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CALL FOR PAPERS: Closes April 3, 2023
Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 45(4), 45(5), and 45(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

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

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections, and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances

- Analyses of recent Supreme and Appellate court criminal law cases in Canada
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We also invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities)
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- Evidence in matters of national security
- Thresholds of evidence for police or state conduct
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations
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- Use of evidence in prison law and administrative bodies of the prison systems
- Understandings of harms or evidence in corporate criminality
- Historical excavations and juxtapositions related to evidence or knowing in criminal law
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We will be reviewing all submissions on a rolling basis with final submissions due by April 3, 2023. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

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THE JOURNAL

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A Missing Piece: Frameworks for Analyzing Carceral Attitudes in International Law

SILAS KOULACK*

ABSTRACT

The purpose of this paper is to interrogate international human rights law through an "abolition lens." The paper first defines an abolition lens in the international context by canvasing various sociological and criminological thought on the matter. It then argues that the use of this lens can provide important insight for academics and practitioners. Although international human rights law is not normally thought of as contributing to the carceral state, the paper posits that carceral attitudes are manifest in international human rights instruments, and that the wording of these instruments should be interrogated through an abolition lens to ensure that international human rights law contributes to liberation rather than carceralization. As examples, the *Convention Against Torture*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Human Rights Standards for Law Enforcement* are analyzed. Finally, the paper concludes with a call for other international law instruments to be interrogated in a similar fashion, to ensure that international human rights law fulfils its liberatory potential, and aids states and communities in avoiding carceral outcomes.

Keywords: Prison; Police; International Law; International Human Rights Law; International Criminal Law; Abolition; International Covenant on

* Criminal lawyer and LLM Candidate at the Schulich School of Law, Dalhousie University. Many thanks to Professor Archie Kaiser and the two anonymous peer reviewers for their insightful comments on the earlier draft of this paper. Unless otherwise indicated, all views (and errors) expressed here are my own.

Economic, Social and Cultural Rights; ICESCR; Foucault; Dylan Rodriguez; Law Enforcement; Convention against Torture

I. DEFINING AN "ABOLITION FRAMEWORK"

> *You have to act as if it were possible to radically transform the world. And you have to do it all the time.*[1]

Often, international law is seen as aspirational. Although some international conventions are binding, others are framed as general plans to guide development.[2] If that is the case, and international law sets out ideals for which states should strive, then we need to be mindful of the ideals that it is projecting.

In this paper I first define an "abolition framework", concluding that it is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein; focused on the liberation of all subjugated peoples. In defining this framework, I canvas several sociological interpretations to come to a definition that is appropriate for international law. I then describe why this lens is useful, and how it can rectify some of the issues in international human rights law. Finally, I use this lens to analyze the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*"),[3] as well as the *International Human Rights Standards for Law Enforcement* ("*IHRSLE*").[4] These international documents will serve as an example of how international human rights law can benefit from the incorporation of an abolition lens.

A. Abolish What?

There are myriad definitions of abolition, or an abolition framework, within academia, not all of them appropriate for use in international law. To come to a useful definition of abolition it is first best to describe what is

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1 Angela Davis, Distinguished Professor Emerita, University of California Santa Cruz, Lecture at Southern Illinois University Carbondale (Feb 13, 2014). Quoted in Dorothy E Roberts, "Foreword: Abolition Constitutionalism" at 2.

2 See e.g. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol 993 (entered into force 3 January 1976) [*ICESCR*].

3 *ICESCR*, *supra* note 2.

4 *International Human Rights Standards for Law Enforcement*, United Nations High Commissioner for Human Rights Centre for Human Rights, online (pdf): <www.ohchr.org/documents/publications/training5add1en.pdf> [perma.cc/MS6L-KX8B] [*IHRSLE*].

being abolished. On one level, abolition refers to the ending of prisons and imprisonment. However, this definition is too limited. Juvenile detention halls are carceral, and police officers detaining or arresting citizens outside of prison extend the carceral state to our city streets. Essentially, any state action meant to curtail or control groups or activities may be carceral. Dan Berger suggests "Carceral Power is, at its core, repressive social control, yet the places and means through which that control is expressed change over time."[5] Michel Foucault famously described the carceral state as an "archipelago" – an interconnected chain of islands, each holding a different form of discipline, punishment, or confinement.[6] This "subtle, graduated carceral net, with compact institutions, but also separate and diffused methods" hangs over the entirety of a carceral society. Foucault notes that the carceral network extends well beyond prisons. Penal colonies and juvenile detention facilities are included. Even institutions such as orphanages and apprenticeships, convents, moral improvement associations, and charities that practice surveillance are part of the carceral archipelago.[7]

This broader definition is much more useful in defining carceralization as an issue, but it lacks two important elements. Foucault's work focuses on the state and its carceral policies, but he does not meaningfully address the implications of corporations in carceral politics.[8] It also does little to address the fact that carceral systems disproportionately target certain populations.

Corporations can further the carceralization of a society in at least three discrete ways. Firstly, and most importantly, wage labourers are under constant scrutiny from their employers. For example, Amazon employees are "surveilled by computers to ensure productivity rates are met."[9] When a

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5 Dan Berger, "Finding and Defining the Carceral State" (2019) 47:2 Revs in American History 279 at 285.

6 Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed translated by Alan Sheridan (Toronto: Random House, 1977) at 297.

7 *Ibid* at 298.

8 Since Foucault's death in 1984, the role of corporations in incarceration and carceral politics has become increasingly difficult to ignore. The use of private prisons, private security forces, and the privatization of services within prisons such as phone services, food services, and religious services all attest to this growing collaboration.

9 Michael Sainato, "'I'm Not a Robot': Amazon Workers Condemn Unsafe, Grueling Conditions at Warehouse" (5 February 2020), online: *The Guardian* <www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse> [perma.cc/2C43-VHV9].

labourer is "on the clock," their actions, and their time, belong to someone else. Bob Black details:

> The unofficial line is that we all have rights and live in a democracy. Other unfortunates who aren't free like we are have to live in police states. These victims obey orders or else, no matter how arbitrary. The authorities keep them under regular surveillance. State bureaucrats control even the smallest details of everyday life. The officials who push them around are answerable only to higher-ups, public or private. Either way, dissent or disobedience are punished. Informers report regularly to the authorities. All this is supposed to be a very bad thing. And so it is, although it is nothing but a description of the modern workplace...You find the same sort of hierarchy and discipline in an office or factory as you do in a prison or monastery. In fact, as Foucault and others have shown, prisons and factories came in at about the same time, and their operators consciously borrowed from each other's control techniques.[10]

The typical response to this argument is, of course, that a worker who does not like the conditions of their workplace can simply find a new job. Such is the blessing of the free market. However, trends "from the 1970s onwards has amounted to a process of the real subsummation of labor to finance capital...the lives of potential workers – from places of dwelling through healthcare to education – are incorporated into and dependent upon the operations of finance capital...to support life."[11] When workers are dependent on debt while working precarious and insecure jobs to maintain a minimum standard of living there is little opportunity to leave a distasteful job without facing bankruptcy and homelessness.[12] There is also little motivation to search for new employment if the other available jobs are equally distasteful. This is the second way corporatization contributes to a carceral society. By gatekeeping access to vital resources such as food and housing, corporate or state-controlled marketplaces mandate participation. This monopoly on vital resources creates a coercive effect – if one does not submit to the authority of a workplace and boss, survival becomes impossible. This authority then manifests itself in the workplace in the carceral ways described above. Lastly, corporate and private ownership

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10 Bob Black, "The Abolition of Work" ed by Bob Black *The Abolition of Work and Other Essays*, (Port Townsend, WA: Loompanics Unlimited 1985) 17 at 21.

11 Lisa Adkins, "Essay Forum: Labor in Financialization" in Philip Mader, Daniel Mertens & Natascha van der Zwan, eds, *The Routledge International Handbook of Financialization*, (England, UK: Routledge, 2020) at page 1 of Chapter 27C.

12 *Ibid*.

occupies significant amounts of space.[13] Residents and small businesses are routinely priced out of neighborhoods by high-paying renters or buyers. These residents and small businesses may then be driven into neighborhoods which are heavily policed.[14] Public space is becoming more rare, and more securitized.[15] When citizens cross over into the private sphere, they are subject to surveillance or expulsion by the owner. Any deviance can result in removal from private property, enforced by the state. As public space shrinks, areas outside of corporate surveillance and control also shrink.

The other important addition to Foucault's archipelago is an acknowledgment of who the carceral state affects. Carceral systems are designed to surveil and control deviance, but deviance is a social construct largely defined by those in power. Different groups are disproportionately targeted in different societies based on the ideologies of those in authority.

Therefore, we can come to a final definition of a carceral state for the purposes of this paper and a description of what this framework seeks to abolish. Carceral states include an interlocking network of public and private systems of control that act to surveil and control populations that have been designated deviant by the dominant group.

B. An Abolition Framework

An abolition framework seeks to dismantle the carceral state and replace it with something else. Accepting such a wide definition of the carceral state may present challenges for abolition, but this is a worthwhile enlargement. It accomplishes little to abolish prisons if they are replaced with another institution.[16]

Dorothy E. Roberts offers the motivation behind an abolition framework: "the answer to persistent injustice in criminal law enforcement

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13 Jeffrey Hou & Sabine Knierbein, eds, *City Unsilenced: Urban Resistance and Public Space in the Age of Shrinking Democracy* (England, UK: Routledge, 2017) at 8.

14 *Ibid.*

15 Neil Smith & Setha Low, ed, *The Politics of Public Space*, (New York: Routledge, 2006) at 1.

16 See e.g. Dan Berger, *supra* note 5, (where he argues that the closing of asylums in the U.S. was a process of reinstitutionalization instead of deinstitutionalization: not emptying institutions but instead shifting their function towards even more punitive ends) at 279–280.

is not reform; it is prison abolition."[17] Although helpful, this definition is not expansive enough – it properly identifies one problem with a carceral society but does nothing to suggest a solution. Nor does it address carceral systems outside of the prison. Later, Roberts accepts "three central tenets…of abolitionist philosophy."[18] These are, firstly, that the carceral system can be traced back to slavery, secondly, that expanding criminal punishment functions to oppress Black people and other marginalized groups, and thirdly, that a more humane and democratic society is possible.[19] Although helpful in an American context, this definition is less appliable for use in the international context. The history of American slavery gives little analytical aid for instance in analyzing the carceral elements of Nigeria.[20] However, Roberts' two other points are crucial to our definition: that expansion of criminal punishment further oppresses marginalized communities, and that humane and democratic alternatives are possible.

Eric A. Stanley adds depth to this definition, noting that incarceration enforces "gender conformity and heteronormativity … along with white supremacy, ableism, and xenophobia, features of maintaining a carceral state."[21]

Dylan Rodriguez offers the most developed definition for use in international law. He states: "Abolition is a dream toward futurity vested in insurgent, counter-Civilizational histories – genealogies of collective genius that perform liberation under conditions of duress."[22] Rodriguez further clarifies:

> "Abolition, in its radical totality, consists of constant, critical assessment of the economic, ecological, political, cultural, and spiritual conditions for the security and liberation of subjected peoples' fullest collective being and posits that revolution of material, economic, and political systems compose the necessary but not definitive or completed conditions for abolitionist praxis."[23]

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17 Dorothy E Roberts, *supra* note 1 at 4.

18 *Ibid* at 7.

19 *Ibid*.

20 See e.g. Viviane Saleh-Hanna, *Colonial Systems of Control: Criminal Justice in Nigeria* (Ottawa, ON: University of Ottawa Press, 2008).

21 Eric A Stanley, "Queering Prison Abolition, Now?" (2012) 64:1 American Q 115 at 116.

22 Dylan Rodriguez, "Abolition as Praxis of Human Being: A Foreword" (2019) 132:6 Harvard L Rev 1575 at 1575.

23 *Ibid* at 1579.

Though Rodriguez offers a complete definition, a simpler roadmap is elucidated by Arthur Waskow:

> [T]he only alternative [to prisons] is building the kind of society that does not need prisons. A decent redistribution of power and income so as to put out the hidden fire of burning envy that now flames up in crimes of property – both burglary by the poor and embezzlement by the affluent. And a decent sense of community that can support, reintegrate and truly rehabilitate those who suddenly become filled with fury or despair, and that can face them not as objects–'criminals'–but as people who have committed illegal acts, as have almost all of us.[24]

An abolition framework, then, is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein, focused on the liberation of all subjugated peoples. This liberation will only be possible through a revolution in social relations such that the need for incarceration and surveillance becomes unnecessary.

Some argue that the kind of social relations necessary for abolitionist transformation requires state action. As Berger argues, "genuine reform must provide a state response at the point of need rather than at the point of lawbreaking".[25] However, considering this issue originates with the state, it may be wiser to rely on a grassroots or community response, supported by state resources. No matter how this transformation may come about, it is clear that further investment in carceral systems cannot bring about the bright future promised by abolition theory. Investment in communities and alternatives to carceral systems is the only way forward. The record of international law on this point has been mixed. Some aspirational conventions, such as the *ICESCR*, support investment in communities in a way that an abolition framework would support. However, these aspirational documents tend to have little in the way of enforcement mechanisms and often include significant caveats. These can be contrasted with other international documents, such as the *Convention Against Torture* or the International Human Rights Standards for Law Enforcement (*IHRSLE*), both written without caveats.[26] This attitude and approach in international human rights law contributes to the carceral framework on an international scale.

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[24] Arthur Waskow, resident, Institute for Policy Studies, *Saturday Review*, 8 January 1972, quoted in Angela Davis, "Are Prisons Obsolete" (New York: Seven Stories Press, 2003) at 105.

[25] Dan Berger, *supra* note 5.

[26] *IHRSLE*, *supra* note 4.

C. Crime as a Social Phenomenon

Crime and deviance are social constructs that vary throughout societies and time.[27] What is a crime in one area may not be a crime in another. Various factors affect what is criminal, but it is often largely based upon relations of power in a given state.[28] This also applies in the international sphere. Powerful states are more influential in shaping international law than weak ones.[29] Non-state parties are only rarely allowed a role in international law at all. The rapidly shifting legality of recreational cannabis use worldwide is a clear example of this phenomenon. Cannabis did not become illegal in Canada until 1923, when without debate it was simply noted that "there is a new drug in the schedule".[30] This was not a practical decision but was based on racial politics.[31] This was a somewhat puzzling prohibition – there was little recorded use of cannabis in Canada at the time, and none was seized until 1937.[32] However, the law can be explained by its links to "Chinese Exclusion", and fears of Chinese opium traffickers.[33] It took until long after this moral panic had subsided for recreational cannabis to become legalized, but it was once again due to social factors. Similar links can be drawn to the "War on Drugs" in America. [34] Other states such as Mexico, South Africa, Uruguay, Malta, and Georgia have also done an about face on recreational cannabis laws following changing societal attitudes.[35] Indeed, there are few crimes that have enjoyed universal

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27 William Little, *Introduction to Sociology* (2012) Chapter 7, online (pdf): <opentextbc.ca/introductiontosociology/chapter/chapter7-deviance-crime-and-social-control/#:~:text=Crime%20and%20deviance%20are%20social,of%20power%20that%20structure%20society> [perma.cc/2HVQ-BYP2].

28 *Ibid*.

29 See e.g. Jack L Goldsmith & Eric A Posner, *The Limits of International Law*, (Oxford: Oxford University Press, 2005) at 23.

30 Nathan Ruston, *'There is a New Drug in the Schedule': The Mysterious Origins of Criminalized Cannabis* (Bachelor of Arts in the Department of History, University of Victoria, 2018) at 28 [unpublished].

31 Catherine Carstairs, *'Hop Heads' and 'Hypes': Drug Use, Regulation and Resistance in Canada, 1920-1961* (PhD Graduate Department of History, University of Toronto, 2000) at 35 [unpublished].

32 *Ibid*.

33 *Ibid* at 32.

34 Angela Davis, *supra* note 24 at 109.

35 Basit Aijaz, "From Canada to Uruguay, Here Are Some of the Countries Where Marijuana is Legal" (15 October 2021) online: *India Times* <www.indiatimes.com/trending/social-relevance/countries-where-marijuana-is-legal-551710.html>

acceptance across time periods and societies. Examples like the rapidly changing legality of cannabis use demonstrate that little is inherently criminal – the definition of crime is influenced by the attitudes and power structures surrounding the issue.

II. Why This Lens is Useful – Issues in International Human Rights Law

Understanding that crime is a social phenomenon can lead to radical responses to crime. In this section, I will first lay out what the nature of crime as a social phenomenon means for "fighting crime". Next, I will address whether or not the carceral state has been an effective response to crime. Finally, I will address how an abolition framework could be useful to deconstruct the carceral elements inherent in modern international human rights law.

A. "Fighting Crime" Through Carceral Means

Accepting an abolition framework requires a massive shift in international human rights law. Firstly, the social nature of crime must be accepted. We have identified "crime" as being defined by those in power, but we have not looked at how sociological trends can influence behaviours on a large scale. Sociological factors influence all of our actions. Offenders, and their offending actions, are no different. Making something illegal, whether in international or national law, does not stop that action from occurring if the material conditions under which those actions arise are not changed. Another approach must be taken if the goal is to stop these crimes before they happen, instead of reacting after they have occurred.

International human rights law can be seen as having a mixed record on incarceration. On the one hand, it sets standards for the amelioration of prison conditions, tries to ensure some guidelines are followed, and seeks to eliminate inhumane acts such as torture.[36] On the other hand, it

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[perma.cc/CP2M-FJNL]; Monir Ghaedi, "A Roundup of Countries That Permit Recreational Cannabis" (15 October 2021) online: *DW* <www.dw.com/en/a-roundup-of-countries-that-permit-recreational-cannabis/a-59510115> [perma.cc/RMP3-P62S].

[36] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS 1465 (entered into force 10 December 1984) [*Convention Against Torture*].

uncritically accepts the legitimacy of prisons and police and adds islands to the carceral archipelago in every state where it is accepted.

Prisons, originally, were meant to be humane instruments of individual reform.[37] Based on Christian ideals, they were meant to mimic a monastic setting and give inmates a chance for religious self-reflection and self-reform.[38] However as we now know, carceral solitude is much more likely to produce significant mental and physical harm than reformation.[39] In fact, enforced confinement and solitude often leads to inmates struggling to reintegrate with society when released.[40] Social isolation is correlated with clinical depression and long-term impulse-control disorder.[41] Nor is this a new revelation. As early as 1890 the US Supreme Court recognized that:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[42]

The World Health Organization has stated that "Prisons are bad for mental health", and that mental disorders may be "further exacerbated by the stress of imprisonment…mental disorders may also develop during imprisonment itself as a consequence of prevailing conditions".[43] Despite the hope that prisons would reform and rehabilitate those incarcerated within them, contemporary studies suggest that the opposite occurs. Former inmates often experience

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37 Angela Davis, *supra* note 24 at 45–48.

38 *Ibid* at 45, 46.

39 Bruce A Arrigo & Jennifer Leslie Bullock, "The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change" (2008) 52:6 Intl J Offender Therapy Comparative Criminology 622 at 627.

40 *Ibid*.

41 *Ibid*.

42 *Re Medley*, 134 US 160 (1890) at 168 (on solitary confinement).

43 World Health Organization & the International Committee of the Red Cross, Information Sheet, "Mental Health and Prisons" (2005) online (pdf): *WHO* <www.who.int/mental_health/policy/mh_in_prison.pdf> [perma.cc/VYH7-EX7Q] at 1.

greater difficulties obtaining employment and maintaining social and personal relationships than those who have not been incarcerated.[44]

In some countries, rehabilitation is only a goal in name only. For example, Patrick Igbinovia posits that prisons established in Nigeria "were essentially custodial facilities created to protect British nationals against dangerous offenders", without concern for the well-being of inmates.[45]

Although there may be various reasons for sentencing an offender to incarceration, rehabilitation is not one that is very well supported by evidence. It does not decrease the likelihood of future crimes and does nothing to address the social causes of crime.

B. Other Reasons for Incarceration

At best, imprisonment can have two uses. The first is retributive, a punishing measure, meant to hurt those who have hurt others and meting out justice in the form of "an eye for an eye". One could argue that such an approach is morally just, but in an attempt to avoid a moralistic argument it is enough to note the second part of this expression: that it "makes the whole world blind". Punishing a criminal may make us feel good, but if it is not reducing the likelihood of future crime, it is but a fleeting feeling of relief. I argue the better approach is to ensure the fewest eyes possible are lost.

The other argument often used in favour of imprisonment is deterrence theory. Deterrence theory suggests that if strict punishments are associated with crimes, then citizens will act rationally to avoid punishment and therefore not commit crimes.[46] This argument does not appear supported empirically. Massive carceral networks which set out horrific punishments have failed to eliminate crime. Even the harshest punishments often have

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44 José Cid, "Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions" 6:6 Eur J Criminology 459 at 462.

45 Patrick Edobor Igbinovia, "The Chimera of Incarceration: Penal Institutionalization and its Alternatives in a Progressive Nigeria" (1984) 28:1 Intl J Offender Therapy & Comparative Criminology 22 at 23.

46 Ihekwoaba D Onwudiwe, Jonathan Odo, & Emmanuel C Onyeozili, "Deterrence Theory" in Mary Bosworth, ed, *Encyclopedia of Prisons & Correctional Facilities* (California: Sage Publications Inc, 2005) 233 at 234.

no impact on crime rates.[47] If the threat of prison stopped one from committing a crime, prisons would be empty. The fact that they are not empty suggests that they have not had the deterrent effect advertised.[48] On the other hand, countries such as Iceland, Finland, the Netherlands, Sweden, and Denmark, often held up as models of rehabilitation, have seen declining prison populations.[49]

C. How this Relates to International Law

International law generally avoids attempting to control how a state treats its own citizens. Rather, it is usually more concerned with how states interact with each other.[50] International human rights law is an exception to this rule.[51] International human rights laws provide some protections for citizens against their own state and prescribe some standards for how citizens should expect to be treated.

International human rights laws, and international laws in general, are more difficult to impose than national laws. With national law, most states have the power to ensure their enforcement. Police, courts, and if necessary, militaries, will ensure that national law is upheld through the use of force. Short of war, it is difficult to hold a state to their responsibilities under international law in a comparable way, as states nominally have a monopoly on the use of force within their borders. Instead, international law must rely

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47 See e.g. Amnesty International, "Does the Death Penalty Deter Crime: Getting the Facts Straight" (1 June 2008), online (pdf): *Amnesty International* <www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf> [perma.cc/6FDN-XEKJ].

48 For a more robust criticism of the deterrence hypothesis see David A Anderson "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging" (2020) 4:2 American L & Economics Rev 295.

49 Human Rights Channel "New Report Says Europe's Prison Population is Shrinking" (2 April 2019), online: *Council of Europe* <human-rights-channel.coe.int/asset-new-report-says-europe-s-prison-population-is-shrinking-en.html> [perma.cc/LAV5-GTJD]; See Peter Fransen, "The Rise of Open Prisons and the Breakthrough of the Principle of Normalisation from the 1930s Until Today" in Peter Scharff Smith & Thomas Ugelvik, eds, *Scandinavian Penal History, Culture and Prison Practice*, (United Kingdom: Palgrave Macmillan, 2017) 81 at 81ff (for a history of "open prisons" in Nordic countries) and at 88 – 92 (for a comparison to "closed prisons", but note that the authors are critical of the Nordic model).

50 Frédéric Mégret, "Nature of Obligations" in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 86 at 86.

51 *Ibid.*

on state volunteerism, or states voluntarily binding themselves to their obligations.[52] Human rights laws only have traction when a state has bound itself through an international law instrument, usually a treaty. It can be hard to convince states to bind themselves in this manner when they receive nothing tangible in return.[53]

This "special nature" of human rights law has significant consequences for its enforcement. Typical, "contractual" international law between state parties takes the form of binational or multinational agreements and can be enforced by infringing on the benefit that the other party received from the contract, or, if the agreement has contemplated it, through binding forms of dispute resolution such as arbitration or court. Obviously, these kinds of enforcement mechanisms do not work with international human rights law, where the benefit does not flow to another state but to individuals. Some human rights laws, such as the *Convention on the Prevention and Punishment of the Crime of Genocide*,[54] can be brought before international courts.[55] In reality however, court adjudication has been rare.[56] More common is a state obligation to provide reports outlining how they have complied with their obligations, which can lead to bad press, sanctions, or criticisms from other states if they have failed to comply.[57] Some instruments have created a right of petition before international bodies.[58] Although these novel solutions create some accountability for states, in reality these remedies are often hard to access. Even greater challenges must be navigated to enforce aspirational treaty obligations such as those in the *ICESCR*.[59]

It is important to note the above when analyzing international human rights law through an abolition lens to understand its structure, and to understand how that structure can be changed. There are two main types of international human rights laws. Firstly, there are prescriptive (or

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52 *Ibid* at 87.

53 *Ibid* at 87 (or when a state has been bound through customary international law).

54 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

55 *Ibid* at 105.

56 *Ibid* at 106

57 *Ibid* at 106.

58 *Ibid* at 106.

59 *Cf* Dinah L Shelton, *Advanced Introduction to International Human Rights Law*, 2nd ed (UK: Edward Elgar Publishing Limited, 2020) at 125, 194–197.

proscriptive) laws, and secondly, there are aspirational ones.[60] Prescriptive laws mandate or prohibit a kind of behaviour or action. There may be punishment if those behaviours or actions occur. One example would be the *Convention Against Torture*.[61] States and individuals are not permitted to perpetrate torture. If a state discovers that a person in their territory has committed torture or is alleged to have committed torture, they must take them into custody.[62] A response from the state is mandated and clearly delineated. On the other hand, an aspirational law is one which directs a state to strive for a certain standard. Aspirational laws set out goals for a state to try to achieve and may direct the state on what it should prioritize. An example of an aspirational law is the right to water. Adopted as a human right in General Comment 15 of the *ICESCR*, it states that "State parties have to adopt effective measures to realize, without discrimination, the right to water".[63] This theoretically puts a positive obligation on the state to actively take steps to ensure that this right is upheld. However, it does not set out what effective measures the state must carry out. Nor does this section state that there will be any consequences for failing to adopt these measures. Additionally, the General Comment notes that "the Covenant…acknowledges the constraints due to the limits of available resources", leaving wide latitude for states to ignore this right while spending resources on other priorities.[64] International aspirational laws such as the right to water are eviscerated by these qualifiers.

An abolition framework would emphasize substantive rights such as the right to water and set more robust standards for such rights to be fulfilled, transforming them from aspirational laws to prescriptive ones. It would also require meaningful complaint mechanisms against the state to ensure that this right is taken seriously. Investments in communities and assurance that basic needs will be met must be treated with more priority by international human rights law.

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60 *Ibid.*

61 *Convention against Torture*, *supra* note 36.

62 *Convention against Torture*, *supra* note 36 art 6.

63 Committee on Economic, Social and Cultural Rights (UN), 29th Sess, General Comment No 15 (2002) art 11 & 12 (Right to Water), online (pdf): <www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf> [https://perma.cc/U894-ETJU].

64 *Ibid* at para 17.

III. CASE STUDY: *ICESCR*

The difference between prescriptive and aspirational laws is brought into stark relief through an abolitionist framework. Looking at a case study of an international law will provide a concrete example of the usefulness of this analytical approach. The language in an aspirational document, the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), will be compared with the language of a prototypical prescriptive law, the *Convention Against Torture*.

The *ICESCR* is an aspirational document and sets out positive obligations that state signatories should follow. The rights contained within the *ICESCR* include the right to just and favourable conditions of work, the right to form trade unions, the right to social security, the right to an adequate standard of living, and the right to the continuous improvement of living conditions.[65] These are key rights which directly address the wellbeing of state citizens. However, this document, particularly Article 2, contains significant caveats. These caveats unfortunately undercut the potential of international human rights law. They also undercut the ability of international law to address crime through proactive meeting of needs. Providing these rights would ensure the health of communities. Healthy communities can respond to harm or deviance without relying on prisons or punishment.[66]

A. Articles 6, 7 and 9

The link between the fulfillment of human rights obligations and reduction in crime may not be immediately apparent. However, when crime is observed as a social phenomenon instead of an individual one, the natural conclusion is that a social response is possible instead of an individual one. When crime is observed as a legalistic response to activities designated deviant because of a society's power structures, the appropriate social response becomes apparent: eliminating these power structures in favour of a more egalitarian society. For instance, many crimes which do not cause

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65 *ICESCR*, *supra* note 2.

66 See e.g. Erica R Meiners & Maisha T Winn, "Resisting the School to Prison Pipeline: the Practice to Build Abolition Democracies" (2010) 13:3 Race Ethnicity & Education 271 at 273; see also Allegra M McLeod, "Prison Abolition and Grounded Justice (2015) 62:5 UCLA L Rev 1156 at 1163.

harm but are determined to be deviant, such as panhandling or sleeping in open spaces, could be immediately reduced or eliminated through the provision of affordable (or free) housing, and social insurance. This would be a significant step away from a carceral society without creating any risk. Likewise, meaningful articulation of Articles 6 and 7 of the *ICESCR* would have radical effects on criminal deviance.[67] Article 6 states that the "Parties…recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."[68] Part 2 continues:

> The steps to be taken by a State Party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.

Article 7 recognizes the right of everyone to "just and favourable" conditions of work, fair wages, a decent living, safe and healthy working conditions, and rest.[69] Several studies have shown a relationship between employment and lowered crime rates.[70] Putting mechanisms in place to ensure these rights are protected in meaningful ways would not only increase the economic well-being of individuals, but also make everyone less likely to be at risk from the harmful behaviour of others. The UN has acknowledged that employment contributes to a person's "development and recognition within the community", also noting its importance for social inclusion.[71] A prescriptive right to fair wages and a decent living

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67 See Steven Raphael & Rudolf Winter-Ebmer, "Identifying the Effect of Unemployment on Crime" (2001) 44:1 JL & Econ at 271; see also Fredrik Lundqvist "Unemployment and Crime" (Economics, Södertörn University, 2018) at 17–20 (for "weak but significant evidence") or at 4 for a literature review of other studies finding a connection.

68 *ICESCR*, *supra* note 2 art 6.

69 *Ibid* at art 7.

70 Raphael & Winter-Ebmer, *supra* note 67 at 271; Lundqvist, *supra* note 67 at 4, 17–20.

71 Committee on Economic, Social and Cultural Rights (UN), 35th Sess, General Comment No 18 (2006) art 6 (The Right to Work) at para 1, online: <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfUKxXVisd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BIkX8AGQrVyIc> [perma.cc/URR8-NB72].

would radically reduce crimes of poverty, and shift power structures towards less carceral systems.

The international labour market does not reflect these ideals. There are "major gaps in access to work", and access to work does not ensure good working conditions.[72] Worldwide, more than 630 million workers (or one in five) do not earn enough to avoid moderate or extreme poverty.[73] Labour underutilization affects over 470 million people worldwide, while 188 million are unemployed.[74] Furthermore, labour markets are "not adequately distributing the fruits of economic growth", undermining the value of Articles 6 and 7.[75] Fully implementing these articles would ameliorate these conditions, while addressing criminal deviance through the alleviation of negative social conditions.

B. Article 10

Meaningful interpretation of Article 10 of the *ICESCR* could also impact crime and social behaviour. Article 10 states that:

> 1. The widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Social bonds are consistently shown to be related to criminal behaviour.[76] Especially important are family bonds. Families, as the *ICESCR* points out, are the "fundamental group unit of society", and play a tremendous role in the deviance or conformity of members.[77] Stronger bonds and healthier families indicate less likelihood of crime.[78] Article 10

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72 International Labour Organization, "World Employment and Social Outlook: Trends 2020" (2020), online (pdf): <www.ilo.org/wcmsp5/groups/public/~dgreports/~dcomm/~publ/documents/publication/wcms_734455.pdf> [perma.cc/9WBT-D7WA] at 3.

73 *Ibid* at 12.

74 *Ibid* at 12.

75 *Ibid* at 11.

76 See e.g. Bradley R Entner Wright et al., "Low Self-Control, Social Bonds, and Crime: Social Causation, Social Selection, or Both?" (1999) 37:3 Criminology 479 at 502.

77 See Thomas J Mowen & Christy A Visher, "Drug Use and Crime After Incarceration: The Role of Family Support and Family Conflict" (2015) 32:2 Justice Q 337 at 354 (on the rates of drug use and crime during family conflict).

78 *Ibid*.

of the *ICESCR* has tremendous potential to address crime. Meaningful implementation of this article would help protect family bonds, strengthen social cohesion, and limit harmful deviance. It can also be concluded that Article 10 would have a disproportionate effect on the rates of domestic violence.[79]

C. Article 11

A similar analysis can be drawn with Article 11 of the *ICESCR*. Article 11 states that:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[80]

Article 11 could be radically transformative. The potential promises within Article 11, an adequate standard of living, food, clothing, and housing, would require the complete restructuring of the economic and social relations in some states. What is "adequate" is debatable and circumstantial, but it is largely agreed that this standard requires that "[n]o one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of basic freedoms, such as

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79 Forced marriage itself can be seen as a form of domestic violence – see e.g. Geetanjali Gangoli, Amina Razak & Melanie McCarry, "Forced Marriage and Domestic Violence Among South Asian Communities in North East England" (2006) 23:6 School Policy Studies U Bristol 1 at 32.

80 *ICESCR*, *supra* note 2 art 11.

through begging, prostitution, or bonded labour…[it] implies a living above the poverty line".[81] Obviously, in many societies across the world all of these actions occur, whether the *ICESCR* is ratified there or not. In some countries, begging and prostitution are illegal, and crimes of desperation based on sub-standard living conditions occur everywhere.[82] Amelioration of living conditions would eliminate this category of crime, while improving the lives of everyone and affirming important economic rights.

The standards set out in Article 11 have clearly not been met. Many developing countries struggle to provide proper housing, and homelessness and inadequate housing in developed countries is growing as well – the opposite of the promised "continuous improvement in living conditions".[83] There are over 100 million homeless persons worldwide, with 1.6 billion facing inadequate housing.[84]

D. Article 13, 14, and others

The right to education, enshrined within Articles 13 and 14, contains a similar promise for the elimination of crime without the use of carceral methods.[85] Increases in educational attainment significantly reduce all categories of crime.[86] Unfortunately, 60 million children worldwide still do

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81 Claudia Martin et al., *The International Dimension of Human Rights: A Guide for Application in Domestic Law* (Washington, D.C.: Inter-American Development Bank, 2001) at 577–578; see also Asbjørn Eide, "Adequate Standard of Living" in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 186 at 194.

82 For an explanation of crimes of desperation see e.g. Teresa Gowan "The Nexus: Homelessness and Incarceration in Two American Cities" (2002) 3:4 Ethnography 500 at 517.

83 Asbjørn Eide, *supra* note 81 at 195.

84 United Nations Human Settlements Programme (UN-Habitat), "UN Stats" (2020), online (pdf): <unstats.un.org/sdgs/metadata/files/Metadata-11-01-01.pdf> [perma.cc/V965-A9NF]; see also Committee on Economic, Social and Cultural Rights (UN), 6th Sess, General Comment No 4, art 11 (The Right to Adequate Housing), adopted 1991 UN Doc E/1992/23 online: <www.escr-net.org/resources/general-comment-4> [perma.cc/C69F-DF9B].

85 *ICESCR*, *supra* note 2 art 13.

86 Lance Lochner, "Education and Crime" (2007) National Bureau Economic Research Working Paper No 15894 at 1.

not have access to primary education.[87] Most of the rights contained within the *ICESCR* follow the same pattern – tremendous potential for the strengthening of communities, with a corresponding predictable reduction in crime. The fact that these rights are not meaningfully enforced betrays the potentially liberatory nature of the covenant.

E. Article 2

The potential benefits that could flow from the *ICESCR* are obvious. Equally obvious is the fact that the standards set out therein are not always met. Moreover, they do not have to be. The caveats inherent in the *ICESCR* eviscerate the radical potential of the convention. Article 2 states:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.[88]

The significant promises outlined in the rest of the *ICESCR* lose meaning in the face of Article 2. There are several caveats outlined in this text. Firstly, each state is only expected to "take steps" to fulfil the outlined rights. The rights, therefore, are not guaranteed. The only guarantee is that a state must appear to be moving in a direction to eventually fulfil the covenant. Furthermore, the state is only expected to take these steps "to the maximum of its available resources".[89] A state party may be expected to demonstrate it has made efforts to satisfy the minimum core of this right,

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87 Fons Coomans, "Education and Work" in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 232 at 233.

88 *ICESCR*, *supra* note 2 art 2.

89 *ICESCR*, *supra* note 2 art 2(1).

but the covenant does not specify what this minimum core is.[90] For example, Brodie, Pastore, and Rosser argue that mere bricks and mortar are not enough to provide adequate housing.[91] A dwelling, land, services such as water and plumbing, and the financing of such are necessary.[92] However, the covenant does not guarantee these, leaving states some latitude to avoid obligations. Lastly, the Article uses the language "achieving progressively the full realization of rights".[93] This articulation provides no actual impetus for achieving said full realization. No actual rights need be granted. Only a slow trend toward them is required. This hardly makes them rights at all, but mere pipe dreams floating in the unforeseeable and likely distant future.

F. Standards in Other International Legal Instruments

These half-hearted promises are not the norm for international legal instruments. While the *ICESCR* requires states to take amorphous "steps", to the "maximum of its available resources", other treaties like the *Convention Against Torture* make direct demands.[94] The *Convention Against Torture* directs states to "take effective legislation, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[95] It also notes that "No exceptional circumstances whatsoever" can justify torture.[96] State parties are directed to enshrine the right against torture within national criminal law.[97] The language in these two documents is drastically different. The *ICESCR* allows for exceptions and slow improvement. The *Convention Against Torture* requires swift and precise action for its fulfillment.

G. Abolitionist Possibilities Within the ICESCR

An abolition framework, as defined earlier in this paper, is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein, focused on the

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90 Juliet M Brodie, Clare Pastore, & Ezra Rosser, *Poverty Law Policy and Practice,* 2nd ed (Toronto: Wolters Kluwer Law & Business, 2020) at 793.

91 *Ibid* at 794.

92 *Ibid.*

93 *ICESCR*, *supra* note 2 art 2(1).

94 *ICESCR*, *supra* note 2 art 2(1); *Convention against Torture*, *supra* note 36.

95 *ICESCR*, *supra* note 2 art 2(1).

96 *Ibid* art 2(2).

97 *Ibid* art 4.

liberation of subjugated peoples. This liberation will only be possible through a revolution in social relations such that the need for incarceration and surveillance becomes unnecessary.

Many of the promises of the *ICESCR* relate directly to the promises of abolition. The revolution of social relations necessary to make surveillance and incarceration obsolete might not solely be possible through the *ICESCR*, but a meaningful interpretation of the rights in this document would certainly lay the groundwork for such a revolution. A guarantee of meaningful work with favourable conditions, social security, family protections, and an adequate standard of living would revitalize and strengthen communities. These investments in communities would no doubt have a stabilizing effect. Instead of investing in communities, states are allowed to, and regularly do, invest in carceral policies which marginalize individuals and break down community bonds. The caveats laid out in Article 2 minimize the potential good of the *ICESCR*, limit the possibilities of international human rights law, and lead to an impoverished view of economic, political, and cultural rights.

Healthy communities reduce crime and harmful behaviour, and human rights laws have an important role to play in ensuring the health of communities. Unfortunately, the human rights laws which might lead to healthy communities, such as the *ICESCR*, come with significant caveats which undermine their promise. Other international laws, such as the *Convention Against Torture*, have no such limitations. Crafting international laws in a meaningful way, utilizing an abolition framework, would require more fulsome guarantees of economic and cultural rights. These rights would help create stable and strong communities which could exercise social control over their own members, and not require a carceral state to punish harmful deviance. Instead, these empowered communities would be able to respond to crimes in a way appropriate for their community and their culture. Crafting the *ICESCR* under an abolition framework would require it to be a prescriptive law, with specific goals, no caveats, and a meaningful enforcement mechanism. Done in such a way, the *ICESCR* would contribute to the abolition of the carceral state through a shift in the economic, ecological, political, cultural, and spiritual conditions of the societies where it is embraced.

1. International Human Rights Standards for Law Enforcement

Analyzing other international documents demonstrates how impoverished the *ICESCR* is. Although its limitations become clear when contrasted with the Convention against Torture, this is merely an expression of a larger carceral attitude within international human rights law. The *International Human Rights Standards for Law Enforcement* ("*IHRSLE*") provides some insight. The mere existence of this document legitimizes the existence of law enforcement personnel, and therefore the existence of the carceral state. Much of the language in this document also espouses carceral thinking. In general, the document sets out standards for the way that law enforcement officers (LEOs) must treat civilians, and the rights of individuals that LEOs must not violate. LEOs are expected to "respect and protect human dignity and maintain and uphold the human rights of all persons" and remember that "[e]veryone has the right to security of person".[98] Needless to say, these standards are not always upheld.[99] More to the point, they are directly contradictory to the role of LEOs in a carceral society. Carceral states contain an interlocking network of public and private systems of control that act to surveille and control populations that have been designated deviant by the dominant group. LEOs are one of the key ways of enacting that surveillance and control. Security of the person is strongly related to liberty, and nothing could be less liberating than a powerful carceral state. Furthermore, respecting and protecting human dignity and upholding rights are not natural functions of law enforcement. Rather, LEOs are a key part of a surveillance and control system – directly in contrast to liberty rights and security of the person, especially for marginalized groups.[100]

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98 *IHRSLE*, *supra* note 4 at 4.

99 See e.g. Kristen Williams, *Our Enemies in Blue*, (Cambridge, Massachusetts: South End Press, 2007); Alex S Vitale, *The End of Policing*, (Brooklyn, NY: Verso Books, 2017); The Lagos Judicial Panel of Inquiry, "Lagos State Judicial Panel of Inquiry on Restitution for Victims of SARS Related Abuses and Other Matters", *Report of Lekki Incident Investigation of 20th October 2020* (19 July 2021) (The Honourable Justice Doris Okuwobi); Asian Forum for Human Rights and Development, News Release, "Thailand: End Police Brutality and Use of Violence Against the Democracy Movement (18 November 2020) online (pdf): <www.forum-asia.org/uploads/wp/2020/11/FORUM-ASIA-Statement-Thailand-peaceful-protest-crackdown.pdf> [/perma.cc/B3WP-CZD5].

100 Kristen Williams, *supra* note 99; Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas*, (Cambridge, MA: Harvard University Press, 2001) at 33-37; William Lewis, "The Cops: Racists and Strike Breakers" (May 29, 2020) online: *Left*

Perhaps the fundamental confusion in this document comes from the idea that LEOs are in the business of "protecting all persons against illegal acts".[101] Coming from an abolition framework, we can clearly see that protecting persons against illegal acts is not a function of law enforcement officials.[102] This is not the fault of LEOs. They are not actually equipped to protect individuals from illegal acts. Rather, they have the powers to arrest and investigate illegal acts after the fact. After the fact, however, is too late to protect a victim. To actually protect persons against illegal acts would require healthy communities producing fewer criminals and fewer illegal acts.

The *IHRSLE* also sets out that all police action should respect the principles of non-discrimination. However, this statement neglects the fact that carceral states are necessarily discriminatory – crime is prohibited deviance, and deviance is defined by the elite of a society.[103] Conduct of marginalized groups is categorically more likely to be defined as deviance, and therefore crime.[104] The proper response to this, if the goal is non-discrimination, is to empower communities, decentralize elite power and the ability to define deviance and crime. This can only be achieved through political, economic, cultural, and social rights, such as those enclosed within the *ICESCR*.

IV. CONCLUSION

When utilized, an abolition framework offers unique insight. It emphasizes how state and corporate actions influence the economic, ecological, political, cultural, and spiritual conditions of citizens within any given society. It is also a liberatory framework, seeking an abolition of the carceral state for the emancipation of subjugated peoples through a revolution in social relations. This is not a framework which is commonly applied to international human rights law. This paper fills a niche in the literature by critically analyzing the ways that international human rights law may inadvertently contribute to the carceralization of societies. To prove

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Voice <www.leftvoice.org/the-cops-racists-and-strike-breakers> [perma.cc/BK7M-FCEE].

