on the one hand, a mother with a possible addiction and, on the other hand, the state's placement of her child in its care, is problematic. Left out of the analysis is the Canadian state's practices of removing Indigenous children from their home. Displacement through residential schools, foster care, and prison are interconnected acts of state violence.[96] However, in this judgment, such "systemic and background factors" are again individualized, portrayed as manifesting in a number of individualized ways, including in a mothers' addictions and perceived parenting abilities.

Judge Armstrong also turned the state's placement of Shane Dennis's grandmother in a Residential School into an individualized experience: Judge Armstrong's summarized list of background and systemic factors included "the familial and cultural dislocation wrought by his grandmother's attendance at residential schools".[97] Perhaps a more accurate description would refer to the challenges wrought by the state's actions of placing Veronica Dennis in an abusive residential school. Moreover, rather than considering the resilience of Indigenous families and communities in the face of such state violence—for example, Veronica Dennis cared for Shane Dennis—Judge Armstrong simply depicted Veronica Dennis's attendance at residential schools as resulting in "familial and cultural dislocation". The Canadian state's aim, through residential

[96] See Linda Mussell, "Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities" (2020) 33 J L & Soc Pol'y 15.
[97] *Dennis*, *supra* note 72 at para 33.

schools, was precisely to destroy Indigenous communities. As the Truth and Reconciliation Commission of Canada put it:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."[98]

The survival of Indigenous families and communities shows not dysfunction, dislocation, and disconnection, but strength. As Jonathan Rudin writes: "The fact that Indigenous communities continue to exist in Canada is a testament to the resilience of Indigenous people in the face of incredibly difficult externally imposed challenges."[99] Rudin advises criminal law practitioners "not to make *Gladue* submissions a synonym for failure and trauma—it should also be an opportunity to discuss healing…Cataloguing the traumas and challenges faced by an Indigenous offender and leaving out any of the person's triumphs and successes fails to paint a complete picture of the person."[100] Through my exploration of Judge Armstrong's analysis, I have aimed to show that judicial portrayals of a criminalized Indigenous person's traumas and difficulties might result not only in an incomplete picture of the criminalized person (which is problematic in and of itself) but also of their family and community members. The result is that the analysis

[98] *Canada's Residential Schools: The History, Part 1 Origins to 1939 – The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Montreal: McGill-Queen's University Press, 2015) at 3.
[99] Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019) at 131.
[100] *Ibid*.

obfuscates the objective of remedying the state's oppression. In particular, the analysis clouds the remedial aim by fixating on the challenges faced by Indigenous individuals and communities.

The individualization of background and systemic factors can also be found in the overall depiction of Shane Dennis as vulnerable—as dislocated from his family and disconnected from his "culture". In particular, the summarized list of "systemic and background factors" also included Shane Dennis's "own substance abuse history", "the profound impact of [abuse]…on his own mental health", "racism *experienced* at school", "*dislocation* from his family, time in foster care, and ongoing dislocation from his own children", and "his own *disconnection* from his culture and language as evidenced by his own hostility toward indigenous people".[101] As I discussed in more detail in the second chapter, Carmela Murdocca describes references to dislocation and disconnection as instances of the judicial pathologizing of Indigenous people: Indigenous people are framed as vulnerable subjects, instead of oppressed subjects.[102] She has depicted this kind of analysis as one in which "the historical violence and ongoing traumas of residential schools is transformed into present-day pathologies".[103] Moreover, the approach reveals "a particular kind of pathologized racial ontology that work[s] against supporting or advancing a politics of accountability."[104] Murdocca demonstrates that the very type of analysis that is meant to invoke state accountability instead impedes it.

Judge Armstrong expresses his awareness of systemic injustice in the following manner: "I am mindful of the devastating effects of the unique circumstances of indigenous people and the

[101] *Dennis, supra* note 72 at para 33.
[102] Carmela Murdocca, "Ethics of Accountability: Gladue, Race and the Limits of Reparative Justice" (2018) 30:3 CJWL 522.
[103] *Ibid* at 537.
[104] *Ibid*.

resulting historical overrepresentation in prison. Mr. Dennis' sentence must take those circumstances into account."[105] Yet, through this passage, Judge Armstrong ultimately places all responsibility on Indigenous people. He constructs Indigenous people as generating their own devastating effects, as though it is something essential and unique to Indigenous people that has led to the state imprisoning Indigenous people in high numbers. Judge Armstrong does mention colonialism in his judgment, writing, for example: "Mr. Dennis comes before the court *bearing scars from colonialism* including his grandmother's experience at residential school, his parents' struggles with substance abuse, extensive childhood traumas including serious sexual offences, period of foster care and homelessness, racism at school, incomplete education, dislocation and loss of connection to his culture."[106] But "[b]earing scars" again depicts Shane Dennis as vulnerable and pathologized—as physically injured by colonialism. And, instead of naming the state's abuses again and again, the "struggles" and "traumas" and "racism" experienced by Indigenous people are reiterated, again, and again. Judge Armstrong thus simultaneously acknowledged colonialism while placing the burdens of its effects on Indigenous people alone.[107]

With respect to risk, Judge Armstrong referred to the evidence of a psychiatric pre-sentence report that Dr. Lyne Beauchemin prepared and a psychological assessment that Dr. Patrick Bartel conducted.[108] Judge Armstrong acknowledged that "Dr. Bartel applied [a] variety of tools, some of which have been criticised with respect to their application to indigenous populations in *Ewert v. Canada*, 2018 S.C.C. 30. Dr. Beauchemin and Dr. Bartel also applied the HCR-20 assessment

[105] *Dennis*, *supra* note 72 at para 33.
[106] *Ibid* at para 24 [emphasis added].
[107] For a related analysis of another judgment, see Murdocca, *supra* note 102 at 535-36.
[108] *Dennis*, *supra* note 72 at paras 3, 17.

tool which was not at issue in the *Ewert* case."[109] Without any further analysis of the experts' uses of these tools in relation to Shane Dennis, Judge Armstrong went on to summarize the experts' findings of risk:

> Dr. Beauchemin concluded Mr. Dennis posed a moderate to high risk of violent offending. Dr. Bartel noted an array of risks:
>
> - higher risk for general violence,
> - moderate to high risk for sexual violence, and
> - low risk for arson.[110]

Judge Armstrong's judgment proceeded to include somewhat conflicting discussions of the relevance of the evidence pertaining to Shane Dennis's classification as a high risk for general violence. Judge Armstrong first emphasized "that Mr. Dennis is to be sentenced for the offence he committed, not for his general risk of violence."[111] However, later on, Judge Armstrong referred to the high-risk classification as an aggravating factor and as a factor contributing to a need to deprive Shane Dennis of his liberty. In particular, Judge Armstrong noted that one of the aggravating factors was "Mr. Dennis' risk of future violence, although I note that his risk of future arson is low."[112] The high risk for general violence classification continued to factor into Judge Armstrong's ultimate sentencing decision: "Given the seriousness of the offence, Mr.

[109] *Ibid* at para 17.
[110] *Ibid*.
[111] *Ibid*.
[112] *Ibid* at para 23.

Dennis [sic] high risk of violence, Mr. Dennis' criminal history and his limited insight, some deprivation of liberty is appropriate."[113]

As Judge Armstrong indicated, Shane Dennis's high risk of violence, criminal history, and limited insight served as reasons to impose a custodial sentence. We can thus see that Judge Armstrong attempted to manage and contain risk partially through a carceral sanction. Judge Armstrong also imposed a probation order for the purpose of protecting the public: "I am satisfied that the public will best be protected if a lengthy period of probation can accompany that deprivation of liberty."[114]

Judge Armstrong appeared to conceive of public protection as being connected with rehabilitating Shane Dennis. Judge Armstrong demonstrates this therapeutic understanding of probation by attempting to address Shane Dennis's "limited insight"[115] into his professionally identified need for addictions treatment. Judge Armstrong held that Shane Dennis's "own substance abuse history" constituted one of the "many…unique background and systemic factors…which have resulted in his current offending".[116] In terms of the impact of this factor on Judge Armstrong's sentencing analysis, he stated that "Mr. Dennis'…self-induced intoxication does not diminish his responsibility."[117] It appears that Judge Armstrong thus simply converted Shane Dennis's addictions from a systemic and background factor into an individualized criminogenic need, which not only framed Shane Dennis as "risky" but also as responsible. In

[113] *Ibid* at para 32.
[114] *Ibid*.
[115] *Ibid* at para 34.
[116] *Ibid* at para 33.
[117] *Ibid* at para 29.

the end, Judge Armstrong held "that Mr. Dennis requires intensive treatment for his addiction and that his insight in that regard is wanting."[118]

The concept of the "in betweenness"[119] of responsibility (that is, the notion that responsibility exists somewhere "in between" individuals and the state) encourages criminal justice practitioners to identify individual responsibility, including capacities for exercising varying levels of control over one's actions, and to identify ways in which an individual's abilities and choices are constrained due to the actions of other people and state policies and actions. A relational approach would therefore include an acknowledgment, and fostering, of Shane Dennis's capacity to develop insight into his addictions and behaviours. But a relational approach would also, I think, recognize the contradiction inherent in identifying the state's violence towards Shane Dennis's family and community and assuming that the public can be protected if Shane Dennis takes full responsibility for his addictions and undergoes state-mandated treatment. In other words, a relational approach would also recognize that asking an individual to take full responsibility for preventing further harm to the public (by developing their insight into their addictions and actions and by complying with state orders) is inconsistent with acknowledgments of the oppressive impacts of structural racism and colonialism. Certainly, insight into Shane Dennis's circumstances and actions ought to also include insight into his and his family's violent treatment by the state, including the state's placement of his grandmother in a residential school and the state's placement of Shane Dennis into foster care. And, certainly, that insight would also include a recognition of the violent irony of responding to the effects of

[118] *Ibid* at para 34.
[119] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000) at 208, quoting Kenneth Gergen, "Summary Statements" in Daniel N Robinson, ed, *Social Discourse and Moral Judgment* (San Diego: Academic Press, 1992) 244.

state violence and oppression with state-sanctioned forced imprisonment and programming. The very actions and factors that Judge Armstrong introduces and investigates so closely under the responsibility lens—and that are shown to minimize Shane Dennis's individual responsibility under that lens—are turned into individualized responsibilities to be taken on, and endured, by the purportedly contextualized Shane Dennis under the risk lens.

Judge Armstrong's language further demonstrates a condescending and ignorant attitude toward addictions. Judge Armstrong wrote: "Mr. Dennis explained that he resorted to drugs and alcohol to 'kill his hunger pain'. One would think that spending the same amount of money on food would more productively address his hunger."[120] These comments strike me as insensitive and dismissive towards the challenges faced by people living with addictions.

To situate Judge Armstrong's language in a broader context, the depiction of the choosing, self-directed agent is indeed quite common in constructions of addictions in both criminal law and psychiatry. As Michelle Lawrence explains, "[h]owever vulnerable the individual might be to the onset of addiction and however strong the internal compulsions might be for continued use, in law as in psychiatry, that individual is presumed to retain self-control."[121] Within the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5"),[122] addiction "is classified…as a severe form of 'substance use disorder.'"[123] As Lawrence further explains, "[s]ubstance use disorder is conceived as *chronic* in nature. There is no reference in the DSM-5 to recovery or cure.

[120] *Ibid* at para 14.
[121] Michelle S Lawrence, "From Defect to Dangerous: Has the Door Opened for Recognition of an Addiction-Based Defence in Canadian Criminal law?" (2017) 59:4 Canadian Journal of Criminology and Criminal Justice 573 at 576.
[122] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington: American Psychiatric Association, 2013).
[123] Lawrence, *supra* note 121 at 574.

However, there is likewise no suggestion that the addict ever loses the ability to abstain or to control his or her response to cravings."[124] Rather, clinicians diagnose patients as being "in early remission", "in sustained remission", or at a level of severity based on the total number of symptoms that they present.[125] Indeed, this terminology can be found in Judge Armstrong's review of the psychiatric and psychological evidence pertaining to Mr. Dennis's addictions: "Dr. Bartel noted that Mr. Dennis has a stimulant use disorder in remission due to his limited access to drugs while incarcerated. Dr. Beauchemin noted that Mr. Dennis suffers from a severe substance abuse disorder (primarily alcohol and crystal methamphetamine) in early remission in a controlled environment."[126]

Yet despite the practice, in both law and psychiatry, of characterizing a person living with an addiction as a choosing individual, Lawrence also explains that "[i]t is nonetheless true that drugs and alcohol can impair judgment and mental function."[127] The suggestion that someone living with an addiction should have logically recognized that spending money on food rather than drugs would be the obvious solution for addressing their hunger minimizes the impairments on judgment and cognitive function that addictions can involve.

Criminal law vests a significant amount of power in cognitive volition. For instance, the defence of not criminally responsible on account of mental disorder, the capacities to act with reason and autonomy are used to demarcate a boundary between those whom the state can punish and those whom the state cannot. Sentencing judges recognize the illusory nature of this on-off conception

[124] *Ibid* at 576 [emphasis in original].
[125] *Ibid*.
[126] *Dennis*, *supra* note 72 at para 15.
[127] Lawrence, *supra* note 121.

of capacity for rational, voluntary behaviour.[128] However, I think that Judge Armstrong's judgment further illustrates that, rather than dealing with criminal law's (misleading) capacity constructs directly, sentencing law allows a mental disability, including an addiction, to be harmfully conflated with Indigenous identity. In particular, sentencing law acknowledges the misfit between criminal law's assumption that criminalized people are fully in control of their actions and criminal law's punishment of people living with addictions and other mental and intellectual disabilities. Yet in the case of criminalized Indigenous people, mental and intellectual disabilities seem to be subsumed into Indigenous identity. In other words, sentencing law can represent mental and intellectual disabilities as being intimately connected with a criminalized person's Indigenous identity and history. In Shane Dennis's case, Judge Armstrong classified Shane Dennis's addictions and his mother's addictions as being part of his "unique background and systemic factors". What I see as harmful is that, rather than engaging with the role of the state in creating the circumstances of deprivation, oppression, and displacement that contribute towards these experiences, Judge Armstrong depicted Shane Dennis as being individually responsible for overcoming his addictions. Judge Armstrong thus pathologized Indigenous people, presenting addictions as a problem intimately connected with Indigenous identity, history, and family. Additionally, Judge Armstrong suggested that addictions are resolvable when an Indigenous person takes the steps to develop the insight into the connections between their addictions and their criminalized actions—Judge Armstrong depicted Shane Dennis as failing to exercise his capacity to redirect his choices away from using drugs and alcohol and towards spending money on food. In doing so, Judge Armstrong did not elucidate the ways in which the state has constrained Shane Dennis's choices.

[128] See e.g. *R v Harper*, 2009 YKTC 18 at para 30, 65 CR (6th) 373.

As I mentioned above, a relational approach recognizes the importance of personal agency. To treat Shane Dennis as lacking any capacity to control his addictions would also pathologize him, suggesting that he is simply unable to live a life other than one involving drug and alcohol use. Yet context should help to illuminate the ways in which his choices have been, and might continue to be, constrained and to situate his needs for support within the broader need for change within the criminal justice system (and other related state practices and policies) more generally. By dismissing Shane Dennis's use of drugs and alcohol as an illogical response to hunger, Judge Armstrong's statement showed a preference for the image of the rational, self-directed agent—one who exists independently from social relationships and structures. In other words, Judge Armstrong detached Shane Dennis's addictions from the context that Judge Armstrong had previously laid out. Judge Armstrong classified Shane Dennis's "own substance abuse history" as one of the "many…unique background and systemic factors…which have resulted in his current offending".[129] And yet, Judge Armstrong disconnected that "substance abuse history" from the context of colonialism that was meant to inform the incorporation of his substance use into the judgment in the first place. Judge Armstrong instead reconnected Shane Dennis's substance use with the image of the rational, independent, decontextualized individual.

Rather than depicting drug and alcohol use as an individualized and essentialized problem experienced by Indigenous people, Judge Armstrong could have considered that drug and alcohol use among Indigenous people can be intimately connected with settler colonialism—with the state's actions towards Indigenous people, *not* with Indigenous identity. For example, Elizabeth Comack writes:

[129] *Dennis*, *supra* note 72 at para 33.

> Settler colonialism is a systemic process that continues to wreak havoc on Indigenous communities, not only in terms of the intergenerational impact of the residential school system…but also in terms of the collective trauma and corresponding breakdown of communality as members endeavour to manage the economic marginalization and social exclusion generated by that process. Similarly, capitalist globalization and neo-liberal economic restructuring have exacerbated the complex poverty found in inner-city spaces, creating the conditions for the sex and drug trades and street gangs to flourish—and setting the stage for more trauma.[130]

Comack explains that it is the "systemic process" of settler colonialism that "wreak[s] havoc" on Indigenous people's lives. This analysis highlights the accountability of the state and the role of structural processes, rather than leaving the state and structural processes in the background and rather than suggesting that it is Indigenous people's experiences that wreak havoc on their own lives.

With respect to her study of imprisoned women, Comack writes about some of the reasons that imprisoned women themselves identified when they described their use of alcohol and drugs: "In addition to grieving the loss of their partners, family members, and friends, many of the women were also dealing with the trauma of losing custody of their children. *Drugging and drinking became their way of coping with that loss*."[131] Comack does not portray drug and alcohol use as an individualized and isolated medicalized condition. Rather, she shows that imprisoned women's practices of using drugs and alcohol constitute methods for dealing with loss.

[130] Elizabeth Comack, *Coming Back to Jail: Women, Trauma, and Criminalization* (Black Point: Fernwood, 2018) at 129.
[131] *Ibid* at 128 [emphasis added].

Comack's analysis captures the relational nature of drug and alcohol use—it is an experience that is shared by individual women and the circumstances in which the state has placed women.

Comack's relational depiction of drug and alcohol use is, moreover, informed by her sociological understanding of trauma. In particular, Comack resists the trend to psychologize trauma. Comack explains: "rather than a dualism (yes or no to a psychiatric diagnosis), a sociological understanding of trauma incorporates the notion that trauma exists on a complex continuum."[132] With respect to this continuum, the determination of which people and communities experience more or less traumatization "is very much governed by the social conditions in which those individuals and communities exist and the social capital at their disposal."[133] Furthermore, Comack points out that "[t]he psychiatric framing of trauma…puts the emphasis on the individual as the locus for change (through therapeutic interventions by mental health professionals)."[134] Comack recognizes that, "[c]learly, individuals do require supports and assistance in order to heal from their lived experience of trauma and to move their lives forward in a positive and healthy way."[135] However, she goes on to explain that a sociological approach to trauma is broader: "In company with individual healing, it calls for the healing of families and entire communities. Moreover, in drawing attention to the broader social conditions that produce trauma, the sociological framing implicates the 'tracks through which the 'traffic' of power and decision-making travel'".[136] As a result, responding to, and preventing, trauma "requires

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[132] *Ibid* at 52.
[133] *Ibid*.
[134] *Ibid* at 53.
[135] *Ibid*.
[136] *Ibid*, quoting Elspeth Kaiser-Derrick, *Listening to What the Criminal Justice System Hears and the Stories It Tells: Judicial Sentencing Discourses about the Victimization and Criminalization of Aboriginal Women* (Master of Laws Thesis, University of British Columbia, 2012) [unpublished] at 85 (Kaiser-Derrick is discussing Kimberlé Williams Crenshaw's intersectionality theory, citing Kimberlé Williams Crenshaw, "On Gendered Violence and Racialized Prisons: An Intersectional Tale of Two Movements", presentation delivered by Kimberlé Williams

challenging the forms of oppression—of racism, classism, and patriarchy—that are at the root of this lived experience."[137] Comack reveals that it is possible to frame trauma relationally. She demonstrates that an analysis of trauma can—and should—involve paying attention, and responding, to an individual's needs, a community's needs, and the power dimensions that contribute to structuring people's experiences of trauma.