101 *IHRSLE*, *supra* note 4 at 3.

102 See generally Kristian Williams, *supra* note 99; Alex S Vitale, *supra* note 99 at 31.

103 Alex Vitale, *supra* note 99 at 131–133.

104 *Ibid*.

the use of this framework, different international instruments are analyzed. The *ICESCR*, a convention with strong liberatory potential which could instigate significant investment in community and address the social causes of crime is written to have no hard commitments. States can avoid granting the rights in this document based on caveats and the aspirational nature of the convention. It was not necessary to structure the document this way. Other international instruments are written to be binding and create meaningful duties which must be met by the state. An abolition framework posits that international law should champion investment into and empowerment of communities. To do so would require equipping documents such as the *ICESCR* with meaningful enforcement mechanisms, instead of hollowing them out with caveats. That this is not the case is not surprising. Carceral attitudes seem to be prevalent throughout international human rights law – the necessity of LEOs and prisons are assumed. Further use of the abolition framework in international law is necessary to deconstruct these attitudes, and foster liberatory dialogue within international human rights organizations and treaty bodies.

Taken for *Grant*-ed: Assessing the Short-Comings of the *Grant* Test's Application to the Evidence Obtained from Personal Devices

LAUREN-JEAN OGDEN*

ABSTRACT

Section 24(2) of the *Canadian Charter of Rights and Freedoms* provides a remedy for individuals who suffer harm to their constitutionally protected rights during evidence collection.[1] The framework for a section 24(2) analysis has three distinct steps, the last being a determination of whether the admission of the evidence in question would bring the administration of justice into disrepute. Since 2009, the three-step test laid out by the Supreme Court of Canada in *R v Grant* has been used to arrive at a conclusion on the third factor.[2] However, with the advent of new "types" of evidence the sufficiency of the current application of the *Grant* test must be revisited. In particular, it appears the *Grant* test is inept at handling evidence obtained from personal devices.

In this paper, I explore how judges have taken the unique nature of personal device content for granted, leading to the frequent inclusion of evidence which would have been excluded had it existed in the form of a paper document. This has led to a section 24(2) regime that does not fulfill its purpose of protecting the good repute of the justice system, and instead communicates the justice system's condonation of the violation of

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1 *Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Grant*, 2009 SCC 32 [*Grant*].

individual's rights against unreasonable search and seizure, so long as the ends justify the means.

I. INTRODUCTION

For centuries, the overarching principle of common law evidence was that the search for truth is best served when all relevant evidence is seen, heard, and considered. To serve this purpose, common law courts developed a practice of allowing evidence regardless of the manner it was obtained. It was not until 1974 that legislation was enacted to exclude certain evidence obtained via wiretap. Eight years later, with the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Canadian legal system gained its first general remedy for the exclusion of illegally obtained evidence under section 24(2).[3]

Since 1982, the law around the exclusion of illegally obtained evidence has shifted in many ways. In *R v Collins*, a 1987 Supreme Court case, Justice Lamer laid out three weighted factors to help judges guide their decision on whether illegally obtained evidence should be admitted.[4] The *Collins* factors remained the law until 2009. Then, the decision in *R v Grant* was rendered, creating a new test to determine if admitting illegally obtained evidence would bring the administration of justice into disrepute.[5] This test, often called the *Grant* test, has been instrumental in hundreds of cases in the years since its creation. In 2021, Justice Moldaver affirmed the *Grant* test and its stringent application.[6]

While the justice system continues to rely on the *Grant* test, the reality of modern society is at a crossroads with it. As technology changes and develops, so too do the types of evidence triers of fact find before them. Text messages, computer documents, browser histories, information caches, and similar information are becoming common place in criminal trials. The question, however, is whether the *Grant* test is sufficient to handle these new types of evidence.

In this paper, I will examine the evolution of section 24(2) and the *Grant* test, and how they are applied to evidence obtained from the content

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3 *Charter*, *supra* note 1.

4 *R v Collins*, 1987 SCC 11 [*Collins*].

5 *Grant*, *supra* note 2.

6 See *R v Reilly*, 2021 SCC 38.

of personal devices. In particular, I will examine several post-*Grant* cases dealing with illegally obtained evidence from laptop computers and cell phones and use them to demonstrate the potential shortcomings of the *Grant* test when handling evidence obtained from personal devices.

II. ILLEGALLY OBTAINED EVIDENCE

A. Historically

Philosopher and social reformer Jeremy Bentham wrote that there is "one mode of searching out the truth: … see everything that is to be seen; hear everybody who is likely to know anything about the matter."[7] Bentham's words are reflective of his overarching philosophy: that all relevant evidence should be presumed admissible. For centuries, the English common law, appearing to be informed by the Benthamite perspective, adopted the principle that the administration of justice would be "obstructed where otherwise relevant evidence would not be admissible."[8]

Early evidence rules demonstrated the preference of common law judges for finding the truth by considering all evidence relevant to the matter. In effect, the manner evidence was obtained was paid no mind by judges.[9] Consequently, improperly or illegally obtained evidence, so long as it was relevant, was not tainted by the means used to obtain it. Rather, it was admissible even if acquired by the most ludicrous methods. In fact, in *R v Leatham*, Justice Crompton wrote, "it matters not how you get [evidence]; if you steal it even, it would be admissible in evidence."[10] Justice Crompton's sentiment captured the legal system's disregard for the means used to obtain the evidence. This attitude was reflected in the common law for at least a century following *Leatham*.

In the years following *Leatham*, Canadian law followed English common law in holding that the means of obtaining evidence had little

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7 Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 5 (London: Hunt and Clarke, 1827) at 743.

8 Hugh McKay and Nicola Shaw, "Whatever Means Necessary" Gray's Inn Tax Chambers (31 October 1997) at 2, online (pdf): <taxbar.com/wp-content/uploads/2016/01/1452434391Whatever_Means_Nicola_Shaw.pdf> [perma.cc/7K38-CM7H].

9 *Ibid.*

10 *R v Leatham*, (1861) 8 Cox CC 498 at 501.

bearing on the admissibility of the evidence.[11] In fact, the principle from *Leatham* remained the state of the law for over one hundred years. In 1970, the Supreme Court of Canada affirmed this when a decision was rendered in the case of *R v Wray*.[12]

In *Wray*, the respondent was accused of the 1968 shooting death of Donald Comrie. The Ontario Provincial Police were able to connect the accused to the rifle used in the homicide, and Wray was subsequently asked to accompany an inspector to the Police Headquarters in Peterborough, Ontario. While present at the Police Headquarters, Wray signed a statement "in the form of questions and answers" written by the Inspector. The statement alleged that Wray had concealed the rifle in a swamp near Omomee, and that he would take the police to the location of the rifle. At trial, it was concluded that the statement was involuntary and therefore inadmissible. The Ontario Court of Appeal upheld the decision, ruling that the trial judge had the requisite discretion to reject the evidence. The question of whether the Ontario Court of Appeal erred in law in upholding the trial decision was granted leave to the Supreme Court of Canada.[13]

In giving his reasons for the *Wray* decision, Justice Martland of the Supreme Court of Canada wrote that he was "not aware of any judicial authority ... which supports the proposition that a trial judge has discretion to exclude admissible evidence because...its admission would be calculated to bring the administration of justice into disrepute."[14] Following *Wray*, a meagre handful of trial level decisions shifted course and recognized that trial judges could exercise discretion to exclude evidence where an abuse of process existed.[15] The prohibition of discretion to exclude evidence that was obtained by improper or illegal means, however, remained intact.

Four years after *Wray*, the Canadian Parliament introduced legislation to specifically handle the inadmissibility of evidence obtained by wiretaps and interceptions of private communications.[16] The novel legislation

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11 McKay and Shaw, *supra* note 8.

12 *R v Wray*, [1971] SCR 272.

13 *Ibid.*

14 *Ibid* at 287.

15 See *R v Hawke*, (1974) 2 OR (2d) 210 (ONHCJ); *R v MacLean*, [1975] BCJ No 1017, 27 CCC (2d) 57 (BCCC); *R v Smith*, [1974] BCJ No 776, 22 CCC (2d) 268 (BCSC).

16 Canada, Law Reform Commission of Canada, *Evidence 10: The Exclusion of Illegally Obtained Evidence, a Study Paper Prepared by the Law of Evidence Project* (Ottawa: Justice Canada, 1975) at page 9.

amended section 178 of the *Criminal Code* in such a manner that gave trial judges the discretion to include evidence of intercepted private communications where not including the same would result in an impediment to the administration of justice.[17] For the first time, the newly amended *Criminal Code* allowed for the exclusion of a narrow category of improperly obtained evidence.

B. Section 24(2)

In 1982, the discretion to exclude evidence provided in section 178 of the *Criminal Code* was finally extended to any evidence that was obtained as the result of *Charter* infringing state conduct under section 24(2) of the *Canadian Charter of Rights and Freedoms*.[18] Evidence obtained improperly or illegally was at risk of being omitted from trial. Section 24(2) effectively created a limitation on the common law's general inclusivity rule.

The purpose of section 24(2) is ultimately to protect the public confidence in the administration of justice. Where there is a breach of the *Charter*, there has already been a "diminishment of administration of justice."[19] When state actors breach the constitutional rights of citizens, justice is not being properly administered. Where evidence is collected as a result of the improper administration of justice, allowing its admission at trial may indicate that the justice system condones improper conduct of state actors so long as it yields relevant evidence. This may damage the public perception of the justice system. By providing a remedy for excluding such evidence, the *Charter* protects the "good repute" of the justice system.

There are three requirements for an accused to avail themselves of the section 24(2) remedy.[20] First, the individual's *Charter* rights must have been limited or denied by a state actor. This requires the identification of a specific *Charter* right or rights which have been breached. To satisfy the first requirement, the limitation or denial of *Charter* rights cannot be justified under section 1 of the *Charter*. An example of a situation that may satisfy this condition is one where an individual is arbitrarily detained and searched by a police officer.[21]

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17 Bill C-176, *Protection of Privacy Act*, 1st Sess, 29th Parl, 1973.

18 *Charter*, *supra* note 3.

19 *R v Le*, 2019 SCC 34 at para 140 [*Le*].

20 *Ibid*; *Collins*, *supra* note 4.

21 *Grant*, *supra* note 5.

The second requirement is that the evidence in question must have been obtained in a way that unjustifiably limited or denied a *Charter* right.[22] Generally, this includes the same infringement as the first requirement. Notably, however, there need not be a strict causal connection between the *Charter* infringement and the obtention of evidence, but rather, there must only be some connection. For example, in *R v Strachan*, evidence was obtained by way of a search warrant, but the accused was arrested at the time of the search and denied his section 10(b) *Charter* right to consult with legal counsel. Despite that the same evidence would have been found even if the breach had not occurred, the evidence seized during the search was found to be inadmissible under section 24(2).[23]

The third and final requirement is that the admission of the evidence must bring the administration of justice into disrepute.[24] Between 1982 and the 2008, several criminal cases attempted to identify the correct way to examine this condition.[25] For several decades, the framework for analysing the third requirement consisted of three weighted factors laid out by Justice Lamer in *R v Collins*. Under *Collins*, a court grappling with illegally obtained evidence was to determine the possibility of bringing the justice system into disrepute by considering 1) factors affecting fairness of the trial, 2) factors relevant to the seriousness of the violation, and 3) factors relevant to the effect of excluding evidence.[26]

In 1997, the case of *R v Stillman* came before the Supreme Court of Canada. [27] In *Stillman*, the teenaged appellant, Billy Stillman, was arrested for the murder of 14-year-old Pamela Bischoff after her body was discovered in the Oromocto River in April of 1991.[28] Stillman was taken to the RCMP headquarters in Fredericton, where his attorneys provided a letter indicating that the accused was advised not to consent to the provision of bodily samples or any statements relating to the death of Bischoff.[29] Despite this letter, the RCMP took bodily samples and conducted two interviews without the presence of Stillman's attorneys "in an attempt to obtain a

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22 *Collins*, *supra* note 4.

23 *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673.

24 *Collins, supra* note 4.

25 *Collins*, *supra* note 4; *R v Stillman,* [1997] 1 SCR 607, 144 DLR (4th) 193 [*Stillman*].

26 *Collins*, *supra* note 4at paras 35-39.

27 *Stillman, supra* note 25.

28 *Ibid* at para 2.

29 *Ibid* at para 5.

statement."[30] The trial judge found that the evidence obtained by the RCMP was admissible and should not be excluded under section 24(2) of the *Charter* – a decision which was upheld at the New Brunswick Court of Appeal.[31] The Supreme Court of Canada was tasked with determining whether the Court of Appeal erred in its application of section 24(2) to the facts.

In applying the *Collins* factors to the *Stillman* case, Justice Cory, writing for the majority, further refined the first set of factors by developing a two-step approach to determining the impact of the admission of evidence on the fairness of the trial. This approach required the court to classify the evidence as either conscriptive or non-conscriptive, and then draw a conclusion about whether, if conscriptive, the evidence could have been discovered by some other non-conscriptive means.[32]

In her dissent in *Stillman*, Justice McLachlin opined that there is a need for a more flexible approach to illegally obtained evidence which "preserves the consideration of 'all the circumstances.'"[33] Justice McLachlin goes on to conduct a three-step analysis in her dissent, which emphasized the seriousness of the *Charter* breach, the seriousness of the "affront to the appellant's privacy and dignity," and a balance of the factors favouring exclusion and those favouring admission.[34] Justice McLachlin argues that this approach allows for a more flexible and nuanced analysis than the traditional *Collins* test. Despite Justice McLachlin's proposed approach to section 24(2) in *Stillman*, Justice Lamer's three weighted factors in *R v Collins* remained the law until 2009.

C. *R v Grant*

In 2009, Chief Justice McLachlin (as she then was) used her dissent in *Stillman* to reconfigure the application of the third criteria of the section 24(2) analysis in *R v Grant*.[35] The revision stemmed from several criticisms about the *Collins* test, including the complaint that the test was not consistent with the "language and objectives of s. 24(2)."[36] To respond to

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30 *Ibid* at para 7.
31 *Ibid* at para 17.
32 *Ibid* at paras 113-116.
33 *Ibid* at para 258.
34 *Ibid* at paras 265-268.
35 *Grant*, *supra* note 5at para 60.
36 *Ibid*.

these concerns, Chief Justice McLachlin, writing for the majority, assessed the merits and shortcomings of *Collins*. Noting that the focus of section 24(2) is "not only long-term, but prospective" and targeting "systemic concerns," Chief Justice McLachlin created a revised framework for the third step of the section 24(2) analysis.[37] This framework became known as the "*Grant* test."

Much like the larger section 24(2) test, the *Grant* test has three components that must be considered. The first is the seriousness of the *Charter*-infringing state conduct; the second is the impact on the *Charter* protected interests of the accused; the third and final component is society's interest in an adjudication on the merits.[38] The findings of these considerations must be balanced to determine whether the administration of justice may be brought into disrepute.

1. Seriousness of Charter Infringing Contact

The first line of inquiry that should be pursued per *Grant* is the seriousness of the *Charter*-infringing conduct. According to Chief Justice McLachlin, this factor requires an assessment of whether the administration of justice would be brought into disrepute by "sending a message to the public that courts…condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct."[39] In essence, this line of inquiry is concerned primarily with preserving public confidence in the overall administration of justice.

The seriousness of the *Charter*-infringing conduct is likely to be the highest where the conduct of the state actor shows a blatant disregard for the *Charter* protected rights of the accused. For example, in the Alberta Court of Queen's Bench case *R v Croft*, an RCMP officer sought and executed a warrant which expressly allowed him to refuse to disclose the reasons for the accused's detention – a clear violation of the accused's section 10(a) right to know the reasons for his arrest.[40] At trial, Justice Burrows noted that citizens of Canada are entitled to expect police officers to make decisions affecting their liberty and privacy with "careful regard."[41]

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37 *Ibid*, at paras 69-70.

38 *Ibid*.

39 *Ibid* at 72.

40 *R v Croft*, 2014 ABQB 215 at para 52 [*Croft*].

41 *Ibid* at para 59.

Similarly, in the Supreme Court of Canada case *R v Le*, Justice Karakatsanis agreed that the seriousness of the *Charter* infringing conduct is closely tied with the expectation that state actors ought to know and follow the law to the greatest extent possible.[42]

This does not mean that police or other state actors are expected to never impede on *Charter* rights. Conduct which seriously infringes an accused's *Charter* rights may be permissible in exigent circumstances of urgency or necessity.[43] The exigent circumstances, however, must be genuine. They cannot be fabricated by officers to justify the breach.[44] In other words, the seriousness of the *Charter* breach may be mitigated if warranted in the actual circumstances. Therefore, it may be concluded that the first *Grant* factor is directly related to whether the state conduct is a flagrant disregard for the *Charter* rights, or an incidental infringement done in good faith.

2. Impact on Charter Protected Interests

The second factor of the *Grant* test is the impact of the conduct on the *Charter* protected interests of the accused. Completing this assessment requires a judge to consider the "extent to which the breach actually undermined the interests protected by the rights infringed."[45] In doing this, it is necessary to consider separately the interests which are protected by the right in question and the extent to which they were actually impacted.

Failing to consider this factor independently from the first factor may lead to an incorrect application of the *Grant* test. It is quite possible for the *Charter* infringing conduct to be serious while the impact on the *Charter* protected interests is not. Such was the case in the abovementioned *R v Croft*: despite the seriousness of the police officer's conduct there was no actual impact on the section 10(a) rights of the accused.[46] The *Croft* analysis is notable for two reasons: first, it demonstrates that evidence can be eligible for exclusion under section 24(2) where there is no impact on the *Charter* rights of the accused; second, it evinces the fact that the first and second lines of inquiry are independent of one another.

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42 *Le*, *supra* note 19at para 149; see also *R v Truduce*, 2014 ONCA 547 at para 57.

43 See *R v Burlingham*, [1995] 2 SCR 206 at para 46, 124 DLR (4th) 7.

44 *Ibid*.

45 *Grant*, *supra* note 5at para 76.

46 *Croft*, *supra* note 40 at paras 52, 61.

3. Society's Interest in Adjudication on the Merits

The third and final line of inquiry is society's interest in the adjudication of the matter on its merits. This naming of this factor is perhaps misleading – society will almost always have an interest in the adjudication of a criminal matter, whether it be for the purposes of public safety, deterrence, or other reasons. Instead, this factor may be more aptly described as a determination of "whether the truth-seeking process is better served by the admission or exclusion of the evidence."[47] This final line of inquiry brings new life to the Benthamite common law perspective that the administration of justice may be obstructed where relevant and otherwise admissible evidence is excluded.

This factor requires judges to consider "the fact that the evidence…may facilitate the discovery of truth… weighed against factors pointing to exclusion."[48] In other words, it must be determined whether the merits of remedying the *Charter* breach outweigh the toll the exclusion would take on the "truth-seeking goal of the criminal trial."[49] To make this determination, a judge must consider, for example, the importance of the evidence to the matter, the seriousness of the offence, and the reliability of the evidence. Then, these considerations must be balanced with the purpose of section 24(2) and the need to demonstrate that the justice system does not condone unjustified infringement on *Charter* protected interests.

4. Finding Balance

The above three factors of the *Grant* test must be balanced to determine whether the admission of the evidence in question would bring the administration of justice into disrepute.[50] Completing this balancing act requires judges to complete two steps. The first step is to consider the conclusion drawn on each of the three factors and determine whether it weighs in favour of inclusion or exclusion. The second step is to balance all three factors.[51]

In the recent 2021 Supreme Court of Canada decision *R v Reilley*, Justice Moldaver admonished the failure of trial judges to complete a full

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47 *Grant, supra* note 5at para 79.

48 *Ibid* at para 82.

49 *Ibid*, citing *R v Kitaitchik*, [2002] OJ No 2476, 166 CCC (3d) 14 (ONCA).

50 *Grant, supra* note 5.

51 *Grant, supra* note 5at para 71

and proper balancing of the three factors. The oral decision emphasizes that conducting a balancing of only two of the factors serves to "[undermine] the purpose and application of section 24."[52] In response to the risk of trial judges undermining the purpose of section 24(2), the Supreme Court of Canada cautioned judges to ensure they were balancing all three factors, lest they "[water] down any exclusionary power these factors may have."[53] This serves as a reminder that all three factors of the *Grant* test are of equal importance, and ought to all be considered in the same capacity.

III. SUFFICIENCY OF THE *GRANT* TEST

Section 24(2) appears to be a compromise between the common law perspective that all relevant evidence is admissible no matter how it was obtained and the automatic exclusion of illegally or improperly obtained evidence.[54] The purpose of such a compromise is to ensure the balance of collective interests and individual rights. The question that remains to be answered is whether section 24(2) and *Grant* are sufficient to achieve this purpose.

Today, there are constant and rapid shifts in technology. In the last three decades, lawmakers have been faced with several new forms of "evidence" including text messages, online private messages, internet search histories, and metadata caches. Each of these forms of evidence are primarily accessed using personal devices, such as phone and laptops. It is possible to obtain warrants to seize such personal devices. It is unclear, however, if the either the common law or the *Criminal Code* require a separate warrant or authorization to access the content on the devices once seized. As a result of unclear law in the area, it is not uncommon for warrantless searches of this content to be conducted. So how does this practice affect the application of 24(2) and the *Grant* test?

A review of recent case law indicates that the *Grant* test is ill-suited to balance collective interests and individual rights when faced with new types of evidence. In fact, several post-*Grant* cases indicate that the current framework developed for the application of section 24(2) is skewed in favour of the admission of improperly obtained evidence which might otherwise be excluded if it existed in another form. For example, text

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52 *R v Reilly*, 2021 SCC 38 at para 2.

53 *Ibid*.

message communications that are obtained or intercepted without a warrant may be admitted when the same content, found in a paper document, may be excluded.

The reasons for the insufficiency of the *Grant* may be twofold: first, the "egregiousness or good faith" standard under the first factors of *Grant* test may set a bar that is far too low for warrantless searches of personal device content; second, evidence obtained from personal devices will almost always be relevant to proving the *mens rea* or intent of the accused. The veracity of both statements is demonstrated in cases dealing with the admission of illegally obtained evidence from cell phones and laptops. Both of these facts, which are inherent to the nature of evidence from personal devices, may lead to an application of the *Grant* test that favours the admission of the evidence, regardless of the content.

A. Defining a Personal Device

For the purposes of this paper, a "personal device" includes both cell phones and laptop computers. Such devices, by virtue of their intended use, their portability, and their functions, tend to harbour a great deal of information about an individual. As a result, they are more and more frequently becoming the subject of searches for evidence in criminal matters. Given their nature, however, such devices are significantly different than other physical evidence recovered in searches.

The primary difference between a cell phone or laptop and most other types of evidence is that recovering useful evidence from a personal device requires two "types" of searches. First, an initial search must be done to recover the actual device from the accused's person, car, home, or otherwise. Second, the content of the device itself must be searched to find valuable evidence such as text messages, e-mails, photos, etc. In fact, in *R v Vu*, Justice Cromwell wrote that "computers differ in important ways from the receptacles governed by the traditional framework [for search and seizure]."[55] Justice Cromwell went on to say that "the privacy interest implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets."[56] The justification provided by Justice Cromwell in differentiating traditional receptables from computers is that the personal computers provide access

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55 *R v Vu*, 2013 SCC 60 at para 2 [*Vu*].

56 *Ibid* at para 24.

to "vast amounts of information that users cannot control, may not even be aware of or may have chosen to discard."[57] Cell phones, by nature, are similar to computers in this way. As a result, the differentiation in *Vu* between traditional receptacles and laptop computers can be imputed to all personal devices this paper addresses.

Given the above information, it is generally settled that personal devices, and their content, are much different than other receptacles and their content. Despite this, they are still governed largely by the same evidentiary rules. This includes the same framework for a *Grant* analysis. As a result, it is important to inquire as to whether analytical frameworks like *Grant* are appropriate in their current form for personal device content, or whether they are insufficient to properly handle such evidence.

B. Accessing Content on Personal Devices

Section 8 of the *Charter* provides individuals with a protection against unreasonable search or seizure.[58] The primary purpose of this *Charter* guarantee is to protect people against "unjustified intrusions upon their privacy."[59] This is the *Charter* right which is most often infringed in cases of improperly obtained evidence from personal devices. Determining whether section 8 has been engaged requires a court to ask whether there was a search or seizure, and if so, whether the search or seizure was reasonable.

Canadian courts define "search" as conduct that interferes with a person's reasonable expectation of privacy.[60] It is therefore necessary to determine whether the accused has an expectation of privacy in the thing or location searched. Courts generally find that individuals have a reasonable expectation of privacy in content on personal devices, including personal laptops, work computers and cell phones.[61] While the existence of such case law does not guarantee an expectation of privacy in such devices, it is reasonable to conclude that it is likely that an individual can generally

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57 *Ibid.*

58 *Charter*, *supra* note 3, s 8.

59 See *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Hunter*].

60 See *R v Grossman,* [1998] BCJ No 62 (BCSC) at para 33; see also *R v Evans*, [1996] 1 SCR 8, 131 DLR (4th) 654.

61 See *R v Reeves*, 2018 SCC 56 [*Reeves*]; *R v Cole*, 2012 SCC 53 [*Cole*]; *R v Marakah*, 2017 SCC 59 [*Marakah*]; *BC Hydro & Power Authority v International Brotherhood of Electrical Workers, Local 258 (Petersen Grievance*), [2017] BCCAAA No 135 (BC Collective Agreement Arbitration) [*BC Hydro v IBEW Local 258 (Petersen)*]; *R v Fearon,* 2014 SCC 77 [*Fearon*].

expect to enjoy a reasonable expectation of privacy in the content on their personal devices.

If there is an expectation of privacy in the content of a personal device, then the conduct of a state actor accessing the content without the consent of the owner is likely to constitute an intrusion on the privacy interest. For example, if a person has a reasonable expectation of privacy in their personal text message communications, then a peace officer accessing those text messages without permission of the owner will amount to an intrusion. Notably, the content need not be downloaded to constitute an encroachment on the expectation of privacy, simply looking at the content is sufficient to be classified as an intrusion.[62]

Where an intrusion is found, it must be justified to avoid being classified as "improperly obtained evidence." Generally, three elements must be present for a search to be justified or reasonable: 1) prior authorization, 2) granted by a neutral and impartial arbiter capable of acting judicially, and 3) based on reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found.[63] It is quite possible for an officer to obtain prior authorization in the form of a lawful warrant to search the content on a personal device; in such a case, the search is likely to be "reasonable," and there is no need to consider the section 24(2) framework. An issue arises, however, when the search of a cell phone or laptop is not explicitly authorized but is ancillary to a lawful search.

Traditionally, once the search of a place was authorized by a warrant, the police executing the warrant were empowered to search that place for evidence wherever it may reasonably be.[64] This meant that officers were authorized to open drawers, cupboards, cabinets and any other closed receptacle within reason. In *R v Vu*, however, Justice Cromwell concluded that personal devices are different than receptacles contemplated by the traditional legal framework and therefore must be treated differently.[65] *Vu* dealt with the search of a property that was alleged to be the site of electricity theft. In the basement of this property, the searching officers discovered a

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62 See *R v Moran*, [1987] OJ No 794, 36 CCC (3d) 225 (ONCA).

63 *Hunter*, *supra* note 59at page 146-147; Government of Canada, "Section 8 – Search and Seizure" (2021) online: *Charterpedia* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html> [perma.cc/2X9F-F5E3].

64 *Vu*, *supra* note 55.

65 *Ibid* at para 2.

marijuana grow operation on the basement level of the building. Officers subsequently discovered a computer. An illegal ancillary search of the computer was conducted to identify the owner of the property. During the ancillary search, the officers discovered photographs of an undisclosed subject matter, which the prosecution was able to enter as evidence of the accused's knowledge and control of the grow operation.[66] The Court was faced with a question about whether the search of a cell phone or computer was conducted illegally. In rendering a decision on the question, Justice Cromwell wrote that while a personal device may be seized during a lawful search, a further search of that device cannot be conducted unless and until it is expressly authorized in a warrant.[67] The holding in *Vu* is significant, because it signals that a search of a personal device, within the definition of section 8, is illegal unless explicitly authorized, even where the search leading to the seizure of the personal device is lawful.

A later Supreme Court of Canada decision *R v Fearon* may complicate the holding in *Vu*.[68] In *Fearon*, the Court assessed with evidence obtained from a cell phone that was searched incidentally to the accused's arrest. A search incident to arrest is a common law power provided to peace officers which exempts them from the need to obtain a warrant to conduct a search upon arrest The common law power also empowers peace officers to seize evidence once they have discovered it.[69] In *Fearon*, Justice Cromwell opined that to be legally obtained, the search and seizure of a cell phone incident to arrest must be limited to that which is "truly incidental to the arrest."[70] In other words, the discretion of the officer to search the personal device is restricted, and should only include the most recent activity which is related to the arrest.[71]

Much like the decision in *Vu*, *Fearon* provides parameters for when evidence may be illegally obtained and subject to section 24(2). However, Cromwell's decision in *Fearon* may complicate the understanding of when the search of a personal device is conducted legally. When read in sequence, *Vu* and *Fearon* suggest that a search of a personal device is illegal unless explicitly authorized, including where the search of the device is incident to

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66 *Ibid* at para 73.

67 *Ibid*, at para 49.

68 *Fearon*, *supra* note 61.

69 *R v Morrison*, 1987 CanLII 182 (ONCA), 35 CCC (3d) 437.

70 *Fearon, supra* note 61at para 78.

71 *Ibid* at paras 78-82.

an arrest. However, the two decisions may complicate situations where a search and subsequent arrest are authorized, but a personal device is seized in the course of the search. In such circumstances, it may be unclear whether an ancillary search of the personal device is legal. This uncertainty may create a gray area about when a search is reasonable or justifiable.

Despite this, the law is clear that if an illegal search is conducted on a personal device, it becomes "illegally obtained evidence," and any evidence discovered during the search becomes subject to a section 24(2) exclusion. If it is determined that the illegal search was unjustifiable, and that its admission would bring the administration into disrepute, then it should, in theory, be excluded. Problematically, however, evidence obtained by an illegal search of this nature appears to be admitted into evidence into evidence seemingly by default.[72]

C. Searching in Good Faith

One of the most evident reasons that evidence obtained by an illegal ancillary search of a cell phone is often not excluded, is that it the conduct of the officer often does not meet the threshold of being an "egregious" breach of the accused's rights. This is due, in part, to the ambiguity of the law in this area and the grey area of "reasonable" searches resulting from the interaction of decisions like *Vu* and *Fearon*. In fact, the threshold for an "egregious" breach appears to be lower when the content of personal devices is involved. The fact that the conduct was not outrageous goes to the first line of inquiry from the *Grant* test – the seriousness of the *Charter*-infringing conduct. Where the conduct is not considered egregious, or it is considered to have been done by the offending officer in good faith, it is much less likely to bring the administration of justice into disrepute. Therefore, the analysis of the evidence is more likely to be skewed towards its admission simply by virtue of the nature of the evidence.

In *Vu*, Justice Cromwell noted the significance of the expectation of privacy in personal devices. With relation to computers, specifically, Justice Cromwell writes "computers…give [access] to vast amounts of information

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[72] Note: There are, of course, instances where evidence obtained illegally from cell phones and laptop computers is not admitted into evidence. These cases, while they do exist, are uncommon in comparison to cases where evidence is admitted. Furthermore, many of them appear to rely on the same reasoning and arguments for their admission – this may indicate a systematic admission of evidence of this type.

that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search."[73] Consequently, the accused's privacy interest in the content of their personal devices is high. However, even after recognizing that a warrant authorizing the search of such personal devices is constitutionally required, Justice Cromwell does not find that the unauthorized search of Vu's computer is sufficiently "egregious" to favour exclusion of the evidence.[74] In fact, Justice Cromwell writes that since there was uncertainty in "the state of the law with respect to the search of a computer found inside a premises," the officers executing the warrant "carried out the search in the belief that they were acting under the lawful authority of the warrant."[75]

Vu demonstrates the lower standard of egregiousness applies to content from personal devices, and how ambiguity in the law contributes to the perception of illegal seizures of such information as less "blatant." In fact, Justice Cromwell specifically cites uncertainty in relation to the state of the law as the reason for allowing the admission of the evidence. While the intention of Justice Cromwell's decision in *Vu* was intended to clarify the law and avoid such uncertainties, subsequent cases illustrate the persistent nature of this issue.

The Ontario Superior Court decision *R v Page* is another case related to a warrantless seizure and subsequent search of a cell phone. In this case, the detective responsible for the search and seizure had no prior authorization but alleged that exigent circumstances required the seizure and search of the cell phone immediately.[76] The holding from *Vu* would suggest that explicit authorization is required in order to search a personal device; however, much like the common law power to search incident to arrest, explicit authorization may not be necessary where there are "exigent circumstances." The caveat to this exception is that the exigent circumstances must not have been authored or created by the police.[77]

In delivering the decision in the *Page* case, Justice Raikes opined that the detective had purposely authored and instigated the exigent

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73 *Vu, supra* note 55at para 24.

74 *Ibid*, at para 69.

75 *Ibid.*

76 *R v Page*, 2016 ONSC 713 at para 58 [*Page*].

77 See *R v Silveira*, [1995] 2 SCR 297, 124 DLR (4th) 193.

circumstances by her own intentional actions.[78] Despite this, Justice Raikes held that he was not "prepared to say that [the detective] acted in bad faith," writing that he believed the detective had simply "jumped the gun."[79] To punctuate this conclusion, Justice Raikes writes: "police officers work under enormous pressures where the demands of the public and those of the Courts often prove overwhelming," then added: "the finding that this conduct is a violation should inform future police practices and introduce a note of caution."[80] In brief, the *Page* decision holds that the overwhelming nature of police work makes it difficult to properly assess the reasonableness of a search where the law is not entirely clear. As a result of this, courts appear to hold officers to a lower standard where they have illegally obtained evidence from a personal device if the law surrounding the authorization of such a search and seizure is ambiguous.

The same conclusion was arrived at in *R v Hill*. In *Hill*, an officer conducted a warrantless search of a cell phone. Provincial Court Justice Cardinal held that the search was "not undertaken for a valid objective related to the arrest, but rather for the purpose of furthering the police investigation. Such searches are not allowed."[81] Despite this, Justice Cardinal held "it was not an egregious error. Overall, [the officer] acted in good faith."[82] Despite that previous case law identifies a relatively high privacy interest in personal devices,[83] Justice Cardinal appears to add a layer of complication to the privacy interest by opining that "simply open[ing] the cell phone and [going] directly to the text messages" on a non-password protected phone is a more minor intrusion than a more detailed search or a search of a password protected phone.[84] Such degrees of expectation of privacy may create further ambiguity about the reasonableness or legality of the search, which perpetuates the issue of uncertainty in the law from *Vu*.

The above examples are representative of a larger body of case law, which indicates a much lower standard for what constitutes executing an illegal search in "good faith." *Vu* cites ambiguity in the law as a justification

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78 *Page*, *supra* note 76 at paras 57, 61.

79 *Ibid* at para 65.

80 *Ibid* at paras 65, 67.

81 *R v Hill*, 2013 SKPC at para 33 [*Hill*].

82 *Ibid* at para 36.

83 See *Reeves*; *Cole*; *Marakah*; *BC Hydro v IBEW Local 258 (Petersen)*; *Fearon*, *supra* note 61; *Vu*, *supra* note 55.

84 *Hill supra* note 81 at para 36.

for illegal searches of personal devices. While the Supreme Court of Canada attempted to clarify such ambiguities in its decision in *Vu*, subsequent decision in cases like *Page* and *Hill* demonstrate that there are several opportunities for uncertainty to arise in cases dealing with evidence obtained from personal devices.

It is possible that the nature of personal devices renders it difficult to find clarity in the law. For example, the gray area created by the *Fearon* and *Vu* discrepancy may result in difficulty ascertaining when, or why, a warrant is necessary to search a personal device. Furthermore, the differing characteristics of personal devices may leave enough latitude for courts to find that the officer was conducting a warrantless search in good faith, regardless of how willful the disregard for section 8 protections was. For example, where a phone subject to an unauthorized search is not passcode protected, it may be easier for a judge to find that the officer was acting in good faith and under the belief that no privacy interest was intended.[85]

Given the demonstrably high threshold of "bad faith" in warrantless searches of personal devices, it is possible that the first line of inquiry of the *Grant* test is ill-suited to handle this type of evidence. It is challenging to reconcile the facts that accessing content on a personal device requires several intentional steps, and that officers are expected to know the law and act within it, and that illegally accessing this content is often not considered a "willful disregard" of the accused's constitutional rights. The difficulty in reconciling these facts may lead to diminishment of the good repute of the administration of justice, which defeats the purpose of section 24(2). It may be concluded that a different standard is required for handling this type of evidence.

D. Finding the Evidence is Important

Much like the first *Grant* factor, the third line of inquiry in *Grant* may be insufficient to handle evidence obtained by an illegal search of personal devices. This factor of the *Grant* analysis hinges on whether the evidence is relevant, whether it is reliable, and whether society has an interest in the adjudication of the case. That the determination of this factor is generally based on these three questions presents two identifiable issues: first, that the information contained on an accused's personal device will almost always be relevant to proving some issue, even if it is not the primary issue;

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[85] Such was the case in *Hill*, where the officer "simply opened the cell phone."

second that the reliability of evidence from personal devices is often taken for granted.

To expand on the first issue, it is notable that courts tend to find evidence obtained from personal devices almost always relevant to the case in question. The activities individuals choose to carry out on their phones and computers provide some insight into their state of mind, their knowledge, or their intent. In some cases, courts have even allowed the admission of illegally obtained evidence of this nature where the point it proves is not relevant to the objective of the search in which it was discovered. *Vu* was one such case.

In *Vu*, the original search related only to a charge of "theft of electricity." The search warrant obtained by the officers authorized a search for documentation identifying the owners or occupants of the residence.[86] During the authorized search, the police discovered marijuana in the basement of the dwelling. Subsequently, illegal searches of Vu's computers were carried out which resulted in the discovery of documents and photograph indicating the accused's involvement in the production and possession of the marijuana. Although the illegally obtained evidence had no relation to the initial charge of theft of electricity, Justice Cromwell concluded that the documents and photographs retrieved from the accused's computer were "required to establish knowledge of and control over the marijuana found in the basement of his residence."[87] Despite that the evidence was obtained by what the majority earlier referred to as a breach of a "significant privacy interest," Justice Cromwell opined that there is a "clear societal interest" in adjudicating the charges of production and possession of marijuana for the purposes of trafficking.[88]

Justice Cromwell's decision on the third *Grant* factor is significant to the argument that the *Grant* test is ill-suited to handle evidence illegally obtained from personal devices. Unlike a physical document, there is no conceivable limit on the amount of information that can be obtained from searches of personal devices. The information obtained from personal devices, such as a search history or saved documents will nearly always contain some piece of evidence relevant to the real-world conduct of the accused. For example, an internet search for LED grow lights may be

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86 *Vu, supra* note 55.

87 *Ibid* at para 73.

88 *Ibid.*

relevant to the accused's intention to grow marijuana. If all evidence obtained this way tends to be relevant, then using that relevancy as a justification for its admission may skew the conclusion of the *Grant* application. This does not allow for a true assessment of the impact the evidence may have on the repute of the administration of justice and may therefore defeat the purpose of section 24(2).

The second issue presented by the third factor of the *Grant* test is the reliance on the reliability of the evidence. In *Page*, Justice Raikes notes that the evidence is reliable and important because it is "evidence which the accused...had a hand in creating and possessed."[89] Consequently, Justice Raikes concludes that the evidence should not be excluded. The concern with this conclusion is that nearly all evidence obtained from a personal device will, in theory, be evidence the accused "had a hand in creating and possessed." Search histories, data caches, digital communications, and even keystroke caches are all reservoirs of evidence that the owner or operator of the device may be perceived to have a "hand in creating." Courts appear to take this as an inherent indicator of the reliability of the evidence. This reliance leaves little room for considerations that individuals may share or have shared their device with another person, that malware may have placed files on a computer, that "click bait" ads may have wrongly placed websites in browser histories, or that a computer improperly recorded information.

There are several cases, much like *Page,* where the assessment of the third *Grant* factor turns on the reliability of the evidence, without any critical examination of what makes the evidence relevant.[90] These cases indicate the possibility that the application of the *Grant* test is skewed by the nature of the evidence from personal devices. The fact that information on personal devices may be less reliable than it is often perceived to be is a strong indicator that the third factor of the *Grant* test is not sufficient to handle this type of evidence.

IV. CONCLUSION

The current framework for exclusions of evidence under section 24(2) is incompatible with the nature of evidence obtained from personal devices. While the *Grant* test was originally developed to serve the purpose of section

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89 *Page*, *supra* note 76at para 75.

90 See *Reeves*; *Cole*, *supra* note 61; *R v Townsend*, 2017 ONSC 3435; *R v Munton*, 2018 BCSC 581; R *v Allen*, 2017 ONSC 972.

24(2), its application to cases where evidence is obtained from personal devices fails in achieving this purpose. The reasons for this are at least two-fold.

Firstly, the first factor of the *Grant* test encourages judges to view conduct breaching *Charter*-protected rights as less serious if they are done in "good faith." The law on what constitutes an illegal search of a personal device, while seemingly settled, has created some gray area. This gray area leaves enough latitude to allow officers to believe they are acting in good faith and under authority of the law. As a result, it is possible to conclude that the first factor of the *Grant* test is insufficient to handle evidence of this nature.

Further, the third factor of the *Grant* test requires triers of fact to determine whether the justice system is better served by the inclusion or exclusion of the evidence in question. In several cases, courts have evinced that this determination may often hinge on the importance and reliability of the evidence. However, the problem is that evidence from personal devices tends to provide insight into the state of mind of the accused, the result therefore being that the evidence is nearly always important to some aspect of the case. Furthermore, there is a demonstrated tendency to mechanically find reliability in evidence from personal devices without any critical analysis of how the evidence came to exist on the device, or who created it.[91] Consequently, any determination on the third factor may be skewed towards inclusion based on the nature of the evidence alone.

If at least two of the three lines of inquiry in the *Grant* test are predisposed to a conclusion that the evidence should be admitted, then it is evident that the framework ought to be revisited. Until the *Grant* test is reconfigured to better handle evidence obtained from personal devices, there will continue to be a risk of injustices carried out by the justice system. It is this risk which threatens to diminish the good repute of the justice system, effectively defeating the purpose of section 24(2).

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[91] See *Reeves*; *Cole*, *supra* note 61; *R v Townsend*, 2017 ONSC 3435; *R v Munton*, 2018 BCSC 581; R *v Allen*, 2017 ONSC 972.

Harm Reduction in Federal Prisons in Canada

LIAM PROTHEROE*

ABSTRACT

Canada is in the midst of an alarming opioid overdose crisis, with impacts not just on those in the community but also those who are incarcerated. While some limited focus has been directed towards minimizing the harms of substance use in carceral settings, current approaches remain inadequate in addressing these harms. By way of comparison with successful community programs, this paper critically appraises recent harm reduction programming that has been established in federal prisons and identifies key shortcomings in their implementation. It further argues that these programs may not comply with sections 7 and 15 of the *Charter*, falling short of both domestic and international standards of prison healthcare.

Keywords: Harm Reduction; Substance Use; Federal Prisons; Professionally Accepted Standards; Accessibility; Equivalence of Care.

I. INTRODUCTION

Opioid use and related overdoses continue unabated in Canada. Although there has been significant attention paid to policy responses to this national problem, limited attention has been given to the implications of this crisis on people in prison. This is particularly concerning, as drug use in the carceral setting can lead to serious and well-identified harms – harms which to date have remained substantially under-addressed.

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Some of the most promising short-term responses to the overdose crisis involve the use of evidence-based harm reduction approaches, and the Canadian government has started to implement programming of this sort in federal institutions. However, these programs, as they currently exist, have significant problems which severely limit their accessibility and efficacy.

This paper contributes to the literature by critically appraising these programs, particularly by analysing them through sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[1] Part II outlines the prevalence of addiction issues in both communities and federal prisons and demonstrates how harm-reduction initiatives are desirable methods for reducing the health risks associated with substance use. Given the resounding success of harm-reduction programming in community settings, it is argued that Canada should be looking to implement similarly accessible treatment options for incarcerated individuals.

Then in Part III, the state of drug policy in federal prisons is outlined, and shortcomings surrounding harm reduction in federal prisons are investigated. Following this, various constitutional avenues to compel improvement to these programs are explored. Both section 7 and 15 *Charter* arguments are employed to indicate that Canada may be obligated to provide more effective harm-reduction programming than that which is currently available in federal prisons.

Ultimately, the Canadian government has indicated a commitment to providing what amounts to life-saving healthcare for incarcerated individuals who use drugs, but the efficacy of these measures is being seriously undermined. As will be shown, current harm reduction programming in federal prisons needs to be made significantly more accessible – only then can the harms that result from institutional drug use truly be addressed.

II. Defining the Problem – The Current State of Addiction, and Why Harm Reduction Can Help

[1] *Canadian Charter of Rights and Freedoms*, ss 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

A. The Prevalence of Addiction in Canadian Communities and Prisons

Canada is unquestionably in the midst of a severe and pressing opioid overdose crisis. Between the period of January 2016 and December 2021, 29,052 apparent opioid-toxicity deaths and 30,860 opioid-related poisoning hospitalizations have been reported.[2] These opioid-related deaths have not only been numerous, but also have been increasing yearly: 2829 in 2016, 3921 in 2017, 4406 in 2018, 3698 in 2019, 6638 in 2020, and 7560 in 2021.[3] Due to these alarming numbers and based on a recognition that "harms related to opioids, stimulants, and other substances extend beyond overdoses (poisonings) and deaths," Health Canada has long recognised this trend as an "ongoing public health crisis."[4]

Given that Canada is generally combating high rates of addiction and overdose, it is no surprise that addiction issues are also prevalent in federal prisons. In a 2007 survey conducted by Dr. Zakaria and colleagues for the Correctional Service of Canada ("CSC"), 33% of men and 27% of women self-reported using non-injection drugs while in prisons, and 16% of men and 15% of women reported using injection drugs.[5] These numbers likely underrepresent the actual rates of drug use in prisons, given that the data was obtained through self-reporting methods. Indeed, as noted by Dr. Zakaria in a subsequent CSC report, "underreporting of undesirable, illegal, and/or stigmatizing behaviour may be exacerbated in the correctional environment."[6] The prevalence of drug use in federal prisons has risen since 2007, given that in 2018 the CSC acknowledged "a substantial rise in the

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2 Health Canada, "Opioid- and Stimulant-related Harms in Canada" (Ottawa: Health Canada, March 2022), online: <health-infobase.canada.ca/substance-related-harms/opioids-stimulants> [perma.cc/L2TQ-Y6JP].

3 Health Canada, "Apparent Opioid and Stimulant Toxicity Deaths" (2022) at 20-21, online (pdf): <health-infobase.canada.ca/src/doc/SRHD/Update_Deaths_2022-06.pdf> [perma.cc/TT2A-56HM].

4 Health Canada, "Opioid- and Stimulant-related Harms in Canada," *supra* note 2.

5 Dianne Zakaria et al, "Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey" (2010) at 12 and 15, online (pdf): <www.csc-scc.gc.ca/005/008/092/005008-0211-01-eng.pdf> [perma.cc/9AZ3-FLWN].

6 Dianne Zakaria, "Relationships between Lifetime Health Risk Behaviours and Self-Reported Human Immunodeficiency Virus and Hepatitis C Virus Infection Status among Canadian Federal Inmates" (2012) at 1, online (pdf): <www.publicsafety.gc.ca/lbrr/archives/cn21491-eng.pdf> [perma.cc/987Z-TD87].

number of overdose incidents as a result of problematic opioid use, which mirrors community trends."[7]

The effect of high rates of drug use in prisons extends beyond the prevalence of overdose-related death. Given the limited access to needles and syringes in an institutional setting, needle-sharing is a common practice.[8] This is concerning, as rates of communicable disease are significantly higher in federal prisons than in the community. For example, a 2016 study by Dr. Fiona Kouyoumdjian and colleagues reported that 30% of those in federal prisons had Hepatitis C, and between 1-2% of men and 1-9% of women were infected with HIV.[9] These numbers are incredibly high compared to national infection rates of 0.0311% and 0.0064% for Hepatitis C and HIV, respectively.[10] Needle sharing, particularly given a lack of access to sterilization equipment in federal institutions, is undoubtedly a contributor to these abnormal rates of infection.[11] Thus, not only does addiction in prison lead to high rates of overdose, but also contributes to the spread of communicable disease.

Addiction issues in prisons, then, need to be treated as a public health crisis, rather than a criminal justice issue. Given that drug use in federal institutions is a direct contributor to both disease and death, measures

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7 Correctional Service Canada, "Response to the 45th Annual Report of the Correctional Investigator 2017-2018" (last modified 30 October 2018), online: <www.csc-scc.gc.ca/publications/005007-2808-en.shtml> [perma.cc/N8BF-6CQ8].

8 See Emily van der Meulen et al, "A Legacy of Harm: Punitive Drug Policies and Women's Carceral Experiences in Canada" (2017) 28:2 Women Crim Justice 81 at 89; Emily van der Meulen et al, "Recommendations for Prison-Based Needle and Syringe Programs in Canada" (2016) at 15, 16 and 25, online (pdf): <www.ryerson.ca/content/dam/criminology/tank/faculty/PNSP%20Report%20Jan%202016.pdf> [perma.cc/W79X-E2VY]; Canada HIV Legal Network, "Former Prisoner Steve Simons Writes why a Prison Needle Exchange Program is Needed" (Published 17 August 2020), online: <www.hivlegalnetwork.ca/site/former-prisoner-steve-simons-writes-why-a-prison-needle-exchange-program-is-needed/?lang=en> [perma.cc/U5JV-9DBF].

9 Fiona Kouyoumdjian et al, "Health status of prisoners in Canada" (2016) 62 Can Fam Physician 215 at 217.

10 See Health Canada, "Report on Hepatitis B and C in Canada" (2019) at 10, online (pdf): <www.canada.ca/content/dam/themes/health/publications/diseases-conditions/report-hepatitis-b-c-canada-2016/report-hepatitis-b-c-canada-2016.pdf> [perma.cc/XZX7-QE2K]; AC Bourgeois et al, "HIV in Canada—Surveillance Report, 2016" (2017) 43:12 Can Communicable Disease Report 248 at 250.

11 See Kouyoumdjian et al, *supra* note 9 at 217.

should be taken to minimize these serious impacts. The drug crisis facing this country is not only ongoing in the community, but also in the federal prison population.

The question of how to best craft policy to address addiction in federal prisons does not only require an understanding that addictions and their related harms are prevalent in carceral populations, but also why this is the case. Essentially, it is important to understand how addiction intersects with the criminal justice system. After all, not only is there a high rate of drug use within federal prisons, but also many individuals already dealing with substance use upon entry into these institutions. Research by the CSC in 2012 found that nearly three quarters of males admitted to federal prisons had alcohol or drug dependencies, and noted substance use is a significant area of need for these individuals.[12] It is therefore important to understand how addiction and incarceration are linked to make informed policy decisions.

Perhaps the most obvious link between addiction and the criminal justice system involves Canada's continued approach of criminalizing drugs. This results in the criminalization of those struggling with addiction. After all, the obvious consequence of incarcerating individuals who have engaged in activities stemming from addiction – such as use and possession of illicit drugs – is the substantial presence of people with addictions in federal prisons.

A more fundamental link, however, involves understanding how social determinants of health relate to both addiction and criminalization. It is well recognized that factors such as homelessness, unemployment, food insecurity, and histories of trauma can be linked to substance dependency.[13] These very same social factors are prevalent among incarcerated individuals.[14] The result: those subject to criminalization and imprisonment may well also be suffering from addiction-related issues.

Further, imprisonment itself is considered a social determinant of substance use.[15] The very act of criminalizing an individual can be traumatic,

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12 Correctional Services Canada, "Offender Substance Use Patterns – Aboriginal and Non-Aboriginal Offenders" (2012), online (pdf): <www.csc-scc.gc.ca/005/008/092/rs12-10-eng.pdf> [perma.cc/QH2E-D7WS].

13 See Nick Kerman et al, "'It's not just injecting drugs': Supervised consumption sites and the social determinants of health" (2020) 213 Drug Alcohol Depend at 2.

14 See Kouyoumdjian et al, *supra* note 9 at 216-217.

15 See Kerman et al, *supra* note 13 at 2.

with high rates of physical and sexual violence in prisons.[16] The prison experience can also be negative due to isolation, insufficient exercise and programming, overcrowding, and poor nutrition.[17] Given the conditions in federal prisons and the subsequent stigma and financial burdens upon release, it is no wonder the experience of imprisonment itself can lead to substance use.

Substance use has, and will continue, to persist in federal prisons. As highlighted by James Gacek and Rosemary Ricciardelli, incarcerated individuals "do not suddenly master their addictions and the challenges associated with drug use; as such the sale, distribution, and use of drugs and substances in Canadian prisons endures."[18] The relationship between addiction and incarceration has both causal and correlational components, and the underlying social factors at play are numerous and interrelated. There is simply no way that the profound connection between substance use and incarceration can be overlooked. Any policy adopted to address the addiction crisis in federal prisons must be sensitive to these realities and designed to tackle the actual harms that substance use presents.

B. The Case for Harm Reduction Methods

Eradicating addiction in Canada would require mass social upheaval and reorganization. While focus should be on implementing programs to target the root cause of addiction in Canadian communities, short-term efforts should also be made to minimize the harmful impacts of substance use. After all, there is a continued, serious risk of death and disease in federal institutions.

Perhaps the best short-term approach to limiting the negative effects of addiction in prisons involves the implementation of harm reduction methods. Harm reduction is understood as "interventions aimed at reducing the negative effects of health behaviors without necessarily

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16 See Jens Modvig, "Violence, sexual abuse and torture in prisons" in Stefan Enggist et al, eds, *Prisons and Health* (Copenhagen: World Health Organization, 2014) at 19-24.

17 See Adelina Iftene, "Incarceration in Canada: Risks to and Opportunities for Public Health" in Tracey M Bailey, C Tess Sheldon & Jacob J Shelly, eds, *Public Health Law and Policy in Canada*, 4th ed (Toronto: LexisNexis Canada, 2019) 477 at 479.

18 James Gacek & Rosemary Ricciardelli, "Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons" (2020) 43:3 Man LJ 273 at 288.

extinguishing the problematic health behaviors completely."[19] Common harm reduction approaches in the addiction context include both Needle Syringe Programs ("NSPs") which seek to reduce rates of communicable disease by providing clean syringes to users, as well as safe consumption sites ("SCSs") which aim to reduce overdose and increase access to and enrollment in treatment programs. In both instances, the overarching goal of these interventions are not to prevent substance use itself, but rather to limit harms stemming from use.

Clearly, these approaches are seen as desirable by the Canadian government and the CSC, as evidenced by the establishment of the Prison Needle Exchange Program ("PNEP") and Overdose Prevention Site ("OPS"). By implementing these programs, the CSC has taken an active role in limiting disease and overdose in federal institutions. Unfortunately, both the PNEP and OPS fall short in addressing harms related to substance abuse compared to more successful programs implemented outside of prisons.

Some community harm reduction programs outside of federal prisons have been effective.[20] While criticism of such programming exists, there is strong evidence favouring both needle-exchange and safe consumption as methods of reducing problematic outcomes of substance use. Indeed, such methods have been widely adopted by various organizations and experts as best-practice for the reduction of substance use-related harms in communities.

First considering NSPs, there is overwhelming consensus that such programming is effective. For example, a study by Louisa Degenhardt and colleagues noted that there was strong evidence which "shows that these programmes reduce risk from injections, thereby increasing safe injection."[21] NSPs have been found to both limit the spread of HIV in a cost-effective way, and to increase access to treatment programming.[22] The use of NSPs is endorsed by medical professionals, with the Canadian Nurses Association highlighting the effectiveness of such programs in a variety of

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19 See Mary Hawk et al, "Harm reduction principles for healthcare settings" (2017) 14:70 Harm Reduction J at 1.

20 *Ibid* at 2.

21 Louisa Degenhardt et al, "Prevention of HIV infection for people who inject drugs: why individual, structural, and combination approaches are needed" (2010) 376:9737 Lancet 285 at 286.

22 See Hawk et al, *supra* note 19 at 2.

discussion papers and position statements.[23] Such programs are also supported by international organizations: the World Health Organization ("WHO") concludes in a 2004 report that "the evidence to support the effectiveness of NSPs in substantially reducing HIV must be regarded as overwhelming," and "a number of careful studies in several developed countries and some transitional countries have demonstrated convincingly that needle syringe programmes are cost-effective."[24] Other international bodies, such as the United Nations Office on Drugs and Crime ("UNDOC") and the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), have endorsed NSPs as harm-reduction methods integral to the reduction of communicable disease in injection drug users.[25] Finally, health advocacy groups such as the Canadian HIV Legal Network, as well as the Prisoners with HIV/AIDS Support Action Network significantly support NSPs and their efficacy .[26]

The main criticisms of NSPs tend to focus on the possibility of an uptick in drug use resulting from increased access. However, such an outcome is

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[23] Canadian Nurses Association, "Harm Reduction and Illicit Substance Use: Implications for Nursing" (2017) at 31-34, online (pdf): <ohrn.org/wp-content/uploads/2021/07/Harm-Reduction-and-Illicit-Substance-Use-Implications-for-Nursing.pdf> [perma.cc/B9NC-DMJV]; Canadian Nurses Association, "Focus on Harm Reduction for Injection Drug Use in Canadian Prisons: A Supplement to CNA's Harm Reduction Discussion Paper" (2016) at 5, online (pdf): <ohrn.org/wp-content/uploads/2021/07/Harm-Reduction-in-Canadian-Prisons-Companion-Paper.pdf> [perma.cc/6TXR-BTX5]; Canadian Nurses Association et al, "Harm Reduction and Substance Use" (2018), online: <canac.org/wp-content/uploads/2018/04/joint_position_statement_harm_reduction_and_substance_use.pdf> [perma.cc/9LNC-4ZKF].

[24] World Health Organization, "Effectiveness of Sterile Needle and Syringe Programming in Reducing HIV/AIDS Among Injecting Drug Users" (2004) at 28, online (pdf): <apps.who.int/iris/bitstream/handle/10665/43107/9241591641.pdf?sequence=1&isAllowed=y> [perma.cc/C3YB-N759].

[25] UNDOC, "A handbook for starting and managing needle and syringe programmes in prisons and other closed settings" (2017) at 9, online (pdf): <www.aidsdatahub.org/sites/default/files/resource/unodc-starting-and-managing-needle-and-syringe-programmes-prisons-2017.pdf> [perma.cc/SJ8K-FMBM]; WHO, UNDOC and UNAIDS, "Interventions to address HIV in prisons: Needle and syringe programmes and decontamination strategies" (2007) at 12, online (pdf): <http://apps.who.int/iris/bitstream/handle/10665/43758/9789241595810_eng.pdf> [perma.cc/UFC6-S3DE].

[26] See Van der Meulen et al, "Recommendations for Prison-Based Needle and Syringe Programs in Canada," *supra* note 8 at 15, 16 and 25.

not supported by any evidence. As noted by the WHO, "after almost two decades of extensive research, there is still no persuasive evidence that needle syringe programmes increase the initiation, duration or frequency of illicit drug use or drug injecting."[27] This conclusion is supported by the Canadian Nurses Association, who highlight that "needle distribution and recovery services have not been found to increase substance use, initiation into substance use or injection substance use, nor have they been found to increase rates of crime, public disorder or public nuisance, such as discarded needles."[28]

There is an abundance of evidence supporting the efficacy of SCSs as harm reduction measures. Insite, the first safe consumption site in Canada, was established in 2003, and is considered a resounding success. As noted by Dr. Maria Zlotorzynska and her colleagues, "A large body of peer reviewed research, published in leading medical journals, has documented the various benefits of the program, including reductions in syringe sharing and fatal overdoses, and increased uptake of addiction treatment."[29] The Canadian Nurses Association has recognized Insite as being incredibly effective at reducing overdose-related deaths, finding that the program may have prevented approximately 2-13 deaths per year between 2003 and 2016.[30] Indeed, reported statistics from the site indicate over 3.6 million visits since its establishment in March 2003, with 6440 overdose interventions but zero deaths, suggesting an incredible number of saved lives over the course of the program's life.[31] Even the Supreme Court of Canada (SCC) has recognized the benefits of Insite, with Chief Justice McLachlin noting in *Canada (AG) v PHS Community Services Society* that "Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area."[32]

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27 World Health Organization, "Effectiveness of Sterile Needle and Syringe Programming in Reducing HIV/AIDS Among Injecting Drug Users," *supra* note 24 at 28.

28 Canadian Nurses Association, "Harm Reduction and Illicit Substance Use: Implications for Nursing," *supra* note 23 at 32.

29 Maria Zlotorzynska et al, "Supervised injection sites: Prejudice should not trump evidence of benefit" (2013) 185:15 Can Med Assoc J 1303 at 1303.

30 Canadian Nurses Association, "Harm Reduction and Illicit Substance Use: Implications for Nursing," *supra* note 23 at 39-40.

31 Vancouver Costal Health, "Insite user statistics" (last modified July 2019), online: <www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics> [perma.cc/4TNR-RPYG].

32 *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 19 [*PHS Community Services*].

In addition to the direct benefit of safe injection reducing overdose-related death, SCSs have other positive impacts. In a 2020 study by Nick Kerman and colleagues, interview participants frequently cited social connectedness, sense of community, emotional support, stress reduction, feelings of safety and security, and help accessing health care resources as benefits of SCSs.[33] Increased access to health and addiction care was also noted by the Canadian Nurses Association as a benefit to SCSs, citing a large body of research both domestically and internationally.[34] Thus, not only do safe consumption sites have short-term impacts of reducing overdose and other health risks, but also lead to longer-term effects in the form of greater access to health and addiction services, as well as other related social supports.

Criticism of SCSs is largely based on a fear of increased drug use and related criminal activity, however such a critique is also refuted by the literature. Dr. Maria Zlotorzynska and colleagues note in their article that "the feared negative consequences of opening Insite have failed to materialize" and "although concerns persist that supervised injection facilities attract crime and increase drug use, research undertaken in Vancouver has shown that such fears are unfounded."[35] Research by Thomas Kerr and colleagues also echo this sentiment, with their study – related to Insite specifically – noting that "over 40 peer-reviewed studies have been published which speak to the many benefits and lack of negative impacts of this site."[36] Any fears related to increased crime and public disorder resulting from SCSs simply do not seem to be well-founded.

The overwhelming evidentiary support for harm reduction methods such as NSPs and SCSs makes clear that they should be a priority in addressing the opioid crisis. These programs have a large amount of support from a wide array of organizations, both internationally and within Canada, due to their efficacy in reducing the harms of substance use. Given the relatively recent shift in Canadian drug policy and mounting evidence in favor of these methods, clearly harm reduction must be at the center of Canada's approach to addiction.

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33 Kerman et al, *supra* note 13 at 3-4.

34 Canadian Nurses Association, "Harm Reduction and Illicit Substance Use: Implications for Nursing," *supra* note 23 at 41.

35 Zlotorzynska et al, *supra* note 29 at 1303.

36 Thomas Kerr et al, "Supervised injection facilities in Canada: past, present, and future" (2017) 14:28 Harm Reduction J at 2.

III. HARM REDUCTION IN FEDERAL PRISONS – AN ARGUMENT FOR IMPROVEMENT

Given the efficacy of harm reduction methods in community settings, both needle exchange and safe consumption programs are being rolled out in Federal prisons. Unfortunately, these programs are insufficient to pass constitutional muster. There is an array of shortcomings in these programs when compared to community counterparts. These differences reflect failings of the policy's design by the Federal government. Indeed, valid section 7 and 15 *Charter* arguments can – and have – been raised.[37]

This section outlines the programming in Federal prisons and documents and their main shortcomings. Then, it offers arguments for why these programs are inadequate to pass constitutional muster under sections 7 and 15 of the Charter.

Much of the analysis that follows relies on the recent decision in *Simons v Ontario (Minister of Public Safety)*.[38] In *Simons*, the prison needle exchange program was challenged under both sections 7 and 15(1) of the *Charter*. The case was brought on behalf of lead applicant Steve Simons by various advocacy organizations, including Canadian HIV/AIDS Legal Network, Prisoners with HIV/AIDS Support Action Network, Canadian Aboriginal AIDS Network and Catie. Ultimately, the Ontario Superior Court of Justice dismissed the challenge, in large part due to the continuing rollout and evolution of the program. Nonetheless, the reasoning in this decision was highly informative and may leave the door open for future challenges under the *Charter* should prison harm reduction programs remain unchanged. *Simons* is thus an excellent case study in how Canadian courts may approach a constitutional challenge, and the ways in which they could find success.

A. Current Prison Drug Policy – An Overview

1. The Abstinence-Based Approach in Prison Drug Policy

Since 1987, the Canadian government has been implementing drug strategies to combat the rising addiction and overdose rates in both the

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37 See *Simons v Ontario (Minister of Public Safety)*, 2020 ONSC 1431 [*Simons*].

38 *Ibid*.

community and prisons.[39] These strategies have tended to focus on "the key pillars of prevention, treatment, enforcement and, at times, harm reduction."[40] This formal stated policy has changed over the years, but has often placed strong emphasis on deterrence and criminalization.

This was particularly apparent in the period between 2006 – 2015, where the approach by successive conservative governments focused on preventative and enforcement measures. In 2007, the National Anti-Drug Strategy was established, stating a goal of creating "safer and healthier communities," while notably leaving out harm reduction in this strategy.[41] Implementation of this strategy vastly favoured law enforcement initiatives, with comparatively little funding allotted to treatment, research, prevention, or harm reduction methods.[42] Further, during this time the *Drug-Free Prisons Act* was established, which effectively modified the *Corrections and Conditional Release Act* ("CCRA") to be tougher on drug use in prisons by placing granted parole in jeopardy when a positive urinalysis test has been obtained.[43]

The best evidence of harsh drug-free policies can be seen by analyzing the CCRA.[44] This legislation confers power on the CSC to oversee federal prisons. The most directly relevant provision in this legislation is section 40(i), which states that "an inmate commits a disciplinary offence who **(i)** is in possession of, or deals in, contraband."[45] Contraband is defined in section 2(1) of the CCRA, where it states that "***contraband"*** includes " (a) an intoxicant."[46] An intoxicant is defined in this section as "a substance that, if taken into the body, has the potential to impair or alter judgment, behaviour or the capacity to recognize reality or meet the ordinary demands of life, but does not include caffeine, nicotine or any authorized medication used in accordance with directions given by a staff member or a registered

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39 See Health Canada, "The New Canadian Drugs and Substances Strategy" (last modified 12 December 2016), online: <www.canada.ca/en/health-canada/news/2016/12/new-canadian-drugs-substances-strategy.html> [perma.cc/GJW3-JUH8].

40 *Ibid.*

41 *Ibid.*

42 See Kora DeBeck et al, "Canada's New Federal 'National Anti-Drug Strategy': An Informal Audit of Reported Funding Allocation" (2009) 20:2 Intl J Drug Policy 188.

43 *Drug-Free Prisons Act*, SC 2015, c 30; *Corrections and Conditional Release Act,* SC 1992, c 20 [CCRA].

44 CCRA, *supra* note 43.

45 *Ibid*, s 40(i) [emphasis in original].

46 *Ibid*, s 2(1) [emphasis in original].

health care professional."[47] When these sections are understood together, it becomes clear that the legislation mandates that the CSC provide disciplinary measures whenever any drug other than caffeine, nicotine, or prescription medication is possessed or dealt.

There is some leeway under the *CCRA* for disciplinary offences to be resolved informally.[48] This does not, however, change the fundamentally drug-free nature of the *CCRA*. By categorizing any instance of possessing or distributing intoxicating substances as a disciplinary offence, Parliament has taken a firm stance against the use or possession of any drugs within federal institutions.

2. A Push for Harm Reduction Programming in Federal Prisons

The current governmental policy, named the Canadian Drugs and Substances Strategy ("CDSS"), was implemented by the Liberal government in 2016, and formally restored harm reduction as a pillar of Canada's drug strategy.[49] This marked a refreshing new direction for the Canadian government, and seemed to open the door for more evidence-based approaches to the drug crisis in this country.

This shift in governmental policy has already led to the implementation of some harm reduction methods in federal prisons. First, since 2018 the CSC has been rolling out their PNEP, implemented to date at 11 federal institutes.[50] This program is stated to be "consistent with the Canadian Drug and Substances Strategy and based on comprehensive and informed evidence."[51] The stated goals of this program are to reduce needle sharing in the prison population, facilitate referral to treatment programs, and reduce transmission of communicable diseases and other infections related to injection drug use.[52]

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47 *Ibid*, s 2(1).

48 *Ibid*, s 41(1).

49 See Health Canada, "The New Canadian Drugs and Substances Strategy," *supra* note 39.

50 See Correctional Services Canada, "The Prison Needle Exchange Program" (Ottawa: Health Canada, last modified 15 December 2021), online: <www.csc-scc.gc.ca/health/002006-2004-en.shtml> [perma.cc/8434-ZQNS].

51 *Ibid*.

52 Correctional Services Canada, "Prison Needle Exchange Program" (Ottawa: Health Canada, last modified 28 August 2019), online: <www.csc-scc.gc.ca/health/002006-2005-en.shtml> [perma.cc/YY7B-99UT].

Participation in the PNEP requires consultation with a health professional for education on safe consumption, as well as risks and other harms stemming from drug use.[53] Those who wish to participate must then gain approval from the Institutional Head or Deputy Warden, who will determine if there are any security risks associated with participation.[54] Successful participants of the PNEP are provided kits with clean needles, subject to a one-to-one syringe exchange and prohibition from altering the provided PNEP kits in any way.[55] It should be noted, however, that the PNEP does not override existing rules related to contraband materials, and all illicit drugs still remain prohibited, as do drug-related paraphernalia not part of the provided PNEP kits.[56]

The other major harm reduction initiative undertaken by the CSC is the establishment of an OPS at Drumheller Institution in Alberta. This service is also noted to be consistent with Canada's stated drug strategy, as well as "another component to CSC's harm reduction measures."[57] The OPS is part of "ongoing efforts to help prevent fatal and non-fatal overdoses, reduce the sharing of needles, reduce the transmission of infectious diseases, including HIV and HCV, reduce the occurrence of skin infections, and facilitate referrals to other health care services and programs."[58]

The OPS at Drumheller Institution provides access to "consumption rooms," with health care staff available for education and counselling, as well as to respond to any overdose or other emergency situation.[59] The site is stated to be open from 7:00 am – 7:00 pm every day, with participants of the OPS remaining for 30 minutes or longer as needed for appropriate monitoring to occur.[60] As is the case for community-based safe-injection

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53 *Ibid.*

54 *Ibid.*

55 See Office of the Correctional Investigator of Canada, *Office of the Correctional Investigator: Annual Report 2018-2019* (2019) at 16, online (pdf): <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20182019-eng.pdf> perma.cc/FDH9-K48Z].

56 See Correctional Services Canada, "Prison Needle Exchange Program," *supra* note 52.

57 See Correctional Services Canada, "The Overdose Prevention Service" (Ottawa: Health Canada, last modified 28 August 2019), online: <www.csc-scc.gc.ca/health/002006-2002-en.shtml> [perma.cc/Q8XC-KADL].

58 See Correctional Services Canada, "Overdose Prevention Service" (Ottawa: Health Canada, last modified 28 August 2019), online: <www.csc-scc.gc.ca/health/002006-2003-en.shtml> [perma.cc/WFS7-X86H].

59 *Ibid.*

60 *Ibid.*

sites, participants will bring their own substances to use at the OPS, so long as it is "a quantity of their substance that is suitable for a personal single use."[61] To use the OPS, a prospective participant must meet with Health Services prior to accessing the program.[62]

The existence of this program does not in any way change the overall drug policy in prisons. Much like the PNEP, while participation in the program itself may not be a disciplinary offence, drugs are still considered contraband. As noted by the CSC: "participants using the OPS will not be disciplined solely for using the service. However, if caught with illicit drugs outside of the OPS, they may face disciplinary measures and/or criminal charges."[63]

Thus, while there has been some push for evidence-based approaches to dealing with addiction in federal prisons in recent years, these more progressive programs have been implemented within a statutory framework that still disciplines and criminalizes drug use. There is a clear tension between longer-standing policies of prevention and deterrence, and these newer harm-prevention initiatives. Indeed, as can be seen by the operational details of both the PNEP and OPS, there appear to be varying and contradictory underlying philosophies guiding the implementation of these programs. Without further policy change, these programs are unlikely to live up to their full potential.

3. Shortcomings of these Prison Harm Reduction Programs

When comparing the highly effective harm reduction programs in communities to the implementation of the PNEP and OPS in federal prisons, various shortcomings of the prison programs begin to present themselves. Given the current policy in these institutions to punish the possession of intoxicants, both the PNEP and OPS fall short of effectively addressing addictions through harm reduction. These programs also present additional negative impacts on inmates' rights to privacy and may act to further stigmatize their addictions.

Turning first to the PNEP, several criticisms have been leveraged against its implementation. Firstly, there is serious concern that such a program cannot have meaningful impacts given the current drug-free environment of federal institutions. This was an issue expressed by the Office of the

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61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

Correctional Investigator ("OCI") in their 2018-2019 annual report, noting that "harm reduction seeks to inform and empower individuals in reducing the harms associated with drug use," but that "CSC will fail to meet this objective if it continues to stigmatize and punish drug use behind its walls."[64]

Another related concern involves the confidentiality of participants of the program. As noted by the Canadian HIV Legal Network in a policy brief, "CSC's PNEP violates prisoners' confidentiality at many points without reasonable justification."[65] For example, the focus by the CSC on security necessitates routine inspections of participants and their cells to ensure the PNEP kits are accounted for, which can lead to undue intrusion.[66] This security-first approach also requires approval by an institutional head via a threat assessment, which necessarily identifies prospective participants as individuals engaged in the prohibited and stigmatized activity of substance use.[67] There are clear drawbacks to this approach – participation in the program is severely limited by the need to identify oneself to the institution, given that drug use is a highly stigmatized, and indeed prohibited, activity within federal institutions. In fact, the PNEP is the only program in the world that has such an approach.[68] The OCI has also criticized this breach of confidentiality, noting that while it is often difficult to meet the same standard of confidentiality in a federal institution, "patient confidentiality and 'need to know' principles [still] need to be respected to the extent possible."[69]

The most problematic outcome of these restrictive policies is the incredibly low participation in the PNEP. Indeed, the OCI noted that "as of April 2019, perhaps not surprisingly, there were only a handful of individuals enrolled in the program."[70] This clearly stems from the identified confidentiality and stigma concerns. Many prospective

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64 Office of the Correctional Investigator, *Annual Report 2018-2019*, *supra* note 55 at 16.

65 Canadian HIV Legal Network, "The Correctional Service of Canada's Prison Needle Exchange Program Policy Brief" (2019), online: <www.hivlegalnetwork.ca/site/prison-based-needle-and-syringe-programs/?lang=en>.

66 *Ibid*.

67 *Ibid*.

68 *Ibid*; see Canada HIV Legal Network, "Former Prisoner Steve Simons Writes why a Prison Needle Exchange Program is Needed," *supra* note 8.

69 Office of the Correctional Investigator, *Annual Report 2018-2019*, *supra* note 55 at 16.

70 *Ibid*.

participants are likely unable to trust the provision of clean injection kits from an institution that labels illicit drugs as contraband and punishes those who possess them. After all, by outing oneself as a user, there is fear not only of discipline, but also of the potential barriers to programming and release that this discipline may create. Perceived risks in accessing the PNEP clearly deters widespread use and ultimately hinders its important health impacts.

Similar concerns exist regarding the OPS. While there is far less available information on the specifics of this new program, the continued criminalization and stigma of drug use certainly presents ongoing barriers to effective and widespread use. This is concerning as low usage of the OPS serves to limit many of the benefits of the programming, such as the support, security, and connectedness seen in community based SCSs.[71] Essentially, the accessible and welcoming nature of SCSs should be understood as contributing to their widespread success, but the abstinence-based policies of federal prisons make such qualities unattainable for the CSC's OPS.

The foregoing discussion demonstrates the various ways in which prison harm reduction programs are simply not to the same standards as community programming. Low enrollment through continued drug-free approaches severely hinders their effectiveness. So, while proper implementation of PNEPs and OPSs is capable of seriously curbing rates of disease and overdose in federal prisons, the programs as they stand now are simply insufficient. Canada has recognized and committed to harm reduction, but the CSC programs certainly fall short of meeting this goal.

B. Section 7 of the *Charter* – How Current Harm-Reduction Programming Infringes the Right to Security of the Person

Section 7 of the *Charter* protects against deprivations of life, liberty, and security of the person except in accordance with the principles of fundamental justice. Thus, when a law or state action: (1) infringes an individual's life, liberty, or security of the person; and (2) this infringement does not accord with principles of fundamental justice, then the state act is in contravention of Section 7 of the *Charter*. The failure of both the PNEP and OPS in providing effective and accessible harm-reduction can certainly be understood as constituting a breach of section 7. Indeed, there is reason

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71 See Kerman et al, *supra* note 13 at 3-4.

to believe that these programs fail to meet the requisite healthcare standard, and thus infringe section 7.

As noted above, the PNEP has already been challenged in *Simons* – a challenge that was unsuccessful. This decision is highly informative for understanding the constitutionality of prison harm reduction programming. The outcome itself may be discouraging for those who hoped to see improvement in the PNEP, however there are several reasons to remain optimistic about the success of future challenges.

First, the *Charter* challenge in *Simons* morphed from a challenge originally addressed at the general lack of any NSP in federal prisons. The original argument was that a failure to provide Safe Injection Equipment ("SIE") contravened s. 86 of the *CCRA*. These were not litigated due to the PNEP's establishment, but Justice Belobaba characterized the original sections 7 and 15(1) challenges as "compelling constitutional arguments."[72] Indeed, he noted with regards to the section 15(1) argument in particular, that "if this were still 2012 with no PNEP and the constitutional challenge was focused only on the impugned provisions of the *CCRA* that prohibit SIE, the arguments about discrimination on the basis of disability, sex and race would have been compelling."[73] This indicates that the CSC may be constitutionally mandated to provide some form of harm reduction programming in federal institutions. At minimum, *Simons* seems to suggest that the CSC is required to roll out PNEPs to all federal prisons, and significant delays in doing so may be in contravention of the *Charter*.

Second, Justice Belobaba's unwillingness to find the government in breach of the Charter was in part due to the PNEP being a relatively new program that was not yet fully implemented, and characterizes the challenges as "premature."[74] He thus affords the CSC a high degree of deference, suggesting that because there may be "further design changes," allowing the application to proceed would be "neither prudent nor just."[75]

Finally, his dismissal of the section 7 application was based largely on insufficient evidence to ground the claim.[76] This will be discussed in more detail below, but his decision does not demonstrate that the PNEP is

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72 *Simons*, *supra* note 37 at para 9.
73 *Ibid* at para 80.
74 *Ibid* at para 22.
75 *Ibid* at para 24.
76 *Ibid* at para 48.

implemented in a constitutional manner, but rather that there was a lack of empirical evidence before him to support a finding that section 7 had been infringed.

For these reasons, the decision in *Simons* does not prevent a future *Charter* challenge from succeeding. Indeed, as will be argued in the following sections, there remain serious questions about whether the PNEP and OPS truly meet the standard required by section 7 of the *Charter*.

1. The Deficiencies of the PNEP and OPS Engage Section 7

As has been outlined by the SCC,[77] the first step in a section 7 *Charter* analysis is to determine if an individual's rights to life, liberty, or security of the person is being engaged. This step requires that an applicant prove on a balance of probabilities that the impugned law or state action has a "sufficient causal connection" to the right being deprived.[78] When the effects of the PNEP and OPS are considered in light of their stated objectives, it is clear that security of the person is engaged by this programming.

i. Goals of CSC Harm Reduction Programming

To reasonably assess if a section 7 interest is being engaged, the goals of the CSC in implementing the PNEP and OPS must be understood. Indeed, it is the purpose and objective of the impugned law or act that is central to a section 7 analysis.[79] As noted above, the stated goals for both the PNEP and OPS include the reduction of needle sharing, facilitating referral to treatment programs, and reducing transmission of communicable diseases and other infections related to injection drug use, with the OPS having the additional goal of reducing overdose generally.[80] These goals suggest the programming to be primarily health-focused – the CSC has created the PNEP and OPS to respond to legitimate health risks associated with addiction in federal prisons. This is further supported by section 3(a) of the *CCRA*, which indicates that the safety and humane treatment of prisoners are the primary purpose of the federal correctional system.[81] Thus, these

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77 *Canada (AG) v Bedford*, 2013 SCC 72 at para 58 [*Bedford*].

78 *Ibid* at para 76.

79 *Ibid*.

80 See Correctional Services Canada, "The Prison Needle Exchange Program," *supra* note 50; Correctional Services Canada, "The Overdose Prevention Service," *supra* note 57.

81 *CCRA*, *supra* note 43, s 3(a).

programs can be broadly understood as having the objective of minimizing the health risks of substance use through the provision of evidence-based health interventions.

ii. The Correct Standard of Prison Healthcare

Additionally, it is important to establish the proper standard on which to gauge the success or failure of the healthcare-focused goals of these programs. After all, any assessment of whether health-focused objectives are being met – and the consequences of meeting or failing to meet these objectives – requires reference to some minimum constitutional standard. Both steps of the section 7 test require that the CSC programming fall short of requisite prison healthcare standards: in the first step to demonstrate a sufficient causal connection between state action and the deprivation of a protected interest, and in the second step to establish if the purpose of the legislation runs counter to its effects in a manner inconsistent with the principles of fundamental justice.

The bare minimum standard that the CSC must meet in their provision of healthcare can be found in section 86 of the *CCRA*.[82] Section 86(1) states that "the Service shall provide every inmate with (a) essential health care; and (b) reasonable access to non-essential health care," and section 86(2) indicates that "the provision of health care under subsection (1) shall conform to professionally accepted standards."[83] Thus, if the PNEP and OPS were deemed necessary as "essential healthcare," or if their provision was understood as constituting "reasonable access to non-essential healthcare," then under section 86(2) such programs would be required to be delivered in a way conforming to "professionally accepted standards."[84]

Given the large body of literature on both NSPs and SCSs, including the most effective method of delivering these programs, one could envision an argument that failure to deliver the PNEP or OPS in a way consistent with this literature would constitute a breach of the CSC's legal obligations. In fact, this was the exact argument made in *Simons*.[85] The challenge in *Simons* was based on an alleged failure to provide reasonable and effective access to SIE in accordance with professionally accepted standards, by

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82 *Ibid.*

83 *Ibid*, s 86.

84 *Ibid.*

85 *Simons*, *supra* note 37.

utilizing a security-based model rather than a healthcare-focused one.[86] Such failure was said to breach the section 7 rights of injection drug users in federal prisons by depriving them of their security of the person in a manner inconsistent with the principles of fundamental justice. Thus, the healthcare standard on which the decision in *Simons* was based was that of the provision of services that conformed to professionally accepted standards.

It should be noted here that while this legislative standard informs the minimum level of healthcare that the CSC must provide, international instruments suggest that a higher standard may be constitutionally required. Indeed, international consensus may mandate that healthcare in prisons be provided at a level equivalent to that in the community. Such a heightened standard was not considered in *Simons*, and is not legislatively mandated in Canada, but may be necessary when constitutional principles related to international norms are properly applied. The justification for and consequences of this heightened standard will be engaged with separately later in this paper.

iii. How Security of the Person is Engaged

The SCC has repeatedly indicated that where health and well-being are being impaired by the state, security of the person is engaged.[87] For example, in *Bedford*, the court found that where measures aimed at minimizing the risks of dangerous activity were being prevented by the state, security of the person was implicated.[88] Similarly, in *PHS Community Services Society*, the SCC determined that certain provisions in the *Controlled Drugs and Substances Act*, which in effect prevented individuals from accessing harm reduction treatments from Insite, engaged section 7 of the *Charter*.[89] Chief Justice McLachlin, writing for the Court, noted that "where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out."[90] Given that both the drug-free prison legislation and the security-focused aspects of the prison harm-reduction

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86 *Ibid* at para 47.

87 See e.g. *R v Monney*, [1999] 1 SCR 652 at para 55, 171 DLR (4th) 1, citing *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 123.

88 *Bedford*, *supra* note 77 at para 60.

89 *PHS Community Services*, *supra* note 32 at para 93.

90 *Ibid*.

programs can be understood as preventing individuals from accessing healthcare that would minimize the various risks associated with addiction, security of the person is clearly engaged.

This conclusion may appear to directly conflict the finding in *Simons*, where the applicants were unable to convince Justice Belobaba that section 7 was engaged.[91] It is worthwhile, however, to consider Justice Belobaba's approach to this step of the section 7 analysis.[92] Essentially, Justice Belobaba found insufficient evidence to support the existence of "professionally accepted standards."[93] The applicants contented that a healthcare-centred model free of risk assessment criteria was accepted as this standard, but Justice Belobaba was unconvinced by the evidence presented. Further, the connection purported to exist between the impugned measure and section 7 interest was found to be speculative.[94] When speaking of expert testimony regarding how involvement of security staff limited access to the PNEP, Justice Belobaba noted that "these beliefs and opinions are offered as bald assertions without research support."[95]

The section 7 challenge therefore did not fail due to foundational problems with the underlying argument, but rather a lack of evidence to discharge burden of proof. Were a challenge to be made that proved the existence of a "professionally accepted standard" and tangible connection between low accessibility to the PNEP and its security-based approach, it would seemingly have real merit.

In fact, despite the finding in *Simons*, there is strong reason to believe that a causal connection between the program deficiencies and the security of individuals could be supported in a future challenge. As noted above, the incredibly low participation in the PNEP has been linked by various groups – including the OCI and the Canadian HIV Legal Network – to the security-focused nature of this programming. This approach is particularly problematic for those who are deemed unable to participate in the PNEP – for them, no other means of managing the risks associated with their

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91 *Simons*, *supra* note 37.

92 *Ibid* at para 49, citing *Bedford* at para 76. The first step of the analysis requires that there be "sufficient causal connection" between the impugned measure (failure to conform to professional standards) and the s. 7 interest (here, security of the person) for s. 7 to be engaged.

93 *Simons, supra* note 37 at para 48.

94 *Ibid* at paras 50-51.

95 *Ibid* at para 51.

addictions exist, and they are essentially forced to engage in needle-sharing and other risky activity. Similarly, drug free prison policies provide clear barriers to program participation, as individuals who would otherwise use these programs must weigh access against the risk of identifying themselves as a user to institutional agents. These concerns are not simply speculative – drug control approaches have been found to deter access to treatments and programming, to contribute to the stigmatization of users, and lead to unsafe consumption practices.[96] In an institutional setting, where there is far less privacy and far greater state control, these impacts would only be heightened. Thus, it is unquestionable that evidence of this causal connection exists – it simply has not yet been brought before a Canadian court.