Another issue with respect to Judge Armstrong's construction of risk and use of risk assessment evidence is that he treats Shane Dennis's low level of risk for future arson as less important than the need to prevent *others* from committing arson: "The actions of Mr. Dennis require denunciation. Although Mr. Dennis is at low risk for future arson and thus may not require specific deterrence, general deterrence is still applicable: others ought not to resort to fire-setting when having tantrums."[138] This language is, again, condescending. Shane Dennis was adapting to life outside of an institution (that is, outside of prison), and he and his family were relocated to a hotel due to forest fires. To frame his actions as a "tantrum" takes away his agency in expressing his suffering while also dismissing the extensive traumatic impacts that colonialism and its continuing effects have had on him. The judgment took away Shane Dennis's agency from him by framing him as suffering multiple hardships, including mental disabilities (specifically, "Cluster B Personality Disorder (primarily antisocial and borderline)",[139] "a severe substance abuse disorder",[140] and "possible post-traumatic stress disorder features"[141]) and

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Crenshaw at the UCSB MultiCultural Center Theater, 18 May 2006, Regents of the University of California, online: *YouTube* <http://www.youtube.com/watch?v=d1v9E83yTNA>).
[137] Comack, *supra* note 130 at 53.
[138] *Dennis*, *supra* note 72 at para 27.
[139] *Ibid* at para 16.
[140] *Ibid*.
[141] *Ibid*, quoting Dr. Beauchemin.

intellectual disabilities (that is, "being in the borderline to low-average range of intelligence"[142]). At the same time, the judgment reattributed agency to Shane Dennis, making him responsible for the prevention of other people's acts of arson. In other words, Shane Dennis is treated in a way that will purportedly prevent others from "resort[ing] to fire-setting when having tantrums".

Judge Armstrong's approach is reminiscent of what Erick Fabris and Katie Aubrecht describe as the ways in which "dominant conceptions of madness and disability have been used to maintain oppressive systems of power."[143] Fabris and Aubrecht argue that "[p]sychiatric prescriptions make it possible to define social suffering and dissent as signs or symptoms of the existence of personal disorder and moral weakness, rather than embodied responses to inequitable social systems."[144] Rather than focusing on Shane Dennis's resilience in the face of suffering, and what might be framed as his dissent towards the state's practices of removing him from prison—an institution into which he was previously forced—Judge Armstrong relies on psychiatric determinations of his mental and intellectual abilities and addictions. Moreover, it is questionable whether others in Shane Dennis's circumstances will be deterred through this sentence—likely, healing and care are needed, not incarceration.

The therapeutic interventions, which Judge Armstrong imposed as part of the probation conditions, sought to rehabilitate Shane Dennis: "The next condition lies at the heart of the rehabilitation which this order is designed to foster."[145] This passage has a tone of benevolence

[142] *Dennis, supra* note 72 at para 16.
[143] Erick Fabris & Katie Aubrecht, "Chemical Constraint: Experiences of Psychiatric Coercion, Restraint, and Detention as Carceratory Techniques" in Liat Ben-Moshe, Chris Chapman & Allison C Carey, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave Macmillan, 2014) 185 at 187.
[144] *Ibid*.
[145] *Dennis, supra* note 72 at para 35.

and compassion. Yet all responsibility is placed on Shane Dennis: "Mr. Dennis, your success depends on your willingness to accept help for the many layers of hurt and substance abuse that you have used to cope with that hurt. *If you do not comply with this condition, you and the public may pay a high price*".[146] It is, in my mind, a bit of an illusion that an individual alone can stop the cycle of hurt, substance abuse, and trauma instigated by colonialism. By continuing to institutionalize Shane Dennis and forcing him "to accept help" through criminal justice sanctions, this judgment is part of the colonial impulse to harm Indigenous people. The condition itself leaves a wide scope for intervention, indicating that there are a range of individualized mechanisms that the state might deploy in trying to restrain and contain Shane Dennis's risk: "Without limiting the general nature of this condition, the intakes, assessments, counselling or programs may relate to: a. anger management, b. alcohol or drug abuse, c. mental health".[147]

With respect to Judge Armstrong's limited engagement with *Ewert*, I have identified a similar approach in two other cases involving the sentencing of criminalized Indigenous people. In *Ituluk*,[148] Justice Earl Johnson cited *Ewert* when discussing risk assessment evidence, but the concerns raised in *Ewert* do not seem to have had an impact on Justice Johnson's ultimate analysis. With respect to risk assessment evidence, Justice Johnson noted that the court-ordered Risk Assessment Psychological Report made the following findings:

> Mr. Ituluk presented significant signs of substance dependency and estimated his risk to reoffend with sexual violence as moderate on the static 99-2002 test and high on the Secondary Assessment Sexual Offender instruments. The report indicated that Mr.

[146] *Ibid* [emphasis added].
[147] *Ibid*.
[148] *R v Ituluk*, 2018 NUCJ 21.

> Ituluk's history of sexual violence had escalated in frequency and severity over time and that he engaged in extreme minimization or denial of past sexual violence. The report concludes that the level of risk for Mr. Ituluk to reoffend with sexual violence without treatment is ultimately high.[149]

Justice Johnson thus provided a fairly thorough review of the risk assessment results. Additionally, Justice Johnson discussed a parole officer's evidence with respect to Tom Ituluk's criminogenic needs, or dynamic risk factors: the parole officer's "Correctional Plan Update…indicated that Mr. Ituluk still required a high level of intervention based on dynamic factors. His need for improvement was deemed high in the categories of 'personal emotional', substance abuse, and attitude."[150] Additionally, Justice Johnson discussed a Parole Board decision sheet "that indicates that if [Mr. Ituluk] was released he was likely to commit a sexual offence involving a child or an offence causing death or serious bodily [harm sic] to another person, before the experiation of his sentence."[151]

With respect to *Ewert*, Justice Johnson noted: "This Court acknowledges that the Supreme Court of Canada recently found these diagnostic tools problematic when applied to Indigenous offenders (*Ewert v Canada*…)".[152] This statement constitutes the extent of Justice Johnson's engagement with *Ewert*. In his analysis, Justice Johnson found that "there is a high risk that the accused will reoffend with sexual violence because his history of sexual violence had escalated in frequency and severity over time and because he engaged in extreme minimization or denial

[149] *Ibid* at para 7.
[150] *Ibid* at para 10.
[151] *Ibid* at para 11.
[152] *Ibid* at para 7.

of past sexual violence."[153] Justice Johnson thus relied on the risk assessment evidence despite noting the potential problems of risk assessment tools when applied to Indigenous people.

In *R v Natomagan,*[154] Justice TD Clackson did not cite *Ewert*. Nonetheless, Justice Clackson noted the same concern that was identified in *Ewert*—the possibility of overestimating an Indigenous person's risk. However, Justice Clackson expressly chose to rely on the evidence from risk assessment instruments, given their "predictive value":

> While it is true that the tools used can overstate risk as they are not adjusted adequately for the fact that Aboriginal offenders tend to score higher (because the factors examined seem to be more prevalently experienced by Aboriginal offenders), the fact remains uncontradicted that the risk assessment tools have predictive value and all point to Mr. Natomagan being a high risk.[155]

This passage is troubling precisely because it recognizes that "the factors examined seem to be more prevalently experienced by Aboriginal offenders" and goes on to accept that those factors "point to Mr. Natomagan being a high risk." This passage thus shows the urgent need for taking the step of considering *why* risk factors are "more prevalently experienced by Aboriginal offenders". If Justice Clackson undertook such an analysis, it might have become evident that the factors did not simply "point to Mr. Natomagan being a high risk". Instead, it might have been revealed that these factors construed Mr. Natomagan as "being a high risk" because the factors make him responsible for experiencing oppression. "High risk" could have then been less

[153] *Ibid* at para 25.
[154] *R v Natomagan*, 2019 ABQB 943.
[155] *Ibid* at para 37.

individualized and viewed instead as something that is constructed and sustained by state policies and actions.

4.5.2 Overcoming the Concerns about Risk Assessment Instruments Raised in *Ewert* and/or Minimal Reliance on Risk Assessment Instruments

Similar to the previous section, I will discuss two cases in detail—*R v Gracie*[156] and *R v Durocher*[157]—and refer to other related cases in a briefer fashion. *Gracie* dealt with *Ewert* by demonstrating, in *obiter*, that the concerns about risk assessment instruments would have been overcome in the case because "actuarial testing was only one of many factors taken into account by the experts in this case" and because the experts "also considered their own clinical assessment".[158]

In *Gracie*, Justice Paul Rouleau delivered the judgment of the Ontario Court of Appeal. Daniel Gracie appealed the sentencing judge's designation of him as a dangerous offender and the sentencing judge's imposition of a sentence of indeterminate imprisonment.[159] Daniel Gracie had pled guilty to two aggravated sexual assaults.[160] He had unprotected sex with two women without informing them of his HIV-positive status, and, through these actions, both women contracted HIV.[161] Daniel Gracie appealed the sentencing judgment on the grounds that (1) the sentencing judge failed "to conduct the necessary prospective risk assessment at the designation

[156] *R v Gracie*, 2019 ONCA 658, 147 OR (3d) 385 [*Gracie*].
[157] *Supra* note 5.
[158] *Gracie*, *supra* note 156 at para 52.
[159] *Ibid* at para 1.
[160] *Ibid*.
[161] *Ibid*.

stage" and (2) the sentencing judge failed "to consider the fact that the appellant was Indigenous and the relevant principles from *R. v. Gladue*".[162] On appeal, the Crown conceded that the sentencing judge made those two errors but argued that the errors did not impact the dangerous offender designation or the indeterminate sentence that the judge imposed.[163] In the result, the Court of Appeal dismissed the appeal.[164]

At the time of the sentencing appeal, Daniel Gracie was 43 years old, and he identified as an Indigenous person.[165] In the *Gladue* report, the writer indicated that Daniel Gracie's "biological mother was of Mi'kmiq heritage and a member of the Millbrook First Nations in Nova Scotia."[166] A non-Indigenous couple adopted Daniel Gracie when he was five months old.[167] The adoptive family moved to Toronto with Daniel Gracie when he was young, and he had four siblings in this family.[168] Justice Rouleau went on to note that Daniel Gracie had "a normal family life."[169] Justice Rouleau's use of the term "normal family life" is deeply troubling. The disconcerting implication is that a child who is raised by an Indigenous family has an "abnormal" family life.

Also concerning is Justice Rouleau's analysis that "[t]he record does not suggest that [Daniel Gracie's]…Indigenous background might have had a significant impact on his future prospects

[162] *Ibid* at para 2.
[163] *Ibid* at para 3.
[164] *Ibid* at para 4.
[165] *Ibid* at para 5.
[166] *Ibid* at para 26.
[167] *Ibid* at paras 5, 26.
[168] *Ibid* at para 26.
[169] *Ibid*.

for treatment."[170] As summarized by Justice Rouleau, Daniel Gracie's submissions included the following:

> [T]he sentencing judge erred by failing to consider the fact that he is Indigenous. He argues that his Indigenous background may have played a role in his offending and the possibility of his accessing Indigenous programs and treatment options should have been considered at the penalty stage…[Daniel Gracie] demonstrated an interest in reconnecting with his Indigenous heritage by attending the Native Sons program while at the Elgin Middlesex Detention Centre. The steps he took and the interest he has shown in his community and culture were, in [his]…view, relevant to both his risk assessment and treatment prospects.[171]

Justice Rouleau went on to explain that "[t]he appellant was adopted as an infant and raised in a loving and supportive family. He was introduced to Indigenous practices as a young child through a non-Indigenous relative."[172] In particular, "a non-Indigenous uncle exposed [Daniel Gracie] to sweat lodge and smudging ceremonies, and to hunting, fishing, and trapping."[173] Justice Rouleau also noted that Daniel Gracie's "life of crime began in his teenage years and he did not meet members of his biological family until much later in life, after he committed the predicate offences."[174] After this summary, Justice Rouleau made the determination that "[t]he

[170] *Ibid* at para 46.
[171] *Ibid* at para 42.
[172] *Ibid* at para 45.
[173] *Ibid* at para 26.
[174] *Ibid* at para 45.

record does not suggest that the appellant's Indigenous background might have had a significant impact on his future prospects for treatment."[175]

The implication seems to be that, because Daniel Gracie was adopted into a non-Indigenous family, left this "loving and supportive family" as a teenager, and became involved in a "life of crime" prior to meeting his biological family, his Indigenous background was not significantly relevant to "his future prospects for treatment." The assumptions seemed to include the idea that, in order for his Indigenous identity to have been more relevant, Daniel Gracie would have had to have been in contact with his Indigenous family members prior to the criminal justice system's involvement with him. Removal from his family and community does not seem to be given significant (if any) weight in Justice Rouleau's analysis. This is worrying, because it suggests that *Gladue* factors attach to Indigenous people by virtue of (certain) family and community dynamics among Indigenous people, rather than by virtue of the Canadian state's violent policies and practices in relation to Indigenous people, including the removal of Indigenous children from their homes, families, and communities and the efforts to assimilate Indigenous children into settler Canadian identities and communities.

As part of Justice Rouleau's reasoning that Daniel Gracie's Indigenous background did not significantly "impact…his future prospects for treatment", Justice Rouleau also took into account the following: "The appellant never mentioned reconnecting with his Indigenous roots to either Dr. Chaimowitz or Dr. Woodside."[176] The fact that Daniel Gracie did not mention his interest in "reconnecting with his Indigenous roots" to the psychiatric experts is not, in my mind, indicative

[175] *Ibid* at para 46.
[176] *Ibid*.

of a lack of sincerity on Daniel Gracie's part. Perhaps Daniel Gracie had not (fully) formulated his interest at that time, or perhaps he did not feel comfortable disclosing that interest to these professionals.

Justice Rouleau also explained that "[t]he culturally-specific recommendations contained in the *Gladue* report were not responsive to most of the risk factors identified by the experts. The risk of sexual and violent recidivism was the product of his serious personality disorder, his substance use disorder, his poor treatment and supervision history, and the dim prognosis for meaningful change."[177] In the result, Justice Rouleau concluded:

> [T]here is simply no evidentiary foundation for the appellant's suggestion that the Indigenous programming or treatment options he might access would have any prospect of addressing the risk he poses to the community such that a sentence other than an indeterminate sentence would be appropriate. While the appellant should have access to Indigenous programming, this would not be sufficient to move him from being an offender considered by Dr. Woodside to be unmanageable in the community, to one who could be managed.[178]

I am concerned with the need for "culturally-specific recommendations" to be "responsive to most of the risk factors identified by the experts."[179] Risk factors are not neutral. They are, rather, factors that are part of a broader risk assessment paradigm, and attempts to respond to those factors from within the paradigm (that is, through treatment programs formulated from the

[177] *Ibid*.
[178] *Ibid* at para 47.
[179] *Ibid* at para 46.

perspective of the Risk-Need-Responsivity model) will inevitably claim to be most suited to responding to them. If risk is defined in an individualized way (as they are through risk assessment instruments), then it makes sense that individualized programming would present itself as best addressing risk. However, individualized responses to risk are not necessarily the best way to assess or address an individual's potential to harm others. For example, I discussed in the previous chapter, the tools measure risk of recriminalization, and individualized programming does not change the overarching context within which an individual lives. I will consider different possibilities for protecting people from harm in the next chapter. I explore possibilities that try to engage with the ways in which the state and community norms and practices can constrain people's individual choices.

With respect to Justice Rouleau's analysis, his prioritization of risk factors leads us to Daniel Gracie's second ground of appeal. Daniel Gracie argued that, since the psychiatric experts used the tools considered by the Supreme Court in *Ewert*, "the conclusion that he poses a continuing risk is not reliable and…the sentencing judge's designation and penalty decisions should be set aside."[180] As with the first ground of appeal, Justice Rouleau rejected the second ground. The Court of Appeal held that, because Daniel Gracie did not raise this issue at the time of the sentencing judgment, the Court of Appeal had no evidence to consider. Justice Rouleau went on to state that, "at its highest, *Ewert* stands for the proposition that these actuarial tools are susceptible to cultural bias."[181]

[180] *Ibid* at para 49.
[181] *Ibid* at para 51.

Justice Rouleau noted that Dr. Hart (who testified in *Ewert*) had more recently testified in dangerous offender proceedings, including *R v Haley*,[182] and the sentencing judge's decision in *R v Awasis*.[183] I will briefly outline the treatment of Ewert in these two cases and then return to *Gracie*.

In *Haley*, Justice Gregory Fitch found that Dr. Hart's evidence was different from his evidence in *Ewert*.[184] Specifically, Justice Fitch found that, in the proceedings at issue, Dr. Hart "emphasized that while the potential for cross-cultural variance in the application of actuarial tools to aboriginal offenders is a concern, there is currently no good evidence confirming or dispelling this concern."[185] Additionally, "Dr. Hart…accept[ed] in this proceeding that actuarial risk assessment tools have been shown to be moderately predictive, including when they are applied to aboriginal offenders."[186] Justice Fitch found that "there is cause to be worried about the potential for cross-cultural bias when instruments of this kind are applied to aboriginal offenders" and "that there is cause to be worried that actuarial risk assessment tools, when applied to aboriginal offenders, may be somewhat less reliable than when they are applied to non-aboriginal offenders."[187] Nonetheless, Justice Fitch concluded that "these considerations do not undermine the reliability of the evidence in issue."[188] Justice Fitch's final note was one of making do with the "moderate" reliability of the instruments:

[182] *R v Haley*, 2016 BCSC 1144 [*Haley*], cited in *Gracie*, *supra* note 156 at para 51.
[183] *R v Awasis*, 2016 BCPC 219 [*Awasis Sentencing Judgment*], cited in *Gracie*, *supra* note 156 at para 51. The risk assessment issue does not appear to have been raised on the appeal (see *Awasis*, *supra* note 22).
[184] *Haley*, *supra* note 182 at para 258.
[185] *Ibid*.
[186] *Ibid*.
[187] *Ibid* at para 261.
[188] *Ibid*.

> The best evidence we currently have is that these tools are moderately reliable predictors of risk for both aboriginal and non-aboriginal offenders. It is clear that further research needs to be done to ensure that actuarial instruments do not, in their application, reflect cultural bias when applied to aboriginal offenders. In the interim, they are simply one source of information sentencing judges have available to them in what will always be a holistic and, at the end of the day, *judicial assessment* of the risk posed by an offender.[189]

Justice Fitch recognized that there is reason to be apprehensive about risk assessment instruments: the tools involve a possibility of cross-cultural bias, and they might be less reliable in relation to Indigenous criminalized people. Nevertheless, Justice Fitch determined that the moderate reliability of the tools made them reliable enough. Given the legislated requirement to consider alternatives to imprisonment, especially in relation to Indigenous people, and the judicial determination that section 718.2(e) was a remedial provision—designed to *redress* the state's significant imprisonment on Indigenous people—it seems to me that moderate evidence should not be used to justify harsh sentences. The use of such evidence seems to be a continuation of the precise types of practices that section 718.2(e) was designed to prevent. Specifically, this example shows that, since *Ewert*, judges are continuing to rely on tools that are potentially discriminatory against Indigenous people as a way to justify imprisonment. Justice Fitch acknowledged that "[i]t is clear that further research needs to be done to ensure that actuarial instruments do not, in their application, reflect cultural bias when applied to aboriginal offenders."[190] Nonetheless, Justice Fitch was satisfied that the tools were good enough—as one factor— "in the interim". Judicial reliance upon possibly biased evidence, simply because it is an

[189] *Ibid* at para 264.
[190] *Ibid*.

"interim" measure, demonstrates, again, the suppression of the needs and interests of an Indigenous criminalized person for the sake of projecting an image of protecting the broader society.

The sentencing judge in *Awasis*, Judge Conni Bagnall, noted that, "alongside his general critique of the use of the tools for Aboriginal offenders, Dr. Hart approved of the way they were used by the experts in this case."[191] Specifically, "the results of the administration of the actuarial and hybrid tests were part of a contextual and individual review of Mr. Awasis' risk level."[192] Moreover, the sentencing judge stated: "it must be pointed out that Dr. Hart did not testify in the case at bar 'that the actuarial tests are not good predictors of recidivism in Aboriginals – that they suffer from cultural bias…' as the Court said that he testified in *Ewert* (at paragraph 53)."[193] In the result, Judge Bagnall concluded that, "[o]n the basis of all of the opinion evidence I have heard respecting this issue, I conclude that the actuarial and hybrid measurement tools used to assess Mr. Awasis have been demonstrated to be reliable predictors of future risk of recidivism in Aboriginal offenders."[194] Judge Bagnall thus determined that it was appropriate to rely on the experts' use of the tools on the basis that they were applied in a contextualized way.

I would prefer to read more information about precisely how experts are adjusting the application of actuarial instruments in relation to Indigenous criminalized people. Given that professionals are not excluded from biased reasoning and conduct, it is not clear to me that an assurance that

[191] *Awasis Sentencing Judgment*, *supra* note 183 at para 97.
[192] *Ibid*.
[193] *Ibid* at para 98.
[194] *Ibid* at para 121.

experts undertook "a contextual and individual review of Mr. Awasis' risk level" moves beyond an individualized understanding of risk or avoids reliance on stereotypes and myths.

Returning now to *Gracie*, Justice Rouleau similarly explained that "actuarial testing was only one of many factors taken into account by the experts in this case. They also considered their own clinical assessment of the appellant together with other information concerning him, such as his criminal history."[195] As a result, Justice Rouleau held that "the concerns raised by the appellant as to the reliability of the risk assessment tools as they apply to Indigenous offenders do not undermine the force of the expert evidence or the conclusions of the sentencing judge."[196]

Recall that, in *Montgrand*, the Saskatchewan Court of Appeal decided not to give significant weight to structured clinical judgment. By comparison, when confronted with the possible drawbacks of actuarial risk assessment instruments in *Gracie*, the Ontario Court of Appeal determined that experts' "own clinical assessment" was helpful in assessing risk and in mitigating the possible drawbacks of actuarial instruments. I am not sure that either approach is preferable. Rather, what they both show is a tendency to favour individualized portrayals and determinations of risk, whether produced through algorithms or through professionalized judgment.

In the above passage from *Gracie*, Justice Rouleau mentioned "criminal history" as an example of "other information" that experts examined when determining Daniel Gracie's level of risk. "Criminal history" is a static risk factor that is included in the actuarial instruments examined in

[195] *Gracie*, *supra* note 156 at para 52.
[196] *Ibid*.

Ewert, including the PCL-R. Therefore, "criminal history" was perhaps a poorly chosen example of "other information concerning [Daniel Gracie]" that the experts had considered. Additionally, the "other information"—at least the information reviewed in the judgment—is similarly individualized information. In particular, Justice Rouleau's judgment presents the following overview of the types of information (including actuarial information) that Dr. Woodside and Dr. Chaimowitz considered in determining Daniel Gracie's level of risk: the psychiatric experts relied on a PCL-R score, which "indicated that [Daniel Gracie] had significant psychopathic traits but that he was situated slightly below the cut-off for a formal diagnosis of psychopathy";[197] the experts labelled Daniel Gracie as living with antisocial personality disorder and a marijuana dependence disorder;[198] Daniel Gracie did not inform his sexual partners about his HIV status even though he had received counselling to do so;[199] Daniel Gracie expressed an interest in participating in treatment;[200] Daniel Gracie demonstrated "ambivalence" with respect to "the necessity for treatment and what types of treatments he needed";[201] Daniel Gracie had difficulty identifying his treatment targets;[202] and Daniel Gracie had never participated in "a comprehensive treatment program".[203]

Daniel Gracie's resistance towards psychiatrists' assessments of what he "needs" and of how he must be treated tells us something about what his relational needs and experiences are. His resistance tells us about who he trusts, who he does not, and what he feels he needs for support. *Gladue* compels judges to contextualize criminalized Indigenous people. The aims include

[197] *Ibid* at para 21.
[198] *Ibid* at paras 20, 22.
[199] *Ibid* at para 24.
[200] *Ibid*.
[201] *Ibid*.
[202] *Ibid*.
[203] *Ibid* at para 25.

striving to understand the various forces that have played a part in oppressing an Indigenous person—in constraining their choices and in enabling the criminal justice system to insert itself into the individual's life. Moreover, *Gladue*'s aims include redressing the mass imprisonment of Indigenous people. The judicial practices involve detailing an individual's personal relationships, disabilities, and experiences. And yet, in doing so, Justice Rouleau avoided learning about these factors from the criminalized individual's perspective. Daniel Gracie expressed his views on how he wished to be treated (that is, through culturally-specific programming), but Justice Rouleau discounted these perspectives. Instead of centering Daniel Gracie's understanding of his needs and treatment options, Justice Rouleau privileged psychiatric knowledge about risk, needs, and treatment. This practice diminishes an individual criminalized person's opportunity to meaningfully, and impactfully, share their story about what they need in terms of support. The Canadian state has harmed and failed Indigenous people time and again, as recognized through a *Gladue* analysis. Nonetheless, at sentencing, the state (through judges) continues to marginalize Indigenous people's perspectives on their needs and experiences. Justice Rouleau presented risk factors (which overlap with *Gladue* factors) through a professionalized, psychiatrized lens. Moreover, when Daniel Gracie told the court how he experiences the world, Justice Rouleau repressed Daniel Gracie's expressed perspectives and, instead, privileged the dominant psychiatric narrative.

This judgment demonstrates not only that Indigenous identity might be conflated with mental and cognitive disabilities but also that this conflation masks itself as a neutral relationship. Justice Rouleau determined that *Gladue* factors were irrelevant to Daniel Gracie's dangerous offender designation and to his sentence of indeterminate imprisonment. And yet the reason why

Gladue factors were apparently irrelevant was intimately connected with colonialism. Specifically, Justice Rouleau detached Daniel Gracie's risk factors from *Gladue* factors because Daniel Gracie was separated from his Indigenous family and community as an infant. The judgment thus falsely and harmfully presented *Gladue* factors as an 'Indigenous problem' rather than as factors arising due to multiple forms of violence and displacement carried out by the Canadian state.

In *Durocher*, the experts engaged significantly with the *Ewert* proceedings and the issues those proceedings raised. Justice Louise Charbonneau noted that "[s]ome of the impugned risk assessment instruments in *Ewert* were used by Dr. Choy and Dr. Van Domselaar in their assessment of Mr. Durocher. They both scored him on the PCL-R, the Static-99, and the VRAG-R. Dr. Choy also used the VRS-S0."[204] Justice Charbonneau further explained that the Supreme Court released its judgment in *Ewert* the week after the experts had testified in *Durocher*.[205]

The case involved a dangerous offender application. In the result, Justice Charbonneau designated Cody Durocher as a dangerous offender.[206] She imposed a sentence of 14 years of imprisonment with a following 10 years on a Long Term Supervision Order for a sexual assault conviction, and she imposed a four-year, concurrent, term of imprisonment for a conviction of sexual interference.[207] The sexual assault offence involved a 13-year-old female survivor.[208]

[204] *Durocher*, *supra* note 5 at para 202.
[205] *Ibid* at para 203.
[206] *Ibid* at para 277.
[207] *Ibid* at para 332.
[208] *Ibid* at para 27.

Similar to the British Columbia Court of Appeal in *Awasis*, Justice Charbonneau held that, because "Mr. Durocher is Metis…the principles that apply to the sentencing of indigenous offenders, as set out at section 718.2(e) of the *Criminal Code*, are engaged."[209] Justice Charbonneau indicated that the principles established in *Gladue* and *Ipeelee* "are very important principles that bear repeating."[210] In particular, "among other things,…section 718.2(e) is a remedial provision designed to ameliorate the serious problem of overrepresentation of indigenous offenders in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing in cases involving indigenous offenders."[211] With respect to the dangerous offender context, Justice Charbonneau explained that, "if the Crown has established that the offender poses a threat to public safety, the sentence imposed must be the least restrictive means capable of managing that threat."[212] These passages contain important recognitions of the remedial goals of section 718.2(e) and of the role that the provision plays in dangerous offender proceedings.

At the time of Justice Charbonneau's judgment, Cody Durocher was 34 years old.[213] Cody Durocher's "mother is Dene Tha' from Meander River in Alberta"[214] and "[m]any of [his]…family members on his mother's side attended residential school."[215] Cody Durocher's "father was a white man".[216] This identity "caused some difficulties for the family", in terms of experiencing harassment from "[o]ther band members", which led the family to relocate off of

[209] *Ibid* at para 20.
[210] *Ibid*.
[211] *Ibid* at para 21, citing *Gladue*, *supra* note 4 at para 93 and *Ipeelee*, *supra* note 34 at para 59.
[212] *Durocher*, *supra* note 5 at para 26.
[213] *Ibid* at para 37.
[214] *Ibid*.
[215] *Ibid* at para 38.
[216] *Ibid* at para 39.

the reserve.[217] Cody Durocher "was sexually abused, when he was between 3 and 5 years old, by a female babysitter who was an extended family member",[218] and he spent time fishing and hunting with his father and with his maternal grandparents.[219] He began using marijuana when he was in grade 6 and also starting using alcohol at a young age.[220] At the time of the appeal, Cody Durocher had three children and had been involved in multiple relationships.[221]

Justice Charbonneau also noted that "Mr. Durocher has suffered many losses and trauma throughout his life",[222] pointing out, for example, the details of some of his relatives' deaths:

> When he was 11 one of his uncles hung himself. Mr. Durocher was present in the house when another uncle removed the body. He has vivid memories of that. Another uncle shot himself in the head in a closet and Mr. Durocher saw his body there. Another uncle froze to death. In addition Mr. Durocher and his brother saw a neighbour get killed on their street.[223]

I am concerned that Justice Charbonneau provided such extensive details about the deaths of Cody Durocher's family members, especially when the outcome in the case was one of a dangerous offender designation and imprisonment. While the aim was to contextualize Cody Durocher's life, that purpose should have remained connected with the overarching aim of redressing the mass imprisonment of Indigenous people. When that overarching aim gets lost,

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[217] *Ibid*.
[218] *Ibid* at para 41.
[219] *Ibid* at paras 42, 45.
[220] *Ibid* at para 46.
[221] *Ibid* at para 47.
[222] *Ibid* at para 50.
[223] *Ibid* at para 51.

the contextualization becomes its opposite—it becomes an isolating of Indigenous people's experiences of death and suffering from the broader context of structural oppression and inequality.

Justice Charbonneau also explained that, as an adult, Cody Durocher was present when a friend accidentally fell in a window well, and "[h]e tried, unsuccessfully, to revive his friend."[224] In terms of his family's submissions, "Mr. Durocher's mother is supportive of him. She describes him as a good father and someone who gets along with everyone. She says he always took care of his siblings and has a close relationship with his family."[225] Additionally, "[h]is aunt describes him as energetic, hardworking and outgoing, non-violent and friendly. Other relatives also describe him as hard working, someone who jumps in to help without being asked, respectful, polite, and caring."[226] Justice Charbonneau thus included positive comments about Mr. Durocher and his family relationships. She did not mention any victim impact statement.

With respect to the potential for "cultural bias" within risk assessment instruments, both experts in the case—Dr. Choy and Dr. Van Domselaar—"testified that, as a result of [the *Ewert*] controversy, there has been in the last two years considerable research into this issue."[227] In particular, Dr. Choy and Dr. Domselaar "testified that studies have actually validated several of the instruments that they used."[228] Additionally, "[w]here research did *not* validate the instruments for use with indigenous populations, they did not use them for risk assessment

[224] *Ibid* at para 52.
[225] *Ibid*.
[226] *Ibid* at para 55.
[227] *Ibid* at para 203.
[228] *Ibid*.

purposes."[229] Furthermore, Dr. Choy also explained that he sometimes adjusted the scores as a way "to counteract any inherent bias that may be built into the instrument."[230] Justice Charbonneau found that both experts "were…aware of the potential shortcomings of the instruments they used. They were aware of recent studies on this topic. They used the instruments having the benefit of this information and exercised the necessary caution both in the scoring process and in their use of the instruments."[231]

I think that this case illustrates the limits of the "cultural bias" framework for disputing risk assessment instruments. As I argued in the previous chapter, studies validating risk assessment instruments in relation to Indigenous people "resopnsibilize" Indigenous people for their experiences of oppression. The result is that the validation of risk assessment instruments can continue to label Indigenous criminalized people as being at a high risk of being re-implicated in the criminal justice system. Moreover, the basis for findings of high risk is the existence of factors that are tied to the Canadian state's oppression of Indigenous people. Despite this practice, Justice Charbonneau's judgment did not draw such a link between systemic injustice and risk assessment instruments. Instead, Justice Charbonneau framed the systemic factors that she identified as being distinct from Cody Durocher's risk factors. In other words, she did not view the systemic factors as contributing to his level of risk. In particular, she reasoned that, even though the systemic factors offer an opportunity to "explain…how he got to where he is today", the factors do not "reduce the risk he poses":[232]

[229] *Ibid* [emphasis added].
[230] *Ibid* at para 204.
[231] *Ibid* at para 206.
[232] *Ibid* at para 220.

> Mr. Durocher's background and some of the struggles he has faced, as well as other systemic factors that must be taken into account, most likely go a long way to explaining how he got to where he is today. This must be taken into account, but it does not mean that those circumstances reduce the risk he poses. It also does not mean that these circumstances should necessarily lead to a different conclusion about intractability.[233]

Unfortunately, this practice of pitting responsibility and risk against each other results in an incomplete picture. In particular, I see a judicially constructed image that situates Cody Durocher within a context that includes discrimination, racism, state violence, and criminalization. Yet the image occludes that context in relation to risk. The surrounding context contributes to the framing of Mr. Durocher as "risky", but Justice Charbonneau nonetheless erased it.

I will return to this case in the final section of this chapter ("Looking More Closely at State Accountability"). In that section, I explore Justice Charbonneau's analysis in relation to the conditions that a correctional facility imposed on Cody Durocher. Specifically, she examined a possible connection between those conditions and his later performance in programs. Justice Charbonneau did not, in the end, identify such a connection. Nonetheless, the case illustrates the possibility that judges can engage with the state's treatment of a criminalized person in prison for the purpose of drawing direct, contemporary links between state actions and the criminalization (and other forms of oppression) of Indigenous people. Such an analysis could contribute towards greater recognition that the concept of risk exists "in between" individuals and the state.

[233] *Ibid*.

In *R v Keewasin*,[234] Justice W Danial Newton designated Ricky Keewasin as a dangerous offender and sentenced him to a period of eight years of imprisonment, less credit for time served on remand.[235] The offences included aggravated assault and sexual interference.[236] On the appeal, "counsel for Mr. Keewasin submit[ted]…that the tests used to predict the likelihood of reoffending have not been validated with indigenous populations and, therefore, [the conclusions of the forensic psychiatrist,] Dr. Pearce…cannot be accepted."[237] Justice Newton came to a different conclusion. Specifically, he designated Ricky Keewasin as a dangerous offender and held that Dr. Pearce's conclusions could be accepted on the basis that it did not rely primarily on the actuarial instruments.

In designating Ricky Keewasin as a dangerous offender, Justice Newton determined "that Mr. Keewasin does constitute a threat to the life, safety or physical well-being of other persons".[238] He came to this finding by "plac[ing] significant weight on Mr. Keewasin's history of past and current offences which includes, as noted, 'serious violence', 'fairly quick return to violence' following release from custody, and 'fairly high density of…violence'".[239] Justice Newton also placed significant weight on Ricky Keewasin's "poor prognosis given, as Dr. Pearce notes, Mr. Keewasin's treatment resistance substance abuse disorder, his personality disorder and his current age."[240] Justice Newton "interpret[ed] Dr. Pearce's conclusions to be based on these factors primarily and not the impugned tests."[241] Yet the factors are still individualized.

[234] *R v Keewasin*, 2019 ONSC 3516 [*Keewasin*].
[235] *Ibid* at paras 50-51.
[236] *Ibid* at para 51.
[237] *Ibid* at para 45.
[238] *Ibid* at para 47.
[239] *Ibid* at para 48, quoting Dr. Pearce.
[240] *Keewasin*, *supra* note 234 at para 48.
[241] *Ibid*.

I am concerned about the lack of attention given to the ways in which the state could, and should, support Ricky Keewasin. While Dr. Pearce labelled Ricky Keewasin as being "in a 'high risk category for future violent and/or sexual re-offence",[242] Dr. Pearce also "noted that Mr. Keewasin could make gains with a great deal of structure, support and supervision".[243] Dr. Pearce further commented that Ricky Keewasin "'quite quickly returned to substance abuse' and 'a violent re-offence' when that structure and supervision ended."[244] In my view, this type of evidence might signal a need for the state to provide continuing support to Mr. Keewasin, rather than for the state to place label Ricky Keewasin as a dangerous offender and imprison him.

Justice Newton's analysis shows that, even if risk assessment tools are not the primary source of high-risk classifications, individualized accounts of risk can still characterize both clinical risk assessments. Like in *Montgrand*, this practice shows that simply limiting clinical and/or judicial reliance upon actuarial instruments does not necessarily remove core concerns about discrimination against Indigenous people in risk classifications and in attempts to manage risk.

4.5.3 Looking More Closely at State Accountability

In this section, I discuss two cases that involve judicial engagement with state accountability. I turn first to *Durocher*, which I introduced above. In *Durocher*, Justice Charbonneau reviewed the conditions that correctional facilities had imposed on Cody Durocher, including, for example, the Peace River Correctional Centre's placement of him in administrative segregation. Defence counsel specifically "argue[d] that Mr. Durocher's first significant contact with the correctional

[242] *Ibid* at para 32.
[243] *Ibid*.
[244] *Ibid*.

system, his time at the PRCC, was very harmful to his mental health generally speaking, and more specifically set him back considerably in his ability to be responsive to programming."[245]

Justice Charbonneau noted that "[t]he Crown has pointed out that Alberta Corrections is not on trial in these proceedings. That is true."[246] Yet Justice Charbonneau acknowledged that sentencing law nevertheless offers space for considering the actions of the state. More specifically, Justice Charbonneau explained that it is possible for a judge to draw a connection between state accountability and constructions of risk. In particular, she wrote: "The issue on this Application is not whether the detention conditions and the policies in place at PRCC at the time were appropriate. Rather, the issue for this Court is *whether Mr. Durocher's detention conditions mitigates [sic] or explains his poor performance in the programs he took at Bowden*."[247] In this case, "[d]efence did not call any evidence on the deleterious effects of segregation in general, nor about its specific impact on responsiveness to programming. Defence's position is that I can and should take judicial notice of those things."[248]

Justice Charbonneau explained that "[t]he evidence…about the detention conditions in the segregation units at PRCC, in particular the unit referred to as 'the dark side', raises serious concerns, especially considering that Mr. Durocher was detained in those units for extended periods of time."[249] She proceeded to take "judicial notice of the general proposition that prolonged solitary confinement or segregation has negative consequences for a person's mental

[245] *Ibid* at para 177.
[246] *Ibid* at para 181.
[247] *Ibid* [emphasis added].
[248] *Ibid* at para 182.
[249] *Ibid* at para 178.

health, and that those effects can be long lasting."[250] Furthermore, Justice Charbonneau held that she did not specifically need to take judicial notice of this fact, given that there was evidence in the trial to support the finding.[251] However, Justice Charbonneau concluded that she could not take judicial notice of the specific impact of solitary confinement on Cody Durocher's specific "treatability and responsiveness to specific programming 2, 4 and 5 years later."[252] Moreover, an expert had "testified that it would take months, not years, for someone who has spent time in segregation to be ready to engage in programming."[253] Therefore, Justice Charbonneau concluded that there was insufficient evidence to identify a link between Cody Durocher's time spent in administrative segregation and his later performance in programs.[254]

In the result, Justice Charbonneau relied on Cody Durocher's poor performance in programming in her assessment of his risk. For example, in her concluding comments in relation to designating Cody Durocher as a dangerous offender, she wrote: "Mr. Durocher has, since his transfer to Bowden, been given opportunities to begin addressing his risk factors. Many people attempted to assist him and help him succeed. On the evidence before me, he has not made any real gains towards addressing his risk factors, despite having access to culturally relevant programs."[255] It may well be appropriate and necessary for judges to receive more comprehensive and/or specific evidence relating to the impact of administrative segregation on a criminalized person's responsiveness to programming. However, it is concerning that, despite detailing the state's mistreatment of Cody Durocher, Justice Charbonneau still portrayed him as having "[m]any

[250] *Ibid* at para 193.
[251] *Ibid*.
[252] *Ibid* at para 194.
[253] *Ibid* at para 195.
[254] *Ibid* at para 196.
[255] *Ibid* at para 274.

people" who "attempted to assist him and help him succeed." By making this statement without at least reiterating the ways in which the state has also harmed Cody Durocher, Justice Charbonneau allowed the context of systemic oppression to fade into the background, leaving Cody Durocher fully "responsibilized" for his apparent failure to change.