C. The PNEP and OPS Do Not Accord with Principles of Fundamental Justice

It is well established law that section 7 will be infringed where a law or state action can be proven to be arbitrary, overbroad, or grossly disproportionate.[97] These requirements are clearly explained by Chief Justice McLachlin in *Bedford*: A law is arbitrary when it "bears no connection to its objective," overbroad when "there is no rational connection between the purposes of the law and some, but not all, of its impacts," and is grossly disproportionate when "the seriousness of the deprivation is totally out of sync with the objective of the measure."[98] With regards to the PNEP and OPS, it is their overbreadth and arbitrariness that are of concern.

1. Arbitrariness

In *Simons*, Justice Belobaba was unconvinced that the PNEP was contrary to any principle of fundamental justice. With respect to both arbitrariness and overbreadth, it was conceded by Justice Belobaba that there were no known instances of SIE that have been provided through a PNEP being used to cause harm.[99] Nonetheless, he found that a reasonable perception of risk stemming from providing SIE to prisoners was "neither

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96 See UNGA, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UNGAOR, 65th Sess, UN Doc A/65/255 (6 August 2010) <undocs.org/A/65/255>.

97 See *Bedford*, supra note 77; *R v Malmo-Levine*, 2003 SCC 74.

98 *Bedford*, *supra* note 77 at paras 111, 112, 120 [emphasis in original].

99 *Simons*, *supra* note 37 at para 56.

speculative nor irrational" and ultimately deemed the PNEP's security-based approach to not be arbitrary.[100]

Despite this finding in *Simons*, the legislation can clearly be seen as arbitrary when its healthcare-focused goals are considered in light of the previously discussed prison healthcare standards. With respect to both the PNEP and OPS, implementation almost certainly falls short of the requisite "professionally accepted standard." To start, one can look to *PHS Community Services Society* for circumstances where there was a finding of arbitrariness. In that case, the SCC determined that a ministerial decision to not exempt Insite from the *CDSA* was in effect arbitrary on the basis that such an exemption would clearly further the health and safety goals of this legislation.[101] Essentially, given the well-understood benefits that Insite provides to the health and safety of the community, allowing the *CDSA* to have effect within Insite can only be understood as causing increased risks to users. Similarly, one can view drug-free prison legislation and security-focused approaches to harm reduction implementation as undermining the known benefits of NSPs and SCSs. Thus, the CSC can be understood as conducting the PNEP and OPS in an arbitrary manner, given its effect is in opposition with the healthcare-focused objectives this programming.

Further, there are a few ways that professional standards could be conceptualized which would suggest the programming to be arbitrary. Firstly, the PNEP could be compared to the standards of community NSPs. Making a comparison in this way clearly suggests defects in the PNEP. For instance, confidentiality is a core component in most community NSPs,[102] and thus a failure of the PNEP to ensure confidentiality could certainly be

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100 *Ibid* at paras 58, 64.

101 *PHS Community Services*, *supra* note 32 at 131, 136.

102 See The Canada Addiction Treatment Centers characterizes their needle exchange program as "a confidential and free program" that is run out of pharmacies and clinics, CATC, "Harm Reduction Services," online <canatc.ca/harm-reduction-services/> [perma.cc/CQ24-VHJD]; Halifax's Mainline program notes that respecting confidentiality of clients is central to their code of conduct, "Our Commitment to You," online <mainlineneedleexchange.ca/our-commitment/> [perma.cc/TLA8-78DU]; Vancouver Costal Health characterizes their harm reduction programs, including their NSPs, as "free and confidential", "Harm Reduction," online <www.vch.ca/public-health/harm-reduction> [perma.cc/7BMC-J8K8]; and Peel Public Health's needle exchange program is also "free and confidential," "NEP Overview," online <www.peelregion.ca/health/needle-exchange/index.htm> [perma.cc/A665-H7W8].

seen as falling short of professional standards. More fundamentally though, accessibility for all injection drug users is of paramount importance to community NSPs,[103] and so any significant barriers to access – such as the approval process of the PNEP that prevents some inmates from accessing the service at all – ought to be considered falling short of professional standards.

The PNEP can also be compared to other prison needle exchange programs and doing so also suggests that professional standards are not being met by the CSC. For instance, studies on needle exchange programs in Moldova and Luxembourg attributed their initial ineffectiveness to a lack of trust that the programs were confidential, and UNDOC have therefore suggested that prison NSPs must be conducted in a way that promotes this confidentiality and trust.[104] UNDOC has also indicated that "[p]risoners who inject drugs should have easy and confidential access to sterile drug injecting equipment, syringes and paraphernalia."[105] It therefore seems clear that trust, confidentiality, and accessibility are standards for prison NSPs that have been accepted by experts. To the extent that these standards are not being met by the PNEP, such programming can clearly be understood as being arbitrarily implemented.

2. Overbreadth

There is also reason to view the PNEP, OPS, and surrounding policy as overbroad on the basis that less restrictive means of implementing these

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[103] See Providing access to safe injection equipment is the very point of these programs, and so maximizing accessibility is considered centrally important to their effectiveness. See e.g. Carol Strike et al, "Ontario Needle Exchange Programs: Best Practice Recommendations" (2006) at 140, online (pdf): <www.ohtn.on.ca/Documents/Knowledge-Exchange/Needle-Exchange-Best-Practices-Report.pdf> [perma.cc/6GD9-6RNP], where delivery models that maximize accessibility were recognized as best practice. See also Canada HIV/Aids Legal Network, "Sticking Points: Barriers to Access to Needle and Syringe Programs in Canada" (2007) at 3, online (pdf): <lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/CANHIVAIDS_LN_CAN_UPR_S4_2009_anx4_StickingPoints.pdf>; Carol Strike & Miroslav Miskovic, "Scoping out the literature on mobile needle and syringe programs—review of service delivery and client characteristics, operation, utilization, referrals, and impact" (2018) 15:6 Harm Reduction J at 2.

[104] UNDOC, "A Handbook for Starting and Managing Syringe Programs in Prisons and other Closed Settings" (2014) at 43-44.

[105] UNDOC, "HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions" (2013) at 3.

programs are possible. There is little evidence to suggest that a security-focused approach to the PNEP is necessary. The CSC themselves refer to UNDOC findings that prison NSPs "are not associated with increased assaults on prison staff or inmates," and that they in fact "contribute to workplace safety."[106] Further, as was found in *Simons*, "thus far not a single incident involving harmful use of a needle or syringe has been documented in any prison where there is access to SIE through a PNEP."[107] The need for security screening is therefore questionable, and so limiting access on such a basis can only be seen as overly restrictive.

In this way, even if the implementation of these programs cannot be seen as arbitrary overall, they can certainly be understood as imposing unnecessary restrictions on the accessibility and effectiveness of the programming – directly conflicting with the purpose of the PNEP and OPS.

On the basis of arbitrariness and overbreadth, it seems as though a section 7 *Charter* violation can be readily supported. If so, it is unlikely that the PNEP and OPS implementation can be saved under section 1. After all, the SCC has found that infringements of section 7 are "not

easily saved by section 1."[108] In any event, a section 1 balancing of the salutary effects of the PNEP and OPS against the deleterious effects of its poor implementation would suggest that these programs could not be saved. These programs, as implemented, provide very little actual benefit to incarcerated individuals given their low accessibility. Given the clear rates of overdose, infection, and other use-related harms, the negative impacts of these barriers to accessibility suggests that the CSC's harm reduction methods, as currently implemented, cannot be saved under section 1.

IV. Section 15(1) – How Prison Drug Policy Denies Access to Harm Reduction for Injection Drug Users

Like section 7, there is good reason to view the CSC's approach to harm reduction as being contrary to section 15(1). The inability of these programs to conform with international or legislative standards of healthcare

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106 Correctional Services Canada, "The Prison Needle Exchange Program," *supra* note 50.

107 *Simons*, *supra* note 37.

108 See *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66; *R v Ruzic*, 2001 SCC 24 at para 92; *Winnipeg Child and Family Services v KLW*, 2000 SCC 48 at para 42.

provision, when paired with their disproportionate impacts on those with addiction, clearly constitutes a distinction based on enumerated grounds. Additionally, the link between addiction and other forms of marginalization makes arguments on related grounds compelling as well.

Given that *Simons* also involved a section 15(1) challenge, it is worth discussing this decision at the outset and why it failed. Because the challenge was predicated on the denial of "effective access to SIE/essential health care to all [Injection Drug Use] inmates in accordance with professionally accepted standards," it was ultimately determined that this standard was never proven, as no "distinction" relevant to the first part of the test could be proven to exist.[109] In his analysis, however, Justice Belobaba did note that addiction is indeed an enumerated ground on which a section 15(1) claim could be based.[110] Thus, much like the section 7 challenge, the main shortcoming of the challenge rested on insufficient evidence of an accepted standard with which to compare to the PNEP. Were such evidence to exist, the challenge would have real merit.

The test for a breach of section 15(1) involves two main considerations: (1) Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground; and (2) is the distinction discriminatory?[111] In spite of *Simons*, there is good reason to believe that both can be answered in the affirmative in relation to the PNEP and OPS implementation.

A. Step 1 – The Law Creates a Distinction Based on an Analogous Ground

For the first step, it must be understood that addiction has been considered a disability by Canadian courts and thus falls under an enumerated ground.[112] Therefore, the main question at this first step is if the effects of the prison drug legislation and harm reduction programming is to create a distinction for those with addictions. Such a distinction can be seen to exist.

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109 *Simons*, *supra* note 37 at paras 82-83.

110 *Ibid* at para 80.

111 See *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25.

112 See *Simons*, *supra* note 37 at para 80; *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 356.

The distinction being created is best understood with reference to the healthcare standards for the prison population at large. As discussed above, there is at minimum a requirement that healthcare be provided to "professionally accepted standards." Beyond this minimum standard, though, there may in fact be a requirement (as will be discussed below), that healthcare be equivalent to that of the community. Either way, as noted in the previous section on section 7, such standards do not seem to be met by these programs. Current policy therefore leads to individuals with addictions being unable to access appropriate healthcare services, a clear distinction when compared to the minimal impacts on incarcerated individuals without addictions.

Additionally, there is some reason to believe that other enumerated grounds could be engaged, as women, Indigenous people, or those with mental illness may also be disproportionately affected by this programming. For instance, use of injection drugs has been found to be linked to high prevalence of HIV/HVC infection for Aboriginal people, and both women and those with mental illness have been found to be at increased risk to share drug paraphernalia.[113] Thus, for those populations, where harm reduction would be of particular benefit, a failure to provide such services in a way that conforms to appropriate prison healthcare standards would constitute a distinction on an enumerated ground.

B. Step 2 – The Distinction Discriminates

With respect to the second step of the analysis, it can be said that the distinction is discriminatory in nature. In *Kahkewistahaw First Nation v Taypotat*, the SCC noted that this step would be made out where the distinction had "the effect of perpetuating arbitrary disadvantage on the claimant."[114] Similarly, in *Fraser v Canada (Attorney General)*, the Court required that the distinction "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[115] As noted in the above section 7 analysis, the way these

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113 See Public Health Agency of Canada, "Population-Specific HIV/AIDS Status Report – Aboriginal Peoples" (2010) at 28; Carol Strike et al, *Best Practice Recommendations for Canadian Harm Reduction Programs that Provide Service to People Who Use Drugs and are at Risk for HIV, HCV, and Other Harms: Part 1* (Toronto, ON: 2013) at 37.

114 *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16.

115 *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27.

harm reduction services are being provided is arbitrary, confers little in the way of benefits for those they are intended to help, and prevents many individuals from minimizing the very real risks of substance use in prisons. Given that the government's purpose is to combat the very real issue of disease and overdose in prisons, that they are not making such health interventions accessible only acts to continue to perpetuate the disadvantage these marginalized individuals are experiencing. Therefore, there is good reason to view these programs as being in breach of section 15(1) *Charter* obligations as well.

V. INTERNATIONAL STANDARDS – WHY HEALTHCARE IN PRISONS SHOULD BE EQUIVALENT TO THAT OF THE COMMUNITY

As discussed in the previous sections, there are compelling reasons to view current harm reduction programming as falling short of professional standards – this on its own highlights constitutional concerns with the PNEP and OPS. These concerns, however, become even more significant when international standards are considered.

When looking to international standards of prison healthcare, there is a clear consensus that prison systems ought to provide equivalent care to that of communities. Indeed, there is a general principle echoed in a variety of international instruments whereby "prison health services are obliged to provide prisoners with care of a quality equivalent to that provided for the general public in the same country."[116] This principle has been recognized at an international level by bodies such as the United Nations and WHO.[117] Most notably, this principle is expressed in The United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules"), with rule 24 stating that:

> 1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.

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116 Gérard Niveau, "Relevance and limits of the principle of "equivalence of care" in prison medicine" (2007) 33 J Med Ethics 610 at 610.

117 *Ibid*. See also *Basic Principles for the Treatment of Prisoners*, GA Res 45/111 (1990), r 9; UNAIDS, *WHO Guidelines on HIV Infection and AIDS in Prisons*, UN Doc UNAIDS/99.47/E (1999) at 4.

> 2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.[118]

The Mandela Rules have not been adopted into Canadian domestic law and are therefore not of binding force on the Canadian government.[119] Nonetheless, these rules "represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined," and "reflect a general shift in social views regarding acceptable treatment or punishment."[120]

Indeed, in recent years there has been a trend in Canadian jurisprudence to accept international standards as being informative in *Charter* analyses. The SCC in *Suresh v Canada (Minister of Citizenship & Immigration)* found that "the principles of fundamental justice expressed in s. 7 of the Charter and the limits on rights that may be justified under s. 1 of the Charter cannot be considered in isolation from the international norms which they reflect."[121] In *CCLA v Canada*, the Ontario Superior Court directly adopted the reasoning in *Suresh*, and found the Mandela Rules to be relevant in sections 7 and 1 analysis.[122] The *BCCLA v Canada* decision by the British Columbia Supreme Court similarly relied on *Suresh* to apply international standards to a constitutional analysis.[123] In *Brazeau v AG (Canada)*, the Ontario Superior Court relied on the Mandela Rules to determine that administrative segregation violated the *Charter*.[124] In *R v Capay*, the Ontario Superior Court directly endorsed the *CCLA* decision, finding the Mandela Rules to establish international consensus as to the correct standards of treatment of prisoners.[125] Finally, the Ontario Superior Court in *Francis v Ontario* relied on a variety of the above caselaw, and the

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118 UN-Doc A/Res/70/175 (17 December 2015) ["Mandela Rules"].

119 *Canadian Civil Liberties Assn v Canada (AG)*, 2019 ONCA 243 at para 29; *British Columbia Civil Liberties Assn v Canada (AG)*, 2019 BCCA 228 at para 71.

120 *Canadian Civil Liberties Assn v Canada (AG)*, 2019 ONCA 243 at paras 28,29.

121 *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 59.

122 *CCLA v Canada*, 2017 ONSC 7491 at para 154 [*CCLA*].

123 *BCCLA v Canada,* 2018 BCSC 62 at para 560.

124 *Brazeau v AG (Canada)*, 2019 ONSC 1888 at paras 372-373.

125 *R v Capay*, 2019 ONSC 535 at para 157.

Mandela Rules were again recognized as an international consensus on prison management and prisoner treatment.[126]

This higher standard of healthcare is important, as it is not being met by the current PNEP. Most notably, barriers to access programming in institutions is far higher than the barriers in communities. There are large degrees of variation in the implementation of NSPs in a community setting, but such programming tends to be run by healthcare providers and essentially never records identifying information. In this way, participants can maintain a degree of anonymity. The PNEP, on the other hand, does not uphold such confidentiality, posing a significant barrier to access. This can be seen as a direct failure to meet community standards for these programs in contravention of rule 24(1) of the Mandela Rules, but also as threatening continuation of care upon entry to federal institutions contrary to rule 24(2).

Similarly, how the OPS is implemented creates significant barriers to access the site – barriers that do not exist in the community setting. The security-focused approach in federal prisons directly limits the accessibility of the OPS in a way that does not exist in community SCSs. In this way, the overall prohibition of drugs in federal institutions appears to cause this harm reduction initiative to fall short of the equivalence of care requirement.

Thus, to conform with international standards, Canada's drug-free prison policy must be dramatically altered, or even done away with completely. The approach taken by the CSC is severely limiting the effectiveness of this programming, leaving many in prisons unable to access this potentially life-saving healthcare. These programs fall well short of what is expected by the larger international community, further evidencing their unconstitutional character.

VI. CONCLUSION

Response to the drug crisis in federal prisons is a very real and pressing concern. There are significant documented harms resulting from substance use in these institutions and Canada and the CSC are best positioned to address them. Based on a diverse array of evidence from community programs, it is contended here that the only responsible way to address these harms in a prudent and timely manner is through the continued

126 *Francis v Ontario*, 2020 ONSC 1644 at paras 61, 106, 112, & 269.

establishment and improvement of harm reduction programs such as the PNEP and OPS. Such programs, if properly implemented, can minimize overdose and communicable disease, as well as promote access to addiction treatment programming; in stark contrast to abstinence-based policy which has continued to remain ineffective given the profound relationship between addiction and underlying social factors. Thus, evidence-based harm reduction methods remain the best avenue in addressing this public health crisis.

Unfortunately, both the PNEP and OPS are currently insufficiently implemented, raising serious constitutional concerns. The CSC is likely constitutionally obliged to offer harm reduction programming at all federal institutions, yet slow and incomplete rollout has left most incarcerated individuals without access. Further, even if these programs were in effect within all federal institutions, the PNEP and OPS are still insufficient in their current form. They certainly do not reach the equivalence of care standard as mandated by the Mandela Rules, with continued prohibition of drugs in federal institutions and the security-focused approach to harm reduction programming presenting severe barriers to access that are simply not present in the community. This lack of accessibility may also indicate that the programs fall short of professionally accepted standards, and thus contravene sections 7 and 15(1) of the *Charter*. While such a finding has not yet been made in Canadian courts, the continued development and acceptance of harm reduction strategies by both experts and international bodies can only make such a legal conclusion more likely in the future.

Ultimately, the CSC is uniquely situated to take major steps in response to Canada's drug crisis. They are empowered to provide access to proven and effective programming for some of society's most vulnerable individuals. Unfortunately, while they should be commended for the establishment of the existing programs, it is undeniable that much more work must be done for these programs to be considered a success. Until then, many Canadians in custody will continue to suffer.

Purchasing Privacy and *R v Picard*: Dwelling Places on Public Property

ANDREA LETT*

ABSTRACT

Canadian courts recognize elevated privacy rights with respect to dwelling houses. However, individuals experiencing homelessness who maintain a dwelling place in the form of a temporary structure on public property may not enjoy the same s. 8 *Charter* rights expected on private property. This paper asserts that temporary dwelling structures should carry the same privacy rights regardless of their location. This paper examines the relationship between property rights and public space, the effects of poverty in tandem with criminal law, the effects of *Victoria (City) v Adams* on Canadian law, and the shortcomings/alternatives to emergency shelter spaces.

When certain circumstances are present, this paper proposes the application of a "spectrum of legal rights," where individuals have something more than mere acquiescence from the state to exist on public property. Considering competing interests involving the use of public property, this paper concludes that alternatives to injunctions/cyclical evictions are more effective as long-term solutions. An example of an effective alternative would be prioritizing affordable housing and low-barrier accommodations. In the meantime, until such issues are meaningfully addressed, equal dwelling house protections should apply to all individuals.

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I. INTRODUCTION

Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees the right to be secure against unreasonable search and seizure.[1] With the advent of *Hunter v Southam*, courts have additionally interpreted s. 8 of the *Charter* to manifest in the form of an individual's "reasonable expectation of privacy."[2] In *R v Wong*, the Supreme Court of Canada ("SCC") established that a reasonable expectation of privacy can be determined by asking: "could the individual whose privacy was intruded legitimately claim that in the circumstances, the agents should not have been able to act as they did without prior judicial authorization?"[3]

When it comes to an individual's home, or "dwelling place," courts recognize an elevated right with respect to privacy. The SCC stated the following in *R v Tessling*:

> The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress" ... developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are likely to take place.[4]

The SCC went on to state:

> **There is no place on earth where a person can have a greater expectation of privacy than within their "dwelling house"** ... Such a hierarchy of places does not contradict the underlying principle that s 8 protects "people not places," but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.[5]

In *R v Picard*, the British Columbia Provincial Court trial judge determined that a tent on a city sidewalk did not constitute a "dwelling house" largely because there was no legal right to erect a temporary structure on public property.[6] In this case, the trial judge stated that the City

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

2 *Hunter v Southam*, [1984] 2 SCR 145 at 159, 6 WWR 577 [*Hunter*].

3 *R v Wong*, [1990] 3 SCR 36 at 45, 60 CCC(3d) 460.

4 *R v Tessling*, 2004 SCC 67 at para 22 [*Tessling*].

5 *Ibid* [emphasis added].

6 *R v Picard*, 2018 BCPC 344 at para 24 [*Picard*].

"acquiesced" to Mr. Picard's tent, despite a bylaw that prohibited such structures.[7] This acquiescence did not translate to a legal right for Mr. Picard to place his tent on the sidewalk, and therefore precluded Mr. Picard's temporary structure from meeting the definition of a "dwelling house."[8] Once the trial judge established that Mr. Picard's tent was not a dwelling house, there was no need to obtain a warrant to search his tent and he could not claim the highest level of privacy protection with respect to and s. 8 of the *Charter* as set out in *Tessling*.[9]

The trial judge's perspective surrounding legal rights, dwelling houses, and public property outlined in *Picard* is problematic. While this case holds little weight in Manitoba, it highlights some harmful perspectives that many Canadians hold regarding the harsh realities of homelessness. Privileged Canadians can easily disregard the challenges or factors that contribute to an individual dwelling on public property. Ultimately, a lack of understanding of homelessness has the potential to leave some of the most vulnerable members society with a markedly lower standard of s. 8 *Charter* rights regarding their most intimate and personal space. Until issues of homelessness are meaningfully addressed by all levels of government, temporary structures on public property should constitute "dwelling places" that afford the highest degree of privacy protections under s. 8 of the *Charter*.

II. REASONING

The following five points/factors illustrate why temporary structures—even on public property—should be considered dwelling places:

i) individuals experiencing homelessness do not have private property to call their own. This means that they are excluded from private property and must rely on public property.[10]

ii) bylaws that prohibit temporary shelters on public property (such as the bylaws referred to in *Picard*) can be used to easily undermine s. 8 privacy rights. Such bylaws allow courts to state that a structure is "illegally

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7 *Ibid* at para 40.

8 *Ibid*.

9 *Tessling*, *supra* note 4at 22.

10 J Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L Rev 295 at 300 ["Waldron"].

placed," without taking into account the lack of options for a "legally placed" temporary structure.

iii) *Victoria (City) v Adams* and subsequent injunction cases demonstrate the need for shelter and community for individuals experiencing homelessness.[11] Injunctions preventing tent communities on public property may address certain public interest issues, however, they are not effective long-term solutions as they tend to simply relocate individuals experiencing homelessness.[12] This does not reduce homelessness in Canada, nor does it address its root causes.

iv) emergency shelters are necessary but not the only solution to homelessness in Canada. Additionally, emergency shelters may present barriers with respect to accessibility. When considering the shortcomings and difficulties surrounding emergency shelters, individuals should be afforded the right to choose where to live, pursuant to *Godbout v Longueuil.*[13]

v) if it is true that: (i) public property is meant for the public, including those who experience homelessness; (ii) injunctions relocate but do not effectively address homelessness; (iii) it is unjust to criminalize circumstances of poverty; and (iv) individuals should have the right to choose where they live, then individuals should have something more than mere acquiescence from the state to shelter themselves on public property. A spectrum of rights between acquiescence and a true legal right should be considered.

The following additional points are important to consider when advocating for the privacy rights of individuals experiencing homelessness in Canada:

i) the need for balance when addressing competing interests; and

ii) the fact that there is currently no "right to housing" in Canada with respect to the *Charter*.[14]

III. BACKGROUND

A. Homelessness in Canada

The *State of Homelessness in Canada 2016* reported that at least 235,000 Canadians experience homelessness in a given year, and approximately

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11 *Victoria (City) v Adams*, 2008 BCSC 1363, (2008), 299 DLR (4th) 193 [*Adams*].

12 See *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 4 at para 185 [*Bamberger*].

13 *Godbout v Longueuil*, [1997] 3 SCR 844, 152 DLR (4th) 577 [*Godbout*].

14 See *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja v Canada*].

35,000 individuals experience homelessness on any given night.[15] In some areas, the number of individuals experiencing homelessness is greater than the number of beds available in the surrounding community shelters, leaving many individuals no choice but to sleep in public spaces.[16] As a result, it is not uncommon for tent communities to emerge as a means for individuals experiencing homelessness to protect themselves from the elements, and provide a support system and sense of community.[17]

Even when shelter beds are available, there are reasons folks may choose to not make use of shelter facilities. Some individuals experiencing homelessness have expressed that their possessions (which are few to begin with) are less likely to go missing in a tent community than a homeless shelter.[18] Additionally, tent communities provide a space for individuals to be present during the day, as a place to live and carry out other activities, rather than simply a place to sleep at night.

B. The *Picard* Case

The SCC held in *Hunter* that warrantless searches are presumptively unreasonable, though this presumption may be rebutted.[19] The importance of a warrant when searching a home, in particular, was explained in *R v Evans*:

> The sanctity of the home has constituted a bulwark against the intrusion of the state for hundreds of years ... attempts by the police to enforce the law at people's dwellings frequently leads to confrontations that can have far more serious consequences than the evil sought to be dealt with ... This underlines the need of proceeding by warrant whenever possible as the law requires.[20]

R v Collins states, in order to rebut the presumption, the Crown must establish the following: (1) the search was authorized by law; (2) the law authorizing the search was reasonable; and (3) the search was carried out

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15 Stephen Gaetz et al, "How many people are homeless in Canada?" (accessed 10 April 2022) online: *Homeless Hub* <www.homelesshub.ca/about-homelessness/homelessness-101/how-many-people-are-homeless-canada> [perma.cc/N6QS-JWPZ].

16 See *Adams*, *supra* note 11at para 191

17 See *Vancouver (City) v Wallstam*, 2017 BCSC 937 at para 60.

18 See *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 at para 24 [*Vancouver Fraser Port Authority*].

19 *Hunter*, *supra* note 2at 161.

20 *R v Evans*, [1996] 1 SCR 8 at para 3, 131 DLR (4th) 654.

reasonably.[21] An example of a search authorized by law can be found in the *Controlled Drug and Substances Act*, which authorizes the warrantless searches of a place where "conditions for obtaining a warrant exist but by reason of exigent circumstances would be impractical."[22]

Mr. Picard initially lived in his tent with his partner in Oppenheimer Park in Vancouver, and relocated to Alexander Street in an area across the street from three emergency shelters.[23] Mr. Picard stated he did not wish to make use of the shelters in the city as they did not accommodate couples and he wanted to remain with his partner.[24] Police had placed Mr. Picard's tent under surveillance and had reason to believe that Mr. Picard was engaging in illegal drug trafficking.[25] Both Mr. Picard and his partner were arrested, illegal drugs were found in Mr. Picard's possession during his personal search, and the tent was subsequently searched without a warrant.[26] Mr. Picard asserted that any evidence from the tent should be excluded as it infringed his s. 8 *Charter* rights.[27]

The trial judge considered the principle set out in *R v Feeney*, SCC stating that searches of a home, even when incident to an arrest, are generally prohibited, subject to "exceptional circumstances."[28] The recent SCC decision *R v Stairs* has since called for the application of a stricter test, stating that ... the common law sets too low a bar for searches incident to arrest inside a home. Privacy demands more. When officers seek to search a home for safety purposes—as they did here—the appropriate standard is a reasonable suspicion of imminent threat to police or public safety."[29]

Had Mr. Picard's tent constituted a "home," the Crown would have applied the relevant test at the time, and would have needed to demonstrate exceptional circumstances to conduct the warrantless search.[30] Based on the evidence given, Mr. Picard's tent met the definition of a dwelling house: Mr. Picard had lived in the tent for two years, considered it his home, kept

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21 *R v Collins*, [1987] 1 SCR 265 at 278, 38 DLR (4th) 508 [*Collins*].

22 *Controlled Drugs and Substances Act*, SC 1996, c 19, s 11(7) last amended 2019-09-19.

23 *Picard*, *supra* note 6at para 8.

24 *Ibid* at para 9.

25 *Ibid* at para 3.

26 *Ibid* at para 3.

27 *Ibid* at paras 4-5.

28 *Ibid* at para 24.

29 *R v Stairs*, 2022 SCC 11 at para 107.

30 *Picard*, *supra* note 6 at para 24.

his belongings in the tent, and possessed control of the tent.[31] However, Mr. Picard had no legal right to erect his tent on the City sidewalk, as a city bylaw prohibited temporary structures on city property.[32]

C. Conclusion

The trial judge determined that the city "acquiesced" to Mr. Picard's tent, but this did not amount to a legal right for him to place his tent on the sidewalk.[33] This is troubling because it demonstrates an attitude where the presence of the individual experiencing homelessness is seen as a nuisance and their efforts to stay sheltered are seen as a disruption to society. Sheltering oneself is perfectly legal on private property, but what happens to the individual who cannot afford private property? Their existence is seen as non-compliant with the rules of society, even when their circumstances may be beyond their control. *Picard* illustrates how individuals experiencing homelessness have a diminished expectation of privacy regarding their dwelling spaces in comparison to Canadians who are able to afford private property.

D. Discussion

Many Canadians face homelessness, whether chronic or temporary. According to the Canadian Observatory on Homelessness, there are three main factors that contribute to homelessness:

(1) structural factors such as economic and societal issues. This can include lack of income, or lack of access to affordable housing and health supports;

(2) system failures such as inadequate discharge plans when individuals leave hospitals, correctional institutions, or mental health and addictions facilities; and

(3) personal circumstances and relationship problems, which can manifest in the form of traumatic events, mental health or addiction challenges, or domestic violence.[34]

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31 *Ibid* at para 37.

32 *Ibid* at para 40.

33 *Ibid.*

34 See Stephen Gaetz et al, "Causes of Homelessness" (accessed 10 April 2022), online: *Homeless Hub* <www.homelesshub.ca/about-homelessness/homelessness-101/causes-homelessness> [perma.cc/LBL8-WJTX].

Picard does not take into account why individuals experience homelessness and can be interpreted as assigning a degree of blame to those experiencing it. While this case is not binding in Manitoba and does not carry significant weight, it is an example of discrimination from an authority figure tasked with making profoundly influential decisions for unhoused individuals. The attitude of the trial judge towards homelessness deprives Canadians experiencing homelessness of certain privacy rights by using bylaws with which one may not have the resources or option to comply. In other words: the highest level of privacy given to one's home is something that is bought, and those who cannot afford it are out of luck.

III. ANALYSIS

A. Private/Public Property and the Notion of Being "Comprehensively Unfree"

Many Canadians enjoy the reasonable protections that accompany the basic rules of private property: they have the power to exclude others, including members of the state. However, individuals experiencing homelessness do not enjoy such protections, as they do not occupy private property where they can make such exclusions. As a result, those who experience homelessness are excluded from all private property and therefore must rely on common property, shelters, and other public spaces.[35] In "Homelessness and the Issue of Freedom," J. Waldron stated:

> The streets and subways, they say, are for commuting from home to office. They are not for sleeping: sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's yard is a little too confined. Parks are not for cooking or urinating: again, these are things one does at home ... This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land.[36]

When an individual who has no private property, and is subsequently excluded from public property, they are effectively excluded everywhere. By not allowing individuals experiencing homelessness to perform basic life tasks such as sleeping, urinating, cooking, etc. in public spaces, society does

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35 See Waldron, *supra* note 10at 300.

36 *Ibid* at 301.

not allow those individuals to carry out basic life tasks in any place. Waldron explains the idea behind this reasoning, stating:

> [I]f one is not free to be in a certain place, one is not free to do anything in that place. If I am not allowed to be in your garden (because you have forbidden me) then I am not allowed to eat my lunch, make a speech, or turn a somersault in your garden. Though I may be free to do these things somewhere else, I am not free to do them there. It follows, strikingly, that a person who is not free to be in any place is not free to do anything; such a person is comprehensively unfree.[37]

In "Equity and Homelessness," Andy Yu defined the term "homelessness" by examining the link between homelessness and "unfreedom." He stated:

> Homelessness consists in lacking legal rights to property ... Unlike homeowners, street homeless people, who lack legal rights to property, are radically unfree. Their use of property—which they do not own—opens them to liability for trespass, or else it is contingent on the owner's authorization. They are everywhere subject to potential, if not actual, interference. Similarly, sheltered homeless people, who also lack legal rights to property, are unfree in that they are only at the shelter at the shelter's pleasure. If they are subject to rules governing when they can be there and what they can do when they are there, where failure to comply warrants eviction, they are clearly unfree. But even if they happen to live in relative comfort and no rules happen to be in place, they are still unfree. They are subject to potential interference. Homeless people lack legal property rights to be where they are or anywhere else where they are not subject to another's will.[38]

This definition is helpful as it addresses an individual's status with respect to property rights rather than their status with respect to shelter. Courts often consider capacity of emergency shelters when determining whether to impose an injunction.[39] This is a problematic approach because "the Court would presumably have been satisfied if everyone happened to have shelter, even if they lacked property rights of their own."[40] Looking solely at emergency shelter capacity does not address fluctuation in numbers of homelessness, or reasons one might have to specifically avoid an emergency shelter.

With this in mind, it becomes imperative that those experiencing homelessness are given some space to carry out their basic, daily needs. If public space is the only space available to an individual, then society should

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37 *Ibid* at 302.

38 Andy Yu, "Equity and Homelessness" (2020) 33 Can JL & Juris 245 at 246-247 ["Yu"].

39 See e.g. *Nanaimo (City) v Courtoreille*, 2018 BCSC at para 34 [*Courtoreille*]; *Prince George (City) v Stewart*, 2021 BCSC 2089 at para 65 [*Stewart*].

40 Yu, *supra* note 38at 248.

not purport to exclude them from it, as it effectively excludes them from being anywhere.[41] Asserting that individuals are "illegally" occupying the only space available to them effectively criminalizes them for simply engaging their basic human needs.

B. Problematic Bylaws that Aid in Criminalizing Homelessness

When individuals experiencing homelessness occupy public space with their dwelling places, they are monitored and regulated in ways different to those residing on private property.[42] For example, an individual experiencing homelessness defecating in a public bush, or engaging in a consensual sexual act on public property, is subject to attract criminal liabilities.[43] In contrast, when an individual engages in these basic human activities in a private space, they are not subject legal scrutiny. In many instances, it is not the act itself that is objectionable, but rather the place in which it is done.[44] For many individuals experiencing homelessness, there is no "legal" place for them to carry out these activities, and they are, unfortunately, viewed as nuisances for their existence in a public space.

There is an inherent lack of privacy and autonomy assigned to those experiencing homelessness. When police officers can easily monitor a tent or tent encampment on public property, they are likely able to determine when illegal activities are taking place. As such, they should be able to provide reasons for obtaining a warrant when necessary. Using a bylaw that prohibits temporary structures to justify a warrantless search is grossly unfair because individuals experiencing homelessness can only exist on public property. Bylaws like the ones in *Picard* not only criminalize individuals for attempting to shelter themselves, they can justify privacy invasions which would be intolerable for many privileged Canadians residing on private property.

Warrants are essential for searches pertaining to dwelling places, and this principle should not be so easily dismissed based on poverty. To say that a lesser degree of privacy is attached to the dwelling places of those

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41 See Waldron, *supra* note 10at 300.

42 See Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 Queen's L J 297 at 322.

43 *Ibid* at 306-07.

44 *Ibid* at 306-07.

experiencing homelessness results in an inequality that affects those in the most vulnerable of circumstances.

C. The *Adams* Case

The legality and constitutional implications regarding temporary structures for shelter on public property have been a point of contention in Canadian law, with somewhat mixed results. In the *Adams* case, a bylaw prohibiting temporary structures was read down as unconstitutional. One key factor that persuaded the judge to permit the use of temporary structures between 9pm and 7am was the fact that the population of individuals in need of shelter outweighed the capacity limits offered by the surrounding shelters.[45] The *Adams* case redirected the narrative regarding the eviction of tent communities and temporary structures. Of note, *Adams* has been critiqued as having concern extended to "homeless bodies" in terms of warmth and security, but no further.[46] By placing a great deal of emphasis on shelter capacity, the Court demonstrated concern for physical protections, but did not take into account the trauma, personal dignity, or complex circumstances of the individuals involved where they may refrain from using shelter facilities.

There are a number of concerning issues with the *Adams* decision. First, *Adams* seeks to validate shelter from the elements for the purposes of sleeping at night, but does not address the need for protection from the elements during the day. There may be extreme winds, rains and snow during the day, and individuals should be allowed to protect themselves with temporary shelters from extreme conditions at any time. Second, there have been instances where individuals have mobility issues and experience a great amount of difficulty taking their tents and shelters down during the day.[47] The *Adams* decision does not take into account any of the scenarios. Finally, the validity of a constitutional challenge such as the one seen in *Adams* should not depend so heavily on the availability of shelter. On the *Adams* appeal, the Court stated: "The finding of unconstitutionality is expressly linked to the factual finding that the number of homeless people

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45 *Adams*, *supra* note 11at para 191

46 See Sarah Buhler, "Cardboard Boxes and Invisible Fences: Homelessness and Public Space in City of Victoria v Adams", Case Comment, (2009) 27 Windsor YB Access to Just 209.

47 *Vancouver Fraser Port Authority*, *supra* note 18 at para 20.

exceeds the number of shelter beds."[48] This has been frequently cited in cases such as *Johnson v Victoria (City)* when justifying sufficient space in nearby shelters as a key factor when granting an injunction in relation to impugned tent communities.[49]

Shelter space should not be a single determining factor, as there are many valid reasons that an individual may choose not to stay in an emergency shelter, discussed below in "Emergency Shelters and Godbout." While the *Adams* case marked a step in a more conscious direction, there are still significant gaps in how Canadian law intersects with the harsh realities of homelessness.

1. Responses to Tent Communities After Adams

The British Columbia Court of Appeal stated that it was "yet to be determined" whether or not a prohibition on overhead protection would be constitutional if there were sufficient shelter beds.[50] This was consistent with the trial judge's statement:

> If there were sufficient spaces in shelters for the City's homeless, and the homeless chose not to utilize them, the case would be different and more difficult. The court would then have to examine the reasons why homeless people chose not to use to use those shelters. If the shelters were truly unsafe, it might be that it would still be an infringement of s. 7 to require the homeless to attend at shelters or sleep outside without their own shelter. However, if the shelters were safe alternatives, it may not be a breach of s. 7 for the homeless to be required to make that choice."[51]

When sufficient shelter beds have been available, courts have used this reasoning in *Adams* to grant injunctions on tent communities.[52] *Bamberger* diverged from this reasoning when the British Columbia Supreme Court judge chronicled the history of tent communities in Vancouver's Downtown Eastside as follows:

(1) an injunction was granted in Oppenheimer Park in 2014 as there was evidence of sufficient shelter beds available;

(2) an injunction was granted in Oppenheimer Park in 2020 and the camp was dismantled again;

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48 *Victoria (City) v Adams*, 2009 BCCA 563 at para 74, 313 DLR (4th) 29 [*Adams* Appeal].

49 *Johnston v Victoria (City)*, 2011 BCCA 400 at para 12 [*Johnston*].

50 *Adams* Appeal, *supra* note 49 at para 74.

51 *Adams*, *supra* note 11at para 191.

52 See e.g. *Courtoreille*; *Stewart*, *supra* note 39.

(3) shortly after the Oppenheimer Park encampment was dismantled in 2020, another encampment formed on land belonging to Vancouver Port Authority where an injunction was then granted;

(4) soon after the Vancouver Port Authority camp injunction was granted, a camp was established at Strathcona Park. The camp was dismantled in March 2021 under a ministerial order; and

(5) immediately after the Strathcona Park was dismantled, the encampment in the case at bar was established at CRAB Park.[53]

When looking at the trend and historical evidence, the Court inferred that "ministerial orders and court injunctions effectively clear out a camp from one location but have not been effective in preventing the re-establishment of camps in another location."[54] In other words, uprooting one tent community, regardless of the availability of shelter beds, often led to a camp migration without addressing the issues of homelessness effectively. Displacement and relocation resulted in subsequent injunctions with no long-term solution.

D. Emergency Shelters and *Godbout*

The choice to determine where one wants to live should be protected. If individuals are choosing not to make use of shelter beds it is important to understand the possible reasons for this choice, and to re-evaluate how shelters can more effectively meet the needs of those who may seek to use them. Shelter space should not be the default solution when it comes to addressing homelessness, particularly when individuals have pressing fears and real concerns. While shelter beds are important, many individuals may choose not to make use of their services.

During the COVID-19 pandemic, individuals in Winnipeg utilized public bus shelters as temporary dwellings places as a means to protect themselves from the cold, where outreach workers visited and offered rides to emergency shelters.[55] Despite these visits and the availability of rides, some individuals preferred to sleep in the transit shelters in cold temperatures. Some couples stated that they wanted to remain together, and

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53 *Bamberger*, *supra* note 12at paras 178-184.

54 *Ibid* at para 185.

55 See Sam Samson, "Winnipeggers sleeping in bus shacks may decline emergency shelters for good reasons: advocate" *CBC News* (11 January 2022) online: <www.cbc.ca/news/canada/manitoba/winnipeg-transit-shelters-homelessness-1.6310355> [perma.cc/B6ZM-8A6G] ["Samson"].

were afraid of being split up at a shelter.[56] Others chose to remain in the transit shelters fearing they would be exposed to COVID-19, or expressed concerns about violence in shelters.[57] There were others still who were dealing with mental health issues and needed more support than what could be offered in the shelters.[58] Restrictions on pets and belongings, or a detailed intake processes are also reasons that individuals choose not to make use of emergency shelters.[59]

Choosing where to live is a deeply personal choice. When an individual chooses to find protection from the cold by living in a bus shelter as opposed to an emergency shelter space, that individual's concerns and reasons should be taken into consideration. In *Godbout*, the SCC stated:

> To put it plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, **I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.**[60]

The *Godbout* case differs in that it dealt with a choice of residence on private property, specifically what community an individual chose to make their residence. However, the Court in *Godbout* established that the right to choose where one lives is a personal right, protected under s 7 of the *Charter*.

Given the temperatures in Winnipeg in January 2022, a decision to live in a bus shelter or in a semi-protected public space is both deliberate and telling when it comes to some of the shortcomings in emergency shelters. Kris Clemens, Manager of Communications and Community Relations at End Homelessness Winnipeg, stated that "[a]lmost everyone impacted by homelessness wants a warm, private, comfortable and safe place to stay. Congregate emergency shelters cannot offer all of that."[61] If, and when, an

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56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 See Kayla Rosen, "The biggest barriers facing Winnipeg's homeless population" *CTV News Winnipeg* (16 September 2020) online: <winnipeg.ctvnews.ca/the-biggest-barriers-facing-winnipeg-s-homeless-population-1.5106924> [perma.cc/J4RD-YWAG] ["Rosen"].

60 *Godbout*, *supra* note 13at para 68.

61 Samson, *supra* note 55.

individual chooses to reside on public property instead of a shelter, it is imperative that there are opportunities for them to express their reasons.

IV. LEGAL RIGHT VS. ACQUIESCENCE

The SCC stated in *R v Le* that "[p]eople rightly expect to be left alone by the state in their private spaces,"[62] but this becomes complicated when one's private space is not on private property. The court in *Picard* focused heavily on Mr. Picard not having any "legal right to reside on the property."[63] The Court specifically noted that the City "acquiesced" to Mr. Picard's tent, but this did not give him the legal right to place his tent on City property.[64] Notably, the Court stated that "[i]n the review of the cases where the courts found that a person's residence should not be searched without a warrant save for exceptional circumstances, there was a legal right for the occupant to reside on the property upon which lies the residence."

I would argue that an individual should be afforded something more than acquiescence when a temporary dwelling structure is erected. As discussed above in the *Adams* case, bylaws prohibiting temporary structures for shelter have been, in some circumstances, read down and deemed unconstitutional as they infringed on s. 7 *Charter* rights. Courts have been clear that this does not create a positive right but, given the lack of private property rights and accessibility barriers concerning emergency shelters, a flexible approach with consideration of circumstance should be applied.[65]

I propose that there is not strictly either a "right to shelter" oneself or "mere acquiescence" from the state. These matters should be assessed on a scale, with "no right" at one end, "acquiescence" sitting just above "no right," and "legal rights" at the other end. If certain circumstances are present, and an individual can establish that certain criteria are met, I would assert that an individual may have something more than mere acquiescence, despite not having a full-fledged "legal right."

A. Proposed Conditions for "Something More"

If certain conditions are met, an individual should be granted something closer to a legal right than mere acquiescence from the state to

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62 *R v Le*, 2019 SCC 34 at para 51 [*R v Le*].

63 *Picard*, *supra* note 6at para 39.

64 *Ibid* at 40.

65 *Adams*, *supra* note 11at para 119.

erect their temporary dwelling structure. This would allot them the elevated privacy rights associated with a dwelling house. If an individual can demonstrate (a) that there is reasonable justification for them not to use available shelter space, and (b) that the temporary structure in question is their personal residence, then dwelling house protections should apply.

1. There is a Reasonable Justification for the Individual Not Using Shelter

Mr. Picard stated that he did not want to make use of the shelter, as it did not accommodate couples.[66] Others have stated that the shelters do not allow accommodations for their pets.[67] An individual may not want to abandon their pet as it provides companionship and protection. In some cases, fear of an abusive partner may prevent someone from seeking shelter in a place where they know that their partner may frequent. Such reasons should be taken into consideration, in accordance with *Adams*: "The court would then have to examine the reasons why homeless people chose not to use to use those shelters."

2. The Individual Can Demonstrate that the Structure is their Personal Residence

In *R v Howe*, the Court found that a tent may constitute a dwelling house for the purposes of s 2 of the *Criminal Code*. [68] While *Picard* affirms that a tent may be considered a dwelling house, it takes the narrows the scope of a "residence" by giving significant weight to the placement of the tent on public property. This narrow reading based on location does not appear to align with statements made by the SCC, nor does it align with the definition in the *Criminal Code* examined in *Picard*.

The SCC stated in *R v Le*:

> Living in a less affluent neighbourhood in no way detracts from the fact that a person's residence regardless of its appearance or location, is a private and protected place. This is no novel insight and has long been understood as fundamental to the relationship between citizen and state. Over 250 years ago, William Pitt (the Elder), speaking in the House of Commons, described how "[t]he poorest man may in his bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain

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66 *Picard*, *supra* note 6at para 9.

67 See *Johnston*, *supra* note 49at para 104.

68 *R v Howe (No 2)*, 1983 NSJ no 398, 57 NSR (2d) 325 (NSCA) at para 11-12, 16; *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*].

> may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement."[69]

This quote is particularly important for two reasons: (1) it bestows a private protection onto the residence; and (2) the protection is given "regardless of its appearance of location." This indicates that the location could be on public property. This could be interpreted to give individuals experiencing homelessness the highest level of privacy protection to their temporary structure, provided it is truly their residence. The phrase "regardless of its appearance or location" should have applied to Mr. Picard's tent and, as such, his tent should have constituted a "home" for the purposes of elevated privacy rights. The judge stated that while Mr. Picard did have a reasonable expectation of privacy with respect to the tent, it was still not a "home."[70] However, when one considers a tent their home, eats and sleeps in the tent, controls access to the tent, and owns the tent (as Mr. Picard did)[71] it should, "regardless of its appearance or location," be considered a home.

In addition, the definition of a "dwelling house" set out in the *Criminal Code* examined in *Picard* is as follows:

> ***dwelling-house*** means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes
>
> **(a)** a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
>
> **(b)** a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.[72]

This definition makes no reference to location, or private as opposed to public property. For these reasons, as long as an individual can establish that a temporary structure is their residence, then the attached rights of a dwelling house should flow.

B. Additional Factors/Points to Consider

1. Competing Interests

There are often two opposing interests in cases involving temporary structures and tent communities:

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69 *R v Le*, *supra* note 62 at para 59.

70 *Picard*, *supra* note 6at paras 41-42.

71 *Ibid* at para 37.

72 *Criminal Code*, *supra* note 68s 2.

(1) the "public interest," and

(2) the interests of those individuals seeking shelter in public spaces.

Residents in communities have raised valid concerns surrounding the formation of tent communities. In *Vancouver Fraser Port Authority*, an injunction was granted against a tent encampment when numerous complaints were submitted, involving:

(i) the continuous burning of open flame fires and smoke entering nearby apartments;

(ii) the steep increases in garbage and needles in the area around the tent encampment;

(iii) the health concerns as a result of urination and defecation in the area;

(iv) the loud music; and

(v) the residents nearby no longer feeling safe near the park.[73]

This encampment was dismantled, however shortly after the encampment was abandoned, another encampment was established at Strathcona Park.[74] Given that injunctions are not effective long-term solution, balancing these competing interests may require the consideration of alternative solutions.

The Advocacy Centre for Tenants Ontario stated that prevention of homelessness is key, proposing an eviction diversion system similar to the diversion programs found in the criminal court systems.[75] A report from Winnipeg's public service noted that there was a "critical need" for safe, affordable, culturally appropriate, low barrier housing in the city.[76] The report stated: "until this gap [in housing] is addressed, the current issues related to unsheltered homelessness and encampments will persist and potentially worsen."[77]

To meaningfully uphold the public interest, focus should be placed on effective housing, rather than injunction-based procedures. Rather than enacting bylaws that attach harmful stigmas to individuals, prioritizing programs that i) seek to ensure the prevention of homelessness; ii) promote

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73 *Vancouver Fraser Port Authority*, *supra* note 18at para 34

74 See *Bamberger*, *supra* note 12at para 182-83.

75 Advocacy Centre for Tenants Ontario, "Fact Sheet Homelessness in Canada and Ontario" (accessed 11 April 2022) online (pdf): *Advocacy Centre for Tenants Ontario* <www.acto.ca/production/wp-content/uploads/2017/07/Factsheet-4-Homelessness-in-Canada-and-Ontario2.pdf> [perma.cc/KLH7-K7ZE] ["Advocacy Centre"].

76 Rosen, *supra* note 59.

77 *Ibid.*

accessible, affordable housing options; and iii) offer community support to address trauma, addiction, and mental health concerns, are key. Until governments meaningfully address the reasons behind homelessness, the privacy rights attached to a dwelling house should apply to temporary dwelling structure on public property. This would ensure that a warrantless search of a temporary dwelling structure would need to be justified by exceptional circumstances.

2. Right to Housing

As it stands, there is no positive obligation for governments to provide housing. This was addressed when the Ontario Court of Appeal examined issues of government inaction, homelessness, and access to housing in relation to s. 7 *Charter* rights in *Tanudjaja v Canada*. In this case, the applicant did not challenge any specific legislation or policy, but "submitted that the social conditions created by the overall approach of the federal and provincial governments violate[d] their rights to adequate housing."[78] The submissions stated that Canada had eroded access to affordable housing by cancelling funding for new housing construction, withdrawing from administration of affordable housing, phasing out funding programs for affordable housing projects, and failing to institute rent supplement programs as other countries have done.[79] They submitted that the province of Ontario diminished affordable housing access for similar budget cuts and failure to implement accessible programs and schemes.[80]

The motion judge held that the government did not have a positive obligation to sustain life, liberty or security of the person under s 7 of the *Charter*, and therefore there was no deprivation.[81] The majority in the court of appeal in *Tanudjaja* determined that it was not the Court's place to rule on the matter, as the issues could not be resolved by application of law.[82] As a result, the issues were deemed "unsuited for judicial review."[83] The appeal was dismissed.

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78 *Tanudjaja v Canada*, *supra* note 14at para 10.
79 *Ibid* at para 11.
80 *Ibid* at para 12.
81 *Ibid* at para 55.
82 *Ibid* at para 33.
83 *Ibid* at para 33.

Notably, the trial judge left the door open to the possibility of a future positive right in special circumstances, as noted by the dissent.[84] The dissent made reference to the discussion in *Gosselin c Québec*, stating:

> One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v Attorney-General for Canada*, [1930] A.C. 124 (P.C.), a p. 136, the *Canadian Charter* must be viewed as a "living tree capable of growth and expansion within its natural limits" [... now quoting *Blencoe*] The full impact of s 7 will remain difficult to foresee and assess for a long while yet. Our court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.[85]

From a policy standpoint, investing in assistance and low-income housing can have cost-benefits over the course of time. According to the Advocacy Centre for Tenants Ontario, the average monthly cost for a shelter bed is almost ten times higher than the average monthly cost of social housing.[86] Additionally, individuals experiencing homelessness have higher rates of illness, resulting in costly hospital bills.[87] Facilitating affordable housing is an effective way to address issues of homelessness at a preventative stage, rather than at the reactionary stage.

V. Conclusion

The factors discussed above, which are notably not in the control of the individual, combine to create a matrix where homelessness is consequently criminalized, and makeshift shelters are seen as "illegal" uses of public space. Revision is needed. A society cannot disregard homelessness as a priority, and then purport to evict and criminalize individuals for carrying out basic human activities.

When dwelling place privacy rights are only enjoyed by those who can afford it, they are no longer rights, but rather privileges.

Movements such as "Built for Zero Canada" powered by the "Canadian Alliance to End Homelessness" have proven that a "housing first" approach is both attainable and effective. For example, Medicine Hat, Alberta

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84 *Ibid* at para 56.

85 *Tanudjaja v Canada*, *supra* note 14at para 55 quoting *Gosselin c Québec (Procureur general)*, 2002 SCC 84 at para 82; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 188.

86 Advocacy Centre, *supra* note 75.

87 *Ibid*.

announced in June 2021 that they had become the first city in Canada to functionally end chronic homelessness.[88] This accomplishment meant that through a data-driven system, individuals who would otherwise be affected by homelessness were routinely housed, and that the community maintained three consecutive months where there were three or fewer individuals experiencing homelessness at any given time.[89]

Cities like Medicine Hat demonstrate that when governments and communities prioritize housing and support, homelessness is adequately addressed in an effective manner. Hopefully, such milestones are the first of many. Until these larger issues are addressed, courts should be mindful to equally grant rights to all individuals in Canada, regardless of their circumstances.

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88 Kaitlyn Ranney, "Medicine Hat Becomes first city in Canada to end Chronic Homelessness" (12 July 2021) online: *Community Solutions* <community.solutions/case-studies/medicine-hat-becomes-first-city-in-canada-to-end-chronic-homelessness/> [perma.cc/W7JG-UXLE].

89 *Ibid*.

Who Watches the Watchers: Oversight of State Surveillance

MARK PACKULAK*

ABSTRACT

Surveillance capability is rapidly advancing. What is being captured is more than just stock footage. Powerful artificial intelligence software that uses facial recognition technology can track details about people and their behaviour patterns. This technology is being used to crack down on people in authoritarian states and to extensively monitor citizens in many democratic states. So far, the regulation over how this technology is to be used has largely been absent, leading to tremendous violations of privacy rights in some cases.

The use of this type of technology by the state, specifically the police, could constitute an unconstitutional breach of the reasonable expectation of privacy. Canadian courts have so far held that individuals do not enjoy a right to privacy in any public places. What rights should an individual have over their face and the collection of their information by the state?

This paper first examines the collection of biometric identification data as compared to previous biometric identification collection and use. Secondly, this paper examines some of the capabilities and pitfalls of state surveillance. Finally, this paper suggests that as dangerous as state surveillance can be, it should be a staple of effective policing, if there is sufficient oversight.

The police should have access to the most modern and efficient technology available to serve the public effectively. However, the dangers of

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a complete dissolution of privacy necessitate oversight for the police. There must be an independent body to collect and utilize this technology that the police may access through a judicially operated warrant-like system. Effective policing and privacy can coexist and serve the public good.

Keywords: Surveillance; Facial Recognition; Artificial Intelligence; Reasonable Expectation of Privacy; Video; Warrant; Oversight.

I. INTRODUCTION

Observation is a central part of the Canadian justice system. Many cases have turned on the strength of witness' observation evidence. Public actions carry the well-understood possibility of observation. The State is free to observe everything that happens in the public sphere. Historically this has been the function of police officers on patrol, but technology is expanding the observation powers of the state in a largely unregulated fashion. The protections found in the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[1] cannot be solely managed by the courts through an ends and means analysis.

Police departments have used and continue to use technology without sufficient public oversight. Surveillance cameras have been used for many years to observe and protect from criminal activity. Recent advancements in camera and Artificial Intelligence ("AI") technology are being used by police without the crucial step of public debate. Biometric identification and AI algorithms which can predict criminal behavior are blurring the lines between effective policing and a police state.

Thus far the Supreme Court of Canada ("SCC") has held in *R. v. Tessling* that "a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public."[2] This suggests that the act of leaving any place where someone enjoys a reasonable expectation of privacy is implied consent to be observed. The *Charter* protects from unreasonable search or seizure by the state. The courts face a tough challenge to protect *Charter* rights in an era when technology is rapidly evolving. The *Charter* is a living tree and is intended to grow with society and technology. Parliament and the courts must ensure that the principles of the *Charter* grow with

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1 *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, s 91(24).

2 *R v Tessling*, 2004 SCC 67 at para 40 [Tessling].

technology. The SCC echoed this principle in quoting professor Paul Freund when he admonished American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."[3]

Today politicians and courts are facing tremendous pressure to reform policing. Restricting technological improvements discussed in this paper is not the same thing as reforming policing. Making policing less effective and more onerous does not address systemic issues in our system. The police must utilize surveillance technology that can assist in swift and accurate law enforcement, but because this technology is so dangerous, it must be regulated through an independent agency and accessed through a warrant procedure. This paper will first examine the existing law of reasonable expectation of privacy of personal information, then examine the evolving surveillance technology, and finally suggest a scheme that should be adopted regarding its use.

II. Biometric Incrimination

This paper primarily examines the need for oversight of state use of video surveillance, however given that video surveillance captures personal information it is useful to examine the adoption of other types of personal information collection authorized by law. In 1944, Chief Justice Robson of the Manitoba King's Bench stated that "the taking of these prints was like the taking of statements without warning, and the result could not be used against the defendant."[4] In the above case, fingerprints required for a job application at a World War II defence industries plant were matched to an outstanding warrant from Detroit, Michigan. Long before the crafting of the *Charter*, Chief Justice Robson equated the seriousness of the collection of personal information to that of a right to silence. Unless authorized by statute, the intention of the collection of biometric information must be disclosed and used only for that purpose. A brief exploration of the history of personal biometric information will inform further arguments on the need to safeguard personal information from state surveillance.

A. Fingerprints

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3 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641 [Southam].

4 *Danilhik (Re)*, [1944] CanLII 440 (MB QB), at 267 82 CCC 264 [Danilhik].

Fingerprints have been a staple of law enforcement for over one hundred years. Many forms of biometric identification had been experimented with before fingerprints became the common standard for personal identification. Like all technology and procedures used for law enforcement, fingerprinting had to be accepted and directed for use. In 1934, Chief Justice Thompson of the Supreme Court of British Columbia had difficulty accepting fingerprint evidence as expert evidence and instead included the evidence as opinion evidence. He referenced the 1927 version of the *Identification of Criminals Act*[5] which required any person in lawful custody to be subjected to "the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor in Council having the like object in view."[6]

Systems such as the Bertillon Signaletic System relied upon a series of 11 measurements of fixed points on the body. Cards were kept with the data on them. The system is said to have produced identical identification of two African American men in the Leavenworth Kansas Penitentiary, but their fingerprints were distinct. Although this story, as Simon Cole writes, is almost certainly anecdotal, it does represent the process that many U.S. states went through to attain more accurate forms of identification.[7]

Although fingerprinting was not new in 1934, it had not become a sufficiently accepted science for Chief Justice Thompson to admit as anything but opinion evidence.[8] Of course the current version of the *Identification of Criminals Act* ("*ID Act*") allows for the fingerprinting and photographing of anyone charged or convicted with an indictable or hybrid offence.[9] The admission of DNA evidence faced a similar battle for admission, but with the aid of more precedent.

B. DNA

John J. Walsh, Q.C. wrote about prosecuting *R. v. Allan Joseph Legere* in 1991 and the decision to adduce DNA evidence. The trial featured an extensive *voir dire* hearing regarding the admissibility of DNA evidence that

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5 *Identification of Criminals Act*, RSC 1927, ch 38.

6 *R v De'Georgio*, [1934] CanLII 417 (BC SC) at 378-379, [1934] 3 WWR 374 [De'Georgio].

7 Simon Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification*, (Cambridge: Harvard University Press, 2002) at 140-144.

8 *De'Georgio*, *supra* note 6at 380.

9 *Identification of Criminals Act*, RSC 1985, c I-1, s 2(1).

lasted for 24 days over the course of three months.[10] The Crown called three well-credentialled experts and the defence called a well-credentialled DNA skeptic. Although both sides conceded that every individual has unique DNA, there was considerable argument over the determination of match probability between samples and the accused. At one point the defence expert drew sharp public criticism over the assertion that a high level of inbreeding in New Brunswick was likely to give false match probability results.[11]

Although not the first case in Canada to admit DNA evidence, *R. v. Legere* was a seminal case for the admission of DNA in Canada. This was in part due to the thorough decision of the trial judge which was upheld by the New Brunswick Court of Appeal and denied being heard by the SCC.[12] DNA, like fingerprinting before it, became the new evidentiary standard.

C. Compelling Biometrics

The need for reliable methods of identification is important for many layers of society, but especially so in criminal law. DNA evidence has been used to exonerate as well as to incriminate. According to the Innocence Project, 375 people in America have been exonerated by DNA, 21 of which served time on death row.[13] DNA is a powerful investigative tool, especially with national and international DNA databanks. Compelling and retaining DNA in Canada is regulated by statute, without which, state collection would cast too wide a net. In *Hunter v. Southam*, the SCC examined the *Charter* compliance of legislated search powers. Authorized searches must be conducted based on investigation rather than suspicion: "the state's interest in detecting and preventing crime begins to prevail over the

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10 "Allan Legere Digital Archive: Voir Dire – Transcript" (last visited 13 April 2022), online: University of New Brunswick Allan Legere Digital Archive <www.unb.ca/fredericton/law/library/legal-materials/digital-collections/allan-legere/voirdire-transcript.html> [perma.cc/AQ6N-6MGQ].

11 John Walsh, "R v. Allan Joseph Legere and DNA Evidence: Reminiscences" (last visited 13 April 2022) at 9, online (pdf): University of New Brunswick: Allan Legere Digital Archive <www.unb.ca/fredericton/law/library/_resources/pdf/legal-materials/allan-legere/comms_bibliography/legere_trial_digital_collection__r__v__allan_joseph_legere_.pdf> [perma.cc/9L3V-CJRG].

12 *R v Legere*, [1994] CanLII 3851 (NB CA), 156 NBR (2d) 321 [Legere].

13 "Exonerate the Innocent" (last visited 27 June 2022), online: *Innocence Project* <innocenceproject.org/exonerate/#:~:text=To%20date%2C%20375%20people%20in,prison%20before%20exoneration%20and%20release.> [perma.cc/9S5S-5642].

individual's interest in being left alone at the point where credibly-based probability replaces suspicion."[14]

In America, police used commercial DNA services as a databank to solve cold cases. Their aims, while laudable, clearly infringed on the rights of those who submitted their DNA for another purpose. Companies bowing to public pressure began to refuse police access to their databanks.[15] This example demonstrates the need for regulated protection against unintended self incrimination.

The warrant process is the best regulation available for the collection of biometric information. For a police officer to obtain a warrant to compel identification evidence they must comply with the scheme in section 487.05 and 487.092 of the *Criminal Code* of Canada.[16] An officer must demonstrate that there are reasonable grounds to believe that there is bodily substance evidence and that the person who is the subject of the warrant was a party to the offence. Identification evidence has a tremendous impact on the accused. The process of obtaining a warrant is an important check on the power of the state to compel.

Section 2 of the *ID Act* allows for the collection of fingerprints and photographs of anyone charged with an indictable offence. In *R. v. Beare; R. v. Higgins*, both accused were charged with criminal offences and served with a summons to be fingerprinted prior to their trial. The suspects refused to attend and challenged the constitutionality of section 2 of the *ID Act*. Justice La Forest in writing for the majority found that the constitutional rights of the accused were not infringed since the process for obtaining a summons requires the police to demonstrate reasonable and probable grounds.

D. Retaining Biometrics

Police in Canada retain all fingerprints at the Canadian Police Information Centre in Ottawa. The information stored here is shared with law enforcement outside of Canada as well. The collection of fingerprints and photographs "provide a lasting record and may tie an individual to

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14 *Southam*, *supra* note 3at 167.

15 See Jon Schuppe "Police were cracking cold cases with a DNA website. Then the fine print changed" (23 October 2019), online: NBC News <www.nbcnews.com/news/us-news/police-were-cracking-cold-cases-dna-website-then-fine-print-n1070901> [perma.cc/VW75-TBKW].

16 *Criminal Code*, RSC 1985, c C-46, s 487.

other crimes."[17] The collection of fingerprints and photos taken upon arrest or warrant is authorized by statute, but the storage for future use treads close to the right against self-incrimination. The Court in *R. v. Dore* examined the use of fingerprints that were voluntarily surrendered for exclusion from charges that were subsequently dropped when the fingerprints did not match a sample from a crime scene.[18] The fingerprints were retained and later compared against another crime scene which did match the appellant.

The Court found that once the fingerprints either did not match, or where an accused is acquitted or receives a stay, the accused may request to have the records of their prints destroyed. If an accused requests this, then they have asserted their right to privacy over their own identification information and the state must comply. However, if the accused is convicted then the state may retain the fingerprints or photographs in accordance with the *ID Act*. The *ID Act* stops short of protecting individuals from future incrimination by failing to require the state to destroy records after their unsuccessful testing, though the ability to have biometric information destroyed recognizes that individuals should enjoy a basic right to privacy. The Court recognized this principle when they upheld the overturning of a conviction in *R. v. Borden*. An accused provided DNA for the purpose of exoneration in one investigation, but the police used the sample to charge them in another investigation.[19]

Unfortunately in society, the expansion of surveillance techniques has often been exposed rather than debated. Leaks by Julian Assange, Chelsea Manning, Edward Snowden, and many others who risk prosecution to expose undebated use of technology, demonstrate that too often a state that operates like a child who would rather ask for forgiveness than permission when it comes to observing their citizens.

III. Reasonable Expectation of Privacy

The SCC has repeatedly held that there is a low expectation of privacy in the public sphere.[20] A police officer is well within their duty to observe

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17 Robert Solomon et al, "The Case for Comprehensive Random Breath Test Programs in Canada: Reviewing the Evidence and Challenges" (2011) 49:1 Alta L Rev 37 at 64

18 *R v Dore*, 2002 ONCA 2845, 54 WCB (2d) 691 [Dore].

19 *R v Borden*, [1994] 3 SCR 145, 119 DLR (4th) 74 [Borden].

20 See *R v Boersma*, [1994] 2 SCR 488, 31 CR (4th) 386; *R v Stillman*, [1997] 1 SCR 607 at 611, 144 DLR (4th) 193; *R v Evans*, [1996] 1 SCR 8 at 33-34, 131 DLR (4th) 654; *R v*

and even surveil anyone in a public space. If Canada applies this principle to video surveillance, then cheaper and more effective surveillance technology could observe a majority of Canadian society. The SCC contemplated the careful balancing act needed between individual privacy rights and state interests in *Hunter v Southam*:

> [W]hether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[21]

AI facial recognition, predictive algorithms, and uninformed capture of personal data constitute a huge risk to the privacy expectations of the public.

A. Public Space

As early as 1862 statutes prohibiting wiretapping were enacted in California. A man by the name of D. C. Williams was convicted under statute of listening to corporate communication to sell to stockbrokers.[22] Even with the invention of video surveillance, the practical effect was monitoring or review by a human agent.

A human agent watching a live or recorded video feed is not very different to a security guard on patrol. Cameras in plain sight certainly provide some warning to the public of observation. This level of surveillance is tolerable, often for the protection of property, but what would most people think of a digital surveillance network which captured their every move in public? Consider the indignation of Justice La Forest in his dissent of *R. v. Wise* (1992) which only involved the use of a beeper to allow police to track the movement of a suspect's car:

> I must confess to finding it absolutely outrageous that in a free society the police or other agents of the state should have it within their power, at their sole discretion and on the basis of mere suspicion, to attach a beeper on a person's car

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Wong, [1990] 3 SCR 36, 60 CCC (3d) 460; *R v Mills*, 2019 SCC 22; *R v Tessling*, 2004 SCC 67; *R v Wise*, [1992] 1 SCR 527, 70 CCC (3d) 193 [Wise].

21 *Southam*, *supra* note 3at 159-160.

22 See Precise Digital, "A Brief History of Surveillance in America" (28 March 2018), online: *Precise Digital* <www.precisedigital.com/a-brief-history-of-surveillance-in-america/> [perma.cc/46GB-78NP].

> that permits them to follow his or her movements night and day for extended periods.[23]

Surveillance must be considered not only in the context of the current capability, but also in the reasonable assumption that capability will only improve and cost will decrease.

B. Police Surveillance

The public sphere carries a generally low expectation of privacy. A police officer on patrol is generally accepted to be able to observe any actions in public. A police officer can only be in one place at one time to observe the public. Actively monitored video surveillance can increase the effectiveness of every individual officer. Think about a camera mounted on every corner in every direction that would monitor a sizable grid. If a crime were observed, the officer patrolling the grid could be directed to the scene or suspect by a camera observer.

This system would still have significant gaps since the controller could only watch one screen at a time and would only be able to observe actions. They may recognize a dangerous individual but would only be able to do so if they could recognize them through the camera at a distance. Facial recognition programs can rapidly examine all the faces on the screen and match them to databases. Now instead of a room with dozens of monitors statically focused on a street, there are hundreds of feeds running through a program which stores each face, location, time, direction of travel, and activity of each person walking that street.

In the city of Chongqing in China, 2.58 million cameras monitor 15.35 million people, and facial recognition software alerts police to the presence of people in a crowd who match a person of interest.[24] It is easier to imagine such a system in an authoritarian country where human rights violations are common and expectation of privacy is not a right, but the city of London ranks 3rd in Comparitech's 2021 list of most surveilled cities.[25]

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23 *Wise*, *supra* note 20.

24 See Matthew Keegan, "Big Brother is watching: Chinese city with 2.6m cameras is world's most heavily surveilled" (2 December 2019), online: *The Guardian* <www.theguardian.com> [perma.cc/3E5N-Z7V2].

25 See Paul Bischoff, "Surveillance camera statistics: which cities have the most CCTV cameras?" (17 May 2021), online: *comparitech* <www.comparitech.com> [perma.cc/298N-HJNN].

Technological advances are required for this level of surveillance, but so is the consent of the public. The dramatic increase in public paranoia over crime that occupied many people in the 1990s evolved into fear of terrorism post 9/11. The moment that the consciousness of the world realized that the Twin Towers could be destroyed by a small group of fanatics cemented security as a concern in every free nation.

C. Facial Recognition

Facial recognition programs can be tremendously beneficial. Think of picture accumulation in the modern era. Many people have photo albums of their childhood with occasional pictures printed from special family events. Physical film limited the taking of photos due to cost and time to print. Digital photos resulted in generations now that accumulate thousands of photos each year. Why settle for one perfect shot when you can take twenty and touch up the best one?

Programs were developed to sort photos and eliminated duplicates from overfilled drives. This same technology has been taught by developers to better recognize the subtle differences in faces. Technology to help can be easily turned to more nefarious purposes. Think about cloud storage such as Apple's iPhoto, Facebook, or Google Drive which save millions of images each month. It is convenient for users to be able to sort photos by different family members and friends, but who is being captured in the backgrounds of these photos? It is ludicrous to suggest that individuals obtain the permission of everyone in a public square before they take a picture, and certainly case law suggests that a public space carries a low expectation of privacy.

Facebook settled a lawsuit on January 30, 2020 for $550 million because it used facial recognition technology to create digital profiles of everyone in uploaded photos. Other tech companies are facing similar legal challenges to their nearly unregulated use of facial recognition software to compromise the privacy of users and non-users alike.[26]

The ability of mass state surveillance powered by AI technology to capture information from wide sections of public life constitutes an infringement of privacy. Actions performed in public are often intended for a specific recipient, rather than for observation and profiling by an advanced public surveillance system. Consider what the SCC said in *R. v. Dyment*

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[26] See Samuel D. Hodge Jr., "Big Brother Is Watching: Law Enforcement's Use of Digital Technology in the Twenty-First Century" (2020) 89:1 U Cin L Rev 30 at 79.

regarding the voluntary surrender of a blood sample by a doctor to a police officer:

> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.[27]

There is a weakness in the privacy protection by the courts when it comes to video surveillance. Most of the cases that come before the courts deal with specific infringements of privacy and are not always applicable to the technology used to infringe the privacy. The other issue is that trial and appeal processes take an extraordinary amount of time to resolve. There is no prohibition on the market from using the impugned technology while a case is heard and appealed. Even if surveillance technology is found to infringe privacy rights, successive generations of the same technology may render it substantively different than the impugned technology. It falls to the government to enact legislation that protects the rights of individuals to their privacy. This too though, often falls dreadfully behind the curve of technological improvement.

Consider the case of *Alberta v. Hutterian Brethren*. For years the colony had obtained a photo exemption from their drivers license because of a religious belief restricting the creation of any members' image. This case took more than three years to work its way to the SCC, and the Court found that the infringement of their religious rights was justified by the purpose of the legislation under section 1 of the *Charter*. This case was decided on the basis of religious belief, but privacy was a central untouched theme of the arguments. Justice Abella, writing for the dissent, emphasized the intensely private nature of the colony. She outlined that their lifestyle and interest in privacy extents to their every interaction with the state, and that the infringement of their religion was not just a violation of their religious beliefs, but of their privacy as well.[28]

Facial recognition technology during the time that this case was heard was only emerging into practical use. The government of Alberta wanted to begin using facial recognition with their drivers licensing database to prevent fraud. This suggests that the process had already started or was being

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27 *R v Dyment*, [1988] 2 SCR 417 at 429-30, 55 DLR (4th) 503 [Dyment].

28 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 27 at para 166 [Hutterian].

implemented without public consent or discussion. Privacy was a secondary concern to religious freedom in this case, but what would the reaction be of colony members if it was understood that all across the province of Alberta, the photos that they were now legally required to submit would be accessible to scanners and cameras everywhere?

D. Programming Facial Recognition into AI

To better understand the impact of unconsented capture of a digital likeness of someone's face it is useful to examine the process of capturing and individual likeness. The B.C. Office of the Privacy Commissioner investigated the use of facial recognition by the Insurance Corporation of B.C. Their report is useful to understand the general process of capturing a likeness for facial recognition. According to the report, this happens in three stages:

1. Enrollment. A digital image such as a driver's licence photo is analyzed. Software measures the image line by line and makes grades of skin colour and texture. The image is converted into binary code based on these and other factors.

2. Storage. The unique binary code for each image is stored in a database for future comparison.

3. Matching. This process involves the greatest influence of human bias. Unique binary codes for each image are compared to new images received by the system each day. Images are evaluated for similarities with other existing binary image codes. When similar photos are found, a report is generated for the system which must be reviewed by a panel to examine whether the likeness is in fact the same person. In this way the existing bias of the examiners is training the system.[29]

The photos to digitize for this and other agencies both public and private can come from a variety of sources, but an important distinction regarding privacy is whether the photo was captured with or without the subject's knowledge. In 2021, the Office of the Privacy Commissioner of Canada released a report of an investigation into Clearview AI, Inc.[30]

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[29] Elizabeth Denham, *Investigation into the Use of Facial Recognition Technology by the Insurance Corporation of British Columbia*, Office of the Information and Privacy Commissioner for British Columbia, Report F12-01 (BC: Information & Privacy Commissioner, 2012).

[30] Canada, Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information

Clearview is an American company that provides a paid identification and profiling service to law enforcement agencies. Clearview's AI technology data mines millions of images from social media sites and other pictures publicly uploaded by users to build profiles. Law enforcement agencies can request identification with only a photo of a suspect.

The Office of the Privacy Commissioner of Canada found that Clearview violated Canada's privacy laws, but the resolution was only a voluntary suspension of services offered to Canadian law enforcement agencies for a period of two years to seek guidance. This does not prevent Clearview from operation or continued data mining to identify Canadians or build profiles on them. Such an AI system plugged into real time surveillance could direct real time police operations. Police in cities such as Los Angeles and Chicago have employed AI based predictive policing. This technology uses statistics, surveillance, and algorithms to feed AI which directs policing to areas of concern.[31]

The known weakness of AI is the same as those who program it. Programs are taught what to look for and what indicators are to be used by programmers or users. For the programmers, it is nearly impossible to avoid programming bias into the system. Predictive policing for example often utilizes statistics. Over policing and disproportionate policing of racialized minorities feed data into predictive AI which responds with greater policing. This creates a cycle of greater policing and overrepresentation. Aaron Shapiro argues that the faults inherent to AI predictive policing lie in the society using it rather than the method of policing.[32]

E. Capture without Consent

Consenting to have a digital scan taken of a face carries the consent to have that scan analyzed by the agency doing the collection. A more concerning capture is one which does not come with consent. In the United States, the American Civil Liberties Union is currently engaged in a freedom of information lawsuit against multiple federal agencies for data

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Privacy Commissioner of Alberta, (Ottawa: Office of the Privacy Commissioner of Canada, 2021)

31 See Tim Lau, "Predictive Policing Explained" (1 April 2020), online: *Brennan Center for Justice* <www.brennancenter.org/our-work/research-reports/predictive-policing-explained> [perma.cc/UB5M-TWH6].

32 Aaron Shapiro, "Predictive Policing for Reform? Indeterminacy and Intervention in Big Data Policing" (2019) 17:3/4 Surveillance & Society 456 at 469.

on their crowd surveillance programs.[33] During many of the protests against officer shootings in recent years, many states have surveilled crowds. In some cases drones are used from high altitudes to disguise their presence. In other cases police forces operate hundreds of drones to record vast amounts of footage. In every case these drones do not just capture random individual's actions, but are able to take high resolution images of individuals for identification.[34]

Beyond crowd control, many cities around the world employ public surveillance cameras to record and identify individuals. The Canadian jurisprudence has yet to distinguish mass public surveillance by the state with a public expectation of privacy. Current cost and technological restrictions bearing on continuous surveillance of all public spaces cannot always be assumed to limit surveillance. It is a mistake of jurists to conclude that because current technology may still allow for some privacy from state observation in public spaces, that it is only minimally impairing to *Charter* rights of unreasonable search.

R. v. Voong is such a case where a specific instance of facial recognition technology fails to consider the larger consequences of allowing such a search. The applicant in this case was found to be holding multiple driver's licenses, some with unpaid fines and court summons. The search was conducted using facial recognition software scanning the database of driver's licenses. The Court agreed with the Crown: that there is no expectation of privacy in a photograph or information submitted to obtain a drivers license.[35]

It is not hard to argue that photos submitted to the Ministry of Transportation for driver's licenses could be subjected to scrutiny to prevent fraud.[36] Justice Libman concluded that since the information contained in a search of a driver's license database is similar to information commonly required for many other services, there can be no expectation of privacy even over the photos. The glaring difference is that those other agencies do

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33 *American Civil Liberties Union et al v United States Customs and Border Protection et al*, Dist Ct NY 1:21-cv-10430-ER.

34 See ACLU, "ACLU v CBP-FOIA Case for Records Relating to Government's Aerial Surveillance of Protestors" (last modified 7 December 2021), online: *ACLU* <www.aclu.org> [perma.cc/762A-686S].

35 *R v Voong*, 2018 ONCJ 352 [Voong].

36 See *The Manitoba Drivers and Vehicles Act*, CCSM C-D104, s149.1(4) was amended in 2008 to allow the use of facial recognition technology. It also allows the possibility of future technology to be used for the purpose of identification.

not have the right to deny liberty or impose other harsh penalties. The state requires everyone that wishes to drive on public roads to be licensed. The Court already ruled that photos can be compelled on driver's licenses and as such the submission of a photo is compulsory. While it is true that a driver's license applicant should reasonably conclude that their information and photo is accessible to the police for the determination of driving legally and tracking driving offences, it is not reasonable to conclude that supplied information and photo would be used for any other purpose by any other function of government. Justice Libman did not conclude that such other searches would be legal, but in stating that the applicant had no expectation of privacy over their information, combined with no specific caution or exclusion over other uses, it is possible to conclude that driver's license information is the property of the state for any purpose they see fit.[37]

F. Reasonable Expectation of Privacy in Public Spaces

The SCC dealt with this concept of privacy in public spaces in a more recent case *R. v. Jarvis*.[38] In this case, a teacher in a public high school was using pen camera technology to record students. All the recordings were in public spaces which the accused was allowed to observe students. The trial judge and the Court of Appeal followed precedent and found that students could not have a reasonable expectation of privacy in public spaces. The Courts had no difficulty finding that the offender made the recordings for a sexual purpose since he filmed girls' chests, but they could not find a reasonable expectation of privacy.

The SCC found that "simply because a person is in circumstances where she does not expect complete privacy does not mean that she waives all reasonable expectations of privacy."[39] The Court examined the difference in observing and recording, noting that recording makes available so much more than a human eye in passing can observe. A crucial point in this judgment is the distinction the Court draws between school security cameras and the intimate recording by Mr. Jarvis. The Court indicates that the presence of security cameras connotes a general understanding of being observed and that students can still hold an expectation of how they are

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37 *Voong*, *supra* note 35 at paras 46-47.

38 *R v Jarvis*, 2019 SCC 10 at para 61 [Jarvis].

39 *Ibid* at para 37.

being observed whereas Mr. Jarvis did not obtain this same understood consent.

The Court went further and stated that "individuals going about their day-to-day activities — whether attending school, going to work, taking public transit, or engaging in leisure pursuits — also reasonably expect not to be the subject of targeted recording focused on their intimate body parts (whether clothed or unclothed) without their consent."[40] Modern surveillance abilities capture much more than that. Imagine where you travel, how often, with whom, what you purchase, what you view, who your eyes linger on, what you eat, and much more all being recorded and cataloged. That information is matched to public records to track and analyze the details of your life to predict criminal behaviour which could result in an officer knocking on your door for a friendly conversation about disturbing trends in your habits. It is a relief that the SCC found that Mr. Jarvis violated students' reasonable expectation of privacy.

G. Reasonable Expectation Test

When evaluating whether there exists a reasonable expectation of privacy the SCC uses a totality of the circumstances test from *R. v. Edwards*:

1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed.
2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places.
3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated.
4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably.
5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances.
6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
    a. presence at the time of the search;
    b. possession or control of the property or place searched;
    c. ownership of the property or place;

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40 *Ibid* at para 90.

d. historical use of the property or item;

e. the ability to regulate access, including the right to admit or exclude others from the place;

f. the existence of a subjective expectation of privacy; and

g. the objective reasonableness of the expectation.[41]

As stated in *R. v. Cole*, a totality of circumstances test is "one of substance, not of form," which means that every case is contextual to the circumstances.[42] During the oral submissions of *R. v. Jarvis*, Justice Moldaver probed counsel on the totality of circumstances test. He stated that a student may possess a reasonable expectation of privacy in a public space, but that the recording by a teacher in a position of trust may violate that in ways that a contemporary may not.[43] He later referenced observation in a locker room where an expectation of privacy is unreasonable between those changing but is reasonable with regard to recorded or sexualized viewing of those changing.[44] The Canadian Civil Liberties Association's submissions characterized the reasonable expectation of privacy in a public setting to be conduct or purpose-based over location-based.[45]

The Court in *R. v. Jarvis* had to deal directly with the issue of whether an individual can assert a reasonable expectation of privacy in a public setting. The Court clearly sided with the Crown that the students were exploited and that they enjoyed a reasonable expectation of privacy in situations where the location held no connotation of privacy. The totality of circumstances test elevated otherwise harmless viewing into criminal behaviour. Applying the judgment in *R. v. Jarvis* to state surveillance would ask the question of whether state surveillance in public spaces, however intrusive, is a circumstance that violates a reasonable expectation of privacy. The final section of this paper proposes that the state should have at its disposal every technology to surveil for the purposes of law enforcement, but that to balance privacy concerns, it should be required to follow a warrant process to access the surveillance.

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41 *R v Edwards*, [1996] 1 SCR 128 at 145-46, 132 DLR (4th) 31 [Edwards].

42 *R v Cole*, 2012 SCC 53 at para 40 [Cole].

43 *R v Jarvis*, 2019 SCC 10 (Oral argument Appellant) at 18m:45s.

44 *Ibid* (Oral argument Respondent) at 01h:13m:16s.

45 *Ibid* (Oral argument Intervenor) at 39m:10s.

IV. PRIVACY PROTECTION

Twice in SCC judgments, Justice La Forest references the novel *1984* by George Orwell when writing about police surveillance.[46] In *R. v. Wong* he writes that "we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[47] The invocation of dystopian fiction in reference to SCC cases should not be discarded as mere hyperbole. Justice La Forest considered surveillance techniques employed by Canadian police to be a serious threat to privacy. These cases were heard in 1990 and 1992, before the invention of modern surveillance methods which would rival the imagination of George Orwell.

A. Justified Infringement

The SCC in *Hunter v. Southam* stated that protection of an unreasonable search also provides a reasonable expectation of privacy. If technological ability is the limit to the state observing all members of society, then we should reasonably expect that the technological barriers preventing constant surveillance will only decrease. Society must then develop rules for observation by the state under current constraints that will port to a system with more advanced technology. However, as stated by Paul Bischoff, "unfortunately, there is a paucity of laws on the use of surveillance cameras in public places, and only a small number of jurisdictions have enacted legislation to regulate these activities."[48]

The lack of oversight is particularly concerning given some of the technological capabilities already available in drone technology. Traditional surveillance rules cannot compete with the plethora of relatively low-cost surveillance abilities of drone technology. Durakovic & Durakovic elaborate:

> It is the convenience of drones to be equipped with different and numerous sensors that enables them to track changes from a distance through the visible spectrum, electromagnetic spectrum, biological and chemical changes, with the ability to automatically detect target objects, to track positions through GPS

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46 *Wise supra* 20 at 41; *R v Wong*, [1990] 3 SCR 36 at 47, 60 CCC (3d) 460 [Wong].

47 *Wong*, *supra* note 46.

48 Bischoff, *supra* note 25at 33.

> systems, to register changes in real-time high-resolution cameras, giving huge potential for police use.[49]

Protection of civil liberties through precedent is by its very nature behind the technological curve. Police services in Canada are managed through civilian oversight, but to respect privacy and self-incrimination rights, public disclosure of operational practices must be implemented.

The fact that technology will allow for a more invasive state does not mean that it cannot also realize the vision of a safer society. Public institutions, including the police, owe a debt to society to be as efficient and thorough in their service to society as they can be. Technology that can improve the speed and accuracy of investigations should be implemented. However, the most important part about using improved surveillance will be oversight. All data and surveillance should run through an agency independent of the state or police. All available information, useful to police in their pursuit of a safer society should be available with a warrant-type process. Meeting a similar standard, as determined by the judiciary, would prevent even the question of abuse while serving the interests of justice. The current lack of oversight does more harm to the public perception of police and state power to protect citizens.

B. Oversight

The state is an entity of the public. In a free and democratic society, elections populate government positions with people who are meant to represent the public at large. What activities are criminalized or incentivized are meant to represent the values of the public as a whole. Certainly laws are meant to guard against a tyranny of the majority, but many of these laws require someone withstanding to challenge them. Law enforcement are members of the public and are tasked with protection of the public good. Surveillance by law enforcement has expanded in a large part through the social need for security in a post 9/11 world.