A recent judgment of Judge Hugh Harradence of the Saskatchewan Provincial Court of illustrates another glimmer of closer consideration of state accountability. The case involved a dangerous offender designation application, and it was called *R v Keenatch*.[256] Judge Harradence delivered the judgment in 2019, dismissing the dangerous offender designation application[257] and declaring Cody Dillon Keenatch to be a long-term offender.[258]

The conviction that instigated the proceedings was a conviction of assault causing bodily harm.[259] The assault had taken place at the Saskatchewan Penitentiary,[260] and the Court received no victim impact statement.[261] In the result, Judge Harradence sentenced Cody Keenatch to 30 months of imprisonment to be followed by a 6-year long-term supervision order.[262]

In reviewing Cody Keenatch's background, Judge Harradence noted that "Keenatch is a member of the Big River First Nation."[263] Judge Harradence's contextualization of Cody Keenatch also included the following remarks: "[h]is mother had a history of alcohol, drug and solvent abuse

[256] *Supra* note 6.
[257] *Ibid* at para 52.
[258] *Ibid* at para 66.
[259] *Ibid* at para 2.
[260] *Ibid* at para 1.
[261] *Ibid* at para 68.
[262] *Ibid* at paras 69-70.
[263] *Ibid* at para 28.

including during her pregnancy with him";[264] "[g]iven the addictions of his mother, Keenatch was raised by his grandparents";[265] "Keenatch, along with the other children in the care of his grandparents, was sent into foster care at approximately eight years of age";[266] and two medical experts diagnosed Cody Keenatch as living with Partial Fetal Alcohol Syndrome.[267]

The above passages attribute some responsibility to Cody Keenatch's mother. In particular, Judge Harradence noted that Cody Keenatch's grandparents raised him because of his mother's addictions. However, Judge Harradence also went on to look at state accountability more carefully than the other judgments that I have addressed in this dissertation. Specifically, as I will explore next, Judge Harradence connected Cody Keenatch's experiences in foster care with his criminalization and involvement in gangs, and Judge Keenatch discussed the state's failure to accommodate Cody Keenatch's disability during his time in custody.

With respect to the state's placement of Cody Keenatch in foster care and the impacts that this placement had on Cody Keenatch's life, Judge Harradence explained that "[h]is grandmother noticed a change in his behaviour, for the worse, on his return from foster care. This lasting effect of foster care and the young age of Keenatch's involvement in criminal and gang activity is recognized in the recent report completed by Lizanne Moffatt".[268] In this program performance report,[269] Lizanne Moffatt wrote:

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[264] *Ibid*.
[265] *Ibid* at para 29.
[266] *Ibid*.
[267] *Ibid* at paras 33-34.
[268] *Ibid* at para 29.
[269] See *ibid* at para 22.

> Mr. Keenatch was in and out of foster care the majority of his life and was exposed to unhealthy problem solving throughout his childhood. Having been bounced around between foster homes showed him that when things are not working out, you don't try to work things out, you move somewhere else. At the age of 9 he began associating with gang members and he learned that violence and other criminal activity will often get you what you want. As a result, Mr. Keenatch would use criminal methods to resolve issues with finances and conflict. Further, he would also abuse alcohol and drugs to cope with emotions and to feel a sense of belonging among peers.[270]

Additionally, Judge Harradence noted that "[t]he *Gladue* Report, prepared by Lisa Hill, recounts Keenatch's recollection of being held down and his hair cut off for speaking Cree in his foster home."[271] These reports drew direct connections between the treatment of Cody Keenatch's behaviour and his treatment by the state and within foster care. In this relational context, Cody Keenatch developed problem-solving methods and behaviours that, while "unhealthy", were understandable responses to being moved between homes "when things are not working out".[272] These reports thus not only outlined Cody Keenatch's experiences but demonstrated that his behaviours were reasonable responses to the circumstances in which he was living.

In relation to the state's failure to provide appropriate programming for Cody Keenatch's disability, Judge Harradence reviewed the testimony of the psychiatrist, Dr. Mela: "According to Dr. Mela, during Keenatch's federal incarceration there has been little to no attempt to modify

[270] Lizanne Moffat, Program Performance Report, as quoted in *Keenatch*, *supra* note 6 at para 29.
[271] *Keenatch*, *supra* note 6 at para 30.
[272] Lizanne Moffat, Program Performance Report, as quoted in *Keenatch*, *supra* note 6 at para 29.

programming to accommodate his disability".[273] Judge Harradence further explained that the state's lack of accommodation constituted a *failure*:

> I am satisfied by the evidence in this hearing that the correctional authorities have not adequately modified programming to accommodate Keenatch's disability which was diagnosed over 15 years ago. Keenatch's disability is directly related to his ancestry, background and upbringing as an Indigenous individual. Paragraph 718.2(e) is engaged. *The failure to modify programs to address Keenatch's disability is symptomatic of CSC's ongoing difficulties designing treatment programs to meet the needs of Indigenous offenders*. The issue was recognized by Justice Wagner (as he then was) in *Ewert v Canada*[.][274]

Additionally, Judge Harradence situated the responsibility for Cody Keenatch's limited participation in programming as landing somewhere between Cody Keenatch and the correctional institutions:

> The evidence in this hearing was that Keenatch's past programming record is dismal. *Keenatch cannot be solely responsible for this record. It was clear to me that many obstacles for Keenatch were due to institutional rules or wait lists which ignore any efforts to reduce his risk*. It was only after the evidentiary portion of this hearing that I was informed that Keenatch had been permitted to participate in programming.[275]

[273] *Keenatch*, *supra* note 6 at para 34.
[274] *Ibid* at para 40 [emphasis added].
[275] *Ibid* at para 45 [emphasis added].

These passages again demonstrate some conflation of Indigenous "ancestry, background and upbringing" with the state's violence against and oppression of Indigenous people. Moreover, Cody Keenatch's risk and needs are understood in an individualized and psychiatrized manner. For instance, Dr. Mela administered "actuarial risk tools" to determine Cody Keenatch's "moderate to high risk of violent recidivism."[276] Additionally, as summarized by Judge Harradence, "Keenatch's risk is determined by reference to his impulsivity, his gang affiliation and participation and his substance abuse",[277] and "Dr. Mela opined that Keenatch needs a multi-faceted approach involving medication, grief counselling, substance abuse counselling and counselling and support to promote prosocial groups to replace his gang involvement."[278]These assessments rely on an individualized understanding of risk, which seems to be in tension with efforts to contextualize criminalized people's involvement with the criminal justice system. Yet despite that tension, I see some positive movement in the judgment. In particular, Judge Harradence determined that the state had a responsibility to provide appropriate programming to Cody Keenatch, given his disability, and that the state failed to do so. Further critical considerations of what type of programming should be provided (and what types of systemic changes are needed) would have been welcome. Nonetheless, this judgment seems to take the first step in inviting such analysis. Judge Harradence expressly pointed out the state's contemporary responsibilities—and the state's failures in fulfilling those responsibilities—in relation to the person he was sentencing.

[276] *Ibid* at para 35.
[277] *Ibid*.
[278] *Ibid* at para 38.

4.6 Conclusion

This chapter builds on Chapter Three by examining the treatment of risk assessment instruments in sentencing judgments. In Chapter Three, I demonstrated that critical criminologists and legal scholars have argued that risk assessment instruments assess people's experiences with oppression. Moreover, despite measuring structural inequalities, the instruments attempt to manage risk through individualized treatments and programs. In *Ewert*, Justice Wagner expressed criticisms of some of these tools but did not take issue with their overarching framework of individualizing oppression. Since *Ewert*, researchers have been validating the challenged instruments. Because the validation process leaves intact the fundamental approach that the instruments adopt, these studies have not yet addressed or assuaged concerns about the harms of individualizing risk. This chapter shows that sentencing judgments have followed a similar path, with judgments continuing to individualize risk, whether relying heavily on risk assessment tools or not. However, the chapter also shows that sentencing law could move towards a relational engagement with risk. In particular, two sentencing judgments revealed judicial consideration of whether or not the state failed to provide a criminalized person with the care and treatment that they needed and, if so, whether or not those failures negatively interfered with the ability of the criminalized person to participate in programming designed to reduce their level of risk. It would be desirable for the judgments to go even further and question whether programming can ever sufficiently address "risk" levels that are influenced by structural inequalities. Nonetheless, the judgments at least suggest some movement in that direction. The next chapter will look further into possibilities for relational analyses in sentencing judgments—specifically, analyses that locate responsibility and risk "in between" individuals and the state.

Chapter Five: Pursuing Change

5.1 Introduction

In the first three substantive chapters, I aimed to use the concept of the "in betweenness"[1] of responsibility and risk as a way to engage with the reality that section 718.2(e)[2] has not had its intended remedial effect on the mass imprisonment of Indigenous people. In particular, I aimed to further support strong and well-developed arguments that critically expose the individualized nature of responsibility and risk in sentencing law and practice and racialized and essentialized depictions of Indigenous people within sentencing judgments.

Sentencing represents one set of institutional practices that, while claiming to redress oppression, can simply transform one form of oppression into another, perhaps less immediately recognizable, form. Judges look at an Indigenous individual's personal and family history in vivid detail, with the purported aim of considering a possible sanction other than imprisonment. But judges leave out state actors, place blame on pregnant women and mothers, rely on essentialized ideas about Indigenous people and communities, and use experiences of oppression as reasons to imprison and frame as deviant Indigenous people.

I grappled significantly with what I wanted this final substantive chapter to look like. I envisaged it as a place to explore possibilities for relational thinking in sentencing, all the while feeling

[1] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford: Oxford University Press, 2000) at 208, quoting Kenneth Gergen, "Summary Statements" in Daniel N Robinson, ed, *Social Discourse and Moral Judgment* (San Diego: Academic Press, 1992) 244.
[2] *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

doubtful about the capacity of Canadian sentencing law to pursue constructive, de-individualized approaches and to meaningfully take account of relationships. I continue to feel skeptical that the judiciary can adequately hold the state, including the judiciary itself, to account for its roles in sustaining the oppression and imprisonment of Indigenous people.

One reason for my hesitancy arises from the fact that Parliament inserted the judicial obligation to consider state accountability at a stage of the criminal justice process that leaves little room for distributing blame "between" individuals and institutions. By the time the criminal justice process arrives at sentencing, a court has labelled one individual as "guilty". Unless reframed, the overarching task of the sentencing judge is to impose a proportionate sentence on this individual. State accountability and individualized blame thus work against each other within the very structure through which judges are supposed to simultaneously conduct a reckoning between individual and state responsibility.

Another significant concern is that settler courts and settler law lack legitimacy in the criminalization and punishment of Indigenous people. There is rich diversity among Indigenous scholars with respect to how this lack of legitimacy ought to be resolved, with differing opinions as to whether Canadian law, courts, and justice processes should, or even can, incorporate Indigenous law and Indigenous worldviews and meaningfully address the needs of Indigenous people. Additionally, there are important concerns about how any of these pathways will affect differently positioned Indigenous people, including women and children.

In the end, I decided to use this chapter to illustrate some of the ways in which the "in betweenness" of responsibility and risk can support the *process* of thinking through not only the problems in sentencing judgments (as demonstrated in the first three chapters) but also possibilities for change. This chapter explores some possible changes that could be made within Canadian sentencing law and policy and outside of Canadian law—specifically, through Indigenous justice initiatives. My discussion is structured around a consideration of the ways in which several existing proposals and developments might help to address some of the concerns that I have identified in the earlier chapters. Throughout, I describe some broad changes that sentencing law and practice could adopt or move towards, some Indigenous justice initiatives that some Indigenous scholars have identified as promising, some possible shifts in language that sentencing judges could employ immediately, and some experiences that criminal justice practitioners could look into more closely. The final section of the chapter turns to risk assessment instruments more closely and considers possibilities for challenging the dominant instruments on the basis of the guarantee of the right to equality in the *Canadian Charter of Rights and Freedoms*.[3]

5.3 Possibilities for Engaging with the "In Betweenness" of Responsibility and Risk in Sentencing

This section considers proposals and emerging practices that take seriously the "in betweenness" of responsibility and risk, including the resilience, strength, and needs of Indigenous individuals and communities. At a broad level, criminal law and related scholars have demonstrated that, if

[3] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].

sentencing law is to acknowledge the shared nature of responsibility and risk, then the legislature, courts, and criminal justice practitioners will need to pursue major reforms and also show respect and support for Indigenous justice initiatives.

Marie-Eve Sylvestre offers a helpful overarching framework for pursuing a relational approach to responsibility in sentencing law. She advocates that "[t]he criminal justice system must encourage acknowledgement of wrongdoing and accountability" instead of encouraging either "blame" or the "denial of responsibility".[4] Moreover, she suggests that one of the ways in which the criminal justice system could pursue the objective of holding people accountable without pursuing blame is by incorporating "degrees of responsibility" into sentencing—specifically, into the principle of proportionality.[5] Sylvestre suggests that sentencing law "could establish responsibility on the basis of a scale or spectrum by drawing inspiration from civil law and the award of damages amongst the parties, or even from the *common law* principles of contributory negligence and apportionment of damages."[6] She thus demonstrates that the practice of attributing degrees of responsibility to multiple parties is not inconceivable. Instead, the practice can draw on existing principles in civil law and common law.

In advancing an argument embracing shared responsibility, Sylvestre develops two further ideas. Both of these ideas engage with issues that I previously identified within current judicial attempts to move beyond individualized responsibility. The first idea relates to the issue of mother blaming. In particular, Sylvestre offers the following caution:

[4] Marie-Eve Sylvestre, "'Moving Towards a Minimalist and Transformative Criminal Justice System': Essay on the Reform of the Objectives and Principles of Sentencing" (Ottawa: Department of Justice Canada, 2017) at 20.
[5] *Ibid* at 21.
[6] *Ibid* [emphasis in original].

> The idea of decompartmentalizing and expanding the concept of responsibility should not be viewed as an opportunity to blame victims or, even worse, to expand the criminal net in order to hold certain individuals criminally responsible when they would not currently be found to be criminally responsible due to issues relating to admissibility or evidence. Shared responsibility would simply act as a principle of moderation applicable to the offender him- or herself.[7]

Sylvestre makes it clear that the purpose of pursuing a shared responsibility analysis is not to find other individuals to blame but to instead minimize the impact of the criminal justice system on the criminalized individual. In the cases that I studied in the second chapter, judges took the practice of contextualizing criminalized Indigenous individuals living with FASD as an opportunity to place blame on their mothers. Such a practice moved attention away from the harms that were at issue in the case (such as violence against women) and obscured the responsibilities of the state. The judicial erasure of the state occurred, moreover, in contexts where the very reason for contextualizing the criminalized individual was to situate the individual within their historical and contemporary experiences of oppression.

The second idea relates to the importance of identifying, rather than obscuring, state accountability. In particular, Sylvestre suggests that "[t]he notion of the degree of shared responsibility should be expanded to include the State."[8] Sylvestre explains that Canadian sentencing law already provides the authority for expanding responsibility to include state

[7] *Ibid*.
[8] *Ibid* at 22.

responsibility. Not only, then, is the idea of degrees of responsibility familiar to other legal principles in common law and civil law systems. Sentencing law itself, through *Ipeelee*, has also incorporated the idea of attributing responsibility along a spectrum.[9] Importantly, *Ipeelee* also allows for the diminishment an individual's level of responsibility as a result of the state's harmful actions and inactions.[10] Sylvestre further notes that sentencing law should "expand" this logic.[11] Specifically, sentencing law should not only diminish an individual's responsibility but also attribute responsibility to the state.[12] Sylvestre thus demonstrates that a fuller engagement with state responsibility and with lessened individual responsibility can be separated from the practices of essentializing and pathologizing of groups of people. She shows, in particular, that lessened responsibility among criminalized Indigenous people does not necessarily arise because of something internal to the individuals or to the social groups with which they identify. Lessened responsibility can instead arise because of the state's systematic oppression of Indigenous people. Sylvestre further maintains that, in such circumstances, sentencing judges ought to "responsibilize"[13] the state.

With respect to differentiating between circumstances where responsibility is limited due to the state's failure to support an individual and circumstances where responsibility is limited due to an individual's abilities, Jennifer Nedelsky's relational analysis in the context of "battered women" cases is instructive. Nedelsky specifically explores how a relational theory of autonomy could help with working through "[t]he contemporary problem of the kinds of responsibility that

[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.
[13] Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty" (2005) 7:1 Punishment & Society 29 at 42 [endnote omitted].

should be assigned to 'battered women' who kill their batterers".[14] While Nedelsky examines the context of self-defence, her work points out a gap in judicial reasoning that is reminiscent of a similar gap in judicial analyses involving the sentencing of criminalized Indigenous people. In particular, Nedelsky highlights the judicial obfuscation of institutional failures to protect women—a practice that tracks the judicial obfuscation of institutional failures to protect Indigenous people.

In "battered women" cases, Nedelsky identifies an often "blur[red]" distinction between the "impairment" of a woman's "autonomous judgment" and the "reasonableness" of a woman's actions.[15] The "impairment argument" is the argument that a finding of guilt is not appropriate, because the woman's autonomy was diminished as a result of the abusive relationship.[16] By comparison, according to the "true reasonableness argument", a woman was able to reasonably assess the threat posed by her partner and the choices she had, and did not have, available for protecting herself.[17]

In the majority of "battered women" cases, the judicial reasoning involves a blurred line between these two types of arguments not because judges are "ill-equipped to articulate conceptions of partial autonomy—as opposed to an on/off conception", but because of an "unwillingness to directly confront the external reality, the institutional failure that makes the woman's actions reasonable."[18] As Nedelsky explains, "[b]attering is a social phenomenon…that has been

[14] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 175.
[15] *Ibid* at 178; see also *ibid* at 175-83.
[16] *Ibid* at 177 [emphasis omitted]; see also *ibid* at 176.
[17] *Ibid* at 177; see also *ibid* at 176.
[18] *Ibid* at 181 [footnote omitted].

sustained by patterns of behavior by police, prosecutors, judges, neighbors, friends, and family, which together constitute a long-standing failure to protect women from intimate partner violence (and, indeed, violence generally)."[19] It is thus "the institutional failure that makes the woman's actions reasonable".[20] And while this failure is present in all battered women cases, in some cases, an impairment of autonomy as a result of psychological abuse might be more of a factor explaining the woman's actions.[21] A practice of differentiating between these two arguments, and clarifying that the reasonableness is rooted in an institutional and social failure to protect women from violence, would enable legal actors to specify the dominant issue in a particular case—to explicitly "inquir[e] into the actual degree of autonomy an accused was able to exercise".[22] As this dissertation attempts to demonstrate, in the context of sentencing criminalized Indigenous people, judges similarly do not "confront the external reality, the institutional failure"[23] that contributes to the criminalization of Indigenous people's criminalized conduct. Judges instead tend to focus on pathologizing Indigenous people—listing out, for instance, individuals' cognitive and mental impairments and challenges in school and employment.

In suggesting that criminal law practitioners might extend Nedelsky's analysis to the judicial sentencing of Indigenous people, I run the risk of harmfully implying that all criminalized conduct, including offences such as sexual assaults, can be "reasonable". I think that the term "understandable" might be more suited to the sentencing context. While some criminalized conduct will not be "reasonable", it might nevertheless be "understandable", given, for instance,

[19] *Ibid* at 183-84.
[20] *Ibid* at 181.
[21] *Ibid* at 182.
[22] *Ibid* at 183.
[23] *Ibid* at 181.

the state's failures to protect children from sexual and physical violence. Even in circumstances where an individual lives with cognitive and/or mental disabilities that compromise their abilities to independently control their conduct, the state may have failed to provide supports that the individual needed in order to act in accordance with the law. Additionally, the state may have failed by criminalizing too wide a range of conduct. Indeed, Sylvestre's proposal includes a recommendation for expansive decriminalization and diversion measures.[24] The criminal justice system's harms can, and ought to, be redressed not only through changes in sentencing law but also through changes throughout the various criminal justice processes.[25]

Returning to Sylvestre's proposals for sentencing, further work would need to be done in terms of determining how damages (or something akin to damages) could be apportioned between a criminalized person and the state. Yet a starting place could be for judges to apportion responsibility between a criminalized person and the state and to impose sanctions on the individual that reflect—and do not go beyond—the extent to which they are responsible. Of course, this sounds familiar and like what judges are already trying or claiming to do. Specifically, even when incorporating risk assessment evidence into their sentencing analyses, sentencing judges are required to impose sentences that are proportionate to a criminalized person's level of responsibility and to the seriousness of the offence. However, an important point of distinction is that Sylvestre's analysis appears to call for a more tangible apportionment of responsibility between the individual and the state. Instead of allowing the state to fade into the background, Sylvestre's proposal would seem to encourage judges to keep the state in full

[24] Sylvestre, *supra* note 4 at 25.
[25] *Ibid* at 16.

view throughout the entire sentencing analysis—from a determination of the extent to which a criminalized individual ought to be held accountable to the imposition of a sanction.

In addition to the current practices of identifying state accountability for historical wrongs and identifying generalized state accountability for contemporary forms of oppression such as racism, sentencing judges' analyses of state accountability could also identify concrete, specific examples of contemporary practices of oppression. For example, as I discussed in Chapter Four, sentencing judges have considered evidence of inappropriate prison conditions in dangerous offender hearings for the purpose of determining the level of risk posed by a criminalized individual.[26] This practice is slightly different from judicial consideration of prison conditions for the purpose of applying enhanced remand credit. Nonetheless, the remand credit context illustrates that judicial efforts to respond to institutional failures through reduced sentences are not unknown to sentencing law. As Justice Karakatsanis stated in *R v Summers*,[27] the rationales behind the granting of enhanced credit for time served in a remand centre include a "quantitative rationale", that is, "lost eligibility for early release and parole during pre-sentence custody," and a "qualitative rationale", which "account[s] for the relative harshness of the conditions in detention centres."[28] Credit for time served in a remand centre is meant to recognize those experiences. Relatedly, the *Durocher* and *Keenatch* cases demonstrate that prison conditions might also inform sentencing judges' assessments of risk. A criminalized person might show that the state's institutional failures have contributed towards a criminalized individual's limited abilities and opportunities to pursue programming that is designed to assist them in moving away from recriminalization.

[26] See *R v Keenatch*, 2019 SKPC 38 [*Keenatch*] and *R v Durocher*, 2019 NWTSC 37 [*Durocher*].
[27] *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575.
[28] *Ibid* at para 70.

Ultimately, I think that a fuller engagement with the "in betweenness" of responsibility and risk would require judges to recognize that individualized programming is not sufficient for reducing criminalization, because individualized programming (as currently pursued in the dominant Risk-Need-Responsivity model) treats experiences of injustice as individualized deficits. It is therefore possible that the sort of inquiry and analysis that was undertaken in *Durocher* and *Keenatch* will simply continue to obscure the state's other failures and re-entrench stereotypes about which groups of people need to be changed. In other words, it is possible that such an approach will not ensure that the state examines its own practices in terms of the provision of services relating to, for example, health, education, housing, and employment. At the same time, a recognition that programming should at least be made available to criminalized people (and judicial reductions in sentences in circumstances where it was not) might represent a step towards pursuing shared responsibility in sentencing. The more the state is required to reflect on—and respond to—its own contributions towards inequality and criminalized conduct, the more it might be prompted to change its own practices.

An important feature of Sylvestre's shared responsibility analysis with respect to sentencing is that it serves as one of multiple proposals serving the overarching aim of reformulating the objectives of sentencing. Sylvestre notes that the current articulation of objectives in the *Criminal Code* allows the "negative values of affliction and punishment" to override positive values such as "social integration, responsibility and reparation".[29] The incorporation of shared responsibility into proportionality is intended to serve as one avenue for halting such a practice—for pursuing *moderation* in sentencing, rather than, for example, identifying lessened

[29] Sylvestre, *supra* note 4 at 18.

responsibility but justifying sentences of imprisonment on the basis of principles such as denunciation and deterrence. Sylvestre's proposed sentencing objectives ("moderation", "pardoning", "reconciliation", "reparation", "accountability", and "transformation"[30]) could assist in a case such as *R v Dennis*.[31] In *Dennis,* denunciation and general deterrence appeared to outweigh reduced blameworthiness and a low level of individualized risk. Judge Armstrong identified systemic and background factors and determined that there was a low level of risk that Shane Dennis would be recriminalized for an arson offence in the future. Nonetheless, Judge Armstrong found that Shane Dennis's "actions…require[d] denunciation…[and] general deterrence".[32] Such objectives would not play a role in Sylvestre's proposal, meaning that Judge Armstrong could instead have prioritized goals such as moderation, reparation, and reconciliation.

Additionally, I think that Sylvestre's embrace of shared responsibility would support judicial acknowledgment of judicial contributions to mass imprisonment. For instance, when a judge imposes a sanction of imprisonment on an Indigenous person, the judge could acknowledge that this practice directly contributes to the mass imprisonment of Indigenous people. Such a practice would not have tangible effects on the sanctions imposed on criminalized people. Nonetheless, I think that such statements would at least represent a symbolic step in the direction of moving towards shared responsibility and keeping the roles of all state actors (including judges) in view.

[30] *Ibid* at 16, 18-21.
[31] *R v Dennis*, 2018 BCPC 270 [*Dennis*].
[32] *Ibid* at para 27.

Additional possibilities for dealing with state accountability bring into play the notion of risk. Sylvestre specifically carves out distinct sentencing possibilities in "exceptional situations".[33] She states that, in extreme circumstances, "it is necessary to use security measures and, in some cases, a sentence in order to neutralize and isolate offenders and ensure the safety of victims and communities."[34] She elaborates on the possibility of "[r]ecourse to imprisonment"[35] by indicating that the state should eradicate imprisonment "except in cases when the individual's detention is necessary to ensure attendance in court *or when the individual presents a real risk to the safety of victims and to the public*."[36] According to Sylvestre, the two circumstances that warrant closed custody are: (1) "[f]or purposes of neutralization", where "closed custody would…serve primarily as a safety measure rather than an actual punishment imposed to inflict suffering *per se*"; and (2) "[a]s a measure of compulsion".[37] I will focus my attention on the circumstance of needing to neutralize the risk that an individual poses to victims and the public.

Sylvestre's inclusion of a neutralization exception relates to a concern about situations where "the available dispositions and conflict resolution processes are not deemed to be sufficient or appropriate" for addressing an "imminent threat".[38] This concern is understandable. At the same time, I worry that this sort of exception runs the risk of (over)expansive use. Indeed, in many of the judgments that I reviewed, judges appealed to reasoning along these lines. For example, in *Quash*, Judge Cozens referred to the lack of FASD programming outside of custody as a reason for imposing a sentence of imprisonment. Additionally, dangerous offender hearings are centred

[33] Sylvestre, *supra* note 4 at 19.
[34] *Ibid*.
[35] *Ibid* at 24 [emphasis omitted].
[36] *Ibid* [footnote omitted; emphasis added].
[37] *Ibid*.
[38] *Ibid*.

on a review of the risk that the criminalized person will likely pose to others, and the judgments seem to reveal a significant preference for efforts to respond to experiences of oppression with individualized carceral measures.

It is possible that some of Sylvestre's other recommendations would help to temper my concern about judicial over-sanctioning on the basis of risk analyses. For example, Sylvestre calls for significant decriminalization and, when incarceration is allowed "for purposes of neutralization or compulsion", for a reduction in maximum carceral sentences.[39] With respect to maximum terms of imprisonment, in particular, she recommends that Parliament "[a]bolish life imprisonment" and, as recommended by the Law Reform Commission in 1976, impose "a maximum sentence of 20 years in cases of imprisonment as a means of neutralization and six months in the case of imprisonment as a way to compel the enforcement of certain measures".[40] These proposals would significantly reduce the circumstances in which judges would be able to impose a sanction of imprisonment, and they would significantly reduce the maximum period of incarceration. As a result, it is possible that there would at least be less instances in which risk assessment could be used to justify imprisonment. Additionally, there might then be more opportunities in the future to critically examine and adjust risk assessment. In other words, risk assessment (at least risk assessment resulting in imprisonment) might turn into an exceptional, rather than ordinary, component of sentencing, which in turn might allow for further critical evaluation of risk assessment.

[39] *Ibid* at 27.
[40] *Ibid*, citing Law Reform Commission of Canada, *A Report on Dispositions and Sentences in the Criminal Process – Guidelines, 197*6, Catalogue No J31-16/1975 (Ottawa: Minister of Supply and Services Canada, 1977) at 27.

Relatedly, research by Celeste McKay and David Milward shines light on the possibility that a reduction in imprisonment can lead to further reductions in imprisonment. McKay and Milward note "that Indigenous recidivists very often have lengthy criminal histories preceding their incarceration in the federal penitentiary system."[41] McKay and Milward thus suggest that the low recidivism rate associated with an Indigenous diversionary program, 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."[42] This idea can be connected with Sylvestre's call for the rare management of risk through incarceration: if the diversionary methods that Sylvestre advocates are pursued (which include consultation and coordination with Indigenous communities[43]), then it is possible that these types of programs will limit the number of people involved in more serious offences (and potentially subjected to risk assessment) down the road. Yet despite these possibilities, I am deeply concerned that an intention to limit custody (on the basis of risk assessments) might nevertheless turn into a practice of significant impositions of custody, especially in relation to groups whom the state already subjects to mass imprisonment and to high-risk classifications.

My concern about mass imprisonment sometimes seems to sit uneasily with my simultaneous concern about the need for the protection of people in the community, including survivors. In expressing my concerns about Sylvestre's exception, I do not want to minimize the importance of protecting survivors and people who might experience violence in the future. Instead, I think that a relational characterization of risk can be helpful in thinking through possibilities for

[41] Celeste McKay & David Milward, "Onashowewin and the Promise of Aboriginal Diversionary Programs" (2018) 41:3 Manitoba Law Journal 127 at 131. See also *ibid* at 154-55.
[42] *Ibid* at 131.
[43] Sylvestre, *supra* note 4 at 23.

reconciling these two concerns. For instance, Sylvestre herself refers to the requirement that an "*individual* present…a real risk to the safety of victims and the public."[44] As I explored in Chapter Four, risk assessment instruments individualize experiences of oppression, redefining these experiences not as circumstances imposed and/or sustained by the state but as individualistic capabilities that can supposedly, with structured supports, be controlled by the individual. Perhaps the state could take seriously the claim that "risky" individuals are both framed as risks due to stereotypes and placed in situations that cultivate "risky" behaviours due to inequality. If the state were to recognize these claims, then the circumstances in which an *individual* will truly be found to pose a risk would dramatically drop. Of course, recognition of, and response to, this shift would require changes outside of the criminal justice system. This requirement makes me question the likelihood of actual change (even in the face of criminal justice legislative reform). Yet despite my doubt, I try to aim for hope. I think that it is the current criminal justice framework that encourages my wariness—making it seem as though imprisoning people for long periods of time as a way to protect other people is a normal and helpful practice.[45]

If it were possible for judges to apportion responsibility and sanctions in a way that would require the state to review and redress its oppressive actions, then it might be possible for the criminal justice system to connect itself with the needed changes outside of the criminal justice system, rather than continuing to exacerbate recidivism and social inequality through the use of imprisonment. Sylvestre is of the view that "[e]ach crime, conceived of as a conflict, must

[44] *Ibid* at 24 [emphasis added].
[45] For discussions of research establishing the opposite (that is, that the criminal justice system, including imprisonment, contributes to recriminalization, see e.g. *ibid* at 7; David Milward & Debra Parkes, "Colonialism, Systemic Discrimination, and the Crisis of Indigenous Over-Incarceration" in Elizabeth Comack, ed, *Locating Law: Race, Class, Gender, Sexuality Connections*, 3d ed (Halifax: Fernwood, 2014) 116 at 141.

present an opportunity for us, as a society, to reflect on the proportion of responsibility that we should have to bear collectively for the crime committed and on ways to prevent these conflicts and problematic situations collectively."[46] Sylvestre suggests that one possibility for moving in this direction is to have criminal justice practitioners (including judges and prosecutors) and community-based practitioners take on roles similar to coroners—they could, for example, make recommendations for structural changes and for bringing societal attention to inequality.[47]

In a similar vein, Sandra Mayson proposes a possible way for criminal justice practitioners to use risk assessment tools while acknowledging that the tools identify systemic (rather than individual) problems. In particular, Mayson offers a recommendation for "accept[ing] the significance of risk to criminal justice decision-making, but…radically rethink[ing] its role".[48] She specifically advocates for the development of "supportive response[s] to risk",[49] posing the question: what if "the default response to risk…were support", rather than coercion?[50] Mayson notes that such a response is possible and appropriate because "[r]isk, after all, is neither intrinsic nor immutable. It is possible to change the odds."[51] I emphasize that "support" must be understood as broader than psychological/psychiatric programming. While this type of support might be necessary in some cases, I doubt that it will ever be sufficient. Support must also include access to services such as housing and healthcare—access to the types of services and living conditions that support people in taking care of themselves and their dependants. Indeed, these are precisely the types of supports for which Mayson advocates.

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[46] Sylvestre, *supra* note 4 [underlining in original].
[47] *Ibid* at 21.
[48] Sandra G Mayson, "Bias In, Bias Out" (2019) 128:8 Yale LJ 2218 at 2282.
[49] *Ibid* at 2286.
[50] *Ibid* at 2287.
[51] *Ibid* [footnote omitted].

As part of developing a response to risk that is supportive rather than punitive in nature, Mayson argues that actuarial risk assessment tools could be utilized "in reverse", that is, "as diagnostic tools to identify sites and causes of racial disparity in criminal justice."[52] The same tools could be applied to illuminate patterns of racialized discrimination in criminal justice processes. Algorithms could then potentially be created in ways that are conscious of, rather than neutral towards, race.[53] Mayson goes further and identifies a few concrete examples of "[a] shift toward a default supportive response to risk".[54] For example, the Supervision to Aid Reentry (STAR) program involves a "reentry-court team".[55] The team inquires with participants about difficulties that they are facing and "assists participants in securing housing, employment, training, counseling, benefits, education, credit, and treatment."[56] Of significant note, the program is geared towards criminalized people whom the Federal Post-Conviction Risk Assessment Tool has classified as being at a medium or high risk of being recriminalized for violent offences.[57] The program illustrates that risk can be understood as something socially constructed and as something that requires social responses even when serious criminalized conduct is involved.

In the context of approaches relating to Indigenous people, any such work should be done with the consultation, agreement, and collaboration of a range of Indigenous governments,

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[52] *Ibid* at 2284.
[53] *Ibid* at 2284-86.
[54] *Ibid* at 2290.
[55] *Ibid* at 2291.
[56] *Ibid*.
[57] *Ibid*, quoting Memorandum from L. Felipe Restrepo, Judge, U.S. Court of Appeals for the Third Circuit, & Timothy R. Rice, Magistrate Judge, U.S. District Court for the E. Dist. of Pa., to Lawrence F. Stengel, Chief Judge, U.S. Court of Appeals for the Third Circuit, Annual Report: Reentry Court Program 1 (July 17, 2018), http://www.fbacrimphila.org /files/2018-annual-report.doc [https://perma.cc/GR4S-QZVM] [emphasis added by Mayson].

organizations, and individuals.[58] This is especially important given the context of the Canadian state's uses of "data" about Indigenous people—including statistics relating to imprisonment. The Canadian state continues to collect data about the numbers of imprisoned Indigenous people but also continues to engage in practices that, in effect, have continued to inflict harm on Indigenous people and communities. This concern about the Canadian state's collection and use of data in relation to Indigenous people raises a further issue in relation to risk assessment instruments. In particular, risk assessment instruments ought to capture social and structural dimensions not only in relation to how criminal justice practitioners respond to findings of risk (as Mayson proposes) but also in relation to how the instruments construct ideas of risk. One suggestion, put forward by Ngozi Okidegbe, is for risk assessment instruments to incorporate community-based knowledge about risk.[59] Mayson's proposal is valuable in that it identifies, and begins to engage with, the social and structural dimensions of criminal justice responses to risk. However, Mayson does not address the institutionalized, carceral nature of the risk knowledge that is incorporated into contemporary risk assessment instruments. Okidegbe argues that there is an alternative approach to the current practice in which researchers generate risk factors by relying on carceral data (that is, information collected through carceral institutions such as the police, courts, and prisons). Instead, algorithms could be "designed, implemented, and overseen by those hailing from most impacted communities."[60] This kind of practice would "change who controls…algorithms by situating most impacted communities into algorithmic governance."[61]

[58] See e.g. Sylvestre, *supra* note 4 at 23.
[59] Ngozi Okidegbe, "When They Hear Us: Race, Algorithms and the Practice of Criminal Law" (2020) 29:3 Kansas Journal of Law and Public Policy 329 [Okidegbe, "Race, Algorithms and the Practice of Criminal Law"]; Ngozi Okidegbe, "Discredited Data: Epistemic Violence, Technology, and the Construction of Expertise", presentation delivered by Ngozi Okidegbe in conversation with Jessica Eaglin, Jamelia Morgan & India Thusi at the Tackling Technology-Facilitated Violence Conference, 25 May 2021.
[60] Okidegbe, "Race, Algorithms and the Practice of Criminal Law", *supra* note 59 at 334.
[61] *Ibid*.

As a result, this proposal holds the promise of addressing—and redressing—oppressive dimensions in the construction of risk factors.

Even if responsibility analyses move towards holding the state accountable for criminalization, Sylvestre maintains (appropriately, I think) that individual accountability should also be encouraged.[62] A practice of denying any individual accountability for past criminalized conduct and of denying any individual accountability for changing one's behaviour in the future could run the risk of dismissing harm and essentializing criminalized people as being incapable of change. I think that the task here is two-fold. On the one hand, judges (and/or other justice participants) should be clear that an emphasis on state accountability aims to highlight the following types of realities: social and institutional structures can greatly constrain the choices that an individual can make and the opportunities that are available to an individual (for example, by undermining individuals' efforts to pursue education and employment); the state has developed (and should redress) racialized criminal justice practices, such as racial profiling; and mainstream norms can sometimes be oppressive, in that they might harmfully dictate what counts as 'positive', 'healthy', and 'correct' behaviour and what counts as behaviour that needs to change. On the other hand, it will also be important for judges (and/or other justice participants) to work to find avenues for criminalized individuals to accept some level of accountability and to practice self-care and respectfulness towards others.

[62] Sylvestre, *supra* note 4 at 16.

The joint pursuit of state and individual accountability is explored in David Milward's critical study of dangerous offender law in Canada.[63] Milward argues that "attention must be given to those who are already, or soon will be, subject to [dangerous offender]…applications".[64] In addition, "Canada must…consider an overhaul of criminal justice policy in favour of justice reinvestment."[65] "Justice Reinvestment" refers to policies that involve investing funding and resources into "social programming", with the aim of preventing people from being implicated in criminal justice processes in the first place.[66]

With respect to immediate practices, Milward argues that "evidence is starting to mount that programming that includes Aboriginal culture and spirituality can address the risk of recidivism for many Aboriginal accused."[67] Milward approaches dynamic risk factors with guarded optimism. He acknowledges Susan Bengston's warning that "research has yet to determine how best to integrate dynamic risk factors into a comprehensive risk evaluation and whether changes in dynamic risk factors (stable or acute) actually reduce recidivism risk."[68] This warning echoes a concern that I discussed in Chapter Three—the concern that there is insufficient evidence regarding the causal links between dynamic risk factors and violence. Yet despite this caution, Milward is hopeful about the emerging evidence "that extensive programming that includes Aboriginal culture and spirituality that addresses the criminogenic needs of Aboriginal accused

[63] David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 Alberta Law Review 619.
[64] *Ibid* at 658.
[65] *Ibid* at 620.
[66] *Ibid* at 630, citing Rob Allen, "Justice Reinvestment and the Use of Imprisonment: Policy Reflections from England and Wales" (2011) 10:3 Criminology and Public Policy 617.
[67] Milward, *supra* note 63 at 653.
[68] Susanne Bengston, "Is Newer Better? A Cross-Validation of the Static-2002 and the Risk Matrix 2000 in a Danish Sample of Sexual Offenders" (2008) 14:2 Psychology, Crime & Law 85 at 103, quoted in Milward, *supra* note 63 at 653.

can better manage the risk of recidivism".[69] Of particular interest to me is an Australian study that Milward discusses, which I will turn to now.