Crime and terrorism prevention are a laudable goal, but there is a cost to a society that surrenders their freedoms and privacy for feelings of security. The fundamental idea of property is a right to privacy and exclusion from that property. American courts have recognized a 4th Amendment right to extend even to those living in a homeless camp on

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[49] Adnan Durakovic & Sabina Durakovic, "Regulating the Non-Military Use of Drones and Protection of Privacy" (2020) 58:3 J Crimin & Crim L 39 at 41.

public property.[50] Canada recognizes an inherent right to privacy but thus far there have been no cases on a reasonable expectation of privacy for the homeless in public spaces.

In China, the police are an extension of the state, and of state policy. It is well known that China is employing a vast network of video surveillance linked to artificial intelligence system. China maintains a national database with 300,000 criminal faces but they also track "mental illnesses, records of drug use, and those who petitioned the government over grievances." According to *The New York Times*, China is using some of these systems to supress citizens based on their ethnicity. A Chinese tech investor in AI who spoke with *The New York Times* said that "China has an advantage in developing [AI] because its leaders are less fussed by 'legal intricacies' or 'moral consensus.'" China is using artificial intelligence to track the approximately 11 million Uighur Muslims, of which nearly 1 million have been displaced into camps.[51]

China may be a cautionary tale about the use of facial recognition AI programs, but they are a state with numerous human rights violations and no right to individual privacy. This technology is potentially a tremendous tool to aid law enforcement and protect against terrorism. The problems with the technology do not come from the equipment, but the users. AI has not crossed into self-instruction apart from the influence of the programmer. In China, the bias of the state against their Uighur population influences the characteristics that the machine is looking for. "Results generated from these [software] calculations may appear like an objective science, but closer analysis reveals this technology's foundational reliance on observational biases that are crystallized into the enforcement records used to train this technology."[52] This type of bias is unavoidable and must be overseen by an independent agency to remove both the state and law enforcement from even perceived improper influences.

In the United States, following the January 6th, 2021 riots at the U.S. Capitol, technology played a crucial part in the charges laid stemming from that date. As of one year from the date of the riot, investigators have combed

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50 See *State v. Pippin*, 200 Wn App 826.5

51 See Paul Mozur "One Month, 500,000 Face Scans: How China is Using A.I. to Profile a Minority", *The New York Times* (14 April 2019) online: <www.nytimes.com> [perma.cc/LQ4U-KWHX].

52 Shawn Singh, "Algorithmic Policing Technologies in Canada" (2021) 44:6 Man LJ 245 at 246.

through more than 20,000 hours of video and 15 terabytes of data. Over 725 people have been arrested. 145 people have pled guilty to misdemeanors and 165 of have pled guilty to felonies.[53] Beyond the tools available to investigators, there was a huge swell of public involvement in the investigation as the FBI listed photos and video of people wanted for the riot.[54]

Many people who respect privacy rights and are uneasy about state surveillance can be rallied in times of exceptional circumstance. Following events like 9/11 and the U.S. Capitol riots, people rallied behind government action such as the FBI call for online sleuthing into riot participants. Megan Ward states: "A state can prime and prep its citizens to accept otherwise distasteful breaches of personal privacy and rights through the opportunity to take matters into their own hands and enact justice against those they deem guilty."[55] It is easier to rally the public behind the apprehension of organizations or people with distasteful views. Online public consciousness is not a great example of sober reflection on the consequences of dangerous surveillance precedents. When it comes to pursuit of fanatics or those who seek to do harm, the posse mentality often quickly morphs into a lynch mob mentality.

Fundamental justice is an important concept to democracy and when the values of a society are ignored because of distasteful actions by a group within that society a precedent has been set and the risk of improper use of that technology dramatically increases. Of course none of these concerns need be a barrier to using technology to safeguard society. However, they are a sober reminder that the human rights of the distasteful elements of our society must be protected to effectively safeguard the human rights of the entire society.

C. Warrant Process

There is a higher duty than has been defined by the courts and legislation. Police are a public entity, composed of members of the public who have been entrusted with authority to serve the public good. Tools that

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53 See Ryan Lucas "Where the Jan 6 insurrection investigation stands, one year later", *NPR* (6 January 2022), online: <www.npr.org> [perma.cc/D2ZP-UVRU].

54 See "Most Wanted: US Capitol Violence" (last visited 15 April 2022), online: *FBI Most Wanted* <www.fbi.gov/wanted/capitol-violence> [perma.cc/L8KY-92Z7].

55 Megan Ward, "Participatory Security and Punitive Agency: Acclimation to Homeland Surveillance in the United States" (2021) 19:3 Surveillance & Society 346 at 346.

can make law enforcement more effective and accurate should be zealously pursued. There is already a process in place for the state to intrude on recognized private grounds under the supervision of the judiciary. When it comes to surveillance, "only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a 'search' within the meaning of s. 8"[56]

The state must take every effort to distance themselves from intrusion upon the privacy of the public. A warrant-like process is the most ideal measure to allow expansion of state surveillance while protecting the public interest. The courts have struggled to define the concept of a reasonable expectation of privacy in a public sphere and it may be that there does not need to be an expectation of privacy if the access to that information has a gatekeeper.

Technology is increasing surveillance capability and decreasing price at a tremendous rate. Given some of the abilities discussed above, it is truly frightening how low the expectation of privacy should be. There are no serious concerns with the ability of a police officer to physically surveil a suspect. Even wiretaps or video surveillance used by an officer, which may capture unintended suspects, are not considered to be an invasion of privacy. Somehow the idea of an officer in control of technology for the purposes of surveillance does not trigger much suspicion, but automation is a different story.

D. Harmonizing Police and Technology

The use of modern surveillance, through increased cameras, drones, and artificial intelligence, evokes images of complete state surveillance. The police are not a machine of the state or controlled directly by any political body. Civilian oversight exists to ensure that the police function as members of the public to serve the public interest. Improved efficiency does not need to change the essential character of police activity. A video camera no longer requires any human monitoring to be able to function. This frees an officer up to engage with the public or respond faster to other needs.

Technological advancement cannot be stalled and as was mentioned above, even if the public decided that the police should not have access to these improved methods of surveillance, it is not possible to prevent the

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[56] "In the Face of Danger: Facial Recognition and the Limits of Privacy Law", Note, (2007) 120:7 Harv L Rev 1870.

explosion of privately used surveillance currently happening. Police should have access to every technology that makes their job more efficient. The key though must be similar to the civilian police boards which act as a buffer between politicians and police. All technology that mass-captures the public and evaluates criminal activity must be managed through non-police, non-state entity.

Modern evidence-based police methods now rely heavily on surveillance footage for good reason. Proliferation of cameras does not need to be dystopian. If all footage and artificial intelligence evaluation were done outside of the police through an independent organization, then police could still have access to any and all relevant evidence, but would need to justify that access. To conduct specific surveillance, or obtain personal biometric identification information, a warrant should be needed.

Police must demonstrate that the information is related to a specific offence or that there is a reasonable likelihood to believe that someone has or will commit an offence. Mass surveillance should be the exact same procedure. When a crime is committed, it is in the public's interest to have criminals accurately and efficiently punished. Police should be able to apply for a warrant for a relevant search of public surveillance, and even tracking data from suspects.

Technology is not the problem with mass surveillance, but rather who has access to it. Society widely accepts that there is no expectation to privacy in the public sphere but expects that they will not be always scrutinized. Many people consider themselves to be responsible drivers, but they occasionally speed or drive with diminished attention to the road. We play with probability in our everyday lives and surveillance by police is acceptable to most people because of the idea that it is primarily focused on someone criminal, not them. Mass surveillance and scanning faces does not have to compromise this perception. It is entirely possible that we could venture out of our homes in confidence if we understood that the information being compiled about us was not accessible without oversight.

In a time where public perception of police has much controversy, technology should be welcomed rather than feared. Police should be protected from public perception through oversight, as much as the public would be protected from improper surveillance. It is not a far stretch to consider what else in the justice system would shortly become automated, following the adoption of artificial intelligent surveillance.

If a system could observe and document the commission of a crime, then suspects would quickly be convicted. There would be a greatly decreased need of a long pre-trial process to determine guilt when a machine could produce a report and evidence before the suspect was even picked up. Imagine a defence lawyer whose task was simply to look for any reasonable doubt to launch an appeal of an automated conviction, rather than to rely on introducing doubt to a jury of peers.

It is no longer science fiction to consider this type of a justice system where people are increasingly removed from operational decisions in the name of efficiency.

V. CONCLUSION

Technology is ever improving and becoming cheaper to use. Policing reform has been a controversial topic and the increasing use of surveillance by the police without a clear oversight regime does not foster transparent policing. It is clearly in the best interest of society to use every technology possible to protect people. Mass facial recognition and artificial intelligence can be employed under the watchful eyes of the court to ensure that no one state body has control over the data which is public life. Implementing an oversight regime and a warrant procedure will accomplish the goals of effective policing and privacy in our society.

Knocking Should Be the Norm, Not the Exception – Evaluating the Need for Reform to the Use of Dynamic Entries in Canada

KEENAN FONSECA*

ABSTRACT

The use of dynamic or no-knock entries by the police in Canada has been minimally examined. The majority's decision in *Cornell* upheld the precedent that police are to use their discretion to identify whether the existence of exigent circumstances requires a departure from the knock and announce rule and perform a dynamic entry. Dynamic entries have led to fatal consequences, raids performed on innocent people based on faulty information, and the practice of dynamic entries being used as a blanket policy by one of Canada's major police forces. This paper analyzes the law of dynamic entries in Canada, with the focus on a need for reform. First, the author evaluates the current state of the law regarding dynamic entries and its history. Second, it reviews Justice Fish's dissent in *Cornell*. Third, current issues with the use of dynamic entries are discussed and analyzed. Fourth, the state of the law of dynamic entries in the United States is reviewed. Fifth, the *Feeney* warrant is reviewed, as a guide for reform. Finally, the recommendation that Canada follow the United States' lead in *Feeney*, and codify both the common law knock and announce principle, and the ability to receive prior authorization to perform a dynamic entry based on an increased standard of exigent standards is proposed.

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Keywords: Dynamic Entry; No-Knock Warrant; Section 8; Exigent Circumstances; Police Discretion; Knock and Announce

I. INTRODUCTION

On the evening of November 22, 2016, eight armed police officers from the Ottawa Police Service tactical unit broke down the door of the Bahlawan residence using a battering ram, in a quiet suburban neighborhood.[1] Next, the officers threw a distraction device, known as a flash bang, into the front hallway creating a loud explosion, a blinding light, and a haze of smoke. The officers then entered the house screaming "police, don't move!" wearing dark grey military style gear, including helmets, balaclavas, vests, and carrying a long gun rifle.[2] The three residents home at the time had no idea what was going on, and the police forced them onto the ground, and handcuffed the father and brother.[3] The police stated that they were executing a search warrant for drugs, and offered no further explanation to the residents.

The Ottawa Police were executing a search warrant issued pursuant to s. 11 of the *Controlled Drug and Substances Act* ("*CDSA*") in support of a drug investigation of Ms. Tamara Bahlawan and her boyfriend, Ahmed Al-Enzi.[4] Ms. Bahlawan lived at the house with her parents but was not home at the time that the police raid had occurred. She was known by the police to be at another location with Al-Enzi, but this information did not prevent her family from having a dynamic entry performed on their home.[5] The police did not find any of the listed drug items in the warrant during their search, however, they did find an unregistered loaded handgun in a bedroom.[6] Ms. Bahlawan was charged with four counts of unlawful possession of a firearm and ammunition under the *Criminal Code* ("*Code*").[7] Ms. Bahlawan brought a s. 8 *Canadian Charter of Rights and Freedoms* ("*Charter*") challenge based on the unreasonable search of the Bahlawan residence, including the manner of dynamic entry used by the police and sought an order to exclude the

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1 *R v Bahlawan*, 2020 ONSC 952 at para 1 [*Bahlawan*].
2 *Ibid*.
3 *Ibid* at para 3.
4 *Ibid* at para 6.
5 *Ibid* at para 30.
6 *Ibid* at para 6.
7 *Criminal Code*, RSC 1985, c C-46 ["*Code*"].

evidence seized by police.[8] The Ontario Superior Court found a serious s. 8 *Charter* violation based on the polices' casual disregard for established authority on how search warrants should be executed, but did not exclude the evidence, as it would not bring the administration of justice into disrepute.[9]

The use of dynamic entries, or no-knock entries, by police when executing search warrants has been a practice of growing concern in Canada and the United States. While the laws relating to this manner of entry have evolved differently in these countries, Canada has not taken steps to address the growing concern, and instead has relied on the discretion of police to determine when to perform a dynamic entry, and for the courts to determine if the police's actions were justified at trial if the admission of the evidence is challenged and must be evaluated by the courts. The United States has continued to evolve the law surrounding no-knock warrants, and following tragic events, including the death of Breonna Taylor, individual states have taken steps to limit the powers of police in their use of dynamic entry.[10]

Canada is no stranger to the fatal consequences of dynamic entries. The police's growing use of these entries as standard practice, and the lack of legislation establishing or limiting the power leads to the need to return to the case of *R v Cornell*. *Cornell* was decided by a 4-3 margin of the Supreme Court of Canada ("SCC") in 2010 on determining the grounds that

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8 *Bahlawan*, *supra* note 1 at paras 7-8; *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

9 *Bahlawan*, *supra* note 1 at para 72.

10 See John W. Lee, "Virginia Bans No-Knock Warrants" (01 March 2021), online: *JOHN W. LEE, P.C. LEGAL BLOG* <hamptonroadslawfirm.com/virginia-bans-no-knock-warrants/> [perma.cc/EMS7-AE2K]; Va Code Ann § 19.2-56 (2021); Mike Maherrey, "To the Governor: Connecticut Passes Bill to Prohibit "No-Knock" Warrants" (31 May 2021), online: *Tenth Amendment Centre* <blog.tenthamendmentcenter.com/2021/05/to-the-governor-connecticut-passes-bill-to-prohibit-no-knock-warrants/> [perma.cc/D3C5-J5AF]; Conn Gen Stat § 54-33a(e) (2021); Marlene Lenthang, "Is Minneapolis' ban on 'no knock' warrants enough to prevent another Amir Locke?" (17 April 2022), online: *NBC NEWS* <tinyurl.com/wepx4z94> [perma.cc/UA62-RQWD]; Minneapolis Government, "Mayor Frey enacts new warrant, entry policy" (05 April 2022), online: *Minneapolis Government* <www.minneapolismn.gov/news/2022/april/mayor-frey-enacts-new-warrant-and-entry-policy-/> [perma.cc/A5WQ-29AV].

required for police to conduct a dynamic entry.[11] It is the dissenting opinion that will be revisited, as focused on the common law and *Charter* protections entitled to Canadian citizens, and addressed a need to limit police tactics which disregard these interests.

The use of dynamic entry by police is a search tactic that directly engages both common law and constitutional protections of Canadians and has led to unpredictable results. This paper will explore whether amendments can be made to provide greater protections to citizens from retroactively justified *Charter* infringing police conduct. The introduction of legislation codifying the knock and announce principle, as well as allowing no-knock warrants to be authorized by the judiciary based on an increased level of exigent circumstances, would reduce the issues around dynamic entries in Canada while balancing the interests of all involved.

Part II of this paper will summarize the history of dynamic entries, the protections that surround them in Canada, and the current process that police in Canada must take to justify the execution of a dynamic entry. Part III will outline the dissenting opinion in *Cornell*. Part IV will outline and analyze the current issues with the law as it relates to dynamic entries. Part V will provide an overview of the law of dynamic entry and no-knock warrants in the United States, and how individual states have attempted to limit the powers of police in using these techniques. Part VI will involve an analysis of the *Criminal Code* section that was added following the SCC's decision in *R v Feeney*.[12] The final Part will contain recommendations regarding what changes, if any need to be taken to address the constitutional concerns of the use of dynamic entry in Canada.

II. DYNAMIC ENTRY IN CANADA

A. Common Law Knock and Announce Principle

Prior to the *Canadian Charter of Rights and Freedoms* ("*Charter*") being enacted, the privacy interests protecting one's home originated from the common law. The knock and announce principle was first developed in the 1604 English decision in *Semayne's Case*, where the castle doctrine was developed under the principle that every man's house is his castle.[13] This

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11 *R v Cornell*, 2010 SCC 31 [*Cornell*].

12 *R v Feeney*, [1997] 2 SCR 13, [1997] SCJ No 49 [*Feeney*].

13 *Semayne's Case* (1604), 5 Co Rep 91a.

indicated a high privacy interest in one's home, but the Court did indicate an exception for those member of the King's party to enter ones home when it was for the purpose of arrest or other process. However, they were required to signify the cause of their coming and make a request to open the doors.[14]

The SCC solidified the common law knock and announce principle first mentioned in *Semayne's Case* in 1974 in *Eccles v Bourque*. The common law knock and announce rule was stated as:

> In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry.[15]

The fundamental justification of this rule is that an unexpected intrusion into one's home can give rise to violent incidents, and it is in the best interests for the safety of the occupants and police that prior to entering the police announce themselves.[16] Despite this decision occurring prior to the implementation of the *Charter*, the SCC stated the privacy of the individual required by the law must also be considered.[17] Similar to the castle principle, the SCC provided a limit to the knock and announce rule, finding that it could be departed from where the police identified exigent circumstances, such as to save someone from death or injury or to prevent the destruction of evidence.[18] This limit indicates the public's interest in justice will at times outweigh the need to protect individuals security and privacy within their home.

B. Section 8 of the *Charter*

With the implementation of the *Charter* in 1982, an additional layer of protection was added regarding the privacy interest of one's home. Specifically s. 8 of the *Charter*, which provides that everyone has the right to be secure against unreasonable search or seizure. The SCC has reviewed the individual's reasonable expectation of privacy in different areas, stating in *R v Silveira* that "a person's home is their refuge ... It is there that the

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14 *Ibid.*

15 *Eccles v Bourque*, [1974] 2 SCR 739 at 758, 19 CCC (2d) 129.

16 *Ibid* at 747.

17 *Ibid.*

18 *Ibid* at 747-748.

expectation of privacy is at its highest and where there should be freedom for external forces, particularly the actions of agents of the state, unless those actions are dually authorized."[19] This indicates that the combination of the common law knock and announce rule and s. 8 of the *Charter* provide for a high reasonable expectation of privacy of Canadians when it comes to police searching their homes.

C. Dynamic Entry

A dynamic entry, or no-knock entry, occurs when police depart from the knock and announce rule, gaining entry to a residence without knocking and announcing that they are the police. A dynamic entry is a police tactic designed to gain rapid entry into a location, which is usually a private home.[20] A dynamic entry generally involves the use of a police tactical team, and is conducted in a militaristic style where police break open the door using a battering ram and enter bearing weapons and body armour.[21]

D. Departure from Knock and Announce

In Canada, police continue to be governed by the knock and announce rule as articulated in *Eccles v Bourque*. However, the SCC in *Cornell* has further developed the exigent circumstances needed to depart from this rule: requiring reasonable grounds in the circumstances "to be concerned about the possibility of harm to themselves or occupants, or about destruction of evidence."[22] It was stated by Justice Cromwell that "experience has shown that it (the knock and announce principle) not only protects the dignity and privacy interest of the occupants of dwellings, but it may also enhance the safety of the police and public."[23]

In Canada, the police are required to submit an Information to Obtain a Search Warrant ("ITO") prior to receiving a search warrant for a residence.[24] The decision to execute a warrant using dynamic entry as opposed to following the knock and announce rule does not require prior

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19 *R v Silveira*, [1995] 2 SCR 297 at para 141, [1995] SCJ No 38.

20 See Brendan Roziere & Kevin Walby, "Analyzing the Law of Police Dynamic Entry in Canada" (2020) 46:1 Queen's LJ 39 at 42 ["Roziere & Walby"].

21 See *Cornell*, *supra* note 11at para 10.

22 *Ibid* at para 20.

23 *Ibid* at para 19.

24 See *Code*, *supra* note 7, s 487(1).

judicial authorization.[25] The decision to depart from the rule is determined solely by the discretion of the police, and the onus is on them to explain why they thought it necessary to do so.[26]

In *Cornell*, Justice Cromwell stated that to depart from the knock and announce rule, police must be satisfied that there were grounds to be concerned about the possibility of violence or that there was a low risk of weapons being present.[27] Regarding destruction of evidence, it was determined that the police must have reasonable grounds to expect that the drugs are both likely to be present in the home and are easily destroyable to justify a dynamic entry on this ground.[28] It was found that police are to be given a certain amount of latitude in the manner in which they decide to enter the premises.[29]

It has been argued before the courts in Canada that prior authorization should be found necessary when police choose to execute a dynamic entry and depart from the knock and announce rule.[30] However, this has been rejected by the courts in multiple jurisdictions across Canada, solidifying that it is not necessary for the police to receive prior judicial authorization to depart from the knock and announce rule.[31] Judicial oversight of dynamic entry by police is instead dealt with after the fact, where it occurs at trial. If the police's choice to use dynamic entry is challenged by the accused, the onus lies on the Crown to lay an evidentiary framework to support the conclusion that the police had reasonable grounds to believe that exigent circumstances were present; the exigent circumstances being the possibility of harm to themselves or the occupants, or concerns about the destruction of evidence.[32] The onus will be heavier on the police/Crown where the departure from the knock and announce principle has occurred.[33] When justifying the actions of police, the Crown must rely on the evidence that is in the record and available to the police at the time that they acted.[34] It was

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25 See *R v Pilkington*, 2013 MBQB 86 at para 69.

26 See *Cornell*, *supra* note 11at para 20.

27 *Ibid.*

28 *Ibid* at para 27.

29 *Ibid* at para 24.

30 See Roziere & Walby, *supra* note 20at 45.

31 See *R v Perry*, 2009 NBCA 12; *Pilkington*, *supra* note 25; *R v Al-Amiri* 2015 NLCA 37.

32 See *Cornell*, *supra* note 11at para 20.

33 *Ibid.*

34 *Ibid.*

reiterated in *Cornell* that the Crown cannot rely on ex post facto justifications.[35] A departure from the knock and announce rule must be justified on a case by case basis, which does not support blanket policies to use dynamic entries in all instances of a particular offence, as this does not comply with s. 8 of the *Charter*.[36] In *Bahlawan*, the court highlighted the importance that the police must consider complying with the knock and announce rule before they decide on the use of a dynamic entry.[37]

III. DISSENT IN *R V CORNELL*, 2010

While the majority's decision has become the framework applied to cases involving dynamic entry, it is important to consider the strong dissent of the 4-3 decision in *Cornell* by Justice Fish. Justice Fish agreed with the majority regarding police being afforded considerable latitude, and that courts should not light interfere with these decisions. However, he emphasized that the decisions must be reasonable, and to be reasonable "they must be informed by a fact-based assessment of the particular circumstances of the search and the force necessary to preserve evidence and to neutralize perceived threats to their safety".[38] He goes on to highlight the fact that it was clear from the evidence the police had that none of the residents living at the Cornell house had a criminal or violent record, that no other persons lived in their home, and that it was not a gang house or a drug house.[39] Regarding the officer's safety concerns, he criticized the majority's acceptance that since another suspect, Nguyen, was found prior to the search wearing body armour, that the Cornell residence was then a safety concern.[40] This is in addition that there was no evidence that weapons would be present at the house, as the ITO outlined the items as "cocaine, packaging equipment, score sheets and cash."[41] Justice Fish outlined the danger in setting the bar too low for safety concerns to justify dynamic entries, considering the lack of a nexus that existed between Nguyen and the Cornell residence.

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35 *Ibid.*

36 See Roziere & Walby, *supra* note 20at 71-74.

37 *Bahlawan, supra* note 1 at para 43.

38 *Ibid* at para 48.

39 *Ibid* at para 49.

40 *Ibid* at para 50.

41 *Ibid* at para 74.

On the topic of destruction of evidence, Justice Fish conceded that illicit drugs are easily concealed or discarded, however he questions the assumption of the police that the occupants of the home would or could destroy the evidence.[42] He suggest that the police should make some attempt to ascertain whether there is a real likelihood that without a dynamic entry there would be enough time to destroy the evidence.[43] He stated that "generic assertions in this regard are plainly insufficient to justify a violent entry of the kind that occurred here."[44] Further the police never supplied the risk analysis to any member of the tactical team, which is an internal record of the police designed to inform the duty inspector of any potential risk involved to the public and police when executing a warrant.[45] This led Justice Fish to conclude that the risk analysis was not relied upon by the police when deciding to conduct a dynamic entry.[46]

The strong dissent in *Cornell* outlines the dangers in setting the standard for satisfying exigent circumstances too low, and basing them on broad conclusions, such as using a dynamic entry because cocaine is expected to be found and is an easily disposable drug. It also points to the dangers in police failing to properly assess risk and share risk analyses with the tactical teams, which would result in unofficial blanket policies to use a dynamic entry whenever a warrant is for easily disposable drugs. The dissent agrees police need to have discretion in their execution but calls for a more reasonable standard for dynamic entries to be used. The dissent stresses the need for police to comply with the citizens protections, including the knock and announce principle and s. 8 of the *Charter.* There have been multiple issues with the use of dynamic entries by the police in Canada and likely would have been less if one of the Justices joining the majority had joined Justice Fish in his decision.

IV. Current Issues with Dynamic Entries in Canada

A. Fatal Consequences

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42 *Ibid* at para 106.
43 *Ibid.*
44 *Ibid* at para 41.
45 *Ibid* at paras 81-82.
46 *Ibid.*

The execution of dynamic entries in Canada, whether directly or indirectly, has resulted in five deaths, including one police officer.[47] That the use of this police tactic for executing a search warrant can have fatal consequences suggests the frequency of dynamic entry use should be limited to specific circumstances. The execution of these searches already involves the implication of *Charter* and common law protections, but can also carry the risk that someone, on either side of the entry, could be killed.

1. Anthony Aust

On October 7th, 2020, the Ottawa Police executed a search warrant by way of dynamic entry on the 12th floor apartment where Anthony Aust lived with his family.[48] The decision to perform the entry in a dynamic fashion was based on tips to police from three confidential informants that Aust was trafficking firearms, cocaine, and fentanyl from his residence, along with his criminal record which indicated he had been charged, along with two others, after police found drugs, cash, and a loaded handgun during a traffic stop. This information was contained in the ITO, along with the police's belief that Aust was posting guns for sale using a cell phone application, despite no photos of these ads being seen by the CBC investigation team.[49] It is further important to note that at the time of search Aust was out on bail, wearing a GPS ankle bracelet and was on house arrest. In addition to these measures, a security camera was also installed in the apartment.

The police rammed the door of Aust's residence and threw a flash-bang grenade into the apartment prior to their entry. After the police entered the apartment, Aust jumped from his bedroom window, falling 12 storeys to death. Police found approximately 33 grams of heroin and 86 grams of fentanyl, along with cash and other drug dealing paraphernalia, but they did not find the gun.[50] Since the police's choice to use a dynamic entry is reviewable at the trial if charges are laid, no court has had the opportunity

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47 See Michael Spratt, "No-Knock police raids need to stop" (01 April 2021), online: *Canadian Lawyer* <www.canadianlawyermag.com/news/opinion/no-knock-police-raids-need-to-stop/354577> [perma.cc/N59L-RUKW].

48 See Judy Trinh, "Police raid on Anthony Aust's apartment didn't match tipster information, court documents show" (15 December 2020), online: *CBC News* <www.cbc.ca/news/canada/ottawa/anthony-aust-ottawa-court-documents-1.5841481> [perma.cc/HT5C-8XCY].

49 *Ibid.*

50 *Ibid.*

to evaluate the police's decision. If not for the news reports surrounding this incident, the public would be unlikely to know exactly what information the police had to justify their actions.

2. Officer Daniel Tessier

In the early morning, just before 5:00 a.m. on March 2nd, 2007, the Laval Municipal Police force conducted a dynamic entry on the home of Basil Parasiris.[51] The police obtained a warrant for the search of Parasiris's home based on seeing Parasiris interacting with two other suspects, Xanthis and Mavroudis, who police believed to be trafficking drugs.[52] Parasiris had been seen with them on multiple occasions, at the store owned by Parasiris, as well as at Parasiris's residence.[53]

After ramming down the front door and the vestibule door, officers entered the residence and began their ascent up the stairs. Parasiris, believing that his house was being raided by unknown persons opened fire on the police, wounding one officer and fatally wounding another.[54] Parasiris testified that he believed his family was being attacked by home invaders on the night in question, testifying that he had no choice but to shoot and did not realize they were police until after he shot.[55] The Police Chief stated that they had found a variety of drugs and 17 cell phones and pagers in the home.[56]

The Judge found that the information police relied on was insufficient to establish a reasonable probability that Parasiris was involved in the drug trafficking.[57] The information was sufficient to satisfy warrants for the other suspects, but there was not enough information to establish a link to Parasiris and the Court concluded that the search warrant for Parasiris's residence should never have been issued.[58] The court also commented that despite s. 11 of the *CDSA* authorizing a search warrant to be executed at any

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51 *R v Parasiris,* 2008 QCCS 2460 at para 11 [*Parasiris*].

52 *Ibid* at para 54.

53 *Ibid* at para 84.

54 *Ibid* at para 17.

55 See CBC News, "Quebec man acquitted in police officer slaying" (13 June 2008), online: *CBC News* <www.cbc.ca/news/canada/montreal/quebec-man-acquitted-in-police-officer-slaying-1.698274> [perma.cc/BCH8-ZGGB] [CBC News].

56 *Ibid.*

57 *Parasiris, supra* note 51at para 94.

58 *Ibid* at para 101.

time, the information in this case did not include any fact that could justify a night search.[59]

The use of force by way of dynamic entry was not justified by the circumstances in the record, as it fails to show any fact establishing that a proper announcement would lead to the imminent loss or destruction of evidence.[60] The police were under the belief that there were no firearms in the Parasiris residence, as the officer did an address check, but failed to run a check using Parasiris's name.[61] Further, the Judge found that is was in contravention of the requirements of s. 12 of the *CDSA*.[62] Ultimately, the search of the Parasiris residence was found to amount to a s. 8 *Charter* violation, and Parasiris was later acquitted of the first-degree murder charge.[63]

In both situations described there were fatal consequences to those involved in the police use of a dynamic entry. The Court in *Parasiris* made clear that both the grounds contained in the ITO and the decision to use dynamic entry were problematic. However, in Anthony Aust's situation the police's decision in the execution of dynamic entry and the grounds in the ITO could not be reviewed by a court. This suggests that the current process is problematic, specifically the after the fact justification of the choice to utilize a dynamic entry. While it was stated by Justice Cromwell in *Cornell* that the knock and announce rule may enhance the safety of the police and public, the preceding examples suggest the departure from this rule can have fatal consequences.

B. Dynamic Entry as a Blanket Technique for Police

As highlighted by the majority in *Cornell,* the police must use their discretion to determine if exigent circumstances exist prior to departing from the knock and announce rule.[64] Further developing this concept, Justice Mainella of the Manitoba Court of Queen's Bench (as he then was) described blanket policies in relation to dynamic entry in *R v Pilkington* as the practice of "officers performing no knock entries when executing *CDSA* search warrants when they had no reason to believe either evidence would

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59 *Ibid* at para 120.
60 *Ibid* at para 124.
61 *Ibid* at para 43-49.
62 *Ibid* at para 129.
63 *Ibid*; see CBC News, *supra* note 55.
64 *Cornell, supra* note 11.

be destroyed or there was a risk to their or others' safety."[65] The use of blanket policies in relation to marijuana grow ops were found to violate s. 8 of the *Charter*.[66] Police are required to base their decision to use a dynamic entry on assessment of the circumstances known to police at the time.[67] In addition, circumstances can change, and police are expected to re-evaluate their decisions based on these circumstances.[68]

Bahlawan was introduced in the introduction of this paper. It involved Justice Gomery finding a s. 8 *Charter* violation based on the manner of dynamic entry used by the police. More specifically, Justice Gomery rejected the Crown's argument of exigent circumstances justifying the entry as the evidence did not show that the Ottawa police ever considered the possibility of a non-dynamic entry.[69]

Constable Cox was responsible for swearing the ITO for the search warrants of the Bahlawan residence, as well as the Heron apartment, and Al-Enzi's residence.[70] His testimony indicated that it was policy that the tactical unit conduct all search warrants for private premises, and that the decision on dynamic entry is made by the duty inspector.[71] Constable Cox indicated that he had provided the duty inspector, Medeiros, and the team leader, Constable Wright, with the operations plan on executing the warrants at the three locations.[72] Following this he briefed them on the ITO and all three agreed that the tactical unit should precede by dynamic entry, with the use of distraction devices at each location.[73] It is important to note that the officers agreed to conduct further surveillance to locate Bahlawan and Al-Enzi, and that modifications to the plan to proceed by dynamic entry could be changed depending on their locations.[74] This surveillance led to police locating Bahlawan and Al-Enzi at the Huron apartment, yet police

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65 *Pilkington*, *supra* note 25 at para 71.
66 *Ibid.*
67 *Ibid* at para 73.
68 *Ibid* at para 74.
69 *Bahlawan*, *supra* note 1 at para 21.
70 *Ibid* at para 22.
71 *Ibid* at para 24.
72 *Ibid* at para 25.
73 *Ibid* at para 26.
74 *Ibid.*

did not use this information to re-evaluate the need to perform a dynamic entry.[75]

The testimony of Inspector Medeiros raised multiple concerns, as he indicated that the knock and announce principle is only used in situations where there is zero risk of exigent circumstances and that in all other cases forced entry was used to allow the officers the element of surprise.[76] He further testified that a non-dynamic entry of the Bahlawan residence was not considered and the police would only knock and announce if there were non-disposable evidence identified in the search warrant.[77]

The Judge found that dynamic entry of the Bahlawan residence was a foregone conclusion and there was no evidence of any consideration to proceed with alternative tactics by the members of the police involved in the investigation.[78] The tactics used by the Ottawa Police Service in this case clearly run contrary to the restriction of dynamic entry as a blanket policy as outlined in *Pilkington*. The blanket policies of the Ottawa Police Service are of great concern overall, as they indicate a clear departure of the consideration of the knock and announce rule, as well as the constitutional protections under s. 8 of the *Charter*.

This furthers the highlighted concern of police having the sole discretion to determine whether to perform a dynamic entry and the potential abuse that can result. Despite the Courts focus on the blanket policy of the Ottawa Police, the Police proceeded to perform the dynamic entry on the Aust residence later in the year. The situation with the Ottawa Police may indicate the overuse of dynamic entries in relation to internal policies of other police forces in Canada, as the number of dynamic entries has been increasing across other police forces.[79]

C. Faulty Information

Another issue that has arisen in police execution of dynamic entries is when police mistakenly target a home, and the evidence supporting the

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75 *Ibid* at para 31.

76 *Ibid* at para 32.

77 *Ibid* at para 35.

78 *Ibid* at para 43.

79 See Zach Dubinsky, Judy Trinh & Madeline McNair, "Police smash couple's living room window with armoured vehicle in drug raid that finds nothing" (18 June 2021), online *CBC News Canada* <www.cbc.ca/news/canada/no-knock-raid-airdrie-calgary-couple-1.6069205> [perma.cc/8A82-K63J] see statistics referring to police services in Montreal, Surete du Quebec, Ontario Provincial Police, London & Calgary.

warrant and entry are inaccurate or non-existent. Further difficulty arises in these circumstances as the police cannot be held directly accountable by the courts regarding the obvious s. 8 *Charter* breaches that occur, and instead the victims are left the sole remedy of pursuing a civil claim against the police.

This situation happened to Joshua Bennett and Jennifer Hacker, who lived just outside of Calgary. The couple was awoken to their door being bashed in, while an armoured vehicle smashed through the living room window which was followed by both tear gas and a stun grenade being thrown into their residence.[80] The couple attempted to get out of their house through the garage where they were greeted at gun-point by the police, who repeatedly asked "where is the meth" and "where's the hard drugs."

The ITO contained a tip from a confidential information that a woman "uses stash houses to hide her drugs and likes using rural areas." This woman had sold marijuana to Bennett weeks prior, and Bennett had picked up some clothes she was selling a week earlier, which were in a garbage bag.[81] The police mistakenly inferred that the garbage bag picked up by Bennett at the woman's home must have been drugs and submitted it as part of the ITO to obtain a search warrant.

Ultimately, Bennett and Hacker were not charged and released by police, however the home they were renting had over $50,000 worth of damage done to it, and the pair state that they have suffered psychological damage from the raid. The pair are currently involved in suing the police for $1.5 million in damages over the raid.[82] The RCMP Superintendent, Gord Corbett stated "these actions were necessary, acceptable, and effective based on the risk present at the time."[83]

This situation is not a one-time occurrence in Canada, as Peter Schneider had a similar experience occur when police raided his house

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80 *Ibid.*

81 *Ibid.*

82 See Judy Trinh & Zack Dubinsky, "Alberta pair sue police for $1.5M over 'malicious' drug raid that found nothing" (12 April 2022), online, *CBC News Canada* <www.cbc.ca/news/canada/calgary/alberta-couple-lawsuit-violent-no-knock-police-drug-raid-1.6416385> [perma.cc/8D8Z-NFRF].

83 *Ibid.*

based on inaccurate informant information.[84] These examples represent another situation where citizens have had their s. 8 *Charter* rights breached, and where the evidence in the ITO would likely not be found sufficient to support the warrant if it were to be reviewed by a court. While inaccurate information from informants is likely to continue to occur, if police had chosen to knock and announce themselves, or further pursued the investigation, both physical and psychological damage could have been prevented.

V. UNITED STATES

In addressing potential reforms to the practice of dynamic entries, it is helpful to look to the United States, where no-knock warrants and the tragic consequences of these practices have been brought to the forefront of attention in the deaths of Breonna Taylor and Amir Locke. In this Part, the evolution of no-knock warrants in the United States will be reviewed, followed by an examination of the individual states who have put in full or partial bans on the use of no-knock warrants and dynamic entries.

A. Dynamic Entries in the United States

Like Canada, the United States finds the precedent for the reasonable expectation of privacy from the castle doctrine of the English common law. The castle doctrine was an absolute defence from all criminal and civil liability when a homeowner reasonably defended his or her home.[85] The castle doctrine further led to the knock and announce rule which was woven into the fabric of early American law.[86] Citizens of the United States also enjoy a constitutional protection to their privacy in their homes, under the Fourth Amendment, which guarantees the right to "be secure in their persons, house, papers and effects, against unreasonable search and seizures."[87]

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84 See Judy Trinh, Virginia Smart & Zach Dubinsky, "Botched no-knock raids prompt calls to limit police tactic" (10 March 2021) <www.cbc.ca/news/canada/no-knock-raids-dynamic-entries-calls-limit-police-tactic-1.5942819> [perma.cc/C68U-34TQ].

85 See Kolby K Reddish, "A Clash of Doctrines: The Castle Doctrine and the Knock-and-Announce" (2016) 25 Widener L J 171.

86 See *Wilson v Arkansas*, 514 US 927 at 932 (1995) [*Wilson*].

87 Jessica M Weitzman, "They Won't Come Knocking No More: Hudson v. Michigan and the Demise of the Knock-and-Announce Rule" (2008) 73 Brooklyn L Rev 1209 at 1209.

The Supreme Court of the United States (SCOTUS) in the case of *Wilson v Arkansas* held that the knock and announce principle forms a part of the reasonableness inquiry under the Fourth Amendment.[88] This strengthened the protection offered to those being searched. However, the Court was careful to provide a limit on the Fourth Amendment, where certain circumstances may exist that would require an officer's unannounced entry into a home.[89] The determination of whether an unannounced entry was reasonable was found to be a responsibility of the lower courts.[90]

In the case of *Richard v Wisconsin* the SCOTUS rejected the Wisconsin Supreme Court's finding that the Fourth Amendment permitted a blanket exception to the knock and announce requirement when executing a search warrant in a felony drug investigation, upholding the case-by-case evaluation of the search executed by police.[91] In this case, the police had requested a warrant that would provide them with permission to conduct a no-knock warrant on Richard's residence, but the magistrate deleted the no-knock portion.[92] In its analysis, the Court finds that a blanket exception to the knock and announce rule for felony drug cases would unfairly affect those present at a home who have no connection to the drug activity or a situation where no one was home, and ultimately the proposed blanket rule would impermissibly insulate these cases from judicial review.[93] The Court ultimately found that the Fourth Amendment did not permit a blanket exception to the knock and announce requirement, and that a case-by-case evaluation of the search execution by police would continue to be the standard.

When referring to exigent circumstances justifying the use of a no-knock entry by the police, the SCOTUS stated that "this standard, strike[s] the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries."[94] This decision can be seen as

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88 *Wilson, supra* note 86 at 929.

89 *Ibid* at 934.

90 *Ibid* at 936.

91 *Richard v Wisconsin*, 520 US 385 (1997) at 387-388 [*Richard*].

92 *Ibid* at 388.

93 *Ibid* at 393.

94 *Ibid.*

upholding the right of state magistrates to issue no-knock warrants to police forces, but requires that sufficient evidence be provided to justify it.[95]

The next major decision of the SCOTUS considering the knock and announce rule occurred in *Hudson v Michigan*. This involved the determination of whether a violation of the knock and announce rule by the police required suppression of the evidence found in the home.[96] In the United States, the suppression of evidence occurs where a constitutional right is violated, however Justice Scalia stated that the "suppression of evidence as having 'always been our last resort, not our first impulse.'"[97] When determining whether evidence should be suppressed, it should only apply where the remedial objectives are thought most efficaciously served and where its deterrence benefit outweigh its substantial social costs.[98]

In addressing dynamic entries, the Fourth Amendment's protection exist until a valid warrant is issued, and the knock and announce rule are not as far-reaching as the constitutional protections.[99] Essentially, the SCOTUS separates the search from the entry by police, leading to the conclusion that just because the knock and announce principle was violated does not contribute to the need to suppress evidence because the evidence still would have been found despite the action of the dynamic entry.[100] In the situation where police violate the knock and announce rule, but have a valid search warrant for the residence, the evidence is not to be immediately suppressed.

B. Comparison Between Canadian and United States Jurisdictions

Canadians and Americans enjoy similar common law protections under the knock and announce principle, as well as constitutional protections under s. 8 of the *Charter* and the Fourth Amendment of the United States *Constitution*. Following the development of evidence suppression in the United States, the law is similar to s. 24(2) of the *Charter* in Canada, in that evidence is not automatically excluded, and an analysis should be

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95 *Ibid.*

96 *Hudson v Michigan*, 547 US 586 (2006) at 589 [*Hudson*].

97 *Ibid* at 591.

98 *Ibid.*

99 *Ibid* at 593.

100 *Ibid* at 600.

conducted. In both countries the justification of dynamic entries based on exigent circumstances is to be done by the lower courts.

However, the main difference between the laws regarding dynamic entries is that in most of the states in the United States, police can apply for authorization through a no-knock warrant to perform a dynamic entry. Whereas in Canada, prior authorization to perform a dynamic entry cannot be approved by the judiciary and falls solely to the discretion of the police. While the process of prior authorization appears to offer greater scrutiny of police evidence, the state of this practice in the United States has been under a great amount of scrutiny in the last decade and has resulted in certain states banning the use of no-knock warrants.

C. States Banning No-Knock Warrants

The United States is unique in comparison to Canada in how individual states have control over their criminal laws and can pass legislation to address any shortcomings in SCOTUS decisions. At this time, the use and execution of no-knock warrants is banned in four states. Florida and Oregon have had the knock and announce rule codified in statute for many decades, while Virginia and Connecticut have added reforms to address recent tragedies.

The tragic death of Breonna Taylor in Louisville, Kentucky in 2020 has sparked outrage among citizens, and has directly contributed to political discussions about the use of no-knock warrants. The police mistakenly believed that Breonna was involved in a drug operation and that she was home alone conducted a dynamic entry on her residence.[101] While the police knocked, they failed to announce themselves, which resulted in Taylor's boyfriend firing his weapon when the door was crashed in. The police opened fire, killing Breonna Taylor and injuring her boyfriend, Mattingly. This no-knock raid led to no drugs or other evidence being found.