The study that Milward describes was carried out by Alfred Allan and Deborah Dawson.[70] All research was monitored by an Indigenous Advisory Committee, comprised of Deanne Fitzgerald, Hector O'loughlin, Neil Fong, Nic Merson, Cheri Yavu-Kama-Harathunian, and Jane Tittums.[71] Allan and Dawson determined "that the factors that best distinguish between non re-offenders and re-offenders in a population of Indigenous male sexual offenders in Western Australia are unrealistic long-term goals, unfeasible release plans, and poor coping skills (the 3-Predictor model)."[72] In their study, Allan and Dawson note that they use the term "re-offender" to refer to circumstances where an offender was "found guilty by a court of law of committing a subsequent violent offence" or a "a subsequent sexual offence".[73] They also explain that "[a] re-offence was deemed to occur in cases where a subsequent offence was committed while on bail but dealt with at the same time of the index offence."[74] Their study focused specifically on "adult male Western Australian Indigenous offenders".[75]

Allan and Dawson define the three predictors, or risk factors, as follows. First, "poor coping skills" refers to "[e]vidence on file that the offender has used alcohol or other maladaptive behaviours as a coping strategy".[76] They further explain that, in the context of criminalized

[69] Milward, *supra* note 63 at 655.
[70] Alfred Allan & Deborah Dawson, *Developing a Unique Risk of Violence Tool for Australian Indigenous Offenders* (Churchlands, West Australia: Criminology Research Council, 2002).
[71] *Ibid* at 20, 40, 1-3.
[72] *Ibid* at 19.
[73] *Ibid* at 37.
[74] *Ibid*. They also further distinguish between "violent re-offenders" and "sexual re-offenders" (*ibid*).
[75] *Ibid* at 8.
[76] *Ibid* at 40.

Indigenous men, "the offender may state he uses one or more maladaptive behaviours to deal with 'hurting inside'".[77]

Second, "unfeasible release plans" refers to "[e]vidence on file [that] the offender did not have feasible or realistic release plans when he was released from prison or court".[78] With respect to criminalized Indigenous men, this predictor included plans to "return…to an area where he was involved in a feud that was ongoing and was at risk of engaging in further feuding behaviour or returned to an environment where he was not only the perpetrator of violence but also the victim."[79] Additionally, the predictor included insufficient "support for the offender in the community" and circumstances where "he was unlikely to have the support required to maintain treatment gains post release."[80] With respect to criminalized Indigenous men, "this would include instances where the offender had been prohibited for either cultural or Justice reasons from returning to the community where he normally resides."[81]

Third, "unrealistic long-term goals" refers to "[e]vidence on file that the offender is unable to plan for the future in a realistic way", including, for instance, "plans in respect of relationships and work (pattern of meaningful activity for Indigenous offenders) he can clearly not achieve given his history and circumstances."[82]

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[77] *Ibid*, citing Paul Memmott et al, *Violence in Indigenous Communities* (Canberra: Attorney-General's Department, 2001).
[78] Allan & Dawson, *supra* note 70 at 40.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.

The three predictors in the 3-Predictor model are distinguishable from the other dynamic risk factors that I have considered in this dissertation. In particular, the predictors are more specific in terms of how they might be realized by criminalized Indigenous men. For instance, by explaining that the use of alcohol is a predictor when it constitutes "a coping strategy" meant "to deal with 'hurting inside'", the first indicator has the potential to better link with the context within which an Indigenous individual might live. The use of alcohol is not simply something that can be framed as harmful and for which an individual can be blamed, but might be something that has become a coping mechanism in a context where an Indigenous person might have faced harms resulting from residential schools and from the state's failures to provide adequate healthcare, education, or support in the face of violence.

Similarly, the indicator of unfeasible release plans does not simply refer to "procriminal associates". The predictor refers, instead, to specific types of relationships that might make it difficult for a criminalized person to avoid recriminalization.

Additionally, the predictor of unrealistic long-term goals maintains respect for an Indigenous individual's goals to pursue employment and respectful relationships. In particular, the predictor indicates that the goals are unachievable due to "his history and circumstances". This approach leaves space for acknowledging that unrealistic goals may arise because of the history and context of state oppression and lack of support. The three indicators thus appear to invite both an engagement with individual and broader state and social accountability.

Milward's embrace of this research is noteworthy, because completely removing all (potential) risk assessment instruments might not be conducive to better responding to risk (even when risk is understood as landing somewhere "in between" the personal and the social). As Hannah Fry writes, "it's not enough to simply point at what's wrong with the algorithm. The choice isn't between a flawed algorithm and some imaginary perfect system. The only fair comparison to make is between the algorithm and what we'd be left with in its absence."[83] And what we would be left with, Fry believes, is the "[i]njustice" that "is built into our human systems."[84] Racist conceptions and applications of risk will thus not go away simply by eliminating risk assessment instruments. Furthermore, even with their dangerous shortcomings, algorithms appear to be baked into existing governance practices and are unlikely to disappear.[85] Okidegbe argues that the currently dominant algorithms are as characterized by racist assumptions as criminal justice professionals.[86] However, algorithms pose more problems because "they appear objective", which "enables these algorithms to produce the same racial inequities as criminal justice actors but under the guise of scientific neutrality."[87] Therefore, even though criminal justice practitioners act upon racist (and other oppressive) assumptions, that does not mean that algorithms offer a less damaging option. Nonetheless, despite the fact that current algorithms incorporate and reproduce racist assumptions and discourses, Okidegbe argues that such "racial effects…are not endemic to the technology" but instead "stem from a series of design choices".[88] Like Milward, Okidegbe explores possibilities for reshaping algorithmic practices rather than trying to completely eradicate them.

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[83] Hannah Fry, *Hello World: Being Human in the Age of Algorithms* (New York: WW Norton, 2018) at 77.
[84] *Ibid*.
[85] Okidegbe, "Race, Algorithms and the Practice of Criminal Law", *supra* note 59 at 334.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.

Milward's research engages with practices that incorporate Indigenous programming and Indigenous notions of justice into the state's criminal justice processes. Milward himself leans towards such approaches, emphasizing that it is desirable and necessary to offer something (that has some empirical support) to people who are currently subjected to criminal justice processes.[89] In another article, McKay and Milward similarly discuss, with positivity, a specific Indigenous justice initiative.[90] The initiative is Indigenous diversionary programming carried out by Onashowewin in Winnipeg.[91] While McKay and Milward express optimism about the potential for Indigenous justice initiatives to reduce the recriminalization of Indigenous people, they do acknowledge that such initiatives are not free from critique.

Chris Andersen, for example, argues that restorative justice practices involve a turn to "*selected* notions of Aboriginality"[92]. As a result of colonialism, Indigenous laws and practices have been (and, through restorative justice models, continue to be) decontextualized from the social, political, legal, and institutional structures in which they historically existed.[93] Andersen states:

> While it is important to the autonomy of Aboriginal individuals and communities to take on and design their future social institutions as *they* see fit, it must be tempered with the realization that virtually all contemporary leadership structures have their historical roots

[89] Milward, *supra* note 63 at 658.
[90] McKay & Milward, *supra* note 41.
[91] *Ibid* at 129.
[92] Chris Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31 Crime L & Soc Change" 303 at 318 [emphasis in original].
[93] *Ibid* at 315-19. See also Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference (Vancouver: UBC Press, 1997) 75. By "human systems", Fry is referring to human judges (rather than algorithmic "judges" or systems).

> in the 1869 *Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs* (later subsumed under the *Indian Act* of 1876). These Acts brushed aside traditional governing structures, replacing them with band councils, formed by election in a duly "democratic" fashion.[94]

Andersen's analysis highlights the agency of the state in the oppression of Indigenous laws and modes of governance. He proceeds to explain that the state's dismissal and repression of Indigenous laws and governance systems continues to pose obstacles to Indigenous self-determination today: "while the RCAP report…suggests that community justice initiatives should take into account the wishes of its most marginalized members, there are no community procedures for ensuring this happens, and no course of redress for those who wish to challenge these schemes."[95] Indeed, as Murdocca's research shows, Indigenous women's groups expressed opposition to the enactment of section 718.2(e).[96] Indigenous women's groups' submissions to the Standing Committee on Justice and Legal Affairs "warned that so-called 'culturally-appropriate' (or community-based) legal mechanisms did not have *any* 'cultural relevance' to certain communities, and furthermore, that cultural approaches to sentencing have and would continue to have serious and violent implications for the women in their communities."[97] The existence of these concerns—and the outcome of the Canadian state disregarding them—demonstrates the potential for settler colonialism to continue to repress the diverse voices and needs of Indigenous communities.

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[94] Andersen, *supra* note 92 [emphasis in original].
[95] *Ibid* at 319.
[96] Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23.
[97] *Ibid* at 32 [emphasis in original].

McKay and Milward take heed of these types of concerns. However, they ultimately suggest that "criticisms…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."[98] McKay and Milward are of the view that Indigenous justice programs, including Onashowewin's Indigenous diversionary programming, can serve as stepping stones towards the ultimate goal of Indigenous self-determination: "As Indigenous communities become more capable and more accustomed to administering justice, they can gradually assume full control over justice."[99]

Of particular note with respect to the relationship between individual and state accountability, McKay and Milward explain that "[t]he [Onashowewin] 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."[100] This recognition suggests that the programs themselves are premised on an understanding of the "in betweenness" of responsibility and risk, which in turn demonstrates that it might be possible to approach individual accountability in ways that do not involve individualized blaming and that do not erase the state's obligations and failures.

[98] McKay & Milward, *supra* note 41 at 159.
[99] *Ibid* at 160, citing Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 175-176 [RCAP].
[100] McKay & Milward, *supra* note 41 at 147, citing Sarah McCoy, Indigenous Organizations in Manitoba: A directory of Groups and Programs Organized by or for First Nations, Inuit and Metis People (Winnipeg: Indigenous Inclusion Directorate, Manitoba Education and Training, 2011) at 120-122 [as cited in McKay & Milward, *supra* note 41].

Jeffery G Hewitt also expresses optimism for Indigenous restorative justice initiatives.[101] Similar to McKay and Milward, he explains that Indigenous-based programs engage both with individuals' needs and with state-generated oppression. Such "programs… produce results focused on healing individual and community harm – including the underlying harms of ongoing colonization."[102] Hewitt suggests that permanent funding is an important part of the move towards Indigenous restorative justice. Without permanent funding from the federal government, Indigenous restorative justice initiatives run the risk of being conceptualized and evaluated through a "colonialist lens", one that "filter[s] out" necessary "Indigenous dimensions of restoration".[103] For example, data, collected and interpreted from a colonialist perspective, might discount the reality that "healing is complicated and takes time."[104] Hewitt highlights that, "[o]n its own, data is not the problem…The problem, rather, is what data we choose to gather and how we use that data to tell a story."[105] Hewitt's insightful discussion of data connects back to critical commentary in relation to risk assessment instruments. Critical analyses have identified and illustrated shortcomings in how researchers collect risk assessment data (that is, in terms of which people comprise the data samples) and in how practitioners interpret, apply, and utilize risk assessment data. For example, practitioners have applied the tools in relation to Indigenous people even when Indigenous people were not included in the samples. Additionally, practitioners have used the results of risk assessment tools to try to change individuals even if the change required is systemic change, even the supposedly desired "change" is based on a contestable normative value, and even if it is not clear that the interventions result in individual change due to their efforts to target certain characteristics and/or abilities. In other words, the

[101] Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313.
[102] *Ibid* at 323.
[103] *Ibid* at 327.
[104] *Ibid* at 319.
[105] *Ibid* at 327.

data surrounding risk has so far privileged the ongoing oppression of Indigenous people rather than making space for, as Hewitt calls it, the "reinvention" of the criminal justice system.[106]

One additional set of interests that a relational framework can assist in illuminating is the set of needs, rights, and concerns of victims and potential victims. As Elizabeth Adjin-Tettey writes, "the protection needs of Aboriginal women must be an equally important part of the decolonization process if it is to be a just one."[107] The "in betweenness" of responsibility and risk can help focus attention on not only the relationships between criminalized people and the state but also the relationships between criminalized people and people who have experienced violence. With respect to victimized people, a relational framework can help to ensure that victimized people are not blamed for criminalized conduct carried out against them, that victimized people are not made responsible for the future healing of a criminalized person, and that victimized people have access to resources, opportunities, and safety.

This dissertation has considered sentencing law's erasure of the state in circumstances where sentencing judges have indicated an effort to repair the harms that the state itself generated through colonialism. In Chapter Two, I briefly identified one way in which sentencing law's erasure of the state can harm Indigenous women. Specifically, in contextualizing male Indigenous criminalized people living with FASD, sentencing judges have reassigned individualized blame to Indigenous pregnant women and mothers. With respect to risk, we might similarly highlight some of the harmful effects of sentencing law's erasures of the state by bringing victimized Indigenous women into the picture. I do not want to essentialize Indigenous

[106] *Ibid*.
[107] Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19:1 CJWL 179 at 200-201.

women as victims of violence. At the same time, I do not want to obscure the high rates of victimization of Indigenous women. As Adjin-Tettey notes, "Aboriginal over-representation in the criminal justice system has two dimensions: Aboriginal people are over-involved in the system both as offenders and victims",[108] and "a significant number of offences stem from interpersonal violence directed against family members, many of whom are women and children."[109] An analysis of the criminalization of Indigenous people ought to also, then, keep in mind Indigenous people's experiences of violence.

Dominant conceptions of risk transform contextualized and systemic experiences into individualized pathologies. In addition, they take attention away from the need to ensure the safety of women and instead fix attention on the search for possible ways to manage individual men's supposed propensity to cause harm. Dominant discourses generally present the management of harm as being in the interests of the public (and victims). In particular, prevailing portrayals of risk frame risk management as preventing an individual from causing harm to others. However, dominant risk approaches do not seem to consider whether there may be alternative—including less severe—measures that could both help a criminalized person to avoid recriminalization *and also* help protect the safety of people who experience high rates of, for example, interpersonal violence. If the criminal justice system is to take seriously the evidence that risk assessment is biased and that risk is (at least partly) generated and sustained through inequality, then criminal justice processes and practitioners must find ways to address this context without abandoning the safety needs of victimized people.

[108] *Ibid* at 192, citing RCAP, *supra* note 99 at xi.
[109] Adjin-Tettey, *supra* note 107 at 192, citing RCAP, *supra* note 99 at 35, 39 [footnote omitted].

Perhaps a turn away from risk management and towards the protection of victimized people's safety would assist in ensuring that decarceral efforts relating to risk are constructive and respectful towards women. More specifically, perhaps paying attention to victimized Indigenous women's needs would prevent responses that involve burdening Indigenous women with the responsibilities of responding to harm and of preventing possible future harm, as has happened in judicial efforts to address the criminalization of Indigenous people living with FASD.[110] Indigenous restorative justice initiatives such as those discussed above might be well suited to this task, in the sense that they encourage individuals to take accountability while also fostering an understanding of systemic oppression. Nonetheless, some Indigenous women have expressed concern about the ways in which restorative justice initiatives can leave unaddressed the needs of Indigenous women and children.

For example, Emma LaRocque argues that appeals to "culturally appropriate" practices can reinforce potentially harmful norms such as the apparent need for "family 'unity'".[111] Such norms can come at the expense of the safety needs of women and children.[112] LaRocque proposes that, "[w]hether an offender is incarcerated or not, he should be removed from the community of the individual or family he has attacked, not only in the interests of justice, but also for the safety of the victim(s) and, it follows, for the well-being of the family (community)."[113] Given that research supports the argument to keep sexual abusers apart from

[110] See Chapter Two. On "responsibilizing" women in the context of reintegrating and rehabilitating abusive male partners in the community, see also Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 CJWL 1 at 28-29.
[111] LaRocque, *supra* note 93 at 80.
[112] *Ibid* at 80-81.
[113] *Ibid* at 81.

the people they have abused in order to support victims' physical and psychological safety,[114] LaRocque concludes that "it is a total contradiction to keep abusers at home while at the same time claiming to protect victims and survivors!"[115] These concerns illustrate the relational network that criminal justice practitioners should take into account when developing and applying decarceral approaches. Decarceral approaches that leave victimized people in the shadows will not redress harmful norms and experiences of violence.

In noting these concerns, I do not mean to suggest that it is (appropriately or legitimately) up to the Canadian state to continue its current criminal justice practices. Indeed, LaRocque clarifies: "I am not arguing that Native peoples cannot or should not control their programs".[116] Rather, she argues that "it is possible to construct new models that accommodate real, multidimensional human lives."[117] LaRocque demonstrates that one of the reasons to look for new options is the need to deal with the impacts of colonialism. Canadian criminal law is inextricably entwined with colonialism. Furthermore, "the persistence of 'culturally appropriate' rhetoric"[118] is intimately connected with the violence that colonialism and racism have generated and sustained.[119] In other words, colonialism has contributed both to the violence of Canadian criminal law and to the violence that LaRocque identifies in some appeals to "culture" and "tradition".[120] Specifically, the incursion of harm into "culture" and "tradition" can be

[114] *Ibid*, citing Linda Ledray, *Recovering from Rape* (New York: Henry Holt, 1986). See also e.g. Kim M Anderson, Lynette M Renner & Fran S Danis, "Recovery: Resilience and Growth in the Aftermath of Domestic Violence" (2012) 18:11 Violence Against Women 1279.
[115] LaRocque, *supra* note 93 at 81.
[116] *Ibid*.
[117] *Ibid*.
[118] *Ibid* at 86.
[119] *Ibid* at 86-89.
[120] I use quotation marks around "culture" and "tradition" not to suggest that Indigenous cultures and traditions are not real but to instead attempt to capture what LaRocque addresses—the ways in which culture and tradition have

understood through a consideration of how colonialism has harmed Indigenous people. For example, "[a]s colonized peoples, Natives have been forced to use whatever arsenal is at their disposal in response to relentless political pressure – pressure that amounts to sociological and cultural warfare – from Canadian governments, especially on issues of land rights and identity."[121] Additionally, "[i]n response to the Euro-Canadian theft of Aboriginal history and of the ground upon which Aboriginal cultures are based, contemporary Native peoples have been trying to prove they do have cultures – and often morally better ones at that – hence the romanticization evident in most culturally appropriate models, as well as the reluctance to critique them."[122] LaRocque's analysis does not encourage readers to complacently accept the Canadian state's existing criminal justice practices and policies. Neither does her analysis prompt readers to champion appeals to Indigenous "culture" and "tradition" without critically examining where those appeals come from and whose needs and interested are being furthered through them. Instead, LaRocque urges readers to identify the destructive impacts of colonialism and racism in both existing Canadian criminal law and in attempts to move away from it.

LaRocque proposes that the way forward is to find new paths—new "means of defining and controlling crime [that] can be applied to our complex, colonized, contemporary communities."[123] LaRocque is hopeful about possibilities for moving forward. She notes that possibilities could still involve the rejection of "non-Native Canadian models".[124] She emphasizes "that we live in a contemporary world, whether in a rural or urban setting. This

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been shaped by colonialism and the ways in which appeals to culture and tradition can sometimes work against some Indigenous people's needs and interests, especially those of women and children.

[121] LaRocque, *supra* note 93 at 87.

[122] *Ibid* at 87-88.

[123] *Ibid* at 91.

[124] *Ibid*.

means we have many worlds from which to draw with respect to ideals of human rights or healing…Native peoples do not have only things of the past for our resources. On the issue of justice for victims of violence, we have numerous sources and resources for discussion, models, and therapy."[125] She also offers some suggestions, such as placing criminalized people in institutions other than prisons, such as centres that "allow Native practices, elders, and other Native experts to be part of therapeutic treatment."[126] If the Canadian state were placing Indigenous people in some other institution, it would likely constitute another instance of transforming oppressive incarceration into a different form. However, LaRocque' analysis addresses programs and centres that would be initiated and run by Indigenous communities. She also advocates that "[t]he Canadian government must provide rehabilitation centres for sexual offenders, but centres that protect victims and restrict offender movement until such time as offenders prove themselves worthy of societal engagement."[127] Additionally, LaRocque proposes that "[t]hese centres should have access to a combination of historical, sociological, and cultural education and consciousness-raising on the nature and devastating effects of colonization and sexual violence, as well as the most modern kinds of therapies possible."[128] LaRocque thus illustrates the importance of combining individual accountability with state accountability. Transformation of criminal justice practices should consider concrete applications of both forms of accountability (such as through the state's provision of resources such as centres). As well, transformation should incorporate both individual and state accountability into the education and consciousness-raising of criminalized individuals in relation to the state's failures and harms. Individual and state accountability can thus work together rather than against each other.

[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.

LaRocque published her critique in 1997, and it appears that some of her concerns may have been addressed in some Indigenous restorative justice initiatives. For instance, Hewitt acknowledges that restorative justice initiatives do raise "real concerns about victim participation"[129] and notes that some initiatives deal with these issues by enabling victimized people to opt out of participation and by offering support for victimized people who do participate.[130] Additionally, Indigenous restorative justice initiatives appear to respond to LaRocque's call for consciousness-raising. For example, Hewitt explains that Indigenous restorative justice initiatives aim to "heal…the underlying harms of ongoing colonization", and McKay and Milward note that Onashowewin programs acknowledge that when the state criminalizes Indigenous people, the context generally involves "a combination of both significant social stressors and negative choices".[131] Hewitt also makes another point that is helpful for reinforcing the idea that critiques of restorative justice do not need to be read as calls for maintenance of the status quo in Canadian criminal justice practice. Specifically, Hewitt notes that, "though victim participation concerns remain valid, those concerns should be balanced against the frequent lack of restitution for the harm caused to victims, and the way in which court processes often subject victims to ruthless cross-examination."[132] Hewitt's admonition echoes Fry's caution in relation to algorithmic risk assessment tools—both words of warning remind readers that we ought not to compare one development with an idealistic, unrealistic vision of other existing practices.

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[129] Hewitt, *supra* note 101 at 318, citing Mary Achilles & Howard Zehr, "Restorative Justice for Crime Victims: The Promise, The Challenge" in Gordon Bazemore & Mara Schiff, eds, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson, 2001) 87.
[130] Hewitt, *supra* note 101 at 318.
[131] McKay & Milward, *supra* note 41 at 147.
[132] Hewitt, *supra* note 101 at 318.

To the extent that Canadian judges are still significantly involved in sentencing, Julia Tolmie's work might also be useful.[133] Tolmie discusses sentencing methods that could both impose less severe sanctions while also taking seriously the needs of survivors and potential complainants. Additionally, the methods acknowledge importance of criminalized individuals taking accountability. Tolmie argues that, in the general context of intimate partner violence, public safety should be reconceived as placing significant emphasis on the safety of victimized people (including past and potential victimized people). She posits that "[s]entences designed with victim safety in mind should not always be *longer* sentences so much as sentences that are *crafted differently*."[134] For instance, when a judge imposes a curfew on a criminalized person at an address that is different from the address of the survivor, the judge might pursue "victim safety" by "prioritis[ing] the need to provide the victim and her young children with a zone of safety so that she can pick the children up from school, feed them and get them to bed, knowing that the offender is not at large. In other words…, the curfew might commence at a time that is reasonable for her to take the children home each afternoon."[135] Blanket statements of public safety and public protection thus seem to obfuscate not only the context, needs, and rights of criminalized people but also the context, needs, and rights of survivors. By comparison, if judges were to be more specific about which people are in need of protection, judges might be better able to listen, and attempt to respond, to those individuals' needs, while also working towards decarceral sanctions.

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[133] Julia Tolmie, "Considering Victim Safety When Sentencing Intimate Partner Violence Offenders" in Kate Fitz-Gibbon et al, eds, *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 2018) 199.
[134] *Ibid* at 202 [emphasis in original].
[135] *Ibid* [footnote omitted].

This section has aimed to illustrate that the "in betweenness" of responsibility and risk can be helpful for working one's way through the multiple paths that scholars and other community members have identified and are continuing to develop. The paths aim to both move away from the mass incarceration of Indigenous people and protect the needs of Indigenous women, children, and elderly people. In the next section, I specifically consider possible future directions for the judicial reliance upon risk assessment evidence in sentencing. This practice has both intensified alongside, and hindered, judicial efforts to redress the state's oppression of Indigenous people.

5.4 Risk Assessment Instruments in Sentencing: Some Thoughts

Risk assessment instruments incorporate stereotypes and sustain harm. At the same time, judges and other professionals subjectively construct and apply risk knowledges. Similar to dominant risk assessment tools, subjective modes of risk assessment and management similarly incorporate typecasts and perpetuate harm. Therefore, I think that there should be efforts to fully move away from dominant risk assessment instruments and from subjective risk assessments that rely on stereotypes and on individualized understandings of, and responses to, risk. From within Canadian law, one mechanism that might be of assistance in this process is the *Charter*'s right to equality.

Sonia Lawrence and Debra Parkes note that section 15 of the *Charter* has historically "had relatively little impact on the many ways that inequality pervades sentencing law."[136] However, they also recognize that criminalized Indigenous women have recently made two successful section 15 challenges—in *R v Sharma*[137] and *R v Turtle*.[138]

In *Sharma*, a majority of the Ontario Court of Appeal declared sections 742.1(c) and 742.1(e)(ii) of the *Criminal Code* to be of no force or effect on the basis that they violated sections 7 and 15 of the Charter. The two provisions prevented sentencing judges from imposing conditional sentences (that is, sentences of house arrest) for certain drug offences. The majority held, "first, that the impugned provisions, in their impact on Aboriginal offenders including Ms. Sharma, create a distinction on the basis of race; and, second, that the provisions deny Ms. Sharma a benefit in a manner that has the effect of reinforcing, perpetuating, and exacerbating her disadvantage as an Aboriginal person."[139]

Turtle involved a Charter challenge brought by Sherry Turtle, Audrey Turtle, Loretta Turtle, Cherilee Turle, Rocelyn R Moose, and Tracy Strang, "all band members of the Pikangikum First Nation" who "each…live, together with their young children, on the First Nation Territory of Pikangikum."[140] Justice David Gibson explained that "the Pikangikum First Nation Territory is an isolated fly in community hundreds of kilometers from the nearest district jail".[141] The

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[136] Sonia Lawrence & Debra Parkes, "*R v. Turtle*: Substantive Equality Touches Down in Treaty 5 Territory" (2021) 66:7 CR 430 at 430, citing e.g. Jennifer Koshan & Jonnette Watson Hamilton, "The Adverse Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights" (4 January 2019), online: *ABlawg* <http://ablawg.ca/wp-content/uploads/2019/01/Blog_JK_JWH_Boudreault_Dec2018.pdf>.
[137] *R v Sharma*, 2020 ONCA 478, 390 CCC (3d) 1 [*Sharma*].
[138] *R v Turtle*, 2020 ONCJ 429 [*Turtle*].
[139] *Sharma*, *supra* note 137 at para 67.
[140] *Turtle*, *supra* note 138 at para 1.
[141] *Ibid* at para 4.

Applicants argued that the Criminal Code's intermittent sentence provisions discriminated against them on the ground of "aboriginal residency".[142] In the result, Justice Gibson held that "the Applicants…established the practical unavailability of an intermittent sentence for a qualifying mandatory minimum punishment for on reserve band members of Pikangikum First Nation is a violation of Charter s. 15(1)."[143]

Lawrence and Parkes develop a careful analysis of *Turtle*. They explore both the possibilities and potential limitations of pursuing decarceral reform through litigation. With respect to criminal law's depictions of people, Lawrence and Parkes recognize criminal law's pull towards the individual. They note that "[t]he criminal law is so relentlessly individualizing".[144] In terms of challenging criminal law's individualizing tendencies and exposing its structural and relational dimensions, Lawrence and Parkes suggest that "[c]onstitutional claims like [the one in *Turtle*] provide a wedge to crack those assumptions open, to momentarily reverse our gaze toward the systemic, the structural, and the community."[145] Section 15 thus shows some promise in serving as a mechanism to draw on relational depictions of people: through section 15, criminal law can bring state accountability for inequality more fully into view.

Yet Lawrence and Parkes also caution that the *Turtle* judgment itself could also be read "as just one in a long line of recent efforts by settlers and their institutions to redeem themselves through telling these stories and making pronouncements."[146] From this perspective, the case "would be a reminder to maintain a critical eye on the claims made about Canadian law and the ways it

[142] *Ibid* at para 23.
[143] *Ibid* at para 105.
[144] Lawrence & Parkes, *supra* note 136 at 444.
[145] *Ibid*.
[146] *Ibid* at 446.

continues to subordinate and pathologize Indigenous communities while glamourizing, comforting and centering non-Indigenous institutions and actors."[147] Canadian sentencing judges' practices of pathologizing, essentializing, and demeaning Indigenous people—in the name of applying a remedial sentencing provision—highlight the importance of sustaining this "critical eye". With a "critical eye", it is likely also possible to also see the potential for section 15 not only to centre the state's responsibility but also to potentially lead to concrete change. As Lawrence and Parkes conclude, "[b]y bringing legal logics to specific places, people and histories, cases like this force these abstractions into new configurations capable of mapping onto the particular contours of the spaces in which they land."[148] Section 15 can potentially offer tangible avenues for dealing with existing realities. To the extent that some criminalized Indigenous people choose to turn towards the *Charter*, it is worth exploring the potential of section 15 to constitute one of many possible paths that Indigenous people embark upon in the process of placing responsibility on the state and advocating for equality.

Some risk assessment tools have also been subjected to a section 15 analysis. However, the constitutional challenge in the risk assessment context did not result in a widening of the judicial gaze to include structural and institutional relationships. In *Ewert*, the Supreme Court of Canada rejected Jeffrey Ewert's claim that the Correctional Service of Canada's use of the challenged risk assessment tools violated his right to equality under section 15 of the *Charter*.[149] Adelina Iftene points out that this outcome "is shocking given that the Court used a s. 15 analysis to

[147] *Ibid*.
[148] *Ibid* at 447.
[149] *Ewert v Canada*, 2018 SCC 30 at paras 79, 91, [2018] 2 SCR 165 [*Ewert*]. The Supreme Court also rejected Jeffrey Ewert's section 7 challenge (*ibid* at paras 76, 91).

interpret and subsequently find a breach of s. 24 of the CCRA."[150] The majority's reasoning with respect to section 15 specifically relied on the lack of evidence: Justice Wagner held that "the trial judge did not find, and indeed could not have done so on the evidence before him, that the impugned tools do in fact overestimate the risk posed by Indigenous inmates or lead to harsher conditions of incarceration or to the denial of rehabilitative opportunities because of such an overestimation."[151] *Ewert* suggests that there is still judicial reluctance to constitutionally "responsibilize" the state for criminal justice inequalities.

Despite Jeffrey Ewert's lack of success, a proposed class action has since been initiated against the Correctional Service of Canada with respect to its use of another risk assessment instrument, the Custody Rating Scale.[152] The statement of claim includes an allegation of a violation of section 15 of the *Charter*.[153] Martha Kahnapace is listed as the representative plaintiff, and the statement of claim indicates that she is Indigenous and was formerly incarcerated.[154]

Also since *Ewert*, investigations into the use of risk assessment instruments in Canadian prisons have been undertaken by the Office of the Correctional Investigator,[155] the Standing Senate Committee on Human Rights,[156] and the Globe and Mail.[157] The Correctional Investigator Ivan

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[150] Adelina Iftene, "Who is Worthy of Constitutional Protection? A Commentary on Ewert v Canada" (21 June 2018), online (blog): *Robson Crim Legal Blog* < https://www.robsoncrim.com/single-post/2018/06/21/Who-is-worthy-of-constitutional-protection-A-Commentary-on-Ewert-v-Canada > [https://perma.cc/DA45-G4DW].
[151] *Ewert*, *supra* note 149 at para 79.
[152] *Kahnapace v Attorney General of Canada*, Federal Court File No T-88-21 (Vancouver), Statement of Claim, online: <https://www.theglobeandmail.com/files/editorial/News/nw-na-bias-prisons-0111/LT_CSC_encl_Statement_of_Claim_-_Jan_11_2021.pdf>.
[153] *Ibid* at 3. The Statement of Claim also alleges a violation of section 7 of the Charter (*ibid*).
[154] *Ibid* at 6.
[155] Ivan Zinger, *Office of the Correctional Investigator Annual Report 2018-2019* (25 June 2019).
[156] Senate, *Interim Report of the Standing Senate Committee on Human Rights – Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to Be Treated as a Human Being* (1 February 2017-26 March 2018) (Chair: The Honourable Wanda Elaine Thomas Bernard) [*Interim Report of the Standing Senate Committee on Human Rights*].

Zinger has stated that, at the time of the 2018-2019 report, the Correctional Service of Canada ("CSC") had not provided "an official response…on how it intends to address the concerns raised by the case and the ensuing SCC decision."[158] In the CSC's "Response to the 46th Annual Report of the Correctional Investigator 2018-2019", the CSC stated that it "collaborated with the Canada Agency for Drugs and Technologies in Health…to assess the validity of the recidivism risk assessment tools for inmate populations".[159] The CSC also stated that "[t]he CADTH report notes that all tools subject to the litigation demonstrate moderate to high predictive accuracy. However, CSC is mindful of a gap in recent research on the SORAG, and will consider any new research that seeks to further assess this specific tool."[160] Additionally, the CSC indicated that "actuarial measures are essential to the process of risk assessment, but the process remains a multi-faceted approach that extends beyond the administration of actuarial measures – cultural variables, such as those that have impacted Aboriginal Social History…must be integrated into the assessment."[161]

Two concerns that I raised in Chapter Three are evident in the CSC's response. First, consistent with recent risk assessment research, which I discussed in Chapter Three, researchers are validating the tools in relation to Indigenous people. This illustrates that the concept of "cross-cultural bias" is likely insufficient for identifying and remedying the inequality that risk assessment tools sustain. In particular, the tools might accurately predict which experiences are

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[157] Tom Cardoso, "Bias behind bars: A Globe investigation finds a prison system stacked against Black and Indigenous inmates", *The Globe and Mail* (October 24, 2020) <https://www.theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments/>.
[158] Zinger, *supra* note 155 at 69.
[159] Correctional Service of Canada, *Response to the 46th Annual Report of the Correctional Investigator 2018-2019* (26 August 2019 [date modified]), online: <https://www.csc-scc.gc.ca/005/007/005007-2810-en.shtml>.
[160] *Ibid*.
[161] *Ibid*.

more likely to lead to rearrest or reconviction, but the factors relied upon are themselves rooted in systemic inequality.

Second, the CSC refers to "cultural variables". The term is, again, indicative of placing blame and responsibility on Indigenous people for experiences of harm and oppression that are generated by the state. By attributing "risk" to "culture", the language essentializes Indigenous people as being part of an inherently dangerous culture while the state is, again, erased. Relatedly, LaRocque observes that, "[i]n the guise of cultural sensitivity, non-Native judges and lawyers have, as a rule, sympathized with Native rapists and child molesters on cultural grounds as if they have any critical basis for deciphering cultural knowledge", leading to "racist implications" such as, "Native men are so culturally primitive, depraved, or deprived they cannot be held responsible for any act".[162] The state's attributions of risk and criminalized conduct to Indigenous "culture" thus place responsibility on Indigenous "culture". This practice distracts from the need to encourage the Canadian state to self-reflexively examine, and redress, its own contributions towards violence and its failures to protect both criminalized and victimized people from violence.

Given that researchers are validating risk assessment instruments in relation to Indigenous people, successful arguments against the instruments need to be grounded in something other than the "cross-cultural bias" claim. A promising alternative approach could be one that recognizes the overall bias of the dominant risk assessment framework. The overall bias manifests in the tools' support of the state's imposition of harsher conditions on imprisoned Indigenous people. This type of argument could acknowledge that even if dominant risk

[162] LaRocque, *supra* note 93 at 89.

assessment tools are validated in relation to Indigenous individuals, the very concept of risk that is incorporated into the tools is nevertheless biased. In other words, even if the tools are validated, the tools lead to harsher outcomes for some Indigenous people and they do so because of that person's experiences of inequality, such as poverty, lack of access to adequate education, subjection to increased policing and surveillance, and underfunded and under-resourced support when experiencing violence.

Empirical evidence of Indigenous people's experiences of harsher punishment is mounting. For example, the Interim Report of the Standing Senate Committee on Human Rights quotes the following from the evidence of Stuart Wuttke, General Counsel, Assembly of First Nations, and Michelle Mann-Rempel:

> Indigenous offenders are more likely to be placed in segregation, accounting for 31 per cent of the cases. Once in isolation, they spend 16 per cent more time there. They account for 45 per cent of all self-harm incidents. Nine in 10 Aboriginal or indigenous offenders are held to the expiry of their sentence versus two thirds of the non-indigenous inmate population. They are more likely to be restrained in prison, to be involved in use of force incidents, to receive institutional charges and to die in prison.[163]

With respect to the Custody Rating Scale, in particular, the Auditor General of Canada stated:

[163] *Interim Report of the Standing Senate Committee on Human Rights, supra* note 156 at 50, quoting House of Commons, Standing Senate Committee on Human Rights, *Evidence*, 42-1, No 19 (7 June 2017) at 11:30 (Stuart Wuttke, General Counsel, Assembly of First Nations) and also citing House of Commons, Standing Senate Committee on Human Rights, *Evidence*, 42-1, No 19 (31 May 2017) at 11:30 (Michelle Mann-Rempel, Lawyer/Consultant, as an individual).

> We found that this tool didn't consider the unique needs of [I]ndigenous offenders as required. More than three quarters of [I]ndigenous offenders were sent to medium- or maximum-security institutions upon admission and were referred to a rehabilitation program. These were at significantly higher levels of security, few offenders were assessed for a possible move to a lower level before release, even after they completed their rehabilitation programs.[164]

The Interim Report also noted that *Gladue* reports are not always available and that Indigenous programming is not available to all imprisoned Indigenous people.[165] These practices can reduce an Indigenous person's chances of being released on parole.[166]

Additionally, risk assessment tools have recently been critically scrutinized by Tom Cardoso in a Globe and Mail report. Cardoso discusses two "particularly crucial" risk assessments: "[t]he first is the Custody Rating Scale, meant to measure what kind of security risk an inmate poses inside"; and "[t]he second…is the Reintegration Potential Score, which gains in importance toward the end of an inmate's sentence."[167]

Similar to the tools that were challenged in *Ewert*, the factors in the Custody Rating Scale raise issues relating to normative value judgments and inequality. For example, these issues can be

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[164] *Interim Report of the Standing Senate Committee on Human Rights*, *supra* note 156 at 52-53, quoting House of Commons, Standing Senate Committee on Human Rights, *Evidence*, 42-1, No 19 (3 May 2017) at 11:30 (Michael Ferguson, Auditor General of Canada, Office of the Auditor General of Canada) [square brackets in *Interim Report of the Standing Senate Committee on Human Rights*].
[165] *Interim Report of the Standing Senate Committee on Human Rights*, *supra* note 156 at 53.
[166] *Ibid* at 54.
[167] Cardoso, *supra* note 157.

seen in the "street stability" factors in the Custody Rating Scale.[168] The "street stability" category includes, for instance, a "marital/family adjustment" category. The category draws on the purported value of a "nuclear family" and the apparent risk posed by not having "significant family relationships" or by experiencing "instability" in a marital relationship.[169] In addition, inequality is significantly factored into the "living arrangements" category of "street stability" factors. The rating considers it to be risky to change residences two times or more within six months before an offence.[170] In finding less risk, the tool takes into account "legitimate reasons for relocation". However, it is not clear what those reasons are. This implies that dealing with evictions, poverty, finding a place to live with children, and escaping an abusive partner are all potentially open to being viewed as "illegitimate". Relatedly, a person will receive a "below average" rating on "employment/education" where they have "been usually unemployed and [were] not employed when the current offence(s) was committed. If the inmate verbalizes that the employment/educational situation contributed to the present offence(s), the rating should be 'below average'."[171] Experiences of oppression such as racism, sexism, classism, and ableism may have played a role in unemployment and in participating in criminalized conduct, and these experiences may be harmfully used to mark a criminalized person as risky.