Deaths as a result of these dynamic entries, like Breonna Taylor's, are not a one-off occurrence, as there have been an estimated 94 people, including 13 police officers, killed in no-knock searches in the United States

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[101] See Scott Glover, Collette Richards, Curt Devine & Drew Griffin, "A key miscalculation by officers contributed to the tragic death of Breonna Taylor", online: *CNN* <www.cnn.com/2020/07/23/us/breonna-taylor-police-shooting-invs/index.html> [perma.cc/DN8R-GS2G].

between 2010 and 2016.[102] This led the State of Virginia to amend § 19.2-56 of the *Code of Virginia* that effectively nullifies and makes irrelevant the decision of the SCOTUS, which bolstered the use of no-knock entries in the United States. Subsection (b) of § 19.2-56 reads "No law-enforcement officer shall seek, execute, or participate in the execution of a no-knock search warrant..."[103] In addition to banning no-knock warrants, § 19.2-56 now places stricter limits on authorizing warrants executed outside of daytime hours.[104] In 2021, Connecticut passed similar reform to amend § 54-33a of the *Connecticut General Statutes* to ban the seeking, execution, and participation in the execution of a no-knock warrant.[105]

In *State v Bamber*, the Florida Appeal Court confirmed that § 933.09 was a statutory codification of the knock and announce rule, and that "no statutory authority exists under Florida law for issuing a no-knock search warrant."[106] However, the Court provided that a no-knock entry could be justified when exigent circumstances exist, such as the destruction of evidence.[107] Further, the Court held that "an officer's belief in the immediate destruction of evidence must be based on particular circumstances existing at the time of entry and must be grounded on something more than his or her generalized knowledge as a police officer and the presence of a small quantity of disposable contraband in a home with standard plumbing."[108] In support of the policy position for banning no-knock warrants, the Court identified the staggering potential of violence to both occupants and police when executed.[109] The Court found that the police were not justified in the search of the Bamber home, and they did not have a reasonable fear that Bamber would likely destroy evidence.

These four states have addressed issues surrounding no-knock warrants and responded by codifying the knock and announce rule. While this bans the issuance and execution of no-knock warrants, it does not expressly prohibit the use of dynamic entry by police when encountering exigent circumstances. The state of the law around dynamic entry and no-knock

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102 See Brian Dolan, "To Knock or Not to Knock: No-Knock Warrants and Confrontational Policing" (2019) 93:1 St John's L Rev 201 at 220.

103 Va Code Ann § 19.2-56 (2021).

104 *Ibid*.

105 Conn Gen Stat § 54-33a(e) (2021).

106 *State v Bamber*, 630 So 2d 1048 (Fla 1994) at 1050 [*Bamber*].

107 *Ibid* at 1052.

108 *Ibid* at 1055.

109 *Ibid* at 1050.

warrants in these states is similar to Canada, where a no-knock warrant cannot be obtained but falls upon the discretion of the police to execute a search warrant by way of dynamic entry. A key takeaway to the reasoning behind these legislative reforms is the overuse of dynamic entries and the insufficiency and inaccurate information used to authorize the warrants. However, of the law in Canada continues to contribute issues in the use of dynamic entries.

VI. *FEENEY* WARRANTS

In Canada, following the case of *Feeney*, ss. 529-529.5 were added to the *Code* which established the legislative framework for executing arrests in dwelling houses.[110] These sections were added as *Feeney* determined that the *Code* failed to provide specifically for a warrant containing such prior authorization to address exigent circumstances.[111] Subsection 529.4(1) allows a judge or justice to authorize a peace officer to perform a dynamic entry, if satisfied by the information on oath that exigent circumstances exist.[112] The specific exigent circumstances referred to are a) expose the police officer or any other person to imminent bodily harm or death; or b) result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.[113] This amounts to what is known in the United States as a no-knock warrant, however s. 529.4(2) requires that the peace officer evaluate the situation again immediately prior to execution to ensure that exigent circumstances remain present.

This section applies only to situations where police officers are attempting to arrest an accused within a dwelling house and is not applicable to the use of dynamic entries in other key areas, such as drug, firearm, and child sexual abuse material offences. However, what this section represents is the codification of the knock and announce rule in specific circumstances, as well as the ability for peace officers to obtain prior

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110 See Michael A. Johnston, "Knockin' On Feeney's Door? A Case Comment on R. v. Cornell" (2012) 58 CLQ. 379 at 397 ["Johnston"].

111 *Ibid.*

112 *Code*, *supra* note 7, s 529.4.

113 *Ibid* [emphasis added].

judicial authorization for a no-knock warrant, although contingent on the continuation of the existence of exigent circumstances.[114]

The exigent circumstances under s. 529.4(1) and the use of the term imminent in both subsections point to a much higher standard to meet than those set out by the SCC in *Cornell* in relation to dynamic entries generally.[115] The SCC found exigent circumstances to be low risk of weapons, possibility of harm, or if the drugs sought could be easily destroyed.[116] It is suggested by Johnston that the approach to dynamic entry outlined by the majority in *Cornell* has lowered the bar of the knock and announce principle and provided a satisfactory analysis to determine whether it was justified.[117] This can be contrasted to the Court's decision in *Feeney*, leading Parliament to enact a new section of the *Code*, specifically codifying the knock and announce principle and providing a standard for the exigent circumstances that could lead to the approval, and then to the execution of a dynamic entry of the police.

VII. RECOMMENDATION

With the growing concerns of the use of dynamic entries by police across Canada and the United States,[118] the fatal consequences that can and have resulted, and the concerning reliance on these tactics by police as highlighted in *Bahlawan*, there is a need for reform. The increasing use of dynamic entries because of a low threshold for their justification from the majority decision in *Cornell* points to the need for a higher bar. This is needed to ensure citizens' *Charter* rights are an important consideration when they may be potentially breached, rather than justification occurring after the breach has occurred.

The implementation of a *Code* section like s. 529.4 would address the shortcomings of the law in dynamic entries in Canada, while balancing the interests of all parties involved. A return to the knock and announce

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114 See Johnston, *supra* note 110 at 397-398.

115 *Ibid.*

116 *Cornell*, *supra* note 11at para 24.

117 Johnston, *supra* note 110 at 399.

118 See Spratt, *supra* note 47; Zach Dubinsky, "More protections needed against police no-knock raids, lawyers say" (19 June 2021), online: *CBC News* <www.cbc.ca/news/canada/no-knock-raids-lawyers-solutions-1.6072238> [perma.cc/Y6KK-CW4K]; Dolan, *supra* note 102.

principle is needed, as stated by Justice Cromwell in *Cornell*: "experience has shown that it [knock and announce principle] not only protects the dignity and privacy interests of the occupants of dwellings, but it may also enhance the safety of the police and public."[119] This principle, combined with the protections of s. 8 of the *Charter*, requires a higher justification for the intrusion into one's home.

The proposed section would allow a judge or justice to authorize the police to depart from the knock and announce rule where the existence of exigent circumstances exist, and the exigent circumstances involve either the imminent threat of bodily harm or death or the imminent threat of destruction of evidence, directly borrowing the language of s. 529.4. Further, following this section, the police would be required to revaluate the exigent circumstances directly prior to executing the dynamic entry to ensure they are still present. While this power would be codified, the police would retain the discretion to enter a residence where prior authorization was not given, but would be required to satisfy the new level of exigent circumstances, involving an imminent threat.

The codification of the common law knock and announce principle as it relates to dynamic entries would increase the merit of the rule. It would extend from a common law protection to a statutory protection. The introduction of a no-knock warrant option outside of the dwelling house arrest under s. 529.4(2) for the purposes of dynamic entries would have both potential strengths and weaknesses. These will be discussed as they would apply to the current issues with dynamic entries in Canada and compared to the United States.

A. Advantages

The first strength of a codified no-knock warrant would be the move to prior judicial authorization from a judge or justice, as opposed to having the ITO and other circumstances of the investigation reviewed after the fact. It would follow that to receive authorization, a greater threshold would have to be met than what the majority in *Cornell* has found. This can be found under s. 529.4(1), which lays out the exigent circumstances that must exist to satisfy the no-knock warrant, which include the imminent threat of bodily harm or death, and the imminent loss or destruction of evidence.[120]

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119 *Cornell*, *supra* note 11at para 19.

120 *Code*, *supra* note 7, s 529.4(1).

With the elevated justification needed to obtain the no-knock warrant, police may choose to investigate further and obtain more information to support the need for a dynamic entry. By taking these additional steps to corroborate the evidence, the police could likely identify situations where a dynamic entry would no longer be required, based on further investigation.

In *Cornell*, the information police had in the ITO would likely not have been enough to satisfy the standard of imminent threat to safety or imminent threat of destruction of evidence. As the dissent had identified, the nexus between the threat to safety was very small, and as identified further investigation into the residents of the Cornell home would have suggested a dynamic entry was not necessary.[121] In *Parasiris*, the Court found that there were not reasonable grounds to issue a warrant for Parasiris' residence, nor perform a dynamic entry.[122] If brought before a judge or justice for permission, this warrant would have been rejected and a tragic result may have been prevented. Another case where the ITO was found by the Court to not contain accurate information to justify a warrant occurred in *R v Garabet*, where the Ontario Court of Appeal found that the evidence was dated, imprecise, and inconclusive.[123] The three preceding cases all involved a risk to the destruction of evidence, and no firearms were expected to be present from the evidence contained in the ITOs.

The next strength of codified no-knock warrants would be the return to the protections that citizens enjoy under the knock and announce principle and s. 8 of the *Charter*. A greater justification for police to depart from these standards would result in these interests being at the forefront of the decision to depart from these protections, rather than being retroactively justified. This benefit may have likely prevented the dynamic entries based on faulty information, as pursuit of evidence would no longer outweigh the protections.

Finally, the police and the Crown would have an easier process to justify the use of a dynamic entry due to the obtaining of the warrant. The high bar of justification would occur prior to the execution of the warrant and would likely contain a higher degree of evidence contained in the ITO.

B. Weaknesses

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121 *Cornell*, *supra* note 11at para 50.

122 *Parasiris*, *supra* note 51at para 94

123 *R v Garabet*, 2017 ONCA 139 at para 10.

While the addition of a no-knock warrant appears to have advantages, it is important to look to the United States where the practice of no-knock warrants is standard in over 40 states and has been banned in four. The problems identified with no-knock warrants in the United States are the danger to both officers and occupants, the possibility of mistaken identity, inaccurate information and insufficient judicial scrutiny, and the overuse of the practice on racial minorities.[124] It was stressed in the case of *Bamber* that the exigent circumstances must be assessed on the scene at the time the warrant is executed.[125]

The implementation of a no-knock warrant statute in Canada would likely address the possibility of mistaken identity, inaccurate information, and insufficient judicial scrutiny by providing the high bar of justification regarding the presence of exigent circumstances. Further, to address the Court's concern in *Bamber*, the police would be required to reassess the exigent circumstances prior to entry on each warrant execution as is required under s. 529.4. While there is a risk that this practice may not be followed in every circumstance, a departure from the practice represents a departure from the statutory authority. This would be preferable compared to the current practice of police relying solely on their discretion to depart from the knock and announce rule.

Another potential weakness of the no-knock warrant would the increased risk to the police, as they would have to prove a higher likelihood that their safety would be at risk to obtain the warrant. This is a legitimate concern; however, a balance must be obtained between the interests of those being searched and the police. In situations where firearms are either confirmed to be present, or highly likely to be present, then police will be able to obtain authorization for a dynamic entry. This must be balanced against justification used in prior cases: that dangerous criminals are involved with drugs, and therefore they may be violent and possess firearms. Additionally, under this new statutory regime, the police would still be able to conduct a dynamic entry in situations where they did not obtain a no-knock warrant. They would however have to evaluate the exigent circumstances based on the criteria containing imminent threat, and if found would be able to proceed with a dynamic entry. This would be evaluated in the same after the fact procedure that is currently used.

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124 See Dolan, *supra* note 102.

125 *Bamber*, *supra* note 106at 1050.

Finally, if the judiciary authorizing the no-knock warrants chose to authorize these warrants without meeting the high bar set out in the statute a risk of the overuse of these warrants would be present. In addition, police could make the ITO appear more detailed, and possibly include assumptions to obtain the no-knock warrant. The proposed solution to this would be defence counsel having full disclosure to the ITO and being able to challenge the approval of the warrant based on the validity of the information it contained.

VIII. CONCLUSION

The use of dynamic entry by police in Canada has resulted in multiple issues concerning the protections Canadians possess under the knock and announce principle and s. 8 of the *Charter*. It is recognized that situations do and will continue to exist where the police must use a dynamic entry to address when exigent circumstances are present, and to protect themselves, occupants, and the destruction of evidence. However, the issues identified have demonstrated that there is an imbalance when considering police power and the protections of the common law and *Charter*. The police should not be allowed full discretion to decide whether to perform a dynamic entry, as they are too involved with the investigation and a third party offers a better consideration of balancing the interests at play. The dissent in *Cornell* stressed the importance of the protections Canadians have from the practice of dynamic entries. The dissent spoke of the need for an increased justification for dynamic entries to allow the police to breach the *Charter* rights of Canadians suspected of crimes.

This paper has resulted in the recommendation that the common law knock and announce rule be codified, as well as the introduction of a no-knock warrant regime in Canada like Parliament's steps following *Feeney* and the introduction of s. 529 of the *Code*. The introduction of no-knock warrants in Canada would result in a higher justification to be met by the police to obtain a warrant and precede by dynamic entry. The exigent circumstances mentioned in *Cornell* would be more onerous and require an imminent threat to bodily harm or death or an imminent threat to destruction of evidence be present. While this standard may be difficult for the police to satisfy, this is an intended consequence. The use of dynamic entries in Canada has resulted in fatal consequences, innocent people have

their homes damaged and raided, and police forces have adopted blanket policies to abuse the practice of dynamic entry.

The likely result of implementing this statutory regime will be that dynamic entries by police will be the exception as opposed to the norm. Dynamic entries will be limited to situations where evidence exists that exigent circumstances are imminent and the need to forego the rights of the occupants of the home will be justified. This balancing of interests is key to maintaining the rights of those involved and preventing the harms that dynamic entry has resulted in.

Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders

ANDREA S. ANDERSON*

ABSTRACT

One of the ways in which anti-Black racism continues to manifest itself is in the over-incarceration of Black Canadians. The incarceration rate of Black Canadian men is five times higher, while Black women are three times more likely to be incarcerated than their white counterparts. Similar to the *Gladue* analysis for Indigenous sentencing, the courts have acknowledged that a cultural lens is also required when sentencing Black Canadians. Examining the implications of anti-Black racism has put forward the proposition that the current sentencing principles can develop a framework of analysis that directly addresses the disparities in the incarcerations of Black Canadians. While not exhaustive, this review positions the recent Canadian court decisions, specifically in Ontario, that have illustrated it is imperative to consider an individual's systemic and social circumstances in determining a fit and proportionate sentence. The sentencing stage provides an opportunity to address the overrepresentation of Black Canadian offenders in the penal system.

Keywords: Sentencing Laws; Anti-Black Racism; Racialization; Impact Cultural and Race Assessment; Incarceration; The Carceral State and the Administration of Justice.

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I. INTRODUCTION

Since reforming 1996 sentencing provisions, the courts have grappled with how to address the role of sentencing objectives within Canada's legacy of colonialism, slavery, and segregation. Several studies and reports have documented a disturbing trend: an increasing over-representation of Black people among those who receive the harshest sentences.[1] Current sentencing practices have contributed to concerns over the higher rates of imprisonment amongst Indigenous and racialized populations in Canada. The incarceration rate of Black Canadian men is five times higher, while Black women are three times more likely to be incarcerated than their counterparts.[2] The 2013 report by the Office of the Correctional Investigator, entitled "The Black Inmate Experience in Federal Penitentiaries," highlights this increase in the carceral population over the past decade: the Indigenous population increased by 46.4 percent, and the number of racialized groups (e.g. Black, Asian, Hispanic) increased by 75 percent.[3] During this same period, the population of white inmates declined by 3 per cent. Further, the report found Black Canadians make up approximately 3 percent of the general population but accounted for 10 per cent of the federal prison population - an increase of 80 per cent since 2003. While these reports confirm that systemic racism and discrimination often manifest in corrections, it also suggests this is a broader societal problem. Empirical evidence and studies, including from Akwasi Owusu-Bempah and Scot Wortley, have shown a direct link between this disparity in the prison population and "Canada's ... historical treatment of racialized peoples and its involvement in both French and British colonialism," which "continue[s]

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1 Black and African Canadians are used interchangeable, represents those who identify as Afro-Caribbean decedents. See e.g. Akwasi Owusu-Bempah, et al, "Race and Incarceration: The Representation and Characteristics in Provincial Correctional Facilities in Ontario, Canada" (2021) *Race and Justice* 1.

2 Akwasi Owusu-Bempah, et al, "Race and Incarceration: The Representation and Characteristics in Provincial Correctional Facilities in Ontario, Canada", (2021), *Race and Justice* 6-8.

3 Government of Canada, The Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries – Final Report" (2013), online: <www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx> [perma.cc/EGC2-XKUM].

to haunt racial minorities in the country."[4] These studies have raised important questions concerning racial discrimination in the criminal justice system, particularly anti-Black racism, and disparities in the sentencing process. From *Parks*to *Le*,[5] the courts have recognized the negative impact of anti-Black racism in the Canadian criminal justice system. Given the acute problem of Black Canadians' over-representation in correctional facilities, Canadian "courts can not presume to be colour blind in these situations."[6] The sentencing stage is one of the areas in the justice system that can directly address the over-representation of Black individuals. The need for sentencing judges to adequately position the social context of anti-Black racism as evidence is evident.

II. SENTENCING LAW

The principles and purposes of sentencing are found in section 718 of the *Criminal Code*.[7] A sentencing judge must consider aggravating and mitigating factors, including those listed in s. 718.2(*a*)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(*b*)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2(*c*)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(*d*) and (*e*)). However, while reconciling these different goals, the fundamental principle of sentencing under section 718.1 of the *Code* is that a "sentence must be proportionate to the gravity of the offence and the degree of

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4 Scot Wortley & Akwasi Owusu-Bempah, "Race, Crime, and Criminal Justice in Canada" in Sandra M Bucerius & Michael Tonry, eds, The Oxford Handbook of Ethnicity, Crime, and Immigration (New York: Oxford University Press, 2014) 281.

5 *R v Parks* (1993), 84 CCC (3d) 353 (ONCA); *R v Le*, 2019 SCC 34.

6 *R v Grant*, 2009 SCC 32 at para 154

7 *Criminal Code*, RSC 1985, c C-46, s 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;
(*b*) to deter the offender and other persons from committing offences;
(*c*) to separate offenders from society, where necessary;
(*d*) to assist in rehabilitating offenders;
(*e*) to provide reparations for harm done to victims or to the community; and
(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

responsibility of the offender." The determination of a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the criminal act.[8] The Supreme Court of Canada (SCC)'s judgment in *Ipeelee* discusses proportionality in relation to both the principle of denunciation and the moral blameworthiness of the offender:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful, and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.[9]

III. Judicial Notice of Systemic Factors

The goal of any sentencing proceeding is to arrive at a fair and just sentence that is proportionate to the crime. To achieve this objective, courts have considered the background and life circumstances of the person being sentenced. For example, sentencing courts have historically considered factors such as gender, age, employment and immigration status, education level, and family circumstances. This has been non-controversial. Accordingly, courts have also long considered the race of the person being sentenced and the historical and social context of any discrimination that offender may have encountered when determining an appropriate sentence. Judges such as Justice Shreck and Justice Hill have acknowledged the detrimental impact of anti-Black racism in general, as well as its insidious

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8 *R v M (CA)*, [1996] 1 SCR 500 at para. 80. See also Toni Williams, "Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada" (2007) 55:3 Clev St L Rev 269.

9 *Criminal Code*, *supra* note 8, ss 718(b), 718.1; *R v Ipeelee*, 2012 SCC 13 at paras 36-37. See also *R v Hamilton* (2004), 241 DLR (4th) 490 (ONCA) at paras 89-91, 186 CCC (3d) 129 [*Hamilton*].

nature in the sentencing equation.[10] Statutory basis for recognizing the insidious and general impact of racial discrimination sentencing considerations of social context are found under s. 718.2(e) of the *Code*, which states "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders." The first interpretation of s. 718.2(e) and its application and relationship to Indigenous offenders was in the SCC decision in *R v. Gladue*.[11]

A key principle from *Gladue* is that s. 718.2(e) "alter[s] the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders."[12] In other words, the *Gladue* framework instructs courts to pay "particular attention" to the unique circumstances of Indigenous offenders and consider whether those circumstances merit "sanctions other than imprisonment." However, s. 718.2(e) does not provide for an automatic reduction in sentence.[13] Rather, in some circumstances, the provision may result in the reduction of the sentence of an Aboriginal offender compared to a non-Aboriginal offender who is similarly situated.[14] This section must always be considered, even for serious offences.[15] The *Gladue* decision also recognized that for the violent and serious offences, s. 718.2(e) was unlikely to alter the sanction imposed on an Aboriginal offender.[16]

Gladue provided at least two distinct considerations for sentencing judges when attempting to determine whether an offender's Indigeneity may justify a more lenient sentence. *Gladue* mandates that in sentencing the courts must consider: (1) the systemic or background factors that have contributed to bringing the Aboriginal offender before the courts, and (2)

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10 *R v Elvira*, 2018 ONSC 7008 at paras 21 to 26.

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

12 *Ibid* at para 75.

13 *Ibid* at paras 78-80, 88, 99

14 *Ibid*. Since *Gladue*, the SCC, and other appellate courts, have held two extremes in the application of *Gladue*: (1). Aboriginal heritage only reducing a sentence when it is causally linked to the offence, which is too strict (*Ipeelee*, *infra* note 17 at paras 81-83; *R v Kreko*, 2016 ONCA 367 [*Kreko*] at para 21; *R v Laboucane*, 2016 ABCA 176 at para 63 [*Laboucane*]); and (2) Aboriginal heritage automatically reducing every sentence, which is too lenient (*Ipeelee* at para 75; *Kreko* at para 19; *Laboucane* at para 54)

15 *R v Ipeelee*, 2012 SCC 13 at paras 84-87.

16 *Gladue*, *supra* note 13 at paras 79, 82.

the types of sentencing procedures and sanctions which may be appropriate in the offender's circumstances, with consideration given to his or her Aboriginal identity and experiences. If there is no alternative to incarceration, the length of the term must be carefully considered.[17]

The attention to "systemic and background factors" is intended to acknowledge the systemic impact of colonialism on individual offenders. This serves as a recognition that a person's criminal behaviour may result, in part, from a system of barriers caused by the legacy of colonialism. As explained in *Gladue*: "the unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people."[18]

The SCC has considered the *Gladue* framework multiple times. *Ipeelee* reaffirmed the principles established in *Gladue* and clarified how they should operate.[19] In addition to affirming that s. 718.2(e) did not shift the proportionality provision, the Court held that when sentences imposed on Aboriginal offenders are lenient, they will be "justified based on their unique circumstances ... which are rationally related to the sentencing process."[20] Lastly, the Court in *Ipeelee* clarified that Aboriginal offenders did not need to "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." Rather, those background factors need only be "tied in some way to the particular offender and offence" such that they "bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized."[21] In *Wells*, the SCC held that a sentencing judge must take into account "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct.[22] In both *Ipeelee* and *Glaude*, the SCC mandated that an understanding of individual background and systemic factors is important for sentencing a non-Aboriginal offender.[23] The socio-economic and racial discrimination

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17 *Ibid* at paras 66, 69.

18 *Ibid* at 65.

19 *Ipeelee*, supra note 17 at para 1.

20 *Ibid* at paras 76-79.

21 *Ibid* at paras 81-83.

22 *R v Wells*, 2000 SCC 10 at para 38.

23 *Ipeelee supra* note 17 at para 77; *Gladue*, *supra* note 13 at para 69.

experienced by offenders are relevant to the degree of their moral culpability and should inform the way sentencing principles are applied. In *Borde*, for example, the Ontario Court of Appeal accepted that the background and systemic factors of Black Canadians, where they are shown to have played a part in the offence, may be considered when determining the sentence:

> The principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the value of the community from which the offender comes.[24]

IV. THE APPLICATION OF SOCIAL FACTORS TO BLACK CANADIANS

Many studies and reports have identified the correlation between the impact of anti-Black racism in Canadian society in general and Ontario, in particular, and the overrepresentation of Black people in the justice system.[25] When considering a framework for applying s. 718.2(e) to Black Canadian offenders, the courts have attempted to examine how the *Gladue* framework could better address how factors such as slavery, colonialism, overrepresentation in the child welfare system, segregation in housing and schools, employment, systemic racism in school discipline, police practices of racial profiling, and overrepresentation in the prison population all impact Black Canadians offenders.

Ontario criminal courts have taken judicial notice of the historical and systemic injustices against Black Canadians in *R v. Parks* (1993), *R v RDS* (1997), *R v Golden* (2001), *R v Brown* (2003), *R v Spence* (2005) and *R v Grant*

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24 *R v Borde* (2003), 8 CR (6th) 203 at 32 (ONCA), 172 CCC (3d) 225 [*Borde* ONCA].

25 See e.g. Stephen Lewis, "Report of the Advisor on Race Relations to the Premier of Ontario, Bob Rae" (1992), online (pdf): <www.siu.on.ca/pdfs/report_of_the_advisor_on_race_relations_to_the_premier_of_ontario_bob_rae.pdf> [perma.cc/C4NC-SW75]; Eric Mills, David P Cole & Margaret Gittens, *Report of the Commission on Systemic Racism in Ontario Criminal Justice System* (Toronto: The Commission, 1995); Ontario Human Rights Commission, "Paying the price: The human cost of racial profiling" (2003), online (pdf): <www-ohrc-on-ca.uml.idm.oclc.org/en/paying-price-human-cost-racial-profiling> [perma.cc/MX26-623M]; City of Toronto, *Toronto Action Plan to Confront Anti-Black Racism* (2016), online (pdf): <www.toronto.ca/legdocs/mmis/2017/ex/bgrd/backgroundfile-109127.pdf> [perma.cc/GYW4-8RNK].

(2009).[26] The importance of social context analysis in sentencing processes allows courts to find more robust justifications for the penalties they impose on offenders. Though the Ontario Court of Appeal (ONCA) has agreed that social context is a valid consideration in the sentencing of non-Indigenous offenders in *Borde*,[27] its subsequent decision in *Hamilton*[28] imposed limits on what types of social context evidence should be examined by judges and how social disadvantage should be considered.

In *Borde*, the Court was asked to apply *Gladue* principles to Black Canadians. Defence counsel argued that the historical circumstances of Indigenous people and Black Canadians were analogous and that the *Gladue* framework should apply in the sentencing of Black offenders.[29] While dismissing the direct analogy, Justice Rosenberg agreed that *Gladue* and the reparative justice principles in s. 718.2(e) had broad applications. The ONCA acknowledged the realities of anti-Black racism and the over-incarceration of Black Canadians in jails and penitentiaries, and concluded that "systemic factors facing African Canadians, where they are shown to have played a part in the offence, might be taken into account in imposing a sentence."[30] Justice Rosenberg followed the pre-*Ipeele* assumption that when an offence is more serious or violent, it is unlikely that the *Gladue* framework would apply.

The holding in *Borde* on the use of social context evidence was supported in the *Hamilton* and *Mason* trial decision. In that case, Justice Hill relied on an element of the *Gladue* framework in emphasizing the need to consider all relevant evidence in the determination of a fit sentence, meaning that "important systemic and background circumstances" of the offence should be relevant to "do justice in every case."[31] The defendants in *Hamilton* and *Mason* were two Black single mothers. Reviewing the evidence,

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26 *R v Parks* (1993), 84 CCC (3d) 353 (ONCA) at para 54, 24 CR (4th) 81 (Jury Selection); *R v RDS*, [1997] 3 SCR 484 at para 47, 151 DLR (4th) 193 (Social Context Judging); *R v Golden*, 2001 SCC 83 at para 83 (Strip Searches); *R v Brown* (2003), 64 OR (3d) 161 (ONCA) at para 9, 173 CCC (3d) 23 (Racial Profiling); *R v Spence*, 2005 SCC 71 at para 5 (Jury Selection); *Grant*, *supra* note 7 at para 154 (Arbitrary Detention).

27 *Borde* ONCA, *supra* note 26.

28 *R v Hamilton* (2004), 72 OR (3d) 1 (ONCA), 186 CCC (3d) 129 [*Hamilton* ONCA].

29 *Ibid*.

30 *Borde* ONCA, *supra* note 26 at para 27.

31 *R v Hamilton (2003)*, 172 CCC (3d) 114 (ONSJ) at para 221, 8 CR (6th) 215 [*Hamilton* ONSJ].

the Court noted that poverty and systemic racism had made Black Canadians, and particularly single mothers, vulnerable to exploitation.[32] The defendants' decision to transport cocaine and act as couriers could not be understood without reference to systemic and background factors. Introducing his own research as evidence, Justice Hill concluded that it would be improper to treat the decision to transport cocaine as purely an individual matter without understanding the structured circumstances of the defendants.[33] The Court held that "systemic and background factors ... should logically be relevant to mitigating the penal consequences" for the defendants.[34]

The Crown appealed the *Hamilton* decision. Justice Doherty, writing the unanimous decision, noted that the trial judge had made several errors. The ONCA concluded that the trial judge had "stepped outside of the proper role of judge on sentencing" and established "a de facto commission of inquiry" on "broad social issues that were not raised by the parties."[35] The Court of Appeal affirmed *Borde*, holding that social context can be considered in the sentencing of non-Indigenous offenders. Furthermore, the Court determined that a sentencing judge must consider all factors that are relevant to the personal culpability of the offender.[36] However, Justice Doherty held that statistical and social science evidence acquired by the trial judge in *Hamilton* and *Mason* could not support a finding that the circumstances of the defendants were the "direct result" of systemic factors: "the fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence."[37] The Court of Appeal warned that if "social ills" are given too much weight on sentencing, "an individual's responsibility for his or her own actions will be lost."[38] *Hamilton* maintained that "systemic and background factors could not affect the length of the sentence" considering "the violent and serious offences committed."[39] The *Hamilton*

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32 *Ibid* at para 198.
33 *Ibid* at para 221.
34 *Ibid* at para 224.
35 *Hamilton* ONCA, *supra* note 35.
36 *Ibid* at para 135.
37 *Ibid* at para 133.
38 *Ibid* at para 140.
39 *Ibid* at paras 28, 104.

appeal raised the threshold for mitigation in sentencing due to social context as the Court cautioned against righting perceived historical wrongs.

Recent cases have highlighted how the courts have grappled with addressing systemic factors when sentencing racialized offenders. In *Duncan,* the sentencing judge declined to apply *Gladue* principles or to consider systemic and racial bias for a Black Canadian offender, given the lack of any evidentiary basis to do so.[40] n *Brissett* the sentencing judge revisited Justice Doherty's comments in *Hamilton* on the risk of overemphasizing social ills to the extent that "result in an individual's personal culpability being lost." In *Brissett,* the Court held that there was no evidence of racial discrimination or stereotyping that exists in society that "had any effect on either the offenders or on the offence in this case."[41] In *Reid*, however, rather than sentencing a young Black man to the 6-12 month jail term sought by the Crown for drug charges, Justice Edward Morgan issued a conditional sentence.[42] The judge considered both Reid's personal circumstances and societal factors, including anti-Black racism and the over-incarceration of Black Canadians.[43] To support his decision, Justice Morgan cited statistics concerning the over-incarceration of Black men in Canada's prison system, including data from the Office of the Correctional Investigator demonstrating that the number of federally incarcerated Black inmates had increased by 80 percent over the last decade. Relying on previous cases such as *Golden*,[44] Justice Morgan acknowledged that the SCC had already taken notice that Black and Indigenous Canadians are overrepresented in the criminal justice system. In turn, the judge held that regarding the Black community, similarly to Indigenous Canadians, "over incarceration is a long-standing problem that has been many times publicly acknowledged, but never addressed in a systemic manner by Parliament."[45] Justice Morgan found that "while this court is not in a position to remedy the societal issues, it can and should take the societal context into account in fashioning an appropriate sentence for an individual offender."[46]

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40 *R v Duncan*, 2012 ONSC 2609 at para 86.

41 *R v Brissett*, 2018 ONSC 4957. Brissett did not follow reasons in *Jackson*, *infra* note 56.

42 *R v Reid,* 2016 ONSC 954 at para 27 [*Reid*].

43 *Ibid* at paras 21-27.

44 *Golden*, *supra* note 33.

45 *Reid*, *supra* note 51 at para 23. Quote from *Gladue, supra* note 13 at para 57.

46 *Ibid* at para 27.

In *Jackson*, Justice Nakatsuru moved beyond *Hamilton* and formed an approach to sentencing that emphasizes the need to consider social context evidence when sentencing Black Canadians. In that case, the defendant was a Black man with a lengthy criminal record. Mr. Jackson self-identified as both Indigenous and African Nova Scotian. Defence counsel asked the judge to take into consideration the systemic and background factors in Jackson's sentencing. Echoing the trial judge's comments in *Hamilton*, Justice Nakatsuru held that it was important to consider the circumstances of each offender in their appropriate context. Building on previous decisions such as *Parks* and *Golden*, Justice Nakatsuru took notice of anti-Black racism. Justice Nakatsuru noted the long history for African Nova Scotians marked by "systemic discrimination, marginalization and systemic recruitment into criminality."[47] Recognizing aspects of *Gladue* that were applicable, Justice Nakatsuru held that socio-economic factors that affect Black Canadians can lead to discriminatory sentencing. In sentencing Mr. Jackson to a total of six years,[48] the Court found that the defendant's personal history of "early racial conflict, identity confusion and family disruption" created conditions for the defendant to come into contact with the justice system.[49]

While in *Hamilton* the ONCA held that systemic and background factors could only be considered if the immediate circumstances of the offender were the "direct result" of these factors, Justice Nakatsuru reconsidered this direct link post-*Ipeelee*. In *Ipeelee*, the SCC noted that the connection between histories of colonialism and present realities is complex, and cautioned against "impos[ing] an evidentiary burden on offenders that was not intended by Gladue."[50] In this vein, the Court in *Jackson* concluded that requiring a direct connection "would simply impose a systemic barrier that would only perpetuate inequality for African Canadians"[51] Justice Nakatsuru acknowledged that the over-incarceration of Black Canadians is "an acute problem" and concluded that "[s]ection

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47 *R v Jackson*, [2018] OJ No 2136 at para 31 [*Jackson*].

48 Mr. Jackson is a Canadian of African heritage. Mr. Jackson self-identified as having had Indigenous heritage but waived the application of *Gladue* principles in his sentencing. Justice Nakatsuru, for possession of prohibited firearm with ammunition and breach of prohibition order. Credited, total sentence was 2 years and 257 days. (Crown sought total of 8.5-10 years. Defence counsel requested 4 years).

49 *Jackson*, *supra* note 56 at para 57.

50 *Ipeelee*, *supra* note 17at para 82.

51 *Jackson*, *supra* note 56 at para 112.

718.2(e) can be resorted to in order to address this particular problem."[52] Further, Justice Nakatsuru found that "within the sentencing principles that currently exist, I believe there is room to build a framework of analysis that can begin to address the issue of disproportionate incarceration of African Canadians."[53]

In his decision, Justice Nakatsuru wrestled with how to reconcile the principles in *Gladue* and *Jackson* with the requirements of sentencing serious crime: "it is recognized that for some crimes, mitigating factors regarding the offender's responsibility is outweighed by the needs of general deterrence and denunciation."[54] In accepting the admissibility of the reports, Justice Nakatsuru concluded: "these are systemic and case-specific factors that lessen … moral blameworthiness for this offence and soften the impact of general deterrence and denunciation" in this particular case.[55]

In *Morris*, a jury found the defendant guilty of possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon. The Crown had asked for 4-4.5 years in jail. Defence counsel argued the sentence should be one-year, minus credit for the number of *Charter* violations that occurred. Justice Nakatsuru sentenced the defendant to 12 months in jail and probation for 18 months. Judicial note was taken on the history of colonialism, slavery, segregation, intergenerational trauma, and anti-Black racism's impact on Black Canadians, specifically Morris as a young Black man.[56]

While acknowledging the similarities between Indigenous persons and Black Canadians, Justice Nakatsuru held that there was little value in comparing the situations as there are significant differences, stating "the relationships they have with state institutions such as the criminal justice system reflect different lived experiences and socio-political realities. In my opinion, the voices of each community deserve to be heard on their own individual terms."[57]

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52 *Ibid* at para 79.

53 *Ibid* at para 73.

54 *R v Morris*, 2018 ONSC 5186 at para 55 [*Morris* ONSC].

55 *Ibid* at 75.

56 *Ibid* at para 74.

57 *Jackson*, *supra* note 56 at para 57.

V. RACE AND CULTURAL ASSESSMENTS

A. Initial Development and Use of Impact of Race and Culture Assessments

Courts have attempted to address the integration of cultural assessment pre-sentence reports into the justice system. The Impact of Race and Culture Assessment ("IRCA") originated in Nova Scotia, and IRCAs have been admitted in Nova Scotia trial courts and used to build on the similarities of *Gladue* reports when determining appropriate sentencing for Black offenders.[58] The IRCAs provide insight into the social context impacting Black Canadian offenders. The inclusion of these reports can be viewed as a sign that the courts are improving their understanding of the implications of systemic racism and addressing the over-representation of Black Canadians in jails. The topics covered in the IRCAs include but are not limited to: socio-economic adversity; mental health, childcare interventions; and immigration hardship. Overall, these cases examine cultural assessment by asking: (1) what is known about the Black Canadian experience in general and as it relates to crime and justice, (2) how the individual's experience and culture contribute, and (3) how does this context inform the services and resources that could facilitate rehabilitation and reintegration for this offender.[59]

R v X was the first reported case to use an IRCA pre-sentencing report. The case was a young offender convicted of the attempted murder of his cousin. The Crown was seeking an adult sentence. The IRCA report provided the sentencing judge with background and contextual evidence of X's experience as a member of the Black community. The report explained that X's demeanour, which was viewed as unremorseful and anti-social, was likely influenced by coping mechanisms developed in response to the impacts of the criminality that affected his community.[60] Justice Derrick acknowledged that it was important to understand the unique racial and cultural factors of Black Canadians in the sentencing process. In this context, the judge found that the IRCA went beyond other pre-sentencing materials or s. 34 of the *Code* to provide "a more textured, multi-

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58 See e.g. *R v X*, 2014 NSPC 95; *R v Gabriel*, 2017 NSSC 90; *R v ES*, 2014 NSPC 81; *JC (Re)*, 2017 NSPC 14.

59 *Jackson*, *supra* note 56.

60 *R v X*, *supra* note 67 at para 189.

dimensional framework for understanding X, his background and his behaviours."[61] The report helped the Court realize the dynamic of the accused as both an offender and a victim of violence in the context of his criminality.[62] The judge ruled for a youth sentence.

B. Impact of Race and Culture Assessments in Ontario Trial Courts

Ontario courts have moved to consider IRCAs in the sentencing of Black Canadian offenders. In *TJT*, the issue before the Court was whether a youth or adult sentence should be imposed for a 15-year-old that had been found guilty of second-degree murder. The IRCA report provided Justice Garson with an understanding of how the offender's childhood had impacted his critical reasoning and decision-making.[63] In this case, the report included descriptions of his father having been in jail most of the boys' life, and a mother who worked two jobs - while raising five boys - the death of his grandmother, the murder of his friends, and his two older brothers being shot multiple times.[64] Justice Garson weighed all the relevant factors and imposed a youth sentence. The Crown did not appeal.

The Court in *Jackson* reaffirmed the judicial powers under s. 723(3) and 721(1) of the *Code* to permit the order of the production of evidence and pre-sentence reports that demonstrate the relationship between systemic factors and the individual's circumstances. Counsel for Jackson submitted an IRCA. The IRCA was prepared by a social worker and presented case-specific information about the impact of anti-Black racism in a manner similar to the *Gladue* reports. In *Morris*, the defence counsel presented two reports: (1) dealing with anti-Black racism in Canada, and (2) addressing Morris' social history. The Court has acknowledged that IRCAs "have the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration."[65] The Court concluded that cultural assessment reports are an "attempt to articulate the issues of anti-Black and systemic racism in Canadian society to the court at

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61 *Ibid* at para 193.

62 *Ibid* at para 198.

63 *R v TJT*, 2018 ONSC 5280 at paras 42-27, 78-82.

64 *Ibid* at para 53.

65 *Ibid* at para 101.

the sentencing stage of adjudicating African Canadians"[66] Justice Nakatsuru's decision was a departure from the pattern of courts sentencing for gun offences. Justice Nakatsuru explained that general deterrence and denunciation, which are often used to justify tougher sentences for gun-related offenses, are not in opposition with the consideration of systemic factors. Furthermore, in *Nur* and *Proulx*[67], the SCC recognized that general deterrence is an ineffective principle in practice.

C. Impact of Race and Culture Assessments at the Ontario Court of Appeal

The *Morris* appeal was the first time an Ontario appellate court addressed the IRCA in the sentencing of Black people in the province.[68] In Ontario, the courts have yet to provide an in-depth analysis of systemic racism, specifically anti-Black racism's impact in sentencing. Prior, NSCA set the foundation for IRCA moving forward. The NSCA in *Anderson* adopted the approach that sentencing judges must consider anti-Black racism with each Black offender:

> In explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for the court to determine, based on the record of the judges' reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted.[69]

By adopting the approach that IRCAs, Justice Derrick held that the use of these reports can play a role in reducing the reliance on incarceration for African Nova Scotian offenders. As such, if any judge ignores or fails to inquire into the systemic and background factors raised during sentencing of an African Nova Scotian, it may amount to an error in law:

> The sentencing of African Nova Scotian offenders must [...] evolve. This is to be accomplished by judges taking into account evidence of systemic and background factors and offender's lived experience, ideally developed through an IRCA, at every step in the sentencing process, and ultimate crafting of a just sanction.
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> [...]

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66 *Jackson*, *supra* note 56 at para 28.

67 *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Proulx*, 2000 SCC 5.

68 *R v Morris*, 2021 ONCA 680 [*Morris* ONCA].

69 *R v Anderson*, 2021 NSCA 62 at para 123 [*Anderson*].

> Mr. Anderson's sentencing shows that change is possible, for the offender, and as significantly, for our system of criminal justice. [70]

In *Morris*, the Crown argued that Justice Nakatsuru's sentence was lenient, and that systemic factors should not be considered because there is no causal link between systemic racism and Morris' offence. Defence counsel, along with 10 intervenors, including the Black Legal Action Centre, advocated for the inclusion of IRCA reports that detail systemic factors when sentencing individuals who are targeted by discriminatory systems to advance substantive equality in sentencing. The key question on appeal in *Morris* was whether a sentencing judge should consider social context evidence that details the effects of anti-Black racism when sentencing a Black person. The Crown argued that anti-Black racism and Morris' possession of a gun must meet the high test for casual connection, by introducing specific evidence to demonstrate if systemic factors are to be taken into consideration in determining Morris' sentence. However, intervenors argued that *Ipeelee* explicitly rejected a causation requirement, and such requirement would impose an unfair evidentiary burden for Black offenders.

The issue before the Court was how much weight should be given to systemic racism, specifically, anti-Black racism. As noted, the courts have long considered the systemic disadvantages of Indigenous offenders in sentencing, however no such principle has been applied for Black Offenders. The Crown's position on appeal included the claim that there lacked a clear evidentiary link between systemic discrimination and the crimes Morris was convicted for. For the Crown, the decisions in *Borde* and *Hamilton* remained good law, as these cases acknowledge that an offender's personal circumstances, including those connected to both overt and institutional racism and its impacts, are relevant in determining an appropriate sentence.[71] The impact of overt and institutional racism will depend on the specifics of the individual case. Further, given the seriousness of gun violence, the Crown maintained that the trial judge allowed the consideration of the impact of systemic racism to "overwhelm" all other considerations in tailoring a fit sentence.[72] The Crown's position was that an appropriate sentence would be three years. On appeal, the Crown

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70 *Anderson*, *supra* note 69 at 164.