As explained by Cardoso, the Reintegration Potential Score includes both static factors and, for Indigenous and women inmates, dynamic factors. The dynamic factors analysis is "based purely on the administering officer's judgment – which allows all sorts of biases to creep in."[172]

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[168] Commissioner's Directive, *Security Classification and Penitentiary Placement*, No 705-7 (Ottawa: Correctional Service of Canada, 15 January 2018), online: <https://www.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml#s9>.
[169] *Ibid*.
[170] *Ibid*.
[171] *Ibid*.
[172] Cardoso, *supra* note 157.

Cardoso further notes that "Indigenous men are 29.5 per cent more likely to receive the worst reintegration rating of 'low'", which restricts their likelihood of being released on parole.[173] This result is in keeping with the research and critiques of risk assessment instruments that I have considered in this dissertation. In particular, the instruments make Indigenous people responsible for experiences of inequality (through the inclusion of factors that assess oppression and/or through subjective bias in applying such factors). Cardoso makes an additional finding that adds another dimension to risk assessment critiques. Specifically, "after controlling for the score, the inmate's age and amount of time since their release, Indigenous men are 9 per cent less likely to reoffend than white men", meaning that they "receive worse reintegration potential scores than they should."[174] This last point suggests that research might even support an argument that imprisoned Indigenous people not only experience more harm in custody (as a result of risk assessment instruments that are based on factors rooted in inequality) but also receive scores that do not reflect their likelihood of being recriminalized. I do not think the latter point is necessary for a section 15 claim, but if established, it would further contribute to establishing discrimination.

Given the empirical evidence that is accumulating against risk assessment instruments and classifications, it is possible that the *Charter* might be used to prevent practitioners and courts from applying and/or relying upon such evidence of "risk". Such a move might in turn speed up the development of tools and practices that are more attentive and responsive to the state's role in generating and sustaining inequality and the mass imprisonment of Indigenous people.

[173] *Ibid*.
[174] *Ibid*.

5.5 Conclusion

The question of how to understand and respond to "risk" is one that cannot be answered from within the boundaries of existing Canadian sentencing law or from within the confines of the dominant Risk-Need-Responsivity model. Neither are the concerns relating to risk assessment 'new'. The Canadian state has a practice of transforming one form of oppression into another and a practice of framing its violence against Indigenous people as responses to "social problems" for which Indigenous people are responsible. Yet scholars have generated an immense body of research, reflection, critique, proposals, and optimism. A relational understanding of responsibility and risk supports this impressive body of work by prompting close consideration of the relationships involved in criminalized conduct and in the process of criminalization.

Chapter Six: Conclusion

Early on in my PhD program, my supervisor helpfully noticed a thread running through my writing—a focus on the ways in which criminal law depicts people. I stitched this thread into the centre of my work, and over time, I narrowed my gaze onto sentencing law. Sentencing law both moves beyond, and is constrained by, criminal law's constructions of the decontextualized individual. I have attempted to explore this process in relation to the judicial sentencing of Indigenous people. I have sought to identify and critique some of the ways in which sentencing law, through its portrayals of Indigenous people, causes harm and violence and perpetuates inequalities, even as sentencing law claims to attempt to end such forms of oppression.

In applying section 718.2(e) of the *Criminal Code*, sentencing judges have brought some difficult experiences of some Indigenous people to light. At the same time, in doing so, judges have presented some of these experiences in negative and harmful ways, have erased or obscured the state's own role in causing such damage, and have minimized or masked Indigenous people's resilience. My engagement with these practices is an ongoing process. I come to this work bound up in settler law and settler academic institutions and traditions. I have strived to question and challenge some of the very systems in which I am deeply embedded. As a PhD student, I had the opportunity to spend multiple years working to understand and contest harmful depictions of people. Many people live with, and resist and contest, such practices in the most tangible ways. I feel close to the subject-matter of this research and also very much removed from it. I regularly experience conflicted feelings in relation to this tension, and I have come to feel that a lack of

resolution is likely a good thing. I will hopefully continue to question and adjust my own assumptions, patterns of thinking, language, and critiques.

In reflecting on the tension between feeling both close to, and removed from, my work, I found it helpful to think carefully about what exactly the value of my critical textual analysis might be. Part of its value lies precisely in its own engagement with tension. Specifically, I have sought to study tensions that arise when state actors attempt to remedy the Canadian state's harms against Indigenous people. Tensions between efforts to change, and resistance to change, are scattered across the judgments that I examined.

Beyond identifying harmful representations of Indigenous people in sentencing judgments, I also hope to contribute to the range of tools that academics, lawyers, judges, teachers, activists, or criminalized individuals and their families themselves have at their disposal for thinking through, talking about, and changing the discourses and practices surrounding the state's violent treatment of Indigenous Peoples. I hope, in particular, that the concept of the "in betweenness" of risk and responsibility encourages criminal justice practitioners to look to the state and its actions and inactions. I hope that criminal justice practitioners look, more specifically, at the points of connection between state actions and omissions (inside and outside criminal law) and the state's criminalization of Indigenous individuals. I hope, as well, that this dissertation's sustained recognition of the persistent and harmful roles of stereotypes and essentializing language in sentencing judgments reminds criminal justice practitioners to recognize the multifaceted, rich, and varied experiences and standpoints of Indigenous individuals.

I see this dissertation as making four key contributions to the scholarship on the mass imprisonment of Indigenous Peoples. First, this dissertation brings together critical scholarship on responsibility and risk and brings that scholarship into direct conversation with judicial analyses in sentencing and post-sentencing law. I see my work as building on, rather than reworking, an already robust body of scholarship on the Canadian state's oppression of Indigenous Peoples through sentencing laws and practices.

Second, my research is distinct in using relational theory as an anchoring point for analyzing sentencing and post-sentencing judicial analyses and in bridging relational concepts with other work that critically analyzes sentencing law and risk assessment instruments. Relational theory is valuable because it involves identifying points of connection between and among individuals and state institutions, policies, and actors. As a result, it fosters an engagement with individuals' diverse experiences and with structural forces that contribute to shaping those experiences. Relational theory strives to avoid the construction of essentializing, stereotyping, and pathologizing depictions of people by viewing people as living "in between" individual and social realms and by showing that legal concepts such as responsibility and risk can similarly capture the "in betweenness" of human experience.

Third, my work demonstrates that, in sentencing law, responsibility and risk reinforce each other in the over-individualization of criminalization, punishment, and rehabilitation and in the erasure and obfuscation of the state. Currently, both concepts omit the state's actions and inactions from meaningful scrutiny. Responsibility and risk do so by individualizing context and experiences of oppression. Furthermore, the individualization process is not one that recognizes the multiple and

diverse ways in which people experience and respond to oppression. Rather, it is a process that treats oppression as the problem of an essentialized, stereotyped, and pathologized individual—that is, as something caused by an individual's and/or their family's or community's traditions and history and as something that an individual, alone, ought to be able to change. As a result, responsibility and risk remove the roles of the state in generating and sustaining oppression and the obligations of the state to end such oppression.

Finally, this dissertation suggests that a relational analysis can highlight, and be used by criminal justice practitioners to better take account of, the experiences of people presented at the 'margins' of sentencing judgments, including survivors and criminalized people's mothers. A relational account of responsibility and risk urges judges to apportion responsibility between individuals and the state—not to simply transfer responsibility from one marginalized person to another. Additionally, relational theory contests the practice of individualized accounts of responsibility and risk presenting the needs of a community as being in opposition to the needs of criminalized people. I show that relational theory calls upon practitioners to acknowledge that reducing criminalization and imprisonment and increasing safety requires the state itself to make structural changes—not to simply try to change the behaviour of criminalized persons.

There are many avenues through which the ideas that I have explored could be further developed and pursued. One avenue is that of teaching. Canadian criminal law casebooks reveal an inspiring history of teaching criminal law in a contextualized manner.[1] Several casebooks incorporate materials that address, for example, Canada's colonial imposition of criminal law on

[1] Sarah-jane Nussbaum, "Critique-Inspired Pedagogies in Canadian Criminal Law Casebooks: Challenging 'Doctrine First, Critique Second' Approaches to First-Year Law Teaching" (2021) 44:1 Dalhousie Law Journal 209.

Indigenous Peoples, the violent and harmful impacts of criminal law on Indigenous Peoples, and the relevance of criminalized people's and victimized people's lived experiences to criminal law education and practice. Further research would be welcome. For instance, this dissertation invites research into questions such as whether and how Canadian criminal law professors introduce students to Canada's mass imprisonment of Indigenous Peoples and to the gendered dimensions of Canada's genocide of Indigenous Peoples (dimensions that include, for instance, police failures to protect Indigenous women, girls, and 2SLGBTQQIA people) and what types of messages students receive.

Criminal law practitioners might also adjust their engagement with some of the concepts presented in this work. For example, since writing the body of this dissertation, I encountered a new judgment of the Saskatchewan Court of Appeal in which Justice Jerome Tholl specifically laid out connections between *Gladue* factors and risk factors:

> As a final observation regarding *Gladue* factors, I note the factors taken into account in the risk assessment in the pre-sentence report, which were used to find that Mr. Kishayinew is at a higher risk to reoffend, are some of the same factors that potentially lower his moral culpability in a *Gladue* analysis. For example, the risk factors for general recidivism for Mr. Kishayinew were found to be substance abuse, negative peers and companions, family–marital relationships, being unemployed at time of offence, employment stability, residence stability, anti-social behaviour, attitude and lack of self-management. It is obvious some of the background facts and current circumstances of Mr. Kishayinew that lead to a conclusion he is at a high risk to reoffend

> are the same factors that diminish his moral blameworthiness in a Gladue analysis. While sentencing is always a highly individualized process, caution must be observed in taking a high risk to reoffend into account in sentencing if doing so could overshadow the Gladue factors and effectively nullify the applicability of s. 718.2(e).[2]

This passage illustrates judicial recognition of the specific factors that risk assessment instruments incorporate and of the overlap between the factors that serve to decrease an individual's level of responsibility and increase an individual's level of risk. This acknowledgment could serve as a step in the direction of further identification of the structural dimensions of both sets of factors. Perhaps such a development will move sentencing law towards greater recognition of the state's roles in criminalization and the construction of risk. It could also, however, turn into yet another reframing and continuation of the "responsibilization" of Indigenous people for the state's oppression and violence.

This dissertation's theoretical engagement with oppression, state violence, relational theory, "responsibilization", and "de-responsibilization" is also supportive of practices and proposals that pursue decarceration outside of the Canadian state's legal processes. By highlighting the oppression and inequalities that sentencing judgments sustain, rather than redress, this dissertation supports calls to both reform and transform criminal law.

While mindful of these contributions and possibilities for future development, in writing this dissertation, I worry that my focus on the harmful language and outcomes in cases might perpetuate the very language and reasoning that I would rather see eradicated. I have aimed to

[2] *R v Kishayinew*, 2021 SKCA 32 at para 63.

address this concern by being explicit about my reasons for repeating damaging language—namely, to indicate the pathologizing phrases that judges employ and to carefully identify the slippage between efforts to redress oppression and the re-oppression of Indigenous people. As Eve Tuck writes, "a paradox of damage" is: "to refute it, we need to say it aloud."[3]

I aim to now reflect on the importance of taking a further step away from the "damage-centered"[4] language and reasoning that is prevalent in the judgments that I have studied. The movement that I have in mind is rooted in Tuck's appeal to researchers "to capture *desire* instead of damage."[5] Tuck explains that this "framework" can serve as "an antidote to damage-centered research."[6] In particular, as an antidote, "a desire-based framework…stops and counteracts the effects of…the frameworks that position [Native] communities as damaged."[7] In the context of critiquing sentencing law's discourses, a desire-based theory supports (and mandates) an effort to avoid images of Indigenous people, families, and communities as damaged.

According to Tuck, "desire-based research frameworks are concerned with understanding complexity, contradiction, and the self-determination of lived lives."[8] Desire-based frameworks do not treat damage as irrelevant, and they do not deny hardship.[9] Rather, "[d]esire…accounts for the loss and despair, but also the hope, the visions, the wisdom of lived lives and communities."[10] A desire-based approach therefore opposes efforts to present people's experiences as consistent with the state's dominant and singular narratives. As a result, a desire-

[3] Eve Tuck, "Suspending Damage: A Letter to Communities" (2009) 79 Harvard Educational Review 409 at 417.
[4] *Ibid* at 413.
[5] *Ibid* at 416 [emphasis in original].
[6] *Ibid*.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid* at 419.
[10] *Ibid* at 417 [emphasis in original].

based theory offers a counterapproach to judicial representations of Indigenous people's experiences. Among the selection of sentencing judgments that I studied for this dissertation, some of them revealed attempts to fit Indigenous individuals' varied experiences (for example, experiences of criminalization, resistance, education, employment, family connections, being harmed, and harming others) into clear compartments—categories of "failure", "achievement", "victim", and "criminal". This attempt to sort and categorize loses sight of both the complexities and the "in betweenness" of an individual's life. People both experience feelings of control and of control escaping their grasp, and people experience themselves as individual beings and as living within a set of community and power relations. Both desire-based and relational theories aim to capture these realities by calling out not only for a critical analysis of existing judicial narratives about Indigenous people, but also for a consideration of the ways in which Indigenous people have demonstrated resilience and articulated relationships of love, power, and oppression.

With a desire-based approach in mind, I aim to shift my attention towards the resilience of Indigenous people. In the face of oppression, Indigenous people sustain their claims to sovereignty, advocate for their connections to family and community, and work towards healing. My relational analyses illustrate that Canadian sentencing judgments' contextualization of criminalized Indigenous people incorporates racialized and essentialized stereotypes of Indigenous people and erases the state and state actors. In an attempt to contest these portrayals, I found that artwork provides helpful and insightful alternative narratives—narratives that counter the stereotypes in the judgments, that bring the state into view, and that centre Indigenous people's resilience, resistance, and survivance. With respect to survivance, Tuck notes that it "is

a key component to a framework of desire."[11] She adopts Gerald Vizenor's definition: "Survivance…means a native sense of presence, the motion of sovereignty and the will to resist dominance. Survivance is not just survival but also resistance".[12] The artwork that I explore encapsulates survivance, both in its creation by a Cree artist, Kent Monkman, and in the subject-matter that the work portrays.

Artwork is one of many avenues through which Indigenous people portray their experiences and identities, and artwork can help to contest the stereotyped, unidimensional portraits that judges construct within their sentencing judgments. By discussing Monkman's artwork in the context of a dissertation that is so focused on state practices and portrayals of Indigenous people, I question whether my upcoming discussion of Monkman's artwork involves "appropriation and co-optation".[13] In what follows, I attempt to engage with Monkman's artwork respectfully. My aim is to show that Monkman's work makes visible some of the people, actions, and emotions that sentencing judgments omit. I hope to show that Monkman's painting not only further exposes the stereotyped and partial portrayals in sentencing judgments but also counters those portrayals. His work illuminates lived experiences, including love and care, and complexity and contradiction. The artwork thus offers a juxtaposition to judicial depictions of Indigenous people in harmful—simplified and essentialized—ways.

[11] *Ibid* at 422.
[12] Gerald Vizenor & A Robert Lee, *Postindian Conversations* (Lincoln: University of Nebraska Press, 1999) at 93. See also Tuck, *supra* note 3 at 422.
[13] "Ogimaa Mikana: Reclaiming/Renaming", online: <https://ogimaamikana.tumblr.com/>.

Monkman "is an interdisciplinary Cree visual artist".[14] He is "[a] member of Fisher River Cree Nation in Treaty 5 Territory (Manitoba)" who "lives and works in Dish With One Spoon Territory (Toronto, Canada)."[15] Here, I reflect on Monkman's painting, *The Scream*.[16]

Figure 1

Kent Monkman
The Scream
2017
Acrylic on canvas
84" x 126"
Collection of the Denver Art Museum
Image courtesy of the artist

[14] "Biography", online: *Kent Monkman* <https://www.kentmonkman.com/biography> ["Monkman Biography"].
[15] *Ibid*.
[16] Kent Monkman, *The Scream*, 2017, Acrylic on canvas, 84" x 126", Collection of the Denver Art Museum (see Figure 1).

The Scream is a representational painting. It portrays monks, nuns, and RCMP officers forcibly taking Indigenous children away from their mothers, whose faces express anguish and turmoil. In "The Incredible Rightness of Mischief: An Interview with Kent Monkman", Robert Enright comments on the arms extending out throughout in the painting.[17] Indeed, when I look at the painting, I am struck by the images of children being yanked from their mothers' arms by monks, nuns, and RCMP officers. Similarly, arms are prominent in the images of RCMP officers powerfully restraining mothers (whose own strength is evident from the obvious effort that the RCMP officers are drawing on, given their facial expressions and the fact that two officers are pulling back one Indigenous woman). Additionally, the viewer can see an RCMP officer bending over and reaching out to snatch a running child from behind, an RCMP officer firmly holding a gun while looking over the scene, and an RCMP officer in the distance who is pointing out in the direction of three children who appear to be running away.

In his interview with Enright, Monkman explains his aim to capture violence and mothers' efforts to end it.[18] The violence inflicted by visible state actors and the defiance of Indigenous mothers and children is palpable. Through these images, Monkman's painting vividly fills in the images that sentencing judges erase—the *direct and violent* actions of RCMP officers, monks, and nuns, and the *strength and resistance* of Indigenous mothers and children.

The Scream was part of Monkman's solo exhibition, "Shame and Prejudice: A Story of Resilience", which was curated by Monkman and organized by the University of Toronto's Art

[17] Robert Enright, "The Incredible Rightness of Mischief: An Interview with Kent Monkman" (2017) Border Crossings 27 at 40.
[18] *Ibid*.

Museum.[19] The exhibition toured across Canada from 2017 to 2020.[20] In another interview, Monkman explains that "[t]his was an opportunity to ask Canadians to think about what 150 years have meant to Indigenous people, and reframe it through my lens…Colonial history really intended to remove Indigenous people from view, but also strip us of our culture and our languages."[21] Monkman thus directly confronts the Canadian state's removal of Indigenous people from stories of Canada's history and the Canadian state's efforts to destroy Indigenous people, cultures, laws, families, communities, and languages.

As I move forward in contemplating the possibilities for relational approaches to the reform and transformation of sentencing law, I will strive to keep *The Scream*'s powerful image in my mind. In contrast to sentencing judgments, *The Scream* vividly reveals the violence of state actors in forcibly removing Indigenous children from their homes and families and the strength and care demonstrated by Indigenous women in resisting the violence. By painting the violence of state actors and the resistance of Indigenous mothers and children, Monkman illuminates not only the state's practices of stereotyping Indigenous people as vulnerable but also the state's practices of silencing and harming Indigenous people. At the same time, *The Scream* portrays and embodies the sustained expressions and actions of hope, strength, resilience, and assertion of sovereignty by Indigenous scholars, lawyers, educators, and artists.

[19] *Ibid* at 28.
[20] *Ibid*; "Monkman Biography", *supra* note 14.
[21] Janet Smith, "In Shame and Prejudice, Kent Monkman paints missing Indigenous images into history" *Georgia Straight* (5 August 2020), online: <https://www.straight.com/arts/in-shame-and-prejudice-kent-monkman-paints-missing-indigenous-images-into-history>.

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