71 *Morris* ONCA, *supra* note 79 at para 5.

72 *Ibid* at para 6.

accepted that given the time that had passed, the incarceration of Morris would not be appropriate.[73] However, the Crown asserted that the courts should not provide leniency toward these types of convictions. Acknowledging that anti-Black racism is a reality in Canadian society, the ONCA held that courts should take judicial notice of systemic anti-Black racism, and furthermore, that sentencing judges can consider the impact of anti-Black racism without requiring that person to first establish a link between their experiences of racism and the offences in which they have been conflicted. The Court also noted that a trial judge's task is not "primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles, and objectives of sentencing."[74]

In *Morris*, the ONCA held that the individualized nature of the sentencing process requires judges to "prioritize and blend the different objectives" to reflect the seriousness of the offence and, in turn, the responsibility of the offender.[75] Further, "trial judges are given considerable discretion to decide how best to blend the various legitimate objectives of sentencing."[76] A fundamental aspect of each sentence is the principle of proportionality. The SCC has confirmed the paramount role of proportionality in sentencing. A sentence that does not comply with the principle of proportionality is considered an unfit sentence.[77] The Courts have described the duality of the principle of proportionality: "on one hand, this principle considers the offender's culpability and responsibility. On the other hand, proportionality measures the seriousness of the crime."[78] The Courts have held that the gravity of the offence is the wrongfulness of the conduct and the harm caused by such conduct.[79] According to the ONCA in *Morris*, the gravity of the offence then demands an emphasis on the objectives of denunciation and deterrence. A key aspect of the principle of

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73 *Ibid* at para 7.

74 *Ibid* at para 56.

75 *Ibid* at para 58.

76 *Ibid* at para 80.

77 *Ipeelee*, *supra* note 17, para 37; *Morris* ONCA, *ibid* at para 61.

78 *R v Nasogaluak 2010 SCC 6, [2010] 1 SCR 206* at para 42; *R v Lacassse* 2015 SCC 164, [2015] 3 SCR 1089 at para 64; *Morris* ONCA, *ibid* at paras 65-66.

79 *R v Friesen*, 2020 SCC 9, 391 CCC (3d) 309 para 75-76, Morris ONCA, *ibid* at para 68.

proportionality is that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender.

In *Ipeele*, the SCC held that, the "principle serves a limiting or restraining function and ensures justice for the offender."[80] In *Morris*, the ONCA, quoting *Nur,* restated that imposing a fit sentence is a "highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."[81] The ONCA held that the principle of proportionality will "most often require a disposition that includes imprisonment."[82] This is particularly the case as the ONCA argued that Canadian courts have long recognized the gravity of certain kinds of offences that require sentences focused on denunciation and general deterrence.[83] The ONCA found that, while they agreed with the trial judge that an offender's life experience can influence the choices made to commit a particular crime, the gravity and seriousness of Morris' offences are not diminished by the systemic evidence that shed light on his decision to commit said crimes. Further, evidence of how the offender's choices are limited by his racial systemic disadvantage addresses the offender's moral responsibility and not to the seriousness of the crimes.[84] In the case of *Morris*, considerations of systemic anti-Black racism are mitigated, to some extent, by considerations of the offender's responsibility when addressing the possession of a loaded, concealed handgun in a public place and the potential harm to the community. The ONCA found that a distinction must be maintained between factors relevant to the seriousness of gravity of the crime and those to the offender's degree of responsibility. If that distinction is maintained, the ONCA found the principle of proportionality "may be misapplied":

> A sentence, like the sentence imposed here, which wrongly discounts the seriousness of the offence to reflect factors which are relevant to the offender's degree of responsibility, will almost inevitably produce a sentence that does not adequately reflect the seriousness of the offence, and, therefore, fails to achieve the requisite proportionality.[85]

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80 *Ipeelee*, *supra* note 17 at para 37.

81 *Morris* ONCA, *supra* note 79 at para 64.

82 *Ibid* para 70.

83 *Ibid* at para 71.

84 *Ibid* at paras 75-76.

85 *Ibid* at para 77.

The ONCA further stated that sentencing judges have always considered an offender's background and life experiences, and in *Morris*, nothing in the social context evidence provided information that detracted from the seriousness of his offence or the objectives of denunciation and deterrence.[86] Rather, the ONCA found that the report provided at trial level conveyed the deep harm caused to everyone in the community by persons, "like Morris," who choose to engage in criminal conduct that is dangerous to community security.[87]

The ONCA did not equate Black offenders with Indigenous, rather, they found that the *Gladue/Ipeele* decisions can inform the sentencing of Black offenders. As noted, in *Morris*, the Court reaffirmed judicial notice of the existence of anti-Black racism and the impacts of individual offenders. Courts should admit evidence on sentencing that is directed at the existence of anti-Black racism, and courts should keep in mind the establishment of over-incarceration of Black offenders, with an emphasis on young male offenders.[88] According to the ONCA, the restraint principle not only requires the courts to determine the important role of sentencing in serious crimes, but it also requires the sentencing judge to consider how long that sentence should be.[89] Asserting that Morris' trial judge erred in sentencing principles in serious crimes by imposing a sentence "far below the range," the ONCA acknowledged that anti-Black racism must be confronted, mitigated, and erased. However, the ONCA did not set out a framework for accounting for the impacts of anti-Black racism on an offender at the sentencing stage.

VI. CONCLUSION

Given the widely acknowledged problem of Black Canadian overrepresentation in Ontario prisons and jails, it is important that the courts collectively understand and consider the role anti-Black racism plays in contributing to Black Canadians' contact with the justice system. However, this understanding and consideration by the courts should not be approached by simply layering a *Gladue* template on top. A sentencing judge can find an appropriate sentence for the offender, one that accounts for all

86 *Ibid* at paras 78, 88.
87 *Ibid* at para 78.
88 *Ibid* at para 123.
89 *Ibid* at para 130.

the contributing circumstances, including historical and systemic factors. The *Borde* decision left an invitation for sentencing judges to address the problems raised by proposing fresh evidence. The ONCA in *Morris* acknowledged that what is new is the information these reports provide and judicial "willingness to receive, understand, and act on that evidence."[90] The decision in *Morris* opened the door to more innovative sentencing approaches toward Black Canadian offenders.

[90] *Ibid* at para 107.

Reasonable Expectations Make Unreasonable Inferences: The Reasonable Expectation Threshold is a Legal Doctrine Unequal to the Menace to Privacy Posed by Mass Surveillance and Algorithmic Analysis

ROBIN MCLACHLEN *

ABSTRACT

This article argues that the reasonable expectation of privacy threshold is a legal doctrine woefully inadequate to emerging technologies of surveillance and prediction. Findings of no REP create zones of section 8 inapplicability wherein the state is impliedly licensed to seize information without judicial oversight or constitutional restraint. Inexpensive automated surveillance technologies promise to radically augment the quantity and quality of information these zones of section 8 inapplicability yield. Increasingly powerful computing systems now threaten to use this gathered information to support inferences of alarming accuracy and devastating specificity.

Following the introduction, the body of this article is divided into four parts. Part II provides a brief history of the REP threshold. Part III describes the threshold's patchwork application to various forms of technological

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surveillance. Part IV projects these common law precedents onto future applications, highlighting the dangers posed to privacy by emerging powers of surveillance and inference. Part V argues that the REP doctrine, even if modified piecemeal to meet emerging technologies, is inadequate to these powers.

In light of developing powers of surveillance and prediction, the article concludes by suggesting that the threshold doctrine be abandoned entirely, with specifically delineated legal authorizations substituted in its place.

I. Introduction

Every time a Canadian court holds that a method of state search and seizure does not infringe upon an applicant's reasonable expectation of privacy, it makes a public policy decision. The effect of that decision is to impliedly create a zone of section 8 inapplicability wherein law enforcement is entitled to act without any judicial or constitutional restraining mechanism. Until recently, these were policy decisions of limited scope.

But this is no longer so. Inexpensive automated surveillance technologies and increasingly powerful computing systems promise to radically augment the quality of information these zones of section 8 inapplicability can yield. Massive amounts of seemingly impersonal data, when fed through powerful new tools of automated analysis, can produce highly accurate inferences, potentially revealing very personal information about the lives and actions of Canadians. The threshold, instead of supporting a sustainable balance between individual privacy and the interests of law enforcement, threatens to fatally subvert the purpose of section 8's protection against unreasonable search and seizure. The doctrine should be abandoned, with specifically delineated legal authorizations substituted in its place.

II. A Very Brief History of the Reasonable Expectation Threshold

The concept of a 'reasonable expectation of privacy' – REP – has been with us since the earliest section 8 jurisprudence. In *Hunter et al v Southam Inc*, Chief Justice Dickson (as he then was) held that:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[1]

Put simply, if a person does not have a REP in the subject area of the search, state interference is not unconstitutional. A search or seizure of something that does not meet the REP threshold does not violate section 8.

Clearly, defining this threshold would be of paramount importance to delineating the scope of the Canadian right to privacy[2] and the legitimate arenas of warrantless state surveillance. The Court expounded upon the reasonable expectation threshold next in *R v Edwards*.[3] Whether an expectation of privacy is 'reasonable' within the meaning of section 8 depended upon an evaluation of the 'totality of the circumstances.'[4] Reviewing judges should consider the following factors when assessing this 'totality':

> (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.[5]

In *R v Tessling*, the Court conceptualized privacy interests in three broad categories: personal, territorial, and informational.[6] Broadly speaking, these categories range from more protected to less, though they will often overlap. In the case of informational privacy – i.e., the category of privacy at issue in this article – the totality of the circumstances should be measured by

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1 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 159–60, 11 DLR (4th) 641 [emphasis in original] [*Hunter*]. The concept was borrowed from American jurisprudence. In *US v Katz*, (1967) 389 US 347, Justice Harlan, in concurrence, wrote that Fourth Amendment protection depended upon a "two-fold requirement: first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

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

3 [1996] 1 SCR 128, 132 DLR (4th) 31.

4 *Ibid* at para 31.

5 *Ibid* at para 45.

6 2004 SCC 67 at paras 20–24.

considering (i) the subject matter of the search, (ii) the applicant's direct interest in that subject matter, (iii) whether the applicant held a subjective expectation of privacy, and (iv) whether that expectation is objectively reasonable.[7]

III. The Threshold's Application to Technological Surveillance

Because the REP threshold is measured against the 'totality of the circumstances' in a given case, its application to different forms of technological surveillance has been patchwork. In the case of Walter Tessling, infrared images of the heat patterns emanating from his house were found not to warrant constitutional protection as they did not reveal anything about his 'biographical core' of personal information.[8] Tessling's subjective expectation, per Justice Binnie (as he then was) for the majority, was not objectively reasonable.[9]

In *R v Plant*, the Court held that residents had no REP in their hydro records.[10] *R v Gomboc* extended the scope of *Plant* by finding that digital recording ammeters – devices placed outside a property that track hydro usage – give rise to no reasonable expectation, even if they are installed, not as a matter of course, but by a police officer's request.[11] In either instance, warrantless surveillance is justified.

Allowances for electronic audio and video surveillance are more nuanced. The Supreme Court of Canada, in *R v Duarte*, held that

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7 *Ibid* at para 32. Objective reasonableness, the fourth factor, is assessed by considering a host of sub-factors, some of which seem to have fallen into disuse. For one example, see Chris Hunt & Micah Rankin, "*R v Spencer*: Anonymity, the Rule of Law, and the Shriveling of the Biographical Core" (2015) 61:1 McGill JL 193.

8 *Tessling*, *supra* note 6 at para 63.

9 *Ibid.*

10 [1993] 3 SCR 281, 145 AR 104. It is a little more complicated than that, but not much: a REP exists only where the hydro company guarantees the customer's privacy. The reasonable expectation, here, is not technology-dependant but contract-dependant. So that: if the hydro company sees fit to guarantee your *Charter* right to privacy against state intrusion, the Court will condescend to guarantee it, too. If that seems a little bit backwards to you, dear reader, I humbly commend both your legal perspicacity and moral exactitude.

11 *R v Gomboc*, 2010 SCC 55.

unauthorized electronic audio surveillance violates section 8.[12] Unauthorized video surveillance of an area in which an applicant has a REP is also unconstitutional.[13] Such state surveillance is governed by sections 487.01–487.019 of the *Criminal Code*.[14] More broadly, law enforcement's use of general video surveillance in public places (i.e., in places where an individual's REP has not been established) is instructed by guidelines published by the Office of the Privacy Commissioner of Canada.[15] Individually targeted video surveillance used on a case-specific basis, however, does not fall within their ambit.[16]

The installation and monitoring of tracking devices on vehicles by law enforcement is licensed only by section 492.1 of the *Code*.[17] This section was enacted following the Supreme Court of Canada's decision in *R v Wise* that the unauthorized installation of a tracking device on the applicant's vehicle violated section 8.[18] In a similar vein, the use of transmission data recorders[19] is governed by section 492.2.[20]

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12 [1990] 1 SCR 30, 65 DLR (4th) 240. However, and this is a pretty big 'however', a testifying officer, per *R v Fliss*, 2002 SCC 16, may 'refresh their memory' with the transcript of an unconstitutionally obtained and excluded audio recording without that testimony being excluded.

13 *R v Wong*, [1990] 3 SCR 36, 1990 CanLII 56. "Where an applicant has a REP" is an admittedly large caveat – one whose too-broad ambit basically makes up the central subject of this paper – but its scope, as least for the purposes of video surveillance, appears to be shrinking. The video-surveillance REP has been recently extended beyond that which has been established for in person surveillance, existing in both the classroom, per *R v Jarvis,* 2019 SCC 10, and the common areas of multi-unit residential buildings, per *R v Yu*, 2019 ONCA 942, app for leave ref'd 2020 CanLII 41795 (SCC).

14 *Criminal Code*, RSC 1985, c C-46, ss 487.01–487.019 [*Code*]. The reasonableness /constitutionality of s 487.01 was affirmed in *R v Kuitenen and Ostiguy*, 2001 BCSC 677, and *R v Lucas*, 2014 ONCA 561. The constitutionality of 487.014 (and, presumably, the accompanying sections from 487.011–487.019) was affirmed in *R v Jones*, 2017 SCC 60.

15 "Guidelines for the Use of Video Surveillance of Public Places by Police and Law Enforcement Authorities" (2 March 2006) online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/vs_060301/> [perma.cc/VT97-MEH8].

16 *Ibid.*

17 *Supra* note 14, s 492.1.

18 [1992] 1 SCR 527, 51 OAC 351.

19 Per the *Code*, *supra* note 14, subsection 492.2(6), "a device … that may be used to obtain or record transmission data or to transmit it by a means of telecommunication."

20 *Ibid*, s 492.2. Warrants under section 492.1 and section 492.2 are issued on a reasonable suspicion standard.

Perhaps of greatest concern, though, for the purposes of this article, is the legal doctrine of abandonment. *R v Dyment* drew a distinction between the 'seizure' and 'gathering' of evidence: items in which an individual has abandoned their REP are not seized but merely gathered (i.e., they are not subject to section 8 protection).[21]

R v Patrick is the controlling case on this doctrine.[22] Its circumstances involved garbage left for collection outside a fence but still within property boundaries. Police officers seized the garbage and searched it, using the obtained evidence to ground a search warrant. The Supreme Court of Canada found that, though Russel Patrick maintained a subjective REP, this expectation was not objectively reasonable. Abandonment, Justice Binnie (as he then was) found for the majority, is a question of fact inferred from the totality of the circumstances, with specific attention paid to the applicant's behaviour toward the subject matter of their privacy claim.[23] By placing his garbage out for pick up, Patrick had abandoned any reasonable claim of privacy in its contents.

Applying the *Patrick* framework, *R v Delaa* found no REP in DNA evidence obtained through an undercover sting involving a fictional 'gum survey.'[24] Similarly, *Usereau c R* found no REP in a glass and straw left at a restaurant that police then submitted for DNA analysis.[25]

The courts may be revising these precedents, however, at least insofar as they relate to genetic material. The Quebec Court of Appeal, in *D'Amico c R*, recently found that abandoning a cup at a diner as a result of an undercover police operation did not equate to abandoning a REP in the genetic material found on the cup.[26] When a reasonable person leaves a used cup at a diner, they are not intending to abandon their DNA, Justice Vauclair found for the majority:

> [O]ne abandons [genetic material] everywhere, all the time without even giving the slightest thought to it. It is "the inevitable consequence of the normal functioning of the human body." One simply cannot infer, from the being of a person, one's intention to abandon the privacy interest in one's DNA information.[27]

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21 [1988] 2 SCR 417, 55 DLR (4th) 503.

22 2009 SCC 17.

23 *Ibid* at para 25.

24 *R v Delaa*, 2009 ABCA 179.

25 *Usereau c R*, 2010 QCCA 894.

26 *D'Amico c R*, 2019 QCCA 77 at para 96–97 [*D'Amico*].

27 *Ibid* at para 99, citing *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193.

Though the circumstances of DNA collection were nearly identical to that in *Usereau*, Justice Vauclair did not explicitly overrule that prior decision. Instead, he distinguished the precedent's factual scenario on the narrow basis that the DNA obtained by police in that instance had not been the result of an undercover operation.[28] Whether Canadians maintain a REP in genetic material that is abandoned in the normal course of daily activity, and not as a result of an undercover police operation thus remains an open question.[29]

IV. PROJECTING THIS APPLICATION INTO THE FUTURE

The structure of section 8 applications *vis-à-vis* warrantless search and seizure is well established. To ground a claim of *Charter* breach, an applicant must demonstrate that a legally meaningful search has occurred by proving a reasonable expectation of privacy. Once this REP in the search's subject area has been demonstrated, the warrantless search in question becomes presumptively unreasonable and thus unconstitutional. If no REP is established, the *R v Collins* criteria – i.e. the meat on the bone of section 8's guarantee: that warrantless search and seizure must be authorized by a reasonable law and performed in reasonable manner – does not apply.[30]

The first step in this process is the critical inflection point for this article's thesis. Wherever courts have found no REP, they have simultaneously acknowledged, by implication, a lawless state power of search and seizure. Such 'search and seizure' is just called 'gathering' instead. By way of euphemism, the courts have thus created wide arenas of surveillance wherein Canadians' section 8 rights do not apply, and thus cannot reasonably constrain state interference.

To wit: *Tessling* found no REP in a building's heat emanations captured by infra-red imagery. This finding, without ever explicitly creating any

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28 *D'Amico*, *supra* note 26 at para 116.

29 In Quebec, at least. In Alberta, where *Delaa*, *supra* note 24, remains the controlling precedent, they presumably do not, as they do not have a REP even in genetic material obtained by way of an undercover police operation. For more on the intersection between AI, genetic information and the Courts, see Jill R Presser & Kate Robertson, "AI Case Study: Probabilistic Genotyping DNA Tools in Canadian Criminal Courts" (June 2021), online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2021/06/AI-PG-Case-Study-Final-EN-June-2021-2.pdf> [perma.cc/TR27-T352].

30 *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508.

reasonable power of search and seizure, authorizes infra-red surveillance by the police of every single building in Canada at all times, provided that the images obtained do not pictorially reveal what is going on inside. Similarly, per *Plant*, police are authorized to actively monitor all records of hydro consumption. Per *Gomboc*, the police are authorized to request (but not demand) that utility companies install digital recording ammeters outside every residence in the country and remit all recovered data to law enforcement. *Patrick* authorizes police sifting and examination of all garbage placed out for collection from all Canadian households. None of these powers of 'gathering' are subject to court review under the *Collins* criteria.

Emerging smart city applications suggest a host of other zones of section 8 inapplicability where law enforcement might use automated surveillance systems to gather evidence without concern for the *Charter* right to privacy: traffic patterns on public roadways and through public parks; household water and gas consumption; and, possibly, social media information.[31]

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[31] In February 2020, the Office of the Privacy Commissioner announced investigations into Clearview AI's facial recognition software (software created from publicly scraped images and the RCMP's use of it. See "Commissioners Launch Joint Investigation into Clearview AI Amid Growing Concerns Over the Use of Facial Recognition Technology" (21 February 2020), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200221/> [perma.cc/V5S3-CJR5]; and "OPC Launches Investigation into RCMP's Use of Facial Recognition Technology" (28 February 2020) online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200228/> [perma.cc/3DRK-UCXY].

In July 2020, Clearview AI ceased operations in Canada. See "Clearview AI Ceases Offering its Facial Recognition Technology in Canada" (6 July 2020), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/news-and-announcements/2020/nr-c_200706/> [perma.cc/ZFT3-ACEE].

In October 2020, the OPC co-sponsored an international resolution on facial recognition technology, calling for principles of transparency, necessity, and proportionality in its usage and implementation by law enforcement. See "Adopted Resolution on Facial Recognition Technology" (October 2020) online (pdf): *Global Privacy Assembly* <globalprivacyassembly.org/wp-content/uploads/2020/10/FINAL-GPA-Resolution-on-Facial-Recognition-Technology-EN.pdf> [perma.cc/6TAF-96YW].

The doctrine of abandonment suggests more still: as well as garbage, recycling, and compost, household wastewater seems plainly abandoned once it leaves the house and should thus, per *Patrick*, lie outside of any one individual's REP (whether DNA analysis is permitted or not,[32] it seems unlikely that chemical or viral analysis would be subject to section 8 review).

To date, these zones of section 8 inapplicability have not, broadly speaking, fundamentally altered the relationship between Canadian law

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In February 2021, the OPC found that Clearview AI's facial recognition software violated federal privacy laws. See "Clearview AI's Unlawful practices Represented Mass Surveillance of Canadians, Commissioners Say" (3 February 2021), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/news-and-announcements/2021/nr-c_210203/> [perma.cc/M5V9-Z287].

In June 2021, the OPC found that the RCMP's use of Clearview AI's software constituted a significant violation of Canada's privacy laws and called for clearer laws on facial recognition technology, specifically. See "RCMP's Use of Clearview AI's Facial Recognition Technology Violated *Privacy Act*, Investigation Concludes" (10 June 2021), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/news-and-announcements> [perma.cc/YDK3-HM64]; "Police use of Facial Recognition Technology in Canada and the Way Forward" (10 June 2021), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/202021/sr_rcmp/> [perma.cc/9EWK-PFBV].

It seems likely that facial recognition will soon come under much stricter regulation; continued indiscriminate and warrantless use seems manifestly unjustifiable. But facial recognition technology is far from the only use that social media information might be put to. If publicly available information were generalized, instead of specific – e.g., based on publicly available data, residents with IP addresses in postal code *x* are 53% more likely than the national average to 'like' social justice Facebook feeds, or feature pictures of a minivan, or post selfies in which the person pictured is wearing a blue hat, etc. – then it seems even more likely, by present common law doctrine, not to meet the REP threshold.

[32] … and to what extent and for what purposes. For example, while current trends point towards the courts eventually protecting 'abandoned' DNA for purposes of personal identification, one can plausibly imagine the courts allowing 'de-identified' genetic (and viral and chemical) analysis. So that, just as CHEO Research Institute, in partnership with the City and the University of Ottawa, presently tests Ottawa's wastewater for COVID-19 viral copies (See "Ottawa COVID-10 wastewater surveillance" (last viewed 29 March 2022), online: *Ottawa COVID-19* <613covid.ca/wastewater/> [perma.cc/65JR-V4T9]), one can imagine a future in which public health and safety considerations might warrant wastewater testing for other infectious, or even hereditary diseases (e.g., West Nile, Zika, HIV, or sickle cell anemia) or chemical composition (e.g., banned substances). Given the rubric within which the courts are presently operating, it is difficult to imagine any one applicant persuasively asserting a REP in this sort of de-identified information.

enforcement and the public.[33] However, this has less to do with the prudence and foresight of our courts' decisions than it does with simple economics and manpower. To date, mass public surveillance, though implicitly sanctioned, has been economically and practically unfeasible. Police departments have not had the manpower to place an observer outside every building in the country. Nor has it been economically feasible to employ officers to count every car that passes every intersection in the country; sift through every container of garbage, compost, or recycling collected each day across Canada; or review every Canadian household's hydro, gas, and water consumption daily, weekly, or monthly.

In the past, these zones of section 8 inapplicability could be reasonably designated by the courts as such because they were, practically speaking, information poor. The underlying reasoning is almost mathematical in the simplicity of its equation: the Court could fairly acknowledge no REP in these areas because, by and large, surveillance of these areas did not reveal much in the way of private information.

But cheap mass surveillance and algorithmic analysis are quickly altering the environment within which these findings of no REP have been made. An abundance of cheap surveillance technologies means that, for the first time in history, law enforcement can harvest vast amounts of data without busting their budgets. The development of powerful algorithmic analysis tools means that police departments need not employ armies of statisticians to sift through the mountains of data potentially at their disposal – computer programs can do it instead.

Even so, a profusion of mass surveillance of public areas would not represent any sort of major shift in Canadian public policy if these zones of section 8 inapplicability were actually as information poor as they seem. But they are not.

To take the first famous example: in 2002, Target, the US-based retailer, asked Andrew Pole if he could devise a way to determine whether a customer was pregnant without her revealing it. He could. Analyzing the recorded purchases of customers who had signed up for Target's baby registry service, Pole identified 25 key pregnancy-related products. He applied his findings to the rest of the Target database, and the company sent out a flurry of fliers and coupons. One customer thusly targeted was still in

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[33] By which I mean: we do not, as yet, live in a police state.

high school. Her father did not know she was pregnant, but Target did and, effectively, told him.[34]

All of which is to say that publicly available, non-private information, when gathered and analyzed in bulk, potentially reveals, by inference, some very private and sensitive information. Even de-identified information can be privately revealing. The neighbourhoods in which we live, their traffic patterns, median income, utility usage, and foot traffic; the chemical and genetic composition of our wastewater; the contents of our garbage, recycling, and compost; the pictures we post online, the Facebook pages we like, and Twitter feeds we follow, when taken together, potentially reveal massive amounts of information about the ways in which we live and act, the things we think and believe in and care for. This is information that, up until now, law enforcement has not had easy access to. It is very much worth asking whether, and exactly how much, we want that to change.

In the past, the representations of the world that law enforcement could build from the common law's zones of section 8 inapplicability were simple and information poor. Police knew which neighbourhoods were relatively wealthy or impoverished or whether they had a particular ethnic or cultural identity. But the sum total of publicly available information supported few inferences about the specific identities, beliefs, lifestyles, and actions of individual Canadians.

Mass surveillance makes these seemingly information poor zones increasingly information rich. Algorithmic analysis has transformed the powers of inference that publicly available information can support. Clearview AI can create a saleable facial recognition program built entirely on publicly scraped data.[35] Predictive policing software – like GeoDASH –

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[34] Charles Duhigg, "How Companies Learn Your Secrets", *New York Times Maganize* (16 February 2012), online: <www.nytimes.com/2012/02/19/magazine/shopping-habits.html> [perma.cc/SES5-646G].

One might reasonably wonder why a company would want to pry so deeply into its customers' lives. The explanation is, of course, money. Pregnant women are a much-desired target demographic for marketers. Newborns disrupt their parents' lives and by implication, their purchasing habits, making new parents uniquely vulnerable to directed advertising. Birth records are public and so after a baby is born, parents are inundated with advertisements for diapers, formula, wet wipes, etc. If Target could detect a customer's pregnancy before the fact of the newborn made it a matter of public record, it could potentially capture a uniquely pliable audience well before any of its competitors knew of their existence.

[35] See Kashmir Hill, "The Secretive Company that Might End Privacy as we Know It", *New York Times* (18 January 2020), online:

can use historical police data to anticipate the likelihood of break-and-enter crimes, allowing the Vancouver Police Department to deploy officers to high-risk areas.[36] Online, ubiquitous mass surveillance has become the *defacto* norm.[37] The internet of things[38] increasingly threatens to extend ubiquitous online surveillance into the real world, too.[39]

Combined with algorithmic analysis, mass surveillance threatens to dramatically augment the specificity and accuracy of the representations inferable from data gathered from the zones of section 8 inapplicability created by the common law. The theoretical endpoint of this trend, though still far off, should alarm anyone invested in liberty, democracy, and reasonably limited powers of state surveillance and control – namely, that algorithmically derived inferences could well become so rich and detailed to effectively mirror the world. With such an accurate representation, law enforcement could effectively surveil each and every citizen at all times without ever technically violating any individual's REP. Practically speaking, of course, such a picture could never be totally accurate. Algorithmically derived inferences are just that: inferences. But each inference, given

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<www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html> [perma.cc/R9BM-LUQ5].

36 See Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (September 2020) at 42–44, online (pdf): *Citizen Lab* <citizenlab.ca/wp-content/uploads/2020/09/To-Surveil-and-Predict.pdf> [perma.cc/42PP-TWZG].

37 "Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights" (2019) at 15–17, online: *Amnesty International* <www.amnesty.org/download/Documents/POL3014042019ENGLISH.PDF> [perma.cc/E5CX-HLD3].

38 Networked, physical objects (e.g., appliances, fixtures, thermostats, home security systems, cameras, etc.) connected to the internet and embedded with sensors that collect, exchange, and process data.

39 A close-to-home example, here, is Sidewalk Toronto – the recently abandoned development project proposed by Google's subsidiary, Sidewalk Labs, for Toronto's Quayside waterfront area. The proposed plan envisioned digital and physical layer integration, with data collection and storage built into the physical infrastructure of the community. See "Plan Development Agreement Between Toronto Waterfront Revitalization Corporation and Sidewalk Labs LLC" (31 July 2018) at 31, 47-50 online (pdf): *Sidewalk Toronto* <web.archive.org/web/20181127094844/https://sidewalktoronto.ca/wp-content/uploads/2018/07/Plan-Development-Agreement_July312018_Fully-Executed.pdf> [perma.cc/Q74Y-YK7Y].

enough data, would be very likely accurate; accurate enough, perhaps, to ground a search warrant.

The patchwork of common law rulings on reasonable expectations of privacy based on the inferences that can be drawn from a single mode of surveillance is a legal doctrine that is simply unequal to this future (and increasingly present)[40] world. If we want concrete, constitutional restraints against devolution into the sort of 1984-esque police state described above, we will need surer restraints on law enforcement than those the REP threshold provides.

V. TWO "REASONABLES" DON'T MAKE A RIGHT

The foundational problem with the REP threshold, from the outset, has actually been one of grammar – namely, that the threshold doctrine inserts an extra adjectival modification into the constitutional guarantee.

The text of section 8 seems plain: it protects against unreasonable search and seizure. Unreasonableness describes the limit of legitimate police action. If one is free from unreasonable search and seizure, only reasonable search and seizure, by implication, is lawful. The question of reasonableness is asked of the state's action: was the search or seizure in question reasonable or not?

So far so good, but complications surfaced almost immediately. In *Hunter*, Chief Justice Dickson (as he then was) held that the limitation suggested by the word 'unreasonable' could be expressed either negatively, as a freedom from unreasonable search and seizure ("FUSS"), or positively, as a reasonable expectation of privacy.[41]

Whatever the necessarily 'liberal' and 'purposive' ambit of constitutional interpretation, this is plainly bad grammar. These adjectival modifications are simply not equivalent. They are not 'positive' and 'negative' expressions of the same limitation. In both instances, the same adjective is used, but it is modifying fundamentally different things.

With respect to the 'negative' limitation – FUSS – 'reasonableness' limits police powers and methods of search and seizure (i.e., if search and

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40 See Bruce Schneier, "Modern Mass Surveillance: Identify, Correlate, Discriminate" (27 January 2020) online (blog): *Schneier on Security* <www.schneier.com/blog/archives/2020/01/modern_mass_sur.html> [perma.cc/P94S-A795].

41 *Supra* note 1 at 159.

seizure powers or methods are unreasonable, they are unconstitutional). The Supreme Court of Canada laid out the process for determining this 'reasonableness' in *Collins*: a search or seizure must be authorized by a reasonable law and carried out in a reasonable manner.[42]

Conversely – as this article has hopefully made plain – the so-called 'positive' expression, REP, modifies the applicant's access to the section 8 right itself. 'Reasonableness,' here, does not limit state action. Instead, it limits the courts' powers of oversight to an examination of an applicant's expectations.

Though there is only one 'reasonable' in the constitutional text, practically speaking, an applicant must pass through two before their section 8 right carries any legal weight. Only where the 'totality of the circumstances' admits of a reasonable expectation of privacy can the right to be free from unreasonable search and seizure be invoked.[43]

The problem with the REP doctrine should, thus, be obvious: it is an extra-constitutional threshold test – an extra 'reasonable' – effectively inserted into the constitutional text. This extra 'reasonable' stands between Canadians and their section 8 guarantee. No such precondition exists for other *Charter* rights.[44]

Proponents of the REP threshold, of course, would argue that this precisely expresses its necessity. After all, not every state action is a search. Courts need a threshold to determine whether a given state action amounts

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42 *Collins*, *supra* note 30 at para 23.

43 That the 'totality of the circumstances' must be analyzed in order to determine whether a search or seizure has taken place means that, *contra* the principles of *Hunter*, *supra* note 1, the constitutionality of particular instances of warrantless search can only ever be assessed after the fact. Practically speaking, police officers do not know exactly what is constitutional, nor does the public.

44 Though the explicit/analogous analysis under section 15 bears some resemblance. As well, reasonable restrictions are licenced by section 1, but only where certain pre-conditions are met. The Court has never undertaken an *Oakes* analysis of the REP threshold doctrine, but it is interesting to consider whether it could pass the section 1 analysis if it were considered as a law limiting section 8's guarantee (proponents of the threshold, of course, would reason it would not (and does not) need to: the threshold itself is not *Charter* infringing; rather, it distinguishes infringement from non-infringement. Tomayto/tomahto.

to a search or seizure at all. The REP threshold, this argument goes, simply distinguishes 'searches' and 'seizures' from not.[45]

The problem with this argument is that the REP threshold has proven to exclude from section 8 protection numerous types of 'collection' that seem to be 'searches' or 'seizures' by another name (i.e., precisely the sort of state incursions that the *Charter* right was designed to protect against in the first place).

One need not look to algorithmic analysis to find obvious examples of the threshold's insufficiency. Despite *Wong*'s strong language about the dangers of state video surveillance, it yet impliedly authorizes mass video surveillance provided no individual's REP is violated. In the absence of effective constitutional interpretation, the Office of the Privacy Commissioner was obliged to step in, publishing guidelines on general purpose video surveillance by law enforcement of public places.[46] These guidelines are, of course, better than nothing, but they are also a far cry from robust constitutional protection. And the underlying legal difficulty remains: a seemingly tautologically correct application of the threshold doctrine[47] removed manifestly rights-eroding practices from court review on a constitutional basis.

As previously indicated, this doctrinal problem is only compounded when it comes to algorithmic analysis of masses of 'non-rights infringing' data. After all, not every bit of data, nor each method of collection will, on its own, rise to the REP standard. If collecting the data itself does not amount to a search or seizure, how can a court reasonably hold that analyzing the data amounts to a section 8 infringement? If no one was searched and nothing was seized, how can section 8 possibly apply?

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45 The practical necessity of a threshold test is, I think, arguable, to say the least. People are not flooding the courts with section 8 applications in a vexatious demand for remuneration or positive state action; they are trying to get evidence excluded in response to the laying of criminal charges against them. Practically speaking, there seems to be little necessity to 'weed out' the fake searches and seizures from the real ones – whatever their name, the state actions in question have almost certainly yielded some form of evidence against the applicant. Whether these actions are 'reasonable' or not goes, I think, to the very purpose of constitutional review (whatever the reasonableness of the applicant's privacy expectations).

46 See *supra* note 13.

47 Requiring a REP before section 8 protection can be invoked is, after all, the entire purpose of the REP threshold.

Sandra Wachter and Brent Middelstandt suggest, in a different context, the assertion of a new human right – namely, a right to reasonable inferences. Wachter and Middelstandt further suggest that such a right, in a commercial context, would go some way towards mitigating the danger posed by algorithmic bias and inaccuracy.[48]

But it is hard to see how this proposed right maps neatly onto Canadian laws of search and seizure. A court's jurisdiction to constitutionally review under section 8 an inference derived from algorithmic analysis would depend upon characterizing that inference, or the analysis from which it was derived, as a search or seizure. An inference is neither – it is, instead, the outcome of the analysis of seized or gathered data. Characterizing an algorithmic analysis as a search or seizure is similarly problematic. If the collection and human analysis of the same data would not amount to a constitutionally meaningful search or seizure, it is difficult to see why algorithmic analysis should meet that definition. After all, the gathered evidence in *Plant*, *Gomboc*, *Patrick*, and *Tessling* each led to inferences sufficient to ground search warrants. What is really so different about algorithmic analysis?

A right to reasonable inferences has the further problem of adding yet another extra-constitutional step to our already exceedingly complicated section 8 constitutional review procedure. Such a right also threatens to push purposive interpretation past its natural limits: the *Charter* contains no right against unreasonably perspicacious inferences, only unreasonable search and seizure.

A more likely solution lies in the piecemeal expansion of Canadians' recognized reasonable expectations of privacy as technological intrusions surface. The Supreme Court of Canada took this approach in *R v Marakah*,[49] *R v Reeves*,[50] *R v Mills*[51] and, most significantly for the purposes of this article, *R v Jarvis*.[52]

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48 Sandra Wachter & Brent Middelstandt, "A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI" (2019) 2 Columbia Bus L Rev 294.

49 2017 SCC 59, which extended applicants' REPs to include their text messages stored on recipients' phones.

50 2018 SCC 56, which acknowledged a REP in shared computers.

51 2019 SCC 22, which recognized a REP in online communications.

52 2019 SCC 10.

Jarvis involved a high-school teacher charged under the voyeurism provisions of the *Code* for taking surreptitious videos of his female students. The majority made three significant findings *vis-à-vis* reasonable expectations of privacy. First, people, in certain circumstances, maintain a REP in observable public places.[53] Second, REPs are more expansive with respect to technological surveillance than human observation.[54] Third, the Court affirmed and expanded upon its prior holdings that privacy is not an all or nothing concept: a lack of REP for one purpose does not mean that a REP is abandoned entirely.[55] Just because a person does not have a REP *vis-à-vis* short-circuit surveillance cameras installed to further public safety, for example, does not mean that they have no REP with respect to private surveillance for sexualized purposes.

Going forward, reasonable expectations should be evaluated against these non-exhaustive considerations: the location where the surveillance took place, the type of surveillance/gathering, the presence or absence of consent, the manner of surveillance, the subject matter of the surveillance, any applicable rules or regulations, the relationship between the surveillor and surveilled, the purpose for which the information was seized/gathered, and the personal attributes of the person recorded/observed.[56]

Speaking generally, the courts' piecemeal expansion of applicants' REP is not without some rationale to recommend it. For one, it assures that legal evolution does not over-correct to a perceived problem before it has fully manifested itself. Relatedly, such piecemeal evolution allows the common law to specifically address evolving technologies of surveillance, each according to their individual intrusiveness, as they appear.

On the downside, this method of piecemeal response means that the law of search and seizure in Canada is always playing catch-up, responding to potentially widespread *Charter* violation only after the damage is done.[57]

More fundamentally, the problem of mapping algorithmic analysis and inference onto the existing law of search and seizure remains. The analysis in *Jarvis* focussed particularly on the modes of surveillance and the purposes for which the data in question is collected. The greater problem, at least

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53 *Ibid* at para 38.

54 *Ibid* at paras 52, 62–63.

55 *Ibid* at paras 41, 61.

56 *Ibid* at para 29.

57 And only once a litigable set of facts have entangled a sufficiently wealthy applicant and come under the scrutiny of a technologically proficient criminal defence attorney.

with respect to algorithmic analysis, is what is done with all the collected and stored data after it has been gathered. Electricity usage is gathered for the purpose of billing users. Search histories are stored to target advertisements. Wastewater analysis is performed to measure population-level rates of COVID infection.

The issue is not how, why, or where the information is collected; it is what it can reveal. The courts to date have, quite understandably, misconceived the nature of private information. It is ubiquitous and fundamentally uncontainable. Whatever our reasonable expectations, collectible, highly personal data about us is everywhere, shed in dandruff, saliva, stray hairs, and finger-nail clippings. Sensitive, private information can be extracted from our utility consumption, wastewater, garbage, and travel patterns. It is inherent in our search, browsing, and streaming histories, our app usage and social media interactions, our publicly available images and videos, and the location data stored on our phones. Like genetic material, we emanate information wherever we go, whatever we do, [58] and it is being assiduously collected.[59] Infringements upon privacy no longer occur solely in easily delineated spheres – personal, territorial, informational. They can happen anywhere, in occurrences invisible to the human eye, in analyses impossible to the human intellect, in inferences unimaginable to our powers of supposition.

The hard and simple truth is that mass surveillance and algorithmic analysis are revealing bad legal doctrine. The distinction between 'gathering' and 'seizure' that the REP threshold demands has always been quibbling and subversive of robust section 8 protection.[60] It merely took the advent of ubiquitous surveillance and predictive analytics to demonstrate how inadequate our constitutional interpretations already were.

Instead of gradually expanding Canadians' REP or an acknowledging a right to reasonable inferences, this article advocates abandoning the threshold doctrine entirely. If the state wishes to search and surveil its citizens, it should be forthright about it and should do so only as authorized by law. The section 8 right is not, after all, absolute, but it may be limited, per *Collins*, by reasonable state restrictions. The tools in its kit are many.

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58 See Ian Kerr & Jena McGill, "Emanations, Snoop Dogs and Reasonable Expectations of Privacy" (2006) 52:3 Crim LQ 392.

59 And, in the era of Big Data, most often without any single, particular purpose in mind.

60 Not that this should be determinative, but it is also the sort of distinction that makes everyone hate lawyers.

The common law authorizes a bevy of warrantless search powers like implied licence, plain-view, *Macdonald*, *Mann*, *Caslake*, etc. These could be adapted, restricted, or expanded where necessary. The ancillary powers doctrine licences courts to create new powers of search and seizure and to specify the conditions under which a given technological surveillance tool might be reasonably deployed. Parliament, as it has in other instances, could step in, and precisely delineate the circumstances and proper procedures for using algorithmic tools on legally gathered data, for sifting garbage, or for seizing genetic material.

The overbroad and patchwork allowances created by the REP threshold doctrine are cumbersome, confusing, and ultimately unnecessary.[61] In *Wong*, Justice La Forest (as he then was) cautioned that it would be wrong to limit to that specific technology *Duarte*'s finding that audio surveillance constituted a search and seizure:

> Rather what the Court said in *Duarte* must be held to embrace all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future.[62]

It is past time that Canadian courts made good on that promise.

VI. CONCLUSION

The law of search and seizure in Canada has yet to come to terms with our increasingly powerful technologies of surveillance and analysis. Mass surveillance and algorithmic assessment threaten to bring section 8 jurisprudence into a state of crisis. But crisis brings both danger and opportunity. The danger is evident: court-created zones of section 8 inapplicability threaten to fatally undermine Canadians' right to privacy from unreasonable state intrusion. But the happy prospect presented by this looming crisis is equally significant – namely, the courts have a rare opportunity to clarify section 8 jurisprudence, resolving 30 years' worth of mounting confusion about 'reasonable expectations' and the distinguishing features of 'gathering' versus 'search and seizure.' In the process, the courts

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61 These broad allowances also contribute to the widespread uncertainty about exactly what may be legally searched or seized. To take but one example, absent the REP threshold doctrine, RCMP officers may not have imagined that they could utilize facial recognition technology absent legal authorization.

62 *Wong*, *supra* note 13 at 43–44.

would streamline the process for bringing these *Charter* applications before the court, thereby eliminating tortuous and time-consuming arguments about the REP threshold. As it presently stands, the REP threshold subverts the purpose of section 8; it should be discarded